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



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

Irene Wintermayr and Dr Amy Weatherburn

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First published 2021

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

ISBN 978-92-2-034505-4 (Web PDF)

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▶ Preface

According to the latest ILO global estimates, 25 million people are victims of forced labour. This issue concerns all regions in the world. UN Sustainable Development Goal 8 on *Decent Work and Economic Growth* includes a target 8.7 for which the international community set itself the objective to eradicate forced labour, modern slavery and human trafficking by 2030 and all forms of child labour by 2025. The ILO has been spearheading the efforts of the Alliance 8.7, an inclusive global partnership which aims to catalyse action to achieve this target. Since the adoption of the landmark Protocol of 2014 to the Forced Labour Convention, 1930 (No. 29), renewed emphasis has been given within the ILO normative framework on access to protection and remedy for victims of forced labour and human trafficking victims.

Belgium and the Netherlands have been members of the ILO since its creation in 1919. Both countries have ratified many of the ILO Conventions, including the fundamental Conventions, and both countries have recently ratified the Protocol of 2014 to the Forced Labour Convention, 1930 (No. 29). Belgium and the Netherlands are globally and regionally recognised for their handling of anti-trafficking law and policy. They have labour inspectors, judges and prosecutors who have received special training on human trafficking and both countries identify a relatively high number of victims compared to many other EU Member States.

This report examines the access to protection and remedy for victims of human trafficking for the purpose of labour exploitation that are available in these two countries. As in practice, the prosecution of many cases of human trafficking is not successful, importantly, this report examines avenues to remedy other than criminal proceedings for human trafficking as well. The study is based on desktop research complemented by interviews with selected practitioners from different professional categories in both countries.

While the scope of the report is limited, the findings provide key insights from frontline professionals and the priorities that are in place in their specific national context. The findings, good practices and points for action aim to provide inspiration and reflection on improving access to protection and remedy for (potential) victims of human trafficking for the purpose of labour exploitation in the two countries and beyond.

Lieve Verboven

Director

ILO Office for the European Union
and the Benelux countries

► Table of contents

Preface	III
Contents	1
List of tables	2
List of boxes	3
List of abbreviations	4
Acknowledgements	5
Executive summary	6
1. Introduction	12
2. Methodology	16
3. Access to protection and remedy: The legal framework	20
3.1. Access to protection in international and regional law	23
3.2. Access to remedy, including compensation, in international and regional law	24
3.3. Procedural rights for protection and remedy in international and regional law	24
3.4. Access to remedy for (potential) victims of human trafficking for the purpose of labour exploitation	25
3.5. The national implementation of the access to remedy and protection to victims of human trafficking for the purpose of labour exploitation: Belgium and the Netherlands	27
4. Access to protection: Belgium and the Netherlands	30
4.1. Detection and referral to the National Referral Mechanism	31
4.1.1. Role of labour inspection in detecting victims	36
4.2. Reflection and Recovery Period	44
4.3. Identification as a victim of human trafficking	49
4.3.1. Cooperation with criminal proceedings as a key condition	50
4.3.2. Access to support and assistance if victims decide to cooperate with criminal proceedings	51
4.4. Non-identification as a victim of human trafficking due to refusal to cooperate	53
4.5. Discontinued criminal proceedings and human trafficking victim status	57
4.6. Acquittals in criminal proceedings and human trafficking victim status	58
5. Access to remedy: Belgium and the Netherlands	62
5.1. Access to remedy from the victim's perspective	63
5.2. Access to remedy in human trafficking through criminal proceedings	64
5.2.1. Where a human trafficking criminal prosecution is pursued	68
5.2.2. Where potential human trafficking victims are not referred to the NRM or refuse to cooperate	71
5.3. Access to remedy in criminal proceedings for other non-human trafficking offences	72
5.3.1. Filing a complaint to the prosecutor	72
5.3.2. Criminal prosecutions for "lower-level" offences	74
5.4. Access to remedy through civil proceedings	79
5.5. Access to remedy via the labour inspectorate	85

5.5.1. “On the spot payments” requested by labour inspectors	86
5.5.2. Complaint to the labour inspection	87
5.5.3. Dissuasive action such as imposing administrative fines and/or closing businesses	89
5.6. Access to remedy through state compensation funds/schemes	92
5.6.1. Victims of violent crime compensation funds	92
5.6.2. Compensation for workplace accidents	93
5.6.3. Insolvency fund	95
5.7. Alternative (informal) mechanisms for recuperation of wages	99
5.7.1. Informal negotiations with the employer	99
5.7.2. Sectoral initiatives: Compliance Foundation with the Collective Labour Agreement for Temporary Agency Workers in the Netherlands	101
5.8. Parallel use of different avenues for access to remedy	102
5.9. The key role of third-party organisations in facilitating access to remedy	104
5.9.1. Civil society support organisations	104
5.9.2. Trade unions	107
6. Concluding remarks	112
6.1. Making existing avenues for protection and remedy more effective in practice for human trafficking victims	113
6.2. Enabling effective complaints and compensation mechanisms for potential human trafficking victims for the purpose of labour exploitation	116
6.3. Tightening labour market governance and better enforcement of labour law	119

► List of tables

Table 1. Definition of the two groups that are the object of enquiry	17
Table 2. List of research participants interviewed in Belgium and the Netherlands	18
Table 3. Overview of substantive and procedural scope of victims’ rights to protection and remedy	21

▶ List of boxes

Box 1. The scope and scale of human trafficking for the purpose of labour exploitation in Belgium and the Netherlands	28
Box 2. Spotlight on the role of trade unions in detecting potential victims: FNV-VNB Road Transport Initiative	35
Box 3. Spotlight on the Dutch labour inspectorate's thematic programme on labour exploitation	42
Box 4. Key findings, good practices and action points – detection and referral to the NRM	43
Box 5. Key findings and action points – reflection and recovery period	49
Box 6. Spotlight on the pilot project: Multidisciplinary identification for victims of human trafficking in the Netherlands	56
Box 7. Key findings, good practices and action points – identification as a victim of human trafficking	59
Box 8. Key findings and action points – access to remedy from the victim's perspective ..	64
Box 9. Spotlight on the Mushroom case: Securing access to remedy (compensation) for all workers	67
Box 10. Spotlight on the advance payment option in the Netherlands	70
Box 11. Spotlight on the non-recognition of Polish workers on human trafficking indictment	75
Box 12. Key findings, good practices and action points – access to remedy through criminal proceedings	78
Box 13. Brussels Employment Tribunal, 23 July 2018 (17/2879/A)	83
Box 14. Key findings and action points – access to remedy through civil proceedings ...	85
Box 15. Spotlight on the recuperation of wages and the Belgian Deposit and Consignment Fund	89
Box 16. Key findings, good practices and action points – access to remedy via the labour inspectorate	91
Box 17. Back pay and the application of EU insolvency law in the Netherlands	97
Box 18. Key findings, good practices and action points – access to remedy through state compensation funds/schemes	98
Box 19. Key findings and action points – alternative (informal) mechanisms for recuperation of wages	102
Box 20. Key findings and action points – parallel use of different avenues for access to remedy	104
Box 21. Despite central role FAIRWORK Belgium are not a designated third-party	107
Box 22. Spotlight on trade union cooperation with prosecution in case of human smuggling involving exploitation in the transport sector	108
Box 23. Key findings and action points – the role of third-party organisations in facilitating access to remedy	111

► List of abbreviations

AVIM	Afdeling Vreemdelingenpolitie, Identificatie en Mensenhandel (Aliens, Identification and Human Trafficking Units, the Netherlands)
BE	Belgium
CEACR	ILO Committee of Experts on the Application of Conventions and Recommendations
CSC-ACV	Confédération des syndicats chrétiens/ Algemeen Christelijke Vakverbond (Belgian Trade Union)
CoE	Council of Europe
CoMensha	Coördinatiecentrum tegen Mensenhandel (Coordination Centre against Human Trafficking, the Netherlands)
COSM	Categorale Opvang voor Slachtoffers van Mensenhandel (Categorical Accommodation and Assistance for Victims of Trafficking in Human Beings, the Netherlands)
DCK-CDC	Caisse des Dépôts et Consignations/ Deposito en Consignatiekas (Deposit and Consignment Fund, Belgium)
FEDRIS	Agence Fédérale des Risques Professionnels/ Federaal Agentschap Voor Beroepsrisico's (Federal Agency for Occupational Risks, Belgium)
FNV	Federatie Nederlandse Vakbeweging (Dutch trade union)
FNV-VNB	Stichting Vervoersbond Naleving CAO Beroepsgoederenvervoer (Dutch trade union foundation in the logistics and transport sector)
FRA	European Union Agency for Fundamental Rights
ILO	International Labour Organization
IND	Immigratie en Naturalisatiedienst (Immigration and Naturalisation Service, the Netherlands)
GRETA	Group of Experts on Action against Trafficking in Human Beings
KMar	Koninklijke Marechaussee (Royal Netherlands Marechaussee)
LIEC	Landelijk Informatie- en Expertise Centrum (National Information and Expertise Centre, the Netherlands)
MYRIA	Centre Fédéral Migration/ Federaal Migratiecentrum (Federal Migration Centre, National Rapporteur on Trafficking in Human Beings, Belgium)
NL	The Netherlands
NRM	National Referral Mechanism
OHCHR	Office of the United Nations High Commissioner for Human Rights
ONSS-RSZ	Office National de Sécurité Sociale/ Rijksdienst voor Sociale Zekerheid (Belgium)
RIEC	Regionale Informatie- en Expertise Centra (Regional Information and Expertise Centre, the Netherlands)
SNCU	Stichting Naleving CAO voor Uitzendkrachten (Compliance Foundation with the Collective Labour Agreement for Temporary Agency Workers, the Netherlands)
SZW	Inspectie Sociale Zaken en Werkgelegenheid, Ministerie van Sociale Zaken en Werkgelegenheid (Labour Inspectorate, Ministry of Social Affairs and Employment, the Netherlands)
UNODC	United Nations Office on Drugs and Crime

► Acknowledgements

The authors relied on the support and knowledge of many people for this publication. First and foremost, we would like to sincerely thank our interviewees for their availability and the invaluable insights they provided based on their daily work and experience. For Belgium, we in particular thank the interviewees from the CSC-ACV Brussels, FAIRWORK Belgium, the Labour inspectorate (National Social Security Office (ONSS-RSZ) and the Social Legislation Inspectorate (*Contrôle des Lois Sociales / Toezicht op de Sociale Wetten*), the prosecutors of the Ministère Public/Openbaar Ministerie, Myria (Federal Migration Centre) and PAG-ASA asbl. For the Netherlands, we are very grateful for the interviewees from CoMensha, FairWork, the FNV-VNB Stichting and the SZW Labour Inspectorate. We also thank the Schadefonds Geweldsmisdrijven for brief but useful exchanges.

We are immensely grateful that Prof Conny Rijken (Tilburg University) agreed to serve as an external reviewer for this publication and for all her useful comments and insights, she provided in that role.

We also owe a big thank you to many ILO colleagues who have supported us in this work. We would like to thank in particular colleagues from the ILO FUNDAMENTALS department Scott Lyon, Aurélie Hauchère and Michaëlle de Cock for acting as the research advisory board and their useful comments support and guidance they provided in this capacity.

The report furthermore benefited from comments by Lilana Keith (PICUM) and Suzanne Hoff (La Strada International) who also reviewed this paper and provided useful comments.

A special thanks to the team from ILO-Brussels, in particular Michael Francis, Fleur Rondelez and Anne-Françoise le Grelle for their important support during the whole process.

Last but not least, a huge thank you to the ILO-Brussels Director Lieve Verboven. Without her support and guidance, we would not have been able to carry out and complete this study.

Any errors that remain are the sole responsibility of the authors.



Executive summary

► Executive summary

According to the latest ILO global estimates on modern slavery, almost **25 million people are victims of forced labour worldwide**.¹ Forced labour persists despite its prohibition in international and regional instruments. The fight against forced labour received new impetus with target 8.7 of the UN Sustainable Development Goals and the adoption of the 2014 Protocol to the Forced Labour Convention, 1939 (No. 29), which reinforces the rights to access to protection and remedy for victims of forced labour and trafficking in human beings. The objective of this study is to examine the **avenues for access to protection and remedy for victims of human trafficking for the purpose of labour exploitation in Belgium and the Netherlands**. While much literature already exists on the gaps in protection and remedy for human trafficking victims, the **relevance of this study is its emphasis on identifying existing avenues for protection and remedy also for potential victims**,² such as those who are not identified as human trafficking victims or have had their human trafficking victim status withdrawn. The study is based on desktop research complemented by interviews with selected practitioners³ from different professional categories in both countries. Our study seeks to provide insights into how these avenues work in practice, to identify barriers that exist in accessing them and to highlight existing good or promising practices. Its findings aim to inform policy makers, practitioners, NGOs and academics in the EU and beyond.

Overall, we found that **in both countries, multiple mechanisms in criminal, civil and administrative law exist**. These allow (potential) victims of human trafficking for the purpose of labour exploitation, at least in theory, to access protection and remedy, including compensation and/or possibilities to claim back wages. **However, it appears to be very difficult to use these mechanisms in practice**. Where (potential) victims make use of such avenues they strongly **rely on specialised assistance**, including anti-trafficking and labour rights support organisations and trade unions. We also noted that there are a number of very committed professionals that aim to support victims in their access to remedy and protection across the different professional categories interviewed and whose commitments undoubtedly make a positive difference in the outcome for victims.

Access to protection depends, first and foremost, on being detected as a potential victim of human trafficking. Our findings echo other reports, which find that **detection of victims is difficult and that most victims go undetected**. Situations of human trafficking for the purpose of labour exploitation are often **not evident at first glance**. Investigating suspicious cases requires time and resources that frontline actors such as labour inspectors and police often lack. (Potential) victims are frequently unwilling to come forward and share necessary information about their situation due to a variety of reasons, including lack of trust in authorities, lack of self-identification as victims, no residence status and dependency on the (often little) income received from their job. In addition, if they are not identified as human trafficking victims they are not entitled to any form of support when making complaints.

1 The estimates include victims of trafficking for the purpose of sexual and labour exploitation, begging and criminal activities. It also includes victims of state-imposed forced labour but it does not include trafficking for the purpose of organ removal – see more in Section 3.1.

2 See Section 2 on Methodology for use of term ‘victim’ and ‘potential victim’ in this study.

3 For the list of practitioners interviewed see Section 2 in Chapter 2 Methodology.

Labour inspectors can have a particularly important role in **detecting and identifying potential victims** in both countries. Notably, we find that the **quality of information and the level of detail** labour inspectors include in their inspection report when coming across potential victims **can have a significant impact on the outcome of a case**. Such information ranges from seemingly trivial issues such as including the workers' correct contact details, to describing the workplace and the working conditions, to noting down the precise function and tasks the potential victim carried out. In the experience of our interviewees, currently trade unions' role and visibility in the anti-trafficking context, in areas such as victim detection, appears to be limited in both countries. However, the example of the Dutch trade union FNV-VNB in the transport sector showcases their potential role in victim detection and in facilitating access to remedy.⁴

In both countries, following detection, suspected victims of human trafficking are to be offered an unconditional reflection and recovery period. In practice, it appears in the Netherlands granting the full reflection and recovery period⁵ can sometimes be influenced by investigative considerations. Furthermore, in both countries, **when multiple victims are detected, not all of them may be listed on the indictment of the prosecutor with severe consequences for their access to protection and remedy**.

Access to protection following the reflection period is conditional upon cooperation with authorities in criminal proceedings in both countries. **The way the conditionality is applied seems to differ in both countries. While practitioners described the conditionality as comparatively "light" in Belgium, it seems to be more burdensome on the potential victims in the Netherlands.**

Practitioners report that in both countries **there are victims who refuse to cooperate with authorities** for a variety of reasons. Consequently, those victims are not identified as victims of human trafficking and are not entitled to the access to protection and remedy tied to this status after the reflection and recovery period. In both countries, **it appears not to be uncommon that the human trafficking victim status is withdrawn in the course of criminal proceedings**. Generally, victims lose their access to protection if cases are discontinued, or - in the case of the Netherlands - if the perpetrator is acquitted. However, in both countries, if proceedings have been going on for a number of years, victims without residence permit can apply for a permanent residence permit.

Receiving their unpaid wages appears to be a central element of remedy for (potential) victims of human trafficking for the purpose of labour exploitation. We find that the main route for human trafficking victims to claim remedy, is by joining criminal proceedings as civil/injured parties. If compensation is awarded following successful proceedings, it is difficult for victims to claim it in practice. The **"advance payment option"** in the Netherlands is a good practice as after eight months if the perpetrator has still not paid the compensation, the government steps in and advances the compensation to the victim.

In both countries, the **judicial threshold applied to prosecute successfully a case for human trafficking for the purpose of labour exploitation is perceived to be high**. The threshold appears to be anticipated by frontline actors when detecting and identifying victims, but also by prosecutors when deciding whether to initiate criminal proceedings. As a result, **there are indications that prosecutors sometimes choose to prosecute for lower-level offences rather than for human trafficking**. This has **severe consequences** for the victims as they will lose the important rights and entitlements that are tied to a human trafficking victim status. However, if criminal proceedings for lower-level offences are launched it may theoretically still be possible for potential victims to join as civil party/injured party to

4 International Transport Workers' Federation, [Pandemic of exploitation in European trucking](#) (26 June 2020).

5 The reflection and recovery period refers to the time period given to a (potential) human trafficking victim to recover and reflect on whether he or she would like to cooperate with authorities - see Section 4.2.

claim compensation. In Belgium, the Social Criminal Code allows for combining certain administrative offences with criminal ones. Hence, it may be possible for the potential victim to claim unpaid wages as a civil party in the criminal proceedings if the human trafficking charge is dropped. However, this hinges on the charges the prosecutors include in the indictment. For instance, it is necessary that the prosecutor includes the charge of non-payment of wages on the indictment, which does not appear to be the case by default. From a prosecutor's perspective, the charge of non-payment of wages is not an important charge as it does not carry a high sentence for the employer. However, from a victim's perspective the inclusion of this offence is crucial to receiving a remedy.

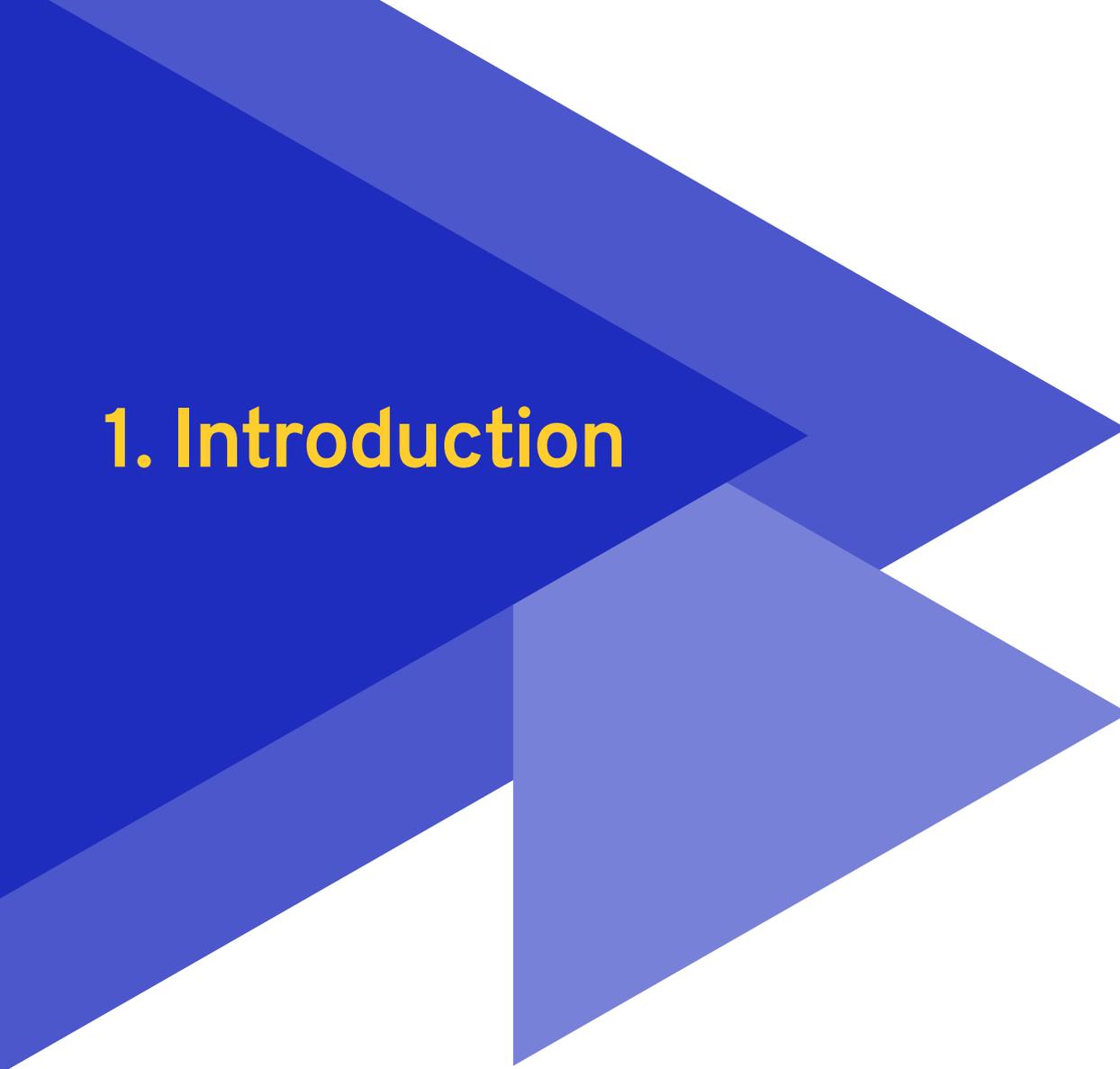
It is important to note that access to remedy is theoretically possible under civil or labour proceedings to potential victims – those who are not identified or have had their human trafficking victim status withdrawn – even if they have an irregular migration status. However, we find that there are **many barriers to accessing labour and civil courts in practice**, ranging from lengthy procedures to high costs. It emerged very clearly from the study that **if civil proceedings are envisaged, the assistance of victim support, civil society organisations or trade unions to victims is indispensable**. These organisations provide advice to potential victims on the different options available. In both countries, these organisations have developed good professional networks and working arrangements with institutional actors. However, they often lack financial resources which prevents them from dealing with all cases and from exploring new avenues for potential remedies including those that are less frequently used. This has a detrimental impact on potential victims' access to remedy.

Both countries have **administrative mechanisms in place** such as **state compensation schemes for victims of violent crime**, for workers who have had **workplace accidents** or whose employers have become **insolvent**. Both countries have set up funds for victims of violent crimes for which human trafficking victims are eligible. However, the accessibility to these funds seems to vary in practice. In Belgium, it appears to be very difficult to access for victims of human trafficking for the purpose of labour exploitation such as due to the need to exhaust other remedies first (criminal proceedings, potentially civil proceedings) and to demonstrate evidence of "intentional violence". In the Netherlands, the barrier to access the fund appears to be much lower, as access to the victims of crime compensation fund does not require the exhaustion of other domestic remedies first. Recent changes in the policy of the fund appear to have significantly simplified access to the fund for human trafficking victims for the purpose of labour exploitation as they no longer have to prove "serious injury".

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 fund FEDRIS if the employer does not have the obligatory insurance. In practice however, victims in an irregular situation barely succeed to access FEDRIS without the support from third party organisations such as lawyers, trade unions and civil society organisations which have practical knowledge on the processes required. As bankruptcy of the employer is an obstacle to claiming back wages, it is possible for potential victims to claim back parts of their wages under **state insolvency schemes**. In Belgium, support organisations have experience with the procedure and have successfully supported potential victims. The Dutch mechanism seems to be less well known to some of the support organisations in the Netherlands. Barriers exist in particular with regard to other debtors being served first, the absence of a formal bank account in case of migrant workers in an irregular situation and that in some sectors workers are formally employed outside the country, where the work is carried out.

In the study, we zoom in on **the role labour inspectors can play in facilitating or even providing access to remedy**. In particular, in Belgium, where workers are found in exploitative situations during workplace inspections, **labour inspectors are able to request the employer to pay unpaid wages on the spot**. In both countries, there is also the possibility for the worker to proactively submit a complaint to the labour inspection that can be followed up in a number of ways. Labour inspectors are also instrumental in ensuring employers respect applicable labour law and have a range of tools available to encourage and enforce compliance. In the Netherlands, there appears to be a renewed commitment by the labour inspectorate to making sure all tools, including closing down companies, are applied more routinely and to referring underpaid workers to lawyers to help them claim back their wages. At the same time, in Belgium, labour inspectors formally have a duty to **report migrant workers in an irregular situation to the authorities**. While this obligation formally does not exist in the Netherlands, in practice, workplace inspections with the police may result in migrant workers in an irregular situation being reported to immigration authorities. In addition, more informal mechanisms such as negotiations with employers or sectoral approaches, such as the Compliance Foundation for Temporary Agency Workers in the Netherlands, may provide avenues for remedy for potential victims. We find that informal negotiations with employers are frequently used but the effectiveness appears to depend on the leverage of the actor involved and the support of trade unions can be very helpful in these cases. In such negotiations **workers seem to be willing to accept payment of wages much below the minimum wage**, as they will be more likely to receive it quickly through such informal negotiations as opposed to having to wait years for formal proceedings to conclude. Sectoral collective agreements and innovative ways of enforcing these (e.g., through better cooperation between relevant actors) may support better compliance in specific sectors.

Overall, taking into account the barriers and promising practices that have emerged from our findings, our recommendations for improving access to protection and remedy for potential victims and victims of human trafficking for the purpose of labour exploitation, can be categorised into three broad themes. **First, making existing rights of access to protection and remedy for victims of human trafficking more effective; second, enabling effective complaint and compensation mechanisms for all workers who are not identified as human trafficking victims, and third tightening labour market governance and enforcement of labour law.**

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1. Introduction

► Introduction

The ILO estimates that there are globally 24.9 million victims of forced labour.⁶ In recognition of the urgent need for effective measures to eradicate forced labour in all its forms and to ensure better access to protection and remedy for victims, the ILO constituents – governments, workers’ and employers’ organisations – adopted a new legal instrument, the Protocol of 2014 to the Forced Labour Convention, 1930 (“ILO Protocol 29”)⁷ and an accompanying Forced Labour (Supplementary Measures) Recommendation, 2014 (No. 203) (“ILO Recommendation 203”) in 2014.⁸ These new instruments complement the two existing and widely ratified Conventions on Forced Labour.⁹ The ILO Protocol 29 creates the legal obligation on ratifying states to take effective measures to provide assistance, protection and remedy to victims of forced labour (including victims of human trafficking) irrespective of their residence status. This research paper aims to contribute to the global efforts under the Alliance 8.7¹⁰ to eliminate and eradicate forced labour and human trafficking and the on-going ratification campaign for the Protocol on Forced Labour.

Both Belgium and the Netherlands recently ratified the ILO Protocol 29.¹¹ In this context, the study examines the avenues for protection and remedy both countries have put in place for victims of human trafficking.¹² Both countries have a comprehensive and robust anti-trafficking framework in place. While we identify areas that could contribute to further strengthening these anti-trafficking frameworks, we also note that both countries have already interesting mechanisms in place with regard to protection and remedy that can also inspire other countries. In this study, we focus on human trafficking for the purpose of labour exploitation and examine in particular the role that labour market actors such as the labour inspectorate, trade unions, and specialised civil society support can play.

Existing research and literature have well established that the majority of victims of human trafficking are not detected and/or identified and only few cases of human trafficking end in successful prosecution of perpetrators.¹³ Even fewer victims actually receive the compensation awarded in such successful cases. This is very problematic with regard to victim’s right to access to protection and remedy. Most of the existing studies focus only on access to protection and remedy of identified victims of human trafficking. The importance of this study is that it also examines avenues that are available in theory and in practice for those potential victims who do not wish to be referred to the National Referral Mechanism

6 ILO, [Global estimates of modern slavery: Forced labour and forced marriage](#) International Labour Office, Geneva, 2017. These are the latest global estimates available as of March 2021.

7 ILO Protocol of 2014 to the Forced Labour Convention, 1930 (No. 29).

8 ILO Forced Labour (Supplementary Measures) Recommendation, 2014 (No. 203).

9 ILO Forced Labour Convention, 1930 (No. 29), ILO Abolition of Forced Labour Convention, 1957 (No. 105).

10 The Alliance 8.7 is a global partnership committed to achieving target 8.7 of the UN Sustainable Development Agenda 2030.

11 The Netherlands in 2017, Belgium in 2019. Both countries as well as all other EU countries have ratified the eight ILO core conventions which include ILO Forced Labour Convention, 1930 (No 29) and ILO Abolition of Forced Labour Convention, 1957 (No. 105). As of March 2021, 19 EU-27 Member States ratified Protocol 29.

12 See Chapter 3 on the use of terms and relationship of “forced labour” and “human trafficking” in ILO instruments.

13 This is generally the case in all EU Member States. See also European Commission, [Third Report on the Progress Made in the Fight against Trafficking in Human Beings as required under Article 20 of Directive 2011/36/EU on Preventing and Combating Trafficking in Human Beings and Protecting its Victims](#) COM (2020) 226 final; Council of Europe, [7th General Report on GRETA's Activities Covering the Period from 1 January to 31 December 2017](#) (2018), p. 197; Weatherburn, A., ‘Improving Prosecutions of Human Trafficking for Labour Exploitation: Lessons Learned from Two European Jurisdictions (England and Wales and Belgium)’ (2020) *Journal of Human Trafficking, Enslavement and Conflict-Related Sexual Violence* 1(1), pp. 49-64.

(NRM)¹⁴ for victims of human trafficking, those who refuse to cooperate with authorities and those who were initially granted human trafficking victim status but have had it withdrawn over the course of the criminal proceedings.¹⁵ Therefore, our analysis is also relevant for other workers in situations of severe exploitation.

Given the qualitative focus and rather limited scope of the research, we aim to provide deeper insights into the avenues and mechanisms that are used by practitioners, highlight some of the mechanisms and practical tools that seem to work in practice and outline key obstacles identified.

The bulk of our research was carried out before the COVID-19 pandemic occurred. However, the mechanisms and avenues we examined did not change. Follow up conversations with our interviewees have shown that there is anecdotal evidence of a shift in priorities and resources of government anti-trafficking actors, making access to protection and remedy more difficult.¹⁶ For instance, in Belgium, as a result of the restrictive measures to prevent the spread of COVID-19, there is now a significant delay in judicial proceedings which adversely affects victims' right to remedy. Furthermore, there are indications that fewer persons are being referred and/or registered as victims of human trafficking and a key priority for labour inspectors and police appears to be the enforcement of compliance with the COVID-19 measures.¹⁷ In addition, due to COVID-19, the immediate physical availability of services to human trafficking victims is more restricted, although shelters try to provide appointments as fast as possible.¹⁸ In May 2020, the Dutch Minister for Social Affairs and Employment commissioned the Taskforce for Migrant Workers Protection (*Aanjaagteam Bescherming Arbeidsmigranten*) to propose measures to improve the work and living conditions of migrant workers in the Netherlands related to housing, employment, and recruitment. This has resulted in a number of recommendations aimed at reducing the (multiple) dependencies migrant workers have on their employer.¹⁹ Victim support organisations in both countries reported an increase in requests for support from migrant workers in an irregular situation during the pandemic with key concerns being loss of income and housing; though they also reported an increased willingness of some workers to pursue court cases against their employer and to speak out about their situation. In the Netherlands this has led to some referrals to the National Referral Mechanism (NRM).²⁰ However, these are only preliminary indications and the overall impact of COVID-19 on access to remedy and protection still needs to be assessed.

14 Refers to the national legal and institutional framework through which human trafficking victims are identified and given support and assistance – see Section 4.1.

15 By definition then, these additional avenues are open to all workers, but we examine them with the vulnerabilities of potential victims of human trafficking in mind. See example given of situation of migrant workers in an irregular situation who are at particular risk of experiencing unsafe and exploitative work conditions, which may lead to or amount to human trafficking or forced labour in PICUM, [PICUM Key Messages and Recommendations on Human Trafficking](#) (2020), p. 6.

16 See ILO Briefing Notes: [ILO Monitor: COVID-19 and the world of work](#) (March – June 2020).

17 Written correspondence from interviewees, November 2020.

18 Written correspondence with specialised shelter for trafficking victims in Brussels, November 2020.

19 Aanjaagteam bescherming arbeidsmigranten, [Geen tweederangsburgers. Aanbevelingen om misstanden bij arbeidsmigranten in Nederland tegen te gaan](#) (30 October 2020); National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children, [Slachtoffermonitor mensenhandel 2015-2019](#), (26 October 2020), p. 37.

20 FairWork, [Impact van corona op migranten in Nederland](#), (17 April 2020). Follow up conversation with FairWork in the Netherlands, November 2020.

This research paper is divided into six chapters:

Chapter 2 specifies the research question and explains the methodology used.

Chapter 3 briefly outlines the rights to protection and remedy enshrined in international and regional instruments for victims of forced labour and trafficking, with a particular emphasis on the ILO instruments and the EU Directive on trafficking in human beings. It furthermore sets out certain rights that are relevant in particular for potential victims. We will then situate the application of this legal framework in the two national settings of the case study: Belgium and the Netherlands.

Chapter 4 analyses the mechanisms for protection, including support and assistance for victims of human trafficking and forced labour in both countries. It identifies obstacles to detection and zooms in on the role labour inspectors play. It analyses the victim identification process in both countries including conditions when assistance and support are withdrawn and possible alternatives.

Chapter 5 examines access to remedy for victims of human trafficking and for those without human trafficking victim status under criminal proceedings and in civil proceedings. It furthermore examines the role of labour inspection in facilitating access to remedy. Moreover, state compensation/mechanisms in place are examined (such as for victim of crime, workplace accidents and insolvency schemes). Finally, it analyses the crucial role of civil society organisations and trade unions to support potential victims in using the existing mechanisms.

In **Chapter 6**, we synthesise our findings and identify good and promising practices, key obstacles and point to initiatives and recommendations that could improve access to assistance and remedy for victims and potential victims of human trafficking for the purpose of labour exploitation.

The findings of the research are of relevance to policy makers, practitioners, NGOs and academics which might be inspired in particular by the good practices in both countries and gain additional knowledge on the obstacles that these two countries still face.

2. Methodology

The overarching aim of this research is to identify the avenues of protection and remedy available (in theory and in practice) to (potential) victims of human trafficking for the purpose of labour exploitation²¹ in Belgium and the Netherlands. In this context we also identify good or promising practices. Within the framework of the research, we aim to answer the following question:

What avenues for protection and remedy are available to, and what barriers to protection and remedy are faced by, (potential) victims of human trafficking in Belgium and the Netherlands?

²¹ ILO Convention 29 covers also human trafficking for victims of sexual exploitation. Resource constraints did not allow us to cover the situation of human trafficking for victims of sexual exploitation as well, although this is an important form of trafficking in both countries.

In order to answer the research question, we identify two groups that are the object of enquiry in this study:

► **Table 1. Definition of the two groups that are the object of enquiry**

<p>Victims of human trafficking for the purpose of labour exploitation</p>	<ul style="list-style-type: none"> • 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.
<p>Potential victims of human trafficking for the purpose of labour exploitation</p>	<ul style="list-style-type: none"> • Following detection, refuse to be referred to the NRM or refuse to cooperate with criminal proceedings or abide by conditions to remain in the NRM.²² • After initial detection, authorities decide that there are not enough indicators of human trafficking and the case is dismissed. • Have been granted human trafficking victim status but it has been withdrawn as a criminal investigation is undertaken but procedural issues prevent prosecution (e.g., lack of evidence, perpetrator cannot be found). • A criminal investigation begins but a prosecution is pursued for non-human trafficking offences (such as fraud, smuggling, irregular employment of third country nationals, non-payment of wages and social security contribution).

The choice of the two different case study countries, is supported further in that both **Belgium** and the **Netherlands**:

- Are globally and regionally recognised for their handling of anti-trafficking law and policy;²³
- Recognise human trafficking for forced labour in criminal law;
- Do not criminalise forced labour as a separate stand-alone offence but have ratified ILO Convention 29 on Forced Labour and recently the ILO Protocol 29;
- Have labour inspectors, judges and prosecutors who have received special training on human trafficking and both countries identify a relatively high number of victims compared to many other EU Member States.

A mixed methods approach is adopted, whereby access to protection and remedy is investigated using desktop research and semi-structured qualitative interviews. Interviewees selected have a key role in tackling human trafficking and labour market abuse in their respective country. They advise on and have practical experience of using the avenues for protection and remedy examined.

22 Brunovskis, A., & Surtees, R., *Leaving the Past Behind: When victims of trafficking decline assistance*, Fafo, Oslo, 2007.

23 E.g., Both countries are repeatedly categorised as Tier 1 Countries in the Annual Trafficking in Persons Report, see US State Department, Trafficking in Persons Report 20th Edition (June 2020). See also GRETA evaluation of Belgium and the Netherlands; GRETA, [Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Netherlands, Second Evaluation Round](#), GRETA (2018) 19; GRETA, [Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Belgium, Second Evaluation Round](#), GRETA (2017), p. 10.

► Table 2. List of research participants interviewed in Belgium and the Netherlands

Organisation	Professional category
PAG-ASA asbl, Belgium	Human trafficking victim support organisation
CSC-ACV Brussels, Belgium	Trade Union
FAIRWORK Belgium	Civil society support organisation
Myria – Federal Migration Centre (<i>Centre fédéral Migration / Federal Migratiecentrum</i>), Belgium	National Rapporteur
Central Thematic Directorate for Trafficking in Human Beings of the National Office for Social Security (<i>Direction Thématique traite des êtres humains d'Inspection de l'Office National de Sécurité Sociale – ONSS/ Themadirectie mensenhandel van de Rijksdienst voor Sociale Zekerheid inspectiedienst - RSZ</i>), Belgium	Labour inspectorate
Advocate General – Public Ministry (<i>Ministère Public / Openbaar Ministerie</i>), Belgium	Prosecutor
Labour Prosecutor -Public Ministry (<i>Ministère Public / Openbaar Ministerie</i>), Belgium	Prosecutor
Social Legislation Inspectorate (<i>Contrôle des lois sociales / Toezicht op de Sociale Wetten</i>), Federal Public Service of Employment, Labour and Social Dialogue, Belgium	Labour inspectorate
FNV, the Netherlands	Trade Union
FNV - Stichting VNB (road transport research and enforcement foundation), the Netherlands	Trade Union
FairWork, the Netherlands	Civil society support organisation
Coordination Centre on Human Trafficking (<i>Coördinatiecentrum Mensenhandel – CoMensha</i>), the Netherlands	Human trafficking victim support organisation
Social Affairs and Employment Inspectorate (<i>Inspectie Sociale Zaken en Werkgelegenheid – SZW</i>), the Netherlands	Labour inspectorate
SZW Inspectorate, the Netherlands	Labour inspectorate

The purpose of the interviews was to identify protection and remedy mechanisms for (potential) victims of human trafficking for the purpose of labour exploitation that are known by anti-trafficking professionals and are used in practice. The desktop research has been twofold, first to get an overview of the state of the art in the country (as reported in publications and reports) and then secondly to reinforce and corroborate the (new) findings from the interviews, so as not to take the findings from the interviews at face value.

The interviews addressed the availability of protection and remedy for (potential) victims of human trafficking for the purpose of labour exploitation first from the perspective of criminal proceedings and secondly from the perspective of civil proceedings. In each instance, the questions addressed four key areas:

- ▶ Avenues for access to protection and remedy for victims
- ▶ Obstacles to ensuring access to effective protection and remedy
- ▶ Examples of promising practices on ensuring access to effective protection and remedy
- ▶ Measures to improve the access to effective protection and remedy for victims

In total, 11 interviews were carried out (with 14 interviewees). All interviews were conducted face to face – with the exception of one skype interview – and lasted on average 90 minutes. All research participants were asked to provide their full-informed consent, and had the right to access, rectify or remove their data at any time. Full information of the handling of personal data was included in the consent form and an information sheet that outlined the purpose of the study.

Each interview was transcribed and then a summary of the interview was drafted, with a view to identifying the key points that emerged and to include illustrative quotes. The data was coded using thematic coding. The data was divided thematically and analysed theme by theme. The data was then comparatively analysed between the two case study countries. The data was double-coded and triangulated. Subsequently interviewees had the chance to review and validate the study. It furthermore benefited from an independent external review²⁴ and was reviewed by organisations working in this field.²⁵

A number of **limitations** are acknowledged. The limited sample size means that the findings must be further corroborated and substantiated with other sources and must not be taken at face value. Where possible, the insights provided by interviewees were cross-checked with existing literature. In addition, all interviewees are experienced practitioners who are part of the NRM or directly support victims in their endeavours to claim remedy or get access to support.

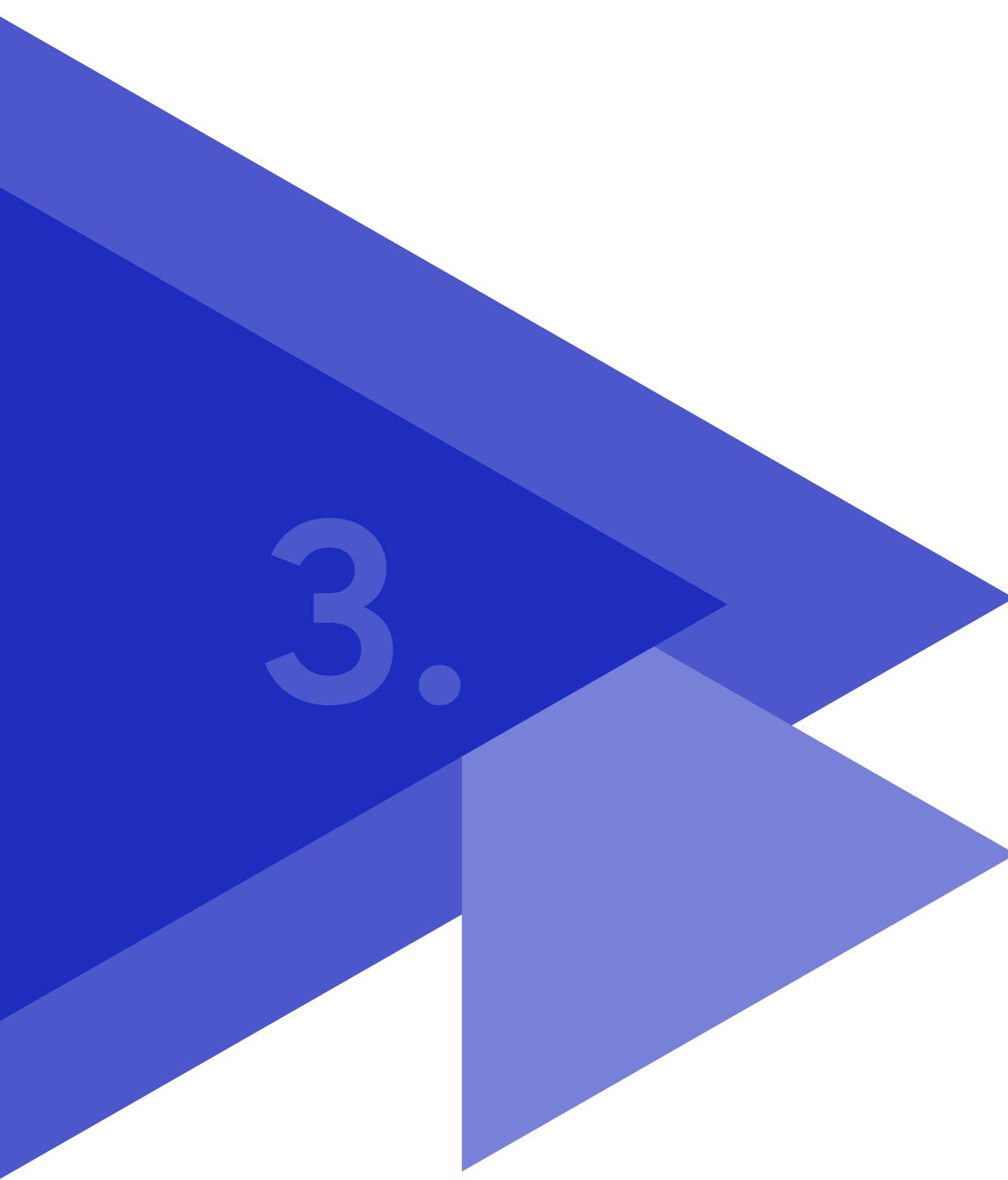
There is sometimes an imbalance of findings between the two countries that reflects the focus of the practitioners' day to day work in practice. Similarly, as we want to demonstrate the current knowledge and use of avenues of protection and remedy by practitioners, it is possible that other initiatives exist but have not been addressed in the present study e.g., other sectorial indicatives, but we focus on those that the interviewees are aware of, identify and use in their daily practice.

Notwithstanding, the findings provide key insights from frontline professionals and the priorities that are in place in their specific national context. Where considered appropriate, recommendations for future action have been identified. However, these do not seek to play off one country as being better than another. Instead, recommendations are hoped to be applicable to a wider perspective. Where promising practices, limitations and or deficiencies are identified, it is hoped that they can provide insight, inspiration and reflection for the implementation of access to protection and remedy for (potential) victims of human trafficking for the purpose of labour exploitation in other national contexts.

24 Prof. Dr. Conny Rijken, Professor of human trafficking and globalization, Tilburg Law School and GRETA Member for the Netherlands.

25 Namely La Strada International and PICUM (Platform for International Cooperation on Undocumented Migrants).

3. Access to protection and remedy: The legal framework



3.

The rights to protection and remedy for human trafficking victims are enshrined in international and regional law. As already indicated in the Introduction and Methodology, we use the most recent legally binding instrument, the ILO Protocol of 2014 to the Forced Labour Convention, 1930 (“ILO Protocol 29”) and its accompanying Forced Labour (Supplementary Measures) Recommendation, 2014 (No. 203) (“Recommendation 203”) as our key point of reference for this research. The ILO Protocol 29 calls on State parties to take effective measures to ensure **identification, release, protection, recovery and rehabilitation** of all victims of forced or compulsory labour, as well as the provision of other forms of assistance and support and to ensure **victims have access to appropriate remedies, such as compensation**.²⁶

In the context of this research, we place an emphasis on the main provisions of ILO Protocol 29 and its accompanying Recommendation 203 that focus on **protection** (including identification, assistance, recovery and rehabilitation) and **remedy (in particular compensation)**²⁷ including the procedural and substantive elements that are essential to both concepts.²⁸

► **Table 3. Overview of substantive and procedural scope of victims’ rights to protection and remedy**

	Access to protection	Access to remedy
Substantive rights	Recovery	Restitution
	Rehabilitation	Compensation
Procedural rights	Access to information	
	Access to legal assistance	
	Regularisation of residence status	

26 Articles 1, 3 and 4 ILO Protocol of 2014 to the Forced Labour Convention, 1930 (No.29).

27 There are other elements to remedy that we do not have the space to delve into in the framework of this study. These have been outlined as recovery, restitution, satisfaction and guarantees of non-repetition, as well as a set of ancillary procedural rights that enable trafficked persons to exercise the right to an effective remedy in a meaningful manner. See the [UN, Report of the Special Rapporteur on trafficking in persons, especially women and children](#), Joy Ngozi Ezeilo, UN/GA/A/HRC/17/35, 13 April 2011, para. 19.

28 UN (2011), *supra* n.28, paras 12-24; OSCE, [Action Plan to Combat Trafficking in Human Beings](#) (2003); Office of the United Nations High Commissioner for Human Rights (OHCHR), [Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law](#), adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005; OHCHR, [Recommended Principles and Guidelines on human trafficking and Human Rights](#) 2002; D Shelton, (2005 2nd ed.), Remedies in International Human Rights Law, p.12-13 cited in United Nations Office on Drugs and Crime (UNODC), [Inter-Agency Coordination Group Against Trafficking In Persons, Providing Effective Remedies for Victims of Trafficking in Persons](#) (Issue Paper) (2016), p.2.

ILO Protocol 29 complements the ILO Forced Labour Convention, 1930 (No. 29) (“ILO Convention 29”) by explicitly noting the obligations State parties have to ensure victims’ rights.²⁹ The forced labour definition enshrined in ILO Convention 29 remains valid. Forced labour is defined as “*all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.*” Hence, this definition covers any type of situation in which a person is forced to work without his or her consent.³⁰ It does not matter whether the type of work or service is recognised as an economic activity or is considered illegal; or whether the person has regular work and/or a residence permit. The ILO Committee of Experts on the Application of Conventions and Recommendations (“ILO Committee of Experts”)³¹ has also clarified that if a person has been deceived about the kind of work or the working conditions, the person’s consent to the deceitful offer is invalid. Further, the “menace of any penalty” is not limited to physical violence or threats thereof but covers also the “threat of loss of rights and privileges”, including for instance, the threat of being reported to immigration authorities.³²

Since the adoption of ILO Convention 29 in 1930, several other legally binding instruments have been concluded at international and regional level. These instruments include most notably the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (“Palermo Protocol”),³³ and in a European context the Council of Europe Convention on Action against Trafficking in Human Beings (“CoE Convention”),³⁴ as well as relevant EU Directives, notably the Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims (“Anti-Trafficking Directive”).³⁵ The instruments cover largely the same types of situations and phenomena defined in the ILO Forced Labour Convention.³⁶ In order to comply with ILO Convention 29, the ILO Committee of Experts, which monitors the application of ratified ILO Conventions by State parties, does not require countries to adopt specific legislation on forced labour provided legislation on trafficking, bonded labour or others encompass all forms of forced labour prevalent in the country.

Both Belgium and the Netherlands have ratified ILO Convention 29,³⁷ ILO Protocol 29, the Palermo Protocol and the CoE Convention. Both have transposed the relevant EU legislation (in particular the Anti-Trafficking Directive, Directive 2004/81/EC (“Residence Permit Directive”)³⁸ Directive 2009/52/EU (“Employers’ Sanctions Directive”)³⁹ and Directive 2012/29/EU (“Victims of Crime Directive”).⁴⁰

29 It also includes other areas, such as measures related to prevention and addressing of root causes of forced labour.

30 An exhaustive list of exceptions is found in Article 2(2) of ILO Convention 29.

31 The ILO Committee of Experts on the Application of Conventions and Recommendations is an independent monitoring body.

32 ILO, 2016 [General Survey on Fundamental Rights – Giving globalisation a human face](#) (2016), para. 270.

33 Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2000).

34 Council of Europe Convention on Action against Trafficking in Human Beings (2005).

35 Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA *OJ L 101, 15.4.2011, p. 1–11.*

36 The overlap of these instruments is not complete. For instance, situations of trafficking of organ removal, or situations of trafficking for forced adoption are not covered by ILO Convention 29. Furthermore, forced state prison labour or other forms of state imposed forced labour is typically not addressed by anti-trafficking instruments.

37 All EU countries have ratified the eight fundamental conventions on forced labour, child labour, collective bargaining and freedom of association and non-discrimination.

38 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, who cooperate with the competent authorities *OJ L 261, 6.8.2004, p. 19–23.*

39 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.*

40 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 *OJ L 315, 14.11.2012, p. 57–73.*

3.1. Access to protection in international and regional law

ILO Protocol 29 requires ratifying State parties to take effective measures for identification, release, protection, recovery and rehabilitation of all victims of forced or compulsory labour, as well as the provision of other forms of assistance and support. ILO Recommendation 203 elaborates further on these rights and stipulates that State parties should take the most effective protective measures to meet the needs of all victims for both immediate assistance and long-term recovery and rehabilitation. This includes measures to protect the physical safety of victims and their family members, accommodation, health care (including medical, psychosocial assistance and the provision of special rehabilitative measures for victims who e.g., have been subjected to sexual violence), privacy of identity and material assistance. These rights are also largely enshrined in the Palermo Protocol, the CoE Convention and the Anti-Trafficking Directive.⁴¹ In several instruments, it is explicit that this assistance is to be provided to presumed victims unconditionally.⁴² ILO Recommendation 203 and the Palermo Protocol ask State parties to provide access to the labour market, education and training opportunities to victims in the country.⁴³

With regard to the specific situation of third-country nationals, the instruments propose an unconditional reflection and recovery period during which presumed victims are to be given the assistance described above and cannot be expelled. Amongst the legally binding instruments, only the CoE Convention proposes a reflection and recovery period of at least 30 days explicitly for all presumed victims.⁴⁴ Importantly, the ILO Recommendation 203, the CoE Convention and the Anti-Trafficking Directive stipulate that victims' access to protection should not be made conditional upon the victim cooperating in criminal proceedings.⁴⁵ The instruments encourage State parties to offer a temporary or permanent residence permit⁴⁶ following the (unconditional) reflection and recovery period to victims without residence status. However, all legally binding instruments allow Member States to make this temporary residence conditional such as upon victims' cooperation with the authorities.⁴⁷ Some of the instruments also explicitly provide for access to the labour market for third-country nationals.⁴⁸

41 Paragraph 9, ILO Recommendation No. 203 para 9; Article 6, Palermo Protocol (though does not include provision on family members and witnesses), Article 11(5), Directive 2011/36/EU, Articles 11 & 12, CoE Convention.

42 Article 11(3), Directive 2011/36/EU, Palermo Protocol and ILO Protocol 29 do not address the question of conditionality of assistance, however Paragraph 5, ILO Recommendation No. 203 elaborates that assistance should be unconditional, Article 13, CoE Convention.

43 Paragraph 9(f), ILO Recommendation No. 203, Article 6(3d), Palermo Protocol, Article 12(4), CoE Convention calls for parties to adopt rules as to the conditions under which lawfully residents should have access to education and the labour market.

44 Paragraph 11(a), ILO Recommendation No. 203, Article 13 CoE Convention for all victims of trafficking specifies at least 30 days, Article 6, Directive 2004/81/EC.

45 Paragraph 5(2), ILO Recommendation No. 203, Article 11(3), Directive 2011/36/EU, Article 12 (6), CoE Convention.

46 Paragraph 11(b), ILO Recommendation No. 203, Article 7, Palermo Protocol, Article 13 CoE Convention, Article 8, Directive 2004/81/EC.

47 ILO Recommendation 203 does not do so but is not legally binding; Article 6(6) of the Palermo Protocol asks State parties to consider humanitarian and compassionate factors in this decision.

48 Access to the labour market: Paragraph 11(b), ILO Recommendation No. 203 & Article 7, Palermo Protocol make no distinction between national victims and third-country nationals.

3.2. Access to remedy, including compensation, in international and regional law

All the above instruments include provisions for victims to claim remedy, in particular compensation. However, for remedy to be effective, both the substantive and the procedural elements have to be provided for.⁴⁹

ILO Protocol 29 stipulates that all victims irrespective of their presence or legal status in the national territory should have access to appropriate and effective remedies, such as compensation. ILO Recommendation 203 elaborates that this includes compensation for personal and material damages, such as unpaid wages and statutory social security contributions. There is an emphasis on the effectiveness and the fact that victims who have returned to their country of origin should still be able to claim remedy.

The Palermo Protocol asks State parties to ensure that victims of human trafficking have the possibility of obtaining compensation for damages suffered (Article 6(6)) and the Anti-Trafficking Directive requires victims of human trafficking to have access to existing schemes of compensation for victims of violent crimes of intent. Under the Victims of Crime Directive, victims also have a right to obtain a decision on compensation from the offender in criminal proceedings (Article 16). The CoE Convention goes furthest by asking ratifying parties to take such measures “to guarantee” compensation for victims in accordance with the conditions under its domestic law, placing a much stronger obligation on State parties. This is important as in practice, effective access to remedy for victims of human trafficking often remains illusory.⁵⁰

3.3. Procedural rights for protection and remedy in international and regional law

In order to secure effective access to remedy and protection, it is of paramount importance that procedural rights are provided for, including **access to information and legal assistance**.

ILO Recommendation 203 elaborates on procedural rights such as access to courts and tribunals, other resolution mechanisms and access to existing compensation schemes, right to information in language victims can understand and legal assistance (preferably free of charge). A specific provision is included that non-nationals can pursue the criminal, civil and administrative procedures irrespective of whether or not they are in the territory of the country where the forced labour took place.⁵¹

The procedural remedy rights listed in the Palermo Protocol are minimal, with a requirement to provide information on relevant court and administrative proceedings, with assistance to ensure that the views of the victim are presented and considered during criminal proceedings (Article 6(2)(a-b)). The CoE Convention mirrors these rights (Article 15). Under EU law, victims of human trafficking also benefit from the provisions in the Victims of Crime Directive which includes provisions on right to information, rights when making a criminal complaint, right to victim support services and access to legal aid (though conditions for legal aid are left to Member States).

Furthermore, in some countries, civil proceedings to claim compensation can only be launched after criminal proceedings have ended. This is particularly problematic for third-country nationals who have no residence status in the country. ILO Recommendation 203 calls to ensure that, both nationals and non-nationals, can pursue appropriate administrative, civil and criminal remedies in that State, irrespective of

49 UN (2011), *supra* n. 27, paras 12-24; OHCHR (2005) *supra* n.28.

50 UNODC (2016) *supra* n.28; UN (2011), *supra* n. 27, para 19.

51 Paragraph 12, ILO Recommendation No. 203.

their presence or legal status in the State, under simplified procedural requirements, when appropriate. The Palermo Protocol and the CoE Convention both call on taking into account any ongoing legal proceedings when considering the repatriation of victims.⁵² The Anti-Trafficking Directive specifically states however that victims are to be provided with support and assistance “before, during and for an appropriate period of time after the conclusion of criminal proceedings.”⁵³

3.4. Access to remedy for (potential) victims of human trafficking for the purpose of labour exploitation

In addition to the compensation mechanisms that are connected to the existence of criminal proceedings, there are also remedies available under civil procedures that enable victims to bring actions against their perpetrators in tort or breach of contract or remedies under labour laws that protect the rights and entitlements of workers.⁵⁴ Of particular relevance are the right to claim unpaid wages and statutory social security contributions (see [Chapter 5](#)).⁵⁵

At the international level, the ILO Committee of Experts emphasised “*the importance of the principle that migrant workers, even if they have been unlawfully employed or are not lawfully residing in the country, enjoy equal treatment with migrant workers in a regular situation with regard to rights arising out of past employment for which they have been affiliated to social security and, in particular, with respect to any outstanding remuneration and benefits due*” [emphasis added]. Furthermore, the Committee of Experts highlighted “*that in its view it was essential that all migrant workers, irrespective of their legal status, whether regular or irregular, be entitled to benefits due in respect of any employment injury suffered*” [emphasis added].⁵⁶ Furthermore, special provisions have been adopted specifically for domestic workers in the ILO Domestic Workers Convention, 2011 (No. 189) – and reinforced in ILO Recommendation 203 – requiring effective access to complaint mechanisms.⁵⁷

Under EU law, the Employers’ Sanctions Directive contains a number of highly important provisions in this regard. It stipulates that employers of illegally employed third-country nationals have to pay any outstanding wages, social security contributions for the period the person was working for the employer as well as any cost arising from sending back payments to the country to which the third country national had returned or had been returned (Article 6(1)). To this end, Member States have to ensure that there are effective mechanisms in place through which third-country nationals can submit a claim against the employer or enable a competent authority of the member state or designated third parties such as trade unions or others, to start procedures to recover these entitlements (Article 6(2)). The directive also stipulates that third-country nationals must be systematically informed about this possibility.

52 Article 8(2), Palermo Protocol; Article 16(2), CoE Convention; The Office of the High Commissioner of Human Rights has emphasised that the regularisation of legal status for third-country nationals should extend to restitution proceedings and not just criminal proceedings, OHCHR, [Human Rights and Human Trafficking Fact Sheet No. 36](#) (2014), p.25.

53 Article 11(1), Directive 2011/36/EU.

54 UNODC (2016), *supra* n.28, p.18.

55 See Articles 25-27, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990 on right to wages regardless of legal status, access to social security and freedom of association.

56 ILO, [General Survey on Migrant Workers Instruments](#) (2016), paras 313 - 314; see also Committee on Economic, Social and Cultural Rights, [General Comment Nr 22 \(2016\) on Fair and Just Working conditions](#) (2016), para. 57.

57 Ratified by BE but not NL. Articles 16 and 17 of the ILO Domestic Workers Convention, 2011 (No. 189) requires states to ensure that all domestic workers have effective access to courts, tribunals or other dispute resolution mechanisms “and “effective and accessible complaint mechanisms and means of ensuring compliance” are put in place. ILO Recommendation No. 203 elaborates that domestic workers should have access to information on complaint mechanisms and legal remedies (para. 9).

Importantly, when calculating remuneration due, a presumption of a three months' employment relationship is to be applied unless the employer or worker can prove otherwise (Article 6(3)). It is worth noting that Member States also have to have the necessary mechanisms in place that allow the third-country nationals to claim their back wages if they have returned to their country of origin. Member States should also define the conditions under which a third country national (found in particularly exploitative working conditions or a minor) may be granted a temporary residence permit, bearing in mind the likely length of national proceedings to claim back the entitlements under this directive (Article 6(5) & Article 13(4)). The reference to comparable conditions of permits as granted under the Residence Permit Directive, implies such permits may grant access to the labour market. The Employers' Sanctions Directive had to be transposed by July 2011. However, a 2014 official implementation report of the directive⁵⁸ and subsequent research by NGOs⁵⁹ concluded that the above outlined protective elements of this directive have not been transposed sufficiently in many EU Member States.⁶⁰

Where an employer becomes insolvent, Member States are obliged to ensure that there are mechanisms to provide for any outstanding remuneration claims resulting from the insolvency.⁶¹ In a judgment of the Court of Justice of the European Union,⁶² the court clarified that insolvency entitlements under the Employers' Insolvency Directive also apply to migrant workers in an irregular situation (see Section 5.6.3).

The above sections demonstrate that there is ample provision in international and regional law for the right to effective remedy of (potential) victims of human trafficking for forced labour, including migrant workers (in an irregular situation). However, our study suggests that potential victims can face significant barriers in making use of them in practice (see *infra*).⁶³

58 European Commission, [Communication from the Commission to the European Parliament and the Council on the application of Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third country nationals](#), Brussels, 22.5.2014 COM(2014) 286 final.

59 PICUM, [Summary of findings in Belgium and the Czech Republic on the implementation of the Employers' Sanctions Directive](#) (2017); PICUM, [Employers' sanctions: Impacts on undocumented migrant workers' rights in four EU countries – position paper](#) (2015).

60 An assessment of the implementation of the Directive is foreseen in the EU Migration and Asylum Pact. European Commission, [Communication from the Commission on a New Pact on Migration and Asylum](#), Brussels, 23.9.2020, COM(2020) 609 final.

61 Article 3, Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer OJ L 283, 28.10.2008 ("Employers' Insolvency Directive").

62 Tümer, 311/1ECLI:EU:C:2014:2337.

63 PICUM, [A worker is a worker: How to Ensure that Undocumented Migrant Workers Can Access Justice](#) (2020), p. 46.

3.5. The national implementation of the access to remedy and protection to victims of human trafficking for the purpose of labour exploitation: Belgium and the Netherlands

Human trafficking is criminalised in Article 433*quinquies* of the Belgian Criminal Code and the Article 273f of the Dutch Criminal Code. The Dutch criminal offence of human trafficking replicates the three constituent elements of the Palermo Protocol and regional definitions of human trafficking. In contrast in Belgium, the human trafficking offence only includes the action and the purpose of exploitation, the means are aggravating factors. In Belgium, the definition of human trafficking for the purposes of labour exploitation is “conditions contrary to human dignity”. It is acknowledged as being broader in scope than the minimum obligation imposed by international instruments, which refer to forced labour or services, slavery or practices similar to slavery, and servitude. In the Netherlands, trafficking for the purpose of labour exploitation comprises at least the exploitation of another person in forced or compulsory labour or services, slavery, slavery like practices or servitude.

Despite the recent ratification of ILO Protocol 29, both countries do not have a separate criminal offence for forced or compulsory labour, since it is deemed that the current anti-trafficking framework is sufficient to fulfil their international and regional obligations when it comes to the prohibition of forced or compulsory labour.⁶⁴

Both, Belgium and the Netherlands have established a National Referral Mechanism (NRM) that provides for the way in which victims are to be i) detected, referred and identified and ii) provided with access to protection and remedy. Furthermore, their access (after the recovery and reflection period) is conditional upon victims’ cooperation in criminal proceedings.

64 For the Netherlands: Goedkeuring van het op 11 juni 2014 te Genève tot stand gekomen Protocol van 2014 bij het Verdrag betreffende de gedwongen of verplichte arbeid (Trb. 2015, 32 en Trb. 2015, 194); For Belgium: GRETA, [Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Belgium](#), First evaluation round, GRETA(2013)14, p.21; GRETA (2017), *supra* n.23, p. 38. See also GRETA, Compendium of good practices in addressing trafficking in human beings for the purpose of labour exploitation (2020), p.6.

► **Box 1. The scope and scale of human trafficking for the purpose of labour exploitation in Belgium and the Netherlands**

In 2019, 88 victims of human trafficking for purpose of labour exploitation were identified, granted access to NRM with a temporary residence permit and assisted by a specialised centre in **Belgium**. Furthermore, 146 offences of human trafficking for labour exploitation were recorded by the police and prosecutors investigated 112 cases of labour exploitation, with 28 cases not pursued to prosecution.⁶⁵ In 2018, a total of 126 traffickers were convicted.⁶⁶

In **the Netherlands**, in 2019, 261 victims of human trafficking for the purpose of labour exploitation were identified and registered by the national victim registration centre and assistance coordinator. It is important to note that in 2019, the total number of human trafficking victim registered almost doubled to 1372 in comparison to 2018 with 742.⁶⁷ Between 2013-2017, only 23 cases of labour exploitation were brought to court.⁶⁸ In 2019, overall 145 new trafficking cases were brought to the prosecutor's office by the police for further investigation. In 2018, it was 142. In 2019, a total of 101 traffickers were prosecuted (as opposed to 138 in 2018). In 2019, 84 traffickers were convicted (whereas in 2018 it was 111).⁶⁹

It is important to note that the ability to source comparable data has been a challenge.⁷⁰ As a result, the data is not complete.

It is worth noting, however, that over the past years, **a significantly higher number of investigations for human trafficking for labour exploitations appear to have been started (and prosecuted) in Belgium compared to the Netherlands**. In Belgium, the Public Prosecutors Office examined the following number of cases for trafficking in human beings for the purpose of labour exploitation 112 (2016), 116 (2017), 113 (2018), 112 (2019),⁷¹ whereas in **the Netherlands** criminal investigations into trafficking for the purpose of labour exploitation were 22 (2016), 13 (2017) and 16 (2018). Between 2015-2019, there were on average 15 perpetrators prosecuted for human trafficking for the purpose of labour exploitation per year which resulted on average in 5 convictions.⁷² In contrast in **Belgium**, in 2019 alone 84 cases for trafficking for the purpose of labour exploitation were prosecuted.⁷³

Other challenges in data collection include a lack of clear data in Belgium regarding the number of referrals that i) enter the reflection and recovery period; ii) immediately are granted human trafficking victim status due to their cooperation with proceedings and iii) make clear distinction between EU nationals and third country nationals. In the Netherlands, no information is given of the number of referrals that i) received B8 Status for reflection and recovery period, ii) received B8 status with no reflection and recovery period, iii) received an extension of the B8 status following a reflection and recovery period.

65 Myria, [Rapport annuel traite et trafic des êtres humains 2020: "Derrière des portes closes"](#) (2020), pp.107-114.

66 Myria (2020), *supra* n.65, p.117.

67 CoMensha, [Het Beeld van 2018](#) (2019); Comensha, [Het Beeld van 2019](#) (2020); Dutch Rapporteur on Trafficking in Human Beings and Sexual Violence against Children (2020), *supra* n. 19, p. 24.

68 Dutch Rapporteur on Trafficking in Human Beings and Sexual Violence against Children, [Dadermonitor mensenhandel 2013-2017](#) (May 2019).

69 US State Department (June 2020), *supra* n.23, pp. 369-370.

70 We note that GRETA has urged the Belgian authorities to develop and maintain a comprehensive and coherent statistical system on trafficking in human beings by compiling reliable statistical data on measures to protect and promote the rights of victims as well as on the investigation, prosecution and adjudication of human trafficking cases. GRETA (2017), *supra* n.23, p.47.

71 Myria (2020), *supra* n.65, p.109.

72 National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children, [Uitgelicht:Arbeidsuitbuiting](#) (2021) pp. 3-4. See also Section 5.2 for a potential explanation.

73 Myria (2020), *supra* n.65, p. 109.

In **Belgium**, Circular of 23 December 2016 concerning multidisciplinary cooperation sets out the NRM by explaining the role of each stakeholder and recalling certain legal obligations, describes the identification procedure, the information to be provided to victims, the assistance provided by specialised centres, and the granting of a reflection and recovery period and a residence permit.⁷⁴ The Circular identifies a number of organisations that are to form the basis for the multidisciplinary cooperation: the police, social inspection services, the Immigration Office, the magistrates, and the specialised centres for the reception and support of victims of human trafficking.⁷⁵ The Circular defines the procedures for the identification, referral, reception and assistance of potential victims of human trafficking and/or certain serious kinds of smuggling and stipulates the conditions that must be met in view of obtaining victims status. The overall aim of the protection procedure is to (re) integrate the victim and to avoid being re-trafficked.⁷⁶

In **the Netherlands**, many of the key provisions regulating victims' access to support and assistance are stipulated in Dutch immigration laws and policies, in particular the Aliens Act 2000⁷⁷ and the Immigration Circular 2000 (B).⁷⁸ These acts regulate access to the reflection and recovery period, the granting of the temporary residence permit (in cases of third-country nationals without legal residence in the Netherlands) and support provisions during the reflection and recovery period and the NRM. After initial contact with victims, by e.g the police, KMar⁷⁹ or the SZW Inspectorate, potential victims are reported to the Coordination Centre on Human Trafficking (*Coördinatiecentrum Mensenhandel* – CoMensha). CoMensha coordinates initial referral to the support system and refers potential victims to shelters and Regional Care Coordinators who coordinate a victim's assistance and support.⁸⁰ In situations of crisis (or at night), police can also contact local victim support organisations directly, where emergency beds are available. In the Netherlands, there are different multidisciplinary mechanisms that bring together the key actors dealing with trafficking. These include the Human Trafficking Taskforce⁸¹ and multidisciplinary Regional and National Information and Expertise Centres (RIECs and LIECs) aimed at tackling organised crime, including trafficking in human beings as well as other public private partnerships.⁸²

In addition to the anti-trafficking framework, Belgium and the Netherlands have also transposed key EU instruments such as the Employers' Sanctions Directive, providing for back pay of wages for third-country nationals who have been irregularly employed.⁸³

74 Circular of 23 December 2016 relating to the implementation of a multidisciplinary cooperation concerning victims of human trafficking and/or certain aggravated forms of human smuggling (*Circulaire relative à la mise en oeuvre d'une coopération multidisciplinaire concernant les victimes de la traite des êtres humains et/ou certaines formes aggravées de trafic des êtres humains*), Belgian Official Gazette, 10 March 2017.

75 Article 12 of the law of 13 April 1995 containing provisions to combat trafficking and smuggling in human beings established an interdepartmental platform for the coordination of the fight against human trafficking and migrant smuggling (*La Cellule interdépartementale de coordination de la lutte contre le trafic et la traite des êtres humains*). The Platform also has a smaller Bureau – chaired by the Criminal Policy Service of the Federal Public Service of Justice and consists of all of the above listed actors: representatives of the Immigration Office, the human trafficking central service of the federal police, Federal Public Service of social security including social inspection, Federal Public Service Employment, Labour and Social Dialogue and the Federal Public Service of Foreign Affairs. Myria and the College of Public Prosecutors General have observer status. The Bureau meets on a monthly basis in order to ensure the functioning and collaboration between the different actors involved in the multidisciplinary approach.

76 Caritas International, [Handbook for legal, social, health professionals involved in the protection of the rights and the assistance of victims of human trafficking](#) (November 2017), pp.8-9.

77 Aliens Act 2000 (*Vreemdelingenwet 2000*).

78 Immigration Circular 2000 (B) (*Vreemdelingencirculaire 2000 (B)*).

79 Koninklijke Marechaussee (KMar) is a branch of the armed forces in the Netherlands that perform military and civilian law enforcement duties.

80 Regional Care Coordinators can also refer victims to CoMensha.

81 The Task Force on Human Trafficking brings together actors such as the Public Prosecution Service, municipalities, the police, and civil society organisations. During the task force meetings information exchange on the latest developments take place and actions are agreed upon.

82 E.g., [Programme Together against Human Trafficking](#).

83 BE: Law of 11 February 2013 providing for sanctions and measures against employers of illegally staying third-country nationals, (*Loi du 11 février 2013 prévoyant des sanctions et des mesures à l'encontre des employeurs de ressortissants de pays tiers en séjour illégal*) Belgian Official Gazette 21 February 2013; NL: Aliens Employment Act (*Wet arbeid vreemdelingen*). NB changes were introduced before the Directive was adopted.

4. Access to protection: Belgium and the Netherlands

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4.

In this chapter, we will briefly outline the findings related to detection and referral to the NRM and the subsequent (or lack of) identification of victims of human trafficking in both countries. We will examine the important role labour inspectors, civil society victim support organisations and trade unions can play in the detection phase. In particular, the research reveals that evidence collected at the detection phase has important implications for the victim's effective remedy at a later stage. It also indicates that the requirement to provide an unconditional reflection and recovery period faces challenges in practice. Granting human trafficking victim status depends upon the victims' willingness to cooperate with criminal proceedings and where human trafficking victim status is not granted or withdrawn, generally no other mechanism ensuring access to support exists.

4.1. Detection and referral to the National Referral Mechanism

Respondents emphasised the importance of detecting victims and were aware of the referral procedure to the NRM in order to safeguard potential victims. In both countries, frontline actors (such as the police, labour inspectors, victim support organisations) who are likely to come into contact with potential victims use indicators from which it can be derived that the person might be a victim. In **Belgium**, a checklist of indicators provides confidential guidelines for frontline professionals.⁸⁴ In **the Netherlands** the police, KMar and the labour inspectorate use different sets of indicators while overall victims should be detected as presumed victims of human trafficking upon the "slightest indication" (*geringste aanwijzing*).⁸⁵ Using these indicators as a guide, it is possible for a wide range of professionals to detect potential victims including, *inter alia*, police, labour inspectorates, regional care coordinators, shelters, health services, immigration services.⁸⁶

Civil society support organisations also have a significant role to play when it comes to detecting potential victims. In both countries, FAIRWORK Belgium and FairWork in the Netherlands were repeatedly referred to as key organisations that not only support workers in exploitative situations, but also have a role to play in detecting human trafficking victims.

Furthermore, in both countries, any member of the public can report potential situations of exploitation to statutory bodies such as the police or labour inspectorate.⁸⁷

84 GRETA (2017), *supra* n.23, p. 23. Circular of 23 December 2016 relating to the implementation of a multidisciplinary cooperation concerning victims of human trafficking and/or certain aggravated forms of human smuggling (*Circulaire relative à la mise en oeuvre d'une coopération multidisciplinaire concernant les victimes de la traite des êtres humains et/ou certaines formes aggravées de trafic des êtres humains*), *Belgian Official Gazette*, 10 March 2017. The brochure is derived from the Annex to College of Public Prosecutors, Circular COL 1/2015 [confidential].

85 Chapter B8-3, Immigration Circular 2000 (*Vreemdelingencirculaire 2000 – B*).

86 Circular of 23 December 2016 relating to the implementation of a multidisciplinary cooperation concerning victims of human trafficking and/or certain aggravated forms of human smuggling (*Circulaire relative à la mise en oeuvre d'une coopération multidisciplinaire concernant les victimes de la traite des êtres humains et/ou certaines formes aggravées de trafic des êtres humains*), *Belgian Official Gazette*, 10 March 2017.

87 Dutch Rapporteur on Trafficking in Human Beings and Sexual Violence against Children, [Tenth Report of the National Rapporteur on Trafficking in Human Beings. Summary](#) (2017); European Union Agency for Fundamental Rights (FRA), [FRANET Social Fieldwork Research Severe forms of labour exploitation – The Netherlands](#) (2015), p. 62.

When detected, victims are to be informed of the available support and assistance.⁸⁸ In **Belgium**, this information can be passed onto presumed victims via a multilingual brochure that is available in 28 different languages and is provided at the point of identification e.g., on the worksite during an inspection etc.⁸⁹ Interviewees highlighted that state authorities such as the police or the labour inspectorate have a **legal duty to inform detected victims about their rights and possibilities for support, assistance and remedy**. Interviewees stressed that while this is generally the case, there is scope to apply this duty more consistently.

A victim can also self-identify by making a complaint or giving a declaration to the police⁹⁰ or directly contacting an anti-trafficking organisation e.g., CoMensha in the Netherlands or one of the three specialised centres for victims of human trafficking in Belgium.

It is to be noted, that those victims who are detected and referred for initial consideration are considered as being the tip of the iceberg.⁹¹ This was highlighted by interviewees in both countries across the different professional categories.

[...] it's a very sad thing, because [...] most situations are not detected, most detected victims are not referred [...].

ONSS-RSZ Labour Inspectorate, Belgium

Despite the availability of access to the reflection and recovery period in both countries there are significant obstacles. A major hindrance is the **victim's lack of self-identification of their own victimhood that can lead to a refusal of potential victims to enter the procedures under the National Referral Mechanism**.

The lack of self-identification of victimhood was attributed to a number of factors. These have been identified in previous research⁹² and were reiterated by the interviewees in this study. They include the following:

- Migrant workers in an irregular situation not wanting to risk being returned to their country of origin;
- Unawareness of the working standards and rights a worker is entitled in the country;
- The acceptance of their working conditions as they are still better than in their country of origin;
- A (false) belief that the fraudulent employer will eventually pay their salary/regularise their residence status;
- A need to continue earning an income, or
- An inability to leave their workplace to file complaints.

88 Article 11 (5) &(6) Directive 2011/36/EU, Article 12(1)(d) CoE Convention 2005.

89 Myria, [Multilingual brochure for victims of human trafficking](#) (2018); See Myria, [Rapport annuel traite et trafic des êtres humains 2019: De la force d'action pour les victimes](#) (2019), pp.26-27 on use of the brochure in practice by frontline professionals.

90 Circular of 23 December 2016 relating to the implementation of a multidisciplinary cooperation concerning victims of human trafficking and/or certain aggravated forms of human smuggling (*Circulaire relative à la mise en oeuvre d'une coopération multidisciplinaire concernant les victimes de la traite des êtres humains et/ou certaines formes aggravées de trafic des êtres humains*), *Belgian Official Gazette*, 10 March 2017.

91 Datta, M., & Bales, K., (2013). Slavery in Europe: Part 1, Estimating the Dark Figure. *Human Rights Quarterly*, 35(4), 817-829.; See external contribution by PAG-ASA (specialised centre) in Myria (2019), *supra* n.89, pp. 78-82 on the dark figure of human trafficking in Belgium.

92 See for example, van Meeteren M., Hiah J. (2019) Self-Identification of Victimization of Labor Trafficking. In: Winterdyk J., Jones J. (eds) *The Palgrave International Handbook of Human Trafficking* (Palgrave Macmillan, Cham).

Furthermore, a **lack of trust in authorities** prevents victims from sharing information that would identify them as a potential victim. An interviewee from the Dutch labour inspectorate stressed that **gaining this trust**, is particularly difficult, when it concerns more organised forms of exploitation of workers. For instance, fraudulent temporary work agencies and employers often coach their workers about what to say in case of inspections. As a result, they are often reluctant to engage with inspectors/frontline first responders. This is aggravated by the fact that, for instance, in **the Netherlands** housing of the workers is often tied directly to the employer or the temporary work agency. Hence by coming forward and talking about their situation the worker risks not only losing his or her job, but also his or her accommodation.⁹³

The Dutch labour market and housing regulations are directly related.
So when [the] work stops, the housing stops.

SZW Inspectorate, the Netherlands

In **Belgium**, labour inspectors reported that there are sometimes instances, in which potential victims were unwilling to be moved to a different part of the country to one of the three designated shelters:

Sometimes, when a victim hears that the shelter is located in Brussels or Antwerp or Liège, they get scared. They can't imagine themselves going to these places [...]. We can explain, but very often, there is resistance to being referred to some kind of organisation that they don't know, in some city they don't know.

ONSS-RSZ Labour Inspectorate, Belgium

Interviewees further highlighted that investigating situations of trafficking for the purpose of labour exploitation required a large number of **resources and time both of which are scarce for authorities**.

Proving exploitation, it's a long process. It asks a lot of investment, a lot of working hours, interviewing documents, [and] other measures.

ONSS-RSZ Labour Inspectorate, Belgium

⁹³ See more on this issue in the report of the Taskforce for Protecting Migrant Workers, Aanjaagteam bescherming arbeidsmigranten (2020), *supra* n. 19.

Moreover, it was noted that the lack of capacity of authorities to inspect workplaces prevents the detection of exploitative situations.⁹⁴ A lack of resources can sometimes also prevent potential victims from being immediately physically transported to a specialised human trafficking centre.⁹⁵

The lack of detection and unwillingness to enter the human trafficking procedure has **severe consequences for victims' access to support, assistance and remedy.**

While in theory such potential victims of human trafficking have possibilities under civil proceedings, these are not usually used in practice (see [Chapter 5](#)). An interviewee from the Dutch labour inspectorate drew attention to the fact that there were numerous workers whose situation might not amount to a situation of trafficking or there were no obvious indicators, but the violation of working and living conditions they experience goes far beyond mere labour law violations. Such workers currently have no institutionalised form of support and assistance available to them in both countries and in practice, even if detected, they remain in a precarious situation.

In very [many] cases they are still working and under these conditions. We can only start a new investigation over and over again. We have a lot of cases [but] we think that they don't want to cooperate. We have explained what we can maybe do but we can't offer a lot when there is no slightest indication [*geringste aanwijzing*], they do not want to cooperate and there will be no shelter. So, mostly, it [the exploitation] continues.

SZW Inspectorate, the Netherlands

Interviewees in **both countries** highlighted the need for **continued training of frontline actors on the issue of detection.** Due to reforms and changes in personnel, knowledge on this issue may be lost. For instance, FAIRWORK Belgium noted that following the reform of the Belgian labour inspectorate in 2017, the mandate of the Well-being at Work Inspectorate (*Contrôle de Bien-être au travail / Toezicht op het Welzijn op het Werk*) – which was previously only mandated to deal with health and safety and building regulations – was extended to also include the investigation of workplace accidents.⁹⁶ This meant the authorities working in that service rather suddenly had to deal with not only health and safety regulations but also with victims and the need to verify their circumstances – an area in which they had no experience nor reportedly received specific training. According to FAIRWORK Belgium, the lack of inspectors' experience engaging with workers and lack of training on spotting signs of exploitation or labour market abuse can negatively impact on victim's right to support and access to remedy.

94 A number of initiatives have been developed by the Dutch Ministry of Social Affairs and Employment to assist at risk groups, including, distributing a brochure, in various languages about working in the Netherlands and carrying out information campaigns in countries of origin, funding FairWork development of online tools and cultural mediators, to inform labour migrants about their rights; working trade unions and companies on the prevention of the exploitation of Bulgarian, Polish and Romanian migrant workers. See GRETA (2020), *supra* n.64, p.24.

95 The Central Thematic Directorate for Trafficking in Human Beings of the National Office for Social Security (*Direction Thématique traite des êtres humains d'Inspection de l'Office Nationale de Sécurité Sociale - ONSS-RSZ*), in their external contribution to the 2019 Annual Report on Human Trafficking and Human Smuggling of the national rapporteur (Myria), raised this issue and explained that in some instances a lack of capacity of the police forces leaves the specialised human trafficking labour inspectors (ECOSOC inspectors) without any assistance during planned inspections. See External Contribution from Thematic Directorate Human Trafficking Inspectorate of the Office of National Social Security and the role of social inspectors in providing information to potential victims on the possibilities for support and assistance in Myria (2019), *supra* n.89, pp.83-84.

96 Royal Decree of 6 June 2017 on the transfer of social inspection staff from the Federal Public Service of Social Security to the National Social Security Office (*Arrêté royal du 6 juin 2017 visant à transférer les agents de l'inspection sociale du Service public fédéral Sécurité sociale à l'Office national de sécurité sociale*) Belgian Official Gazette, 12 June 2017.

[The Well-being at Work Inspectorate] do not work at all on this matter. They go to a building site [to] check the building site or after an accident they go to the building site and then look [to see] if everything is secure and what regulations are not respected or are respected. But they don't have the experience of meeting a worker - who had a labour accident in the past - coming forward afterwards telling their story. The informal world, they will know, but the undocumented world,... they are very unaware of all these aspects. They don't have the experience to go to the employer saying "this guy claims he has [had] a labour accident with you".

FAIRWORK Belgium

Encouragingly, some interviewees noted, however, an **increased demand for training on trafficking in human beings** in recent years by frontline professionals who play a role in victim detection.⁹⁷

► **Box 2. Spotlight on the role of trade unions in detecting potential victims: FNV-VNB Road Transport Initiative**

In both countries, interviewees stated that in their experience trade unions generally were not very active when it comes to detecting victims of human trafficking. However, a notable exception are the efforts of the Dutch FNV-VNB Stichting (hereinafter: "FNV-VNB"); a trade union foundation in the road transport and logistics sector. The FNV-VNB seeks to ensure compliance of employers with applicable collective agreements in the transport sector and provides information and legal advice on questions around these agreements. It takes an active approach to improving the operational processes of companies in the road transport sector in order to better protect drivers. The union reaches out to potential victims pro-actively, such as by visiting them when they are resting in motorway car parks for lorries. This is important as for many of these workers, it is nearly impossible to seek out help for themselves as their working conditions severely limit the scope of possible actions they can take:

[...] in our industry as soon as the worker talks to the authorities, they lose their job. Purely for mathematical reasons, they cannot simply leave their trucks in a car park and start an interview with the authorities because it would take 5 to 8 hours and they would have lost their job. (FNV-VNB, the Netherlands)

In the cases detected by the FNV-VNB, the union also plays a key role in gathering evidence for the criminal investigations: *[In] all road transport cases that are [with] the prosecution, we are the party that brought the case to the surface. (FNV-VNB, the Netherlands).*

The Belgian labour inspectorate has recently begun to engage with the FNV-VNB in cross-border efforts to investigate potential cases of exploitation in the road transport sector. For instance, the FNV-VNB recently brought a potential human trafficking case of a Ukrainian driver to the attention of the Belgian labour inspectorate. The labour inspectorate, in joint efforts with the union, tried to locate this potential victim to examine his working and living conditions and to analyse his tachograph. In another instance, the FNV-VNB cooperated with Belgium union BTB to give a Philippine driver first support and brought the case to the attention of the Belgian labour inspectorate. This driver was then referred to the NRM and identified as a human trafficking victim in Belgium.

⁹⁷ On increased requests for training from non-specialised labour inspectors see Myria (2019), *supra* n.89, pp.86-87.

4.1.1. Role of labour inspection in detecting victims

In both countries, labour inspectors play an important role in the **detection of victims of human trafficking, collection of evidence used in proceedings and, in Belgium, with regard to the calculation of back wages**. Labour inspectors typically come across potential victims during workplace inspections.⁹⁸ If labour inspectors fail to recognise potential victims of human trafficking as such during the inspection this has severe implications for potential victims. In **Belgium**, if no signs of trafficking are observed, labour inspectors have to report migrant workers in an irregular situation to immigration authorities. In **the Netherlands**, this obligation does not exist. However, in practice when labour inspectors check whether employers comply with the obligation not to hire third country nationals in an irregular situation, this control is carried out with the police which is competent to verify the identity of workers. The Aliens, Identification and Human Trafficking Units (*Afdeling Vreemdelingenpolitie, Identificatie en Mensenhandel – AVIM*) are specialised police units on immigration and human trafficking matters that accompany the labour inspectors during such inspections. Hence if migrant workers in an irregular situation who show no indicators of trafficking are detected during such inspections, they will be reported to immigration authorities. Generally, this means migrant workers in an irregular situation will receive an order to leave the country or are referred to a closed centre.⁹⁹ This can be very problematic as situations of trafficking are often not evident at first glance and labour inspectors may have limited capacity and resources to investigate a case further.

It is often impossible to immediately identify exploited workers/potential human trafficking victims. I mean during the first inspection visit, [and] certainly when it is an inspection visit carried out by non-specialized inspectors. It is important to notice that labour trafficking is not a crime that you prove in the act, the inspector finds a worker who is doing undeclared work.

ONSS-RSZ Labour Inspectorate, Belgium

Interestingly, in **the Netherlands**, an interviewee referred to an alternative **manner in which labour inspectors can verify compliance of the employer with this legal obligation which does not require the presence of the AVIM police unit**. The employer's liability (*Werkgeversverplichting*) under Article 15a of the Aliens Employment Act (*Wet Arbeid Vreemdelingen*) obliges the employer to establish the identity of the third country nationals she or he employs within 48 hours by providing a copy of any of the documents referred to in Article 1(1-3) of the Compulsory Identification Act (*Wet op de Identificatieplicht*). This alternative could be used more in practice.

In **Belgium**, there are labour inspectors specifically trained on human trafficking (in particular for the purpose of labour exploitation). In each of the 10 Belgian provinces specialised ECOSOC teams exist (in total about 40 inspectors). Following a reform of the Belgian labour inspection service in 2017, these units operate under a new central thematic unit on human trafficking (*Direction thématique Traite des êtres humains*) which is integrated in the National Office of Social Security (*Office National de Sécurité Sociale – Rijksdienst voor Sociale Zekerheid inspectiedienst* (ONSS-RSZ)). The central unit provides guidance to the ECOSOC teams and ensures they function properly. Priorities of the thematic unit include detecting potential human trafficking victims as well as detecting undeclared work of third country nationals.¹⁰⁰

⁹⁸ See Section 5.3 access to remedy under administrative procedures for possibility to actively file a complaint, but the majority of potential human trafficking victims do not come forward themselves but are detected in inspections.

⁹⁹ See also PICUM (2020), *supra* n.15, p. 6.

¹⁰⁰ Myria (2019), *supra* n.89, pp.83-84.

In Belgium, large scale labour inspections, are coordinated through monthly meetings of the Social Intelligence and Investigation Service (*Service d'information et de recherche sociale – Sociale Inlichtingen- en Opsporingsdienst*) with a focus on the correct application of all the different types of legislation for all workers (not specific to migrants). This umbrella service also develops annual policy and operational plans to detect social fraud and to provide support to the federal social inspection services.¹⁰¹ Through this cooperation, there are a number of inter-agency agreements that have been concluded that seek to ensure cooperation in actions that seek to tackle social fraud and irregular employment, including trafficking in human beings. This includes joint operations and the establishment of specialised teams comprising social inspection services and police and immigration officers.¹⁰²

According to a Belgian labour inspector, joint inspections are organised if there is suspicion of human trafficking. If these are to take place during the weekend or at night, other relevant actors, such as interpreters are taken along so as to ensure there is less need to improvise on the spot such as finding an interpreter after midnight etc.

If we suspect that there is human trafficking, or that there are people without documents, we organise an inspection and mostly we take the social security [inspection service - ONSS-RSZ], the police, but we also take an interpreter, that we can talk immediately to the people.

Labour Inspectorate, Belgium

In **the Netherlands**, the SZW inspectorate takes a risk-based approach to tackle labour law violations. It has developed a number of sectoral and thematic programmes which consist of several activities carried out over a long period of time in a sector or theme.¹⁰³ The inspectorate has a clear policy objective to tackle labour exploitation and protect vulnerable groups. Labour exploitation is one of the newer thematic programmes (see Box 3 Spotlight on the Dutch Labour Inspectorate's thematic programme on labour exploitation). Within each programme the inspectorate combines different instruments and investigations. These can include targeted inspections, consultations with actors in the sector, criminal investigations and partnership with other actors. At the national level, the SZW Country Steering Group Intervention Team (*Landelijke Stuurgroep Interventieteam*) sets up temporary multidisciplinary intervention teams to tackle a specific 'project' related to issues such as social fraud, or other labour law violations.

At the regional level, the inspectorate cooperates with the Regional Information Expertise Centres (RIEC). These centres bring together actors such as the police, tax authorities, municipalities, the Employee Insurance Agency (*Uitvoeringsinstituut Werknemersverzekeringen*) and other inspection services. The RIECs provide opportunities for exchanges of information including on specific ongoing human trafficking cases, labour exploitation and smuggling.¹⁰⁴ An interviewee from the labour inspection stressed the importance of a more integrative approach in particular related to more organised forms of labour exploitation and found the approach in the RIECs very helpful.

101 FRA, [FRANET Social Fieldwork Research Severe forms of labour exploitation – Belgium](#) (2014), p. 16.

102 See for example: Service d'information et de recherche sociale, [Protocole de cooperation entre l'Office des Etrangers \(OE\) et Service d'information et de recherche sociale \(SIRS\)](#) (2018), pp. 6-7.

103 In 2020 sectoral programmes existed in construction, agriculture, horeca, industrial work, cleaning, care, logistics and transport, temporary work agencies; thematic programmes exist in the areas of labour exploitation, asbestos, dangerous substances, discrimination, bogus-companies (*schijnconstructie*) and fraud Inspectie SZW, [Jaarplan Inspectie SZW 2020](#) (18 November 2019), p 9.

104 Inspectie SZW (2019), *supra* n.103, p21.

In **the Netherlands**, the labour inspectorate is competent to investigate labour exploitation and trafficking in human beings for the purpose of labour exploitation. It has a criminal investigation unit with similar competences to law enforcement and conducts criminal investigations under the authority of the public prosecution service.¹⁰⁵ The role of the labour inspectorate goes beyond the detection of victims as the inspectorate can also recommend the Immigration Service (IND) to grant the reflection and recovery period to presumed victims following an informative interview (see *infra* Section 4.3 identification). This is different in **Belgium**, where the role of labour inspectors with regard to detecting victims of human trafficking usually ends after submission of the inspection report to the labour prosecutor.¹⁰⁶

During an inspection, labour inspectors take into consideration indicators such as wages, working conditions, living conditions etc., when assessing the worker's situations.

One of the indicators is wages. If we go to a place and see them and question them, and we hear that they earn €2 per hour, €2 it's a strong indicator for exploitation. If we see 10 people are staying in a room and they have no beds, there are mattresses on the ground and there's cold and [damp] we use them as indicators. We will integrate [this information] into our report to build up a case [in order] to allow the prosecutor to prosecute the case.

ONSS-RSZ Labour Inspectorate, Belgium

For the pursuit of criminal investigations and prosecutions, a (subjective) victim statement alone will not suffice. It will need to be corroborated by objective elements that are often gathered by those who are on-site in the first instance, namely labour inspectors and/or police. **Therefore, in both countries, the information that is collated by the labour inspectors during inspections is very often of vital importance to the victim's potential access to protection and remedy at a later stage** as most cases of human trafficking appear to stand and fall with the evidence that has been collected during the investigation (of which the initial reporting plays a key role).

When there's an acquittal, most of the time, it's because there [is] not enough proof, because there was a gap in the investigation. So it's important to have good investigations.

Myria, Belgium

¹⁰⁵ Trafficking for the purpose of sexual exploitation is followed up by the police, and some cases related to trafficking for labour exploitation may be handled jointly with the police.

¹⁰⁶ Though in some instances, the prosecutor may ask them to conduct a second hearing to find out more about the situation. Belgian prosecutors stated they use the labour inspectorate as victims might trust them more easily as the inspectorate is not the police and cannot deport them.

The problem is that in many investigation files, the duration of the working period is missing. This makes it harder to provide the evidence needed to claim wages.

FairWork, The Netherlands

It is therefore important that the inspection report is comprehensive and detailed. For instance, it is essential that labour inspectors note down as many elements as possible about the situation in which the potential victim is found. This includes the work environment such as the room temperature, the description of the place of work, the working conditions (e.g., state of sanitary facilities), any evidence indicating an employment relationship and in order to determine the applicable wages, the particular job role the potential victim was carrying out.

In order to qualify a case of labour exploitation as a human trafficking case, we always mention that the report of the inspection services should be as detailed as possible, because sometimes they will see that there's a lot of offences against social law, but in order to go further and to have more evidence for the employee, it's very important to be as detailed as possible.

Myria, Belgium

Second, several interviewees stressed the importance of **noting down the correct contact details of the potential victims**,¹⁰⁷ including their bank details and in case of migrant workers, their contact details in the country of origin. Interviewees indicated that the absence of victims' contact details was a significant obstacle for them to access protection and remedy. Contact details are also needed to keep them informed of the proceedings and for them to eventually receive compensation awarded by a court or in back payments from the employer ordered by the labour inspector (see *infra* Chapter 5). This is particularly the case for third-country nationals but also EU nationals who return to their countries of origin.

In the past the inspection lost contact with victims because they lacked contact details. In the mushroom case for instance, they initially noted down only the address where the people were staying at that time, but of course the victims left there because it was the site of the exploitation.

FairWork, The Netherlands

107 This applies of course also to other frontline professionals.

A Dutch labour inspector pointed out that locating potential victims on short-stay employment contracts is particularly problematic as they are not required to register their address with the municipality.¹⁰⁸

I see that you have a [short-stay] working contract in the system but I don't see your address because there is no address ...so where are you? Sometimes I want to visit [...] the vulnerable employees in the evening but [...] I don't have their address.

SZW Inspectorate, The Netherlands

Thirdly, the role of the labour inspectorate and the quality of their evidence gathering during initial workplace visits can be **crucial to the calculation of back wages**. In **Belgium**, the Social Legislation Inspectorate (*Contrôle des Lois Sociales – Toezicht op de Sociale Wetten*) is of particular importance as this service has the competence to calculate the back wages of a worker.

In Belgium, in cases where there is no proof as to the duration of the employment relationship the labour inspector can apply a presumption of **three months working relationship**, unless the employer can provide proof to the contrary (see more in Sections 3.4 and 5.5).

Sometimes it's a discussion. Because there is a suspicion that [the worker] has worked for 3 months but if the employer can prove that it was shorter, we have to accept the shorter term. So, if he can prove, if [the employer] has evidence or testimonies that [the worker] only worked there for two weeks, we can only ask the wages for two weeks.

Labour Inspectorate, Belgium

At a later stage, if specialised centres - providing legal assistance to potential victims - do not agree with the Social Legislation Inspectorate's calculation on back wages they may contest it and request that a lawyer do a second calculation.

When calculating the wages owed to the potential victims, interviewees from the Belgian prosecuting office stressed the importance of noting down the particular type of work the person was doing as wage levels are linked to job roles.

When we do our inspections ourselves our inspectors are trained to watch very closely what the people are doing at that time because in Belgium every function has its own wage. So, if you work in construction or in a bar, it's a completely different wage.

Labour Inspectorate, Belgium

¹⁰⁸ See more on the lack of registration of the place of residence and workplace of labour migrants and the adverse impact on locating migrant workers during COVID-19 see National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children (2020), *supra* n.19, p. 37.

The Social Legislation Inspectorate does carry out inspections themselves. However, colleagues from this service are not present during all inspections and thus rely on their colleagues from the other inspection services to inform them of unpaid workers who have been detected. Interviewees stated that this information is not always passed on which may prevent those workers from receiving their back wages.

What the biggest problem is - if there is a case of human trafficking or economic exploitation, and we are not present at the inspection itself but we get the information from other inspection [services] - their inspectors are not so trained to look or write down what he or she is doing at that time, so then it's very hard to determine what the hourly rate is.

Labour Inspectorate, Belgium

The importance of the calculation of back pay has been acknowledged by the Belgian labour inspectorate, and in the 2020 Annual Labour Inspection plan a specific objective of the inspectorate has been included to ensure that wages are paid in compliance with legislative requirements. In particular, also if the worker finds himself in the lower tier of a supply chain (see Section 5.4). A Belgian labour inspector reported that the operationalisation of this action point will require that all services, include any claims of unpaid wages in inspection reports.

The evidence gathering is particularly crucial when it comes to any subsequent **financial investigations**. Several interviewees also highlighted the role of labour inspectors to support financial investigations by paying attention to the possible identification of valuable goods.

We get more and more requests from prosecutors during the first inspection visits, where we are confronted with exploitative situations, to [be] alert for goods, valuable goods, real estate, expensive cars, [and] to inform the prosecutor as soon as possible, in order for him to be able to seize when he is convinced it's a case of labour exploitation. For example, to seize cars. And linked to that, we calculate the illegal profits that the employer or exploiter has gained from employing illegally [and] exploiting these workers.

ONSS-RSZ Labour Inspectorate, Belgium

► **Box 3. Spotlight on the Dutch labour inspectorate's thematic programme on labour exploitation**

Since 2017, the Dutch labour inspectorate has a thematic programme on labour exploitation (*ernstige benadeling*). The aim of the programme is twofold. First, it aims to **protect** vulnerable workers from exploitation, in particular in those cases where the exploitation is serious but may not amount to trafficking and to **stop criminal employers** from exploiting those vulnerable workers.

Stopping unscrupulous employers means going beyond administering a fine when violations are found and applying a tailor-made approach to such serious labour law violations, using all tools available. According to the 2020 Annual Plan of the Inspectorate, **the inspectorate advocates a hard-line approach (*harde aanpak*) vis-a-vis employers/perpetrators who knowingly and seriously violate working conditions by imposing dissuasive sanctions and temporarily closing down companies.** To this end, the programme seeks an integrative approach and cooperates closely with all relevant actors within and outside the inspectorate. In 2019, for instance, several joint inspections have been carried out that have involved environment, tax and municipal authorities.¹⁰⁹

The **criminal investigation unit of the Dutch labour inspectorate is involved in the programme.** Under the umbrella of the programme an information exchange (*informatieplein*) has been set up within the labour inspectorate that **aims to collect and evaluate all "signals" of labour exploitation** reported from the different sectoral and thematic programmes. In 2020, the inspectorate committed to follow up any report of signals of labour exploitation very quickly, by organising an informative interview (see Section 4.2) and then deciding which instruments of administrative and criminal law are most appropriate for dealing with the situation. If there is the slightest indication of trafficking, the victim is to be offered the reflection and recovery period. In its 2021 Annual Plan, the SZW Inspectorate set itself the target to increase the detection rate of human trafficking victims by 20% compared to the previous year. In 2021, the SZW Inspectorate committed to referring underpaid workers detected to lawyers to facilitate their claims to their full back wages.¹¹⁰

In the 2020 Annual Work Plan of the Dutch labour inspectorate the protection of vulnerable groups of workers is an explicit objective.¹¹¹ While the intention of the inspectorate to protect and remove victims from situations of exploitation is very clear, the amount of formal support that can currently be given to victims of labour exploitation is very limited. In both countries, for trafficking victims there is a well-established legal and administrative framework. However, if workers do not 'qualify' as human trafficking victims, there is no comparable institutional support structure in place e.g., access to accommodation and free legal support to claim back any unpaid wages. An interviewee from the Dutch labour inspectorate very involved in the labour exploitation programme stated, that the fact that no support can be offered to those victims is a key obstacle for many of them to report the exploitation to the authorities.

¹⁰⁹ Inspectie SZW (2019), *supra* n.103.

¹¹⁰ Inspectie SZW (2019), *supra* n.103.

¹¹¹ Inspectie SZW (2019), *supra* n.103.

▶ Box 4. Key findings, good practices and actions points – detection and referral to the NRM**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) and may not have a residence permit or a work permit. In both countries, it is difficult for such workers to report 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 inspections with police specialised in trafficking and immigration matters in order to check the employers' compliance with their obligation not to hire irregular 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 (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.

4.2. Reflection and Recovery Period

In both **Belgium** and **the Netherlands**, following detection, potential victims of human trafficking are referred to the respective National Referral Mechanism (NRM). In both countries, this means that these detected presumed victims are first entitled to an unconditional reflection and recovery period. After this period, further assistance is conditional upon the victim's cooperation (see Section 4.3).

In **Belgium**, if a potential victim of human trafficking is identified, the prosecutor will be informed. The prosecutor will authorise access to a 45-day reflection and recovery period and a referral to one of three specialised centres located in Brussels, Antwerp and Liège. In case the potential victim is in an irregular situation, the specialised centre will contact the human trafficking unit of the Immigration Office, to request a temporary residence permit for 45 days that delays any execution of an expulsion order (*ordre de quitter le territoire*).¹¹² In Belgium, receiving the reflection and recovery period is equivalent

¹¹² The Law of 30 March 2017 amending Article 61/2 of the Law of 15 December 1980 on access to the territory, residence, establishment and repatriation of aliens in order to replace the order to leave the territory by a temporary residence document within the framework of the human trafficking procedure, Belgian Official Gazette, 10 May 2017. Myria, [Annual report trafficking and smuggling of human beings: Minors at major risk](#) (2018), p.87.

to receiving “presumed victim status”, which has to be confirmed at a later stage by the prosecutor¹¹³ (see Section 4.3). During this 45-day period, the presumed victim does not need to make a statement or declaration.¹¹⁴ During the reflection and recovery period, a presumed victim has access to the specialised shelter (if required), psychosocial and medical assistance, administrative and legal support.¹¹⁵ However, where a victim has made a statement or filed a complaint then the reflection and recovery period ceases immediately and the procedure moves onto a second phase during which identification takes place (see Section 4.3).¹¹⁶ As a result, in practice, the full 45 days appears to be rarely used. The vast majority of victims decide after a few days whether or not they would like to comply with the conditions and cooperate.¹¹⁷

In **the Netherlands**, only the Police and KMar are formally competent to offer the 90-day reflection and recovery period,¹¹⁸ though in practice the SZW Inspectorate can also request it to be granted and does so regularly.¹¹⁹ Where a reflection and recovery period is granted the police files an M55 form with the Immigration and Naturalisation Service (IND), on the basis of which the IND suspends the deportation of the suspected victim from the Netherlands.¹²⁰ The reflection and recovery period is legally mandated to be granted upon the “slightest indication” (*geringste aanwijzing*) of human trafficking.¹²¹ During the reflection and recovery period victims have access to medical care,¹²² psychosocial care, legal advice and social allowance, though importantly no work permit is granted during this period.¹²³ During the reflection period, victims that are third country nationals have access to one of the three specialised shelters for trafficking victims (Categorical Accommodation and Assistance for Victims of Trafficking in Human Beings (*Categoriale Opvang voor Slachtoffers van Mensenhandel* (COSM))¹²⁴. Depending on the region different general shelters are available to EU and Dutch nationals.¹²⁵ Some interviewees emphasised that there is a lack of shelter capacity in general, which is then heightened when dealing with cases of exploitation that involves a group of workers. The lack of shelter capacity may lead potential victims being interviewed almost immediately, without any time to rest, speak to a support organisation or have access to a lawyer. This can lead to workers denying that they are experiencing any problems and refuse any assistance. In response, CoMensha has set up crisis beds -10 in The Hague and 10 in

113 Article M3.3., Circular of 23 December 2016 relating to the implementation of a multidisciplinary cooperation concerning victims of human trafficking and/or certain aggravated forms of human smuggling (*Circulaire relative à la mise en œuvre d'une coopération multidisciplinaire concernant les victimes de la traite des êtres humains et/ou certaines formes aggravées de trafic des êtres humains*), *Belgian Official Gazette*, 10 March 2017.

114 Myria, 2013 [Annual Report on human trafficking and smuggling: Building bridges](#) (2014), p. 80.

115 Article M3.3., Circular of 23 December 2016 relating to the implementation of a multidisciplinary cooperation concerning victims of human trafficking and/or certain aggravated forms of human smuggling (*Circulaire relative à la mise en œuvre d'une coopération multidisciplinaire concernant les victimes de la traite des êtres humains et/ou certaines formes aggravées de trafic des êtres humains*), *Belgian Official Gazette*, 10 March 2017.

116 Article M5.2.2., Circular of 23 December 2016 relating to the implementation of a multidisciplinary cooperation concerning victims of human trafficking and/or certain aggravated forms of human smuggling (*Circulaire relative à la mise en œuvre d'une coopération multidisciplinaire concernant les victimes de la traite des êtres humains et/ou certaines formes aggravées de trafic des êtres humains*), *Belgian Official Gazette*, 10 March 2017.

117 Caritas International (2017), *supra* n.76, pp.20-21.

118 Access to the reflection and recovery period is regulated in the Aliens Circular 2000 (*Vreemdelingencirculaire 2000 (B)*).

119 GRETA (2018) *supra* n.23, para. 160.

120 [Model M55 Form](#); FRA (2015), *supra* n. 87, pp. 51-52.

121 Chapter B8/3, Aliens Circular 2000 (*Vreemdelingencirculaire 2000 (B)*). Dutch Rapporteur on Trafficking in Human Beings and Sexual Violence against Children (2017), *supra* n.87, pp. 67-70.

122 is entitled to a benefit and health insurance on the basis of the provision applicable to certain categories of foreign nationals (the so-called (the so-called Rvb-uitkering).8 Artikel 11 lid 2 sub c Vw 2000. Bijlage Mensenhandel bij Hoofdstuk B.8/3 van de Vc 2000, §2.2. Dutch Rapporteur on Trafficking in Human Beings and Sexual Violence against Children (2017), *supra* n.87, p. 64.

123 Those potential victims that already had a valid work permit when detected and identified may work; Pro-Act, [Identification & Support of Victims of Trafficking for Labour Exploitation in the Netherlands, Romania and the UK](#) (2015), p. 22, US State Department, [Trafficking in Persons Report 2018](#) (2018), p. 321.

124 In the past EU nationals have also been accommodated in COSM shelters but the idea is to gradually limit these shelters to third country nationals. See GRETA (2018) *supra* n.23, para 125.

125 Specialised shelters exist for so-called loverboy victims, others are specifically for pregnant women, or those with psychological problems etc FRA (2015), *supra* n. 87, p. 56.

Amsterdam – so that labour inspectors have an alternative and are not required to take potential victims immediately to police stations (see example below of Ukrainian workers).

Before the reflection period is granted, potential victims are subject to a four-stage process (although it is important to note, that in practice these stages may overlap or be taken simultaneously).¹²⁶ Following detection (*de melding* – stage 1), the presumed victims are subject to pre-entry (*het voorportaal* – stage 2), at this stage preliminary notification of detection of a victim is examined further by the organization which received the report about the possible situation of trafficking. Subsequently, the information is sent to an investigative team. Thereafter, a presumed victim will take part in the “informative interview” (*het informatief gesprek* – stage 3). This interview is carried out by a certified inspector¹²⁷ and serves to inform the victim about his or her rights (reflection and recovery period, possibility for a temporary residence permit, access to shelters etc.),¹²⁸ information about the procedure etc. In the last stage (*beslissen over de bedenktijd*), it is decided whether or not the detected victim receives the reflection and recovery period.¹²⁹

Existing literature¹³⁰ has identified tensions between the application of the “slightest indication criteria” and the role of the actors who are involved in the informative interview (stage 3). On the one hand, in order to protect all victims, the applicable legislation aims to keep the threshold low to be identified as a potential victim, hence the “slightest indication criteria”. On the other hand, however, the informative interview appears to also be approached also from a criminal investigation perspective and serves to help assess whether there is enough evidence to launch a prosecution at a later stage. This is problematic as the threshold to successfully prosecute a case for human trafficking in the Netherlands is high.¹³¹

I think the biggest discussion now is that a lot of [potential victims] are not being granted victim status when they should be. The way the slightest indication is interpreted is quite high and I do see that even if it’s not allowed, you see that these investigatory leads are in the back of the minds of the inspectors who are granting victim support or not. This is problematic because only after that, they can still decide that it is trafficking, or we deal with it in a different way.

CoMensha, the Netherlands

126 Dutch Rapporteur on Trafficking in Human Beings and Sexual Violence against Children (2017), *supra* n.87, p. 79.

127 Those are labour inspectors from the SZW Criminal Investigation Unit who received training to become certified THB investigators

128 This applies to migrants in an irregular situation and to asylum seekers, as well as to EU, EEA and Swiss nationals in so far as their rights are not covered by EU legislation Immigration Circular 2000 (B) (Vreemdelingscirculaire 2000 (B)).

129 Dutch Rapporteur on Trafficking in Human Beings and Sexual Violence against Children (2017), *supra* n.87, pp. 80-109 describes the four stages in some detail.

130 GRETA (2018) *supra* n.23, para 109; see also Dutch Rapporteur on Trafficking in Human Beings and Sexual Violence against Children (2017), *supra* n.87.

131 Dutch Rapporteur on Trafficking in Human Beings and Sexual Violence against Children (2017), *supra* n.87, p.6; FRA (2015), *supra* n. 87, p. 14.

The interviewee remarked that these informative interviews take place without lawyers or victim support organisations being present. The interviewee referred to a case in which a group of migrant workers in an irregular situation who were detected and there were objective signs of exploitation (e.g., victims slept at the construction site on mattresses). However, when interviewed all 19 workers made the same statement, including that they were paid well and there were no reasons for complaints.

In the case of the Ukrainians, there were 19 [of them]. They were taken to the police, they spoke to the labour inspectorate, there was no support organization involved, there were no victim lawyers present that can say something to them. They started to interview them, and they all had the same story, that there was nothing wrong and that they were all paid well. And then they stopped and were given a document to say that they were undocumented and should leave country and were sent out of the police station.

CoMensha, the Netherlands

FairWork stated that in practice, where a worker agrees to cooperate during the informative interview, the reflection and recovery period is not used.

If we say that a person has signals of trafficking and we present the case anonymously then that person will have an intake interview. Then it will be decided whether the person will be offered a reflection period and if it will be offered immediately [or] if the person decides to file a complaint immediately then not to make use of the reflection period.

FairWork, the Netherlands

The interviewee from CoMensha affirmed this situation, stating that in their experience there may be more emphasis on identified victims of human trafficking (in particular for labour exploitation) to cooperate before the end of the 90 days. Otherwise, there is a risk that the evidence needed for a successful prosecution could disappear.¹³²

At the moment there are not that many successful labour exploitation cases. So, when they [the labour inspectors] feel that there is something they also want to make sure that everything [all potential evidence] is secured. I don't think it is to limit the rights of victims, it is more pragmatic.

CoMensha, the Netherlands

132 As opposed to victims of sexual exploitation where the recovery period appears generally to be more respected.

Hence, there is a tension between the unconditional right of the potentially traumatised victim to fully benefit from the reflection and recovery period - to take the time and space to determine the direction he or she wishes to take - and the need for investigators to secure evidence in time to ensure successful prosecution. This may mean that victim support organisations need to be more alert to this occurrence and to shield the victim from any undue pressure during the reflection and recovery period.

It is important to note that the original premise of the NRM in both countries was the provision of support and assistance to third-country nationals in an irregular situation who were identified as potential victims of human trafficking. Since the main feature of this support and assistance was the provision of a temporary residence permit, the protection mechanism was implemented, in both case study countries, in the context of immigration law.¹³³ However, in practice, efforts have been made to ensure EU nationals can also benefit.

At the moment they [the specialised centre] have a lady with them who is of African origin but legally resident in Belgium and who needed help with a trafficking case. Well, they have taken her in. Well, it is not foreseen in the law, but they have given her accommodation for now, to allow her to recover a little bit.

Labour Prosecution, Belgium

The Ministry of Justice actually has decided that [since] it is not arranged properly at the level of the municipality, European citizens can also get the B8 status. But for them in that sense the residence status - they already have it - so it is irrelevant - but this is to ensure that they have access to support.

CoMensha, the Netherlands

In **both countries**, the end of the reflection and recovery period denotes a significant crossroads for the victims and the possible direction in which their case will go and their chances of receiving access to remedy. Those who agree to cooperate with criminal proceedings will (subject to a number of other conditions) retain the support and assistance associated with the victim of human trafficking status. (Section 4.3), whereas those who choose not to cooperate with authorities (Section 4.4) and those in whose case no criminal proceedings will be pursued will usually lose the access to protection and remedy associated with the human trafficking victim status (Section 4.5).

¹³³ For instance, Dutch specialised shelters for victims of trafficking were theoretically intended only for victims that are third-country nationals. EU nationals have been accommodated there in practice, but accommodation of them is the responsibility of municipalities. Care coordinators responsible for different regions have been appointed who coordinate accommodation and support to such victims. In 2018, not all care coordinators had been appointed throughout all regions of the country, this negatively impacts Dutch and EU victims' possibility to obtain specialised assistance as they need to rely on decentralised assistance. See GRETA (2018) *supra* n.23, para 124.

▶ **Box 5. Key findings and action points – 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 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 upon the slightest human trafficking indication 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.

4.3. Identification as a victim of human trafficking

The number of victims who are identified as human trafficking victims¹³⁴ is significantly less than those who are initially detected. In the Netherlands in 2019, 1658 potential victims were detected, 75 of whom were not registered as human trafficking victims. In Belgium, of 703 potential victims referred to two of the three specialised centres,¹³⁵ 122 were subsequently accompanied (79 for labour exploitation). Our research finds that it is problematic that cooperation with criminal proceedings is a key condition to receiving access to support and assistance (for third-country nationals a temporary residency permit, work permit etc.) (Section 4.3.1). Where victims agree to cooperate then the access to support and assistance that was offered during the reflection and recovery period will be extended (Section 4.3.2).

134 Or in the Netherlands receiving B8 status following the recovery and reflection period, see Section 4.3.2.

135 See source of referrals of detected potential victims of human trafficking in 2018 in Belgium (NB information from one specialised centre not available) and the Netherlands. Belgium: Payoke, [Annual Report 2018](#), p. 13; PAG-ASA, [Annual Report 2018](#), p. 7. Netherlands: Comensha (2020), *supra* n. 67, pp. 74-75.

4.3.1. Cooperation with criminal proceedings as a key condition

International and European anti-trafficking instruments stipulate that support and assistance for victims of human trafficking should not be made conditional upon cooperation with authorities.¹³⁶ However, in both countries following the reflection and recovery period, continued access to support and assistance is dependent on victims abiding by the conditionalities imposed and in the case of Belgium, being identified as a victim by the prosecutor. In **Belgium**, access to support and assistance provided by the NRM is premised upon a number of conditions, including, *inter alia* agreeing to cooperate with proceedings (lodging a complaint or making a statement against the alleged offender), accepting assistance from the specialised shelter, and agreeing to stop any contact¹³⁷ with the perpetrator.¹³⁸ In **the Netherlands**, the condition for victims to receive continued access to support and assistance is to cooperate with the authorities for the full duration of proceedings.¹³⁹

The interviews reveal that the **application of the condition to cooperate with proceedings in practice is implemented very differently in both countries**. In **Belgium**, the understanding of cooperation is broadly interpreted, allowing for flexibility in how a victim's testimony is obtained.

It may seem rather hard when you read the text, but in fact the implementation is quite “light”.

Labour Prosecution, Belgium

The broad operationalisation of the conditions means that an initial detailed statement from the victim is sufficient. It is, however, possible that a follow-up interview will take place, to add to the initial statement.

The interpretation [of cooperation] can be broad. In most cases we see [that] an initial statement is enough when it's quite detailed. Sometimes [at] a later moment, there's a new hearing by the labour inspection on demand of the prosecutor but then to get some details or specifications on certain topics. Or if, in the meantime, they had other elements in the investigation which they have found, and they want to check that out with the version of the victim or have some more information from the victim, then another hearing can take place. So, it depends a bit on each situation, but sometimes an initial declaration is enough.

PAG-ASA, Belgium

The possibility for such flexibility is facilitated by the cooperation between the actors involved, in particular the close collaboration between prosecutors and the specialised centres/victim support organisations. The latter, having significant experience of working with trafficking victims, can facilitate the fulfilment of the condition simply by the sharing of information.

136 Article 11(3) Directive 2011/36/EU ; Article 12(6,) CoE convention; OHCHR (2002), *supra* n. 28, para. 8. Paragraph 5(2), ILO Recommendation No. 203.

137 This is an issue in particular for victims of sexual exploitation, who are often emotionally dependent on their exploiter or have friends and contacts who are still exploited by the same perpetrator.

138 Circular of 23 December 2016 relating to the implementation of a multidisciplinary cooperation concerning victims of human trafficking and/or certain aggravated forms of human smuggling (*Circulaire relative à la mise en oeuvre d'une coopération multidisciplinaire concernant les victimes de la traite des êtres humains et/ou certaines formes aggravées de trafic des êtres humains*), Belgian Official Gazette, 10 March 2017.

139 Chapter B8.3, 3.1, Immigration Circular 2000 (B) (*Vreemdelingscircular 2000 (B)*).

A specialised centre is considered to have its “know-how” on the issue. And so, what we promote is that there is an exchange, and it happens – it is not necessarily the primary function of the specialised centre – but it happens that the reception centres exchange with the magistrate simply on the question of whether or not we are facing a victim of human trafficking, because the specialised centres - they live with the person, they see certain things, they hear things. They are not supposed to reveal things they have heard from the victims, but there is still an informal contact that takes place and that facilitates identification.

Labour Prosecution, Belgium

In contrast, in **the Netherlands**, the condition to cooperate with proceedings is implemented in a stricter and longer-term manner. For instance, it is not sufficient for a (potential) victim to make a one-off statement at the beginning of the investigation, instead, it is necessary for the person to be present and available throughout the investigation and any criminal proceedings.

You need to be available for law enforcement for the duration of the investigation and that means that whenever they ask you to come to court to be cross-examined, questions will be asked by the defense lawyer. It can be quite invasive and traumatizing because you have to tell your whole story. Many victims that I have spoken to were not sure that they would do it again because they felt – and that’s part of being in a criminal proceedings – as if they were on trial even though the judges tried to cut the questions of the defense, but it is really intrusive.

CoMensha, the Netherlands

Great weight is given to the victim’s statement. Of course, criminal investigators will say “yeah but we are working open minded so we try to investigate around the victim so that we don’t need the statement of the victim.” But in practice, what you see is that a prosecutor would like to have a statement and would like to have a good statement.

SZW Inspectorate, the Netherlands

In the Netherlands, a victim does not have to participate in or cooperate with criminal proceedings where there are humanitarian reasons not to do so (see Section 4.4).

4.3.2. Access to support and assistance if victims decide to cooperate with criminal proceedings

In **the Netherlands**, if a victim decides to cooperate with the authorities and presses charges against his or her trafficker, their B8 status will be granted. This means they will receive a temporary residence permit valid for one year that also permits them to work for that duration. The residence permit is renewable

annually until proceedings end.¹⁴⁰ As during the reflection and recovery period, victims who decide to cooperate are entitled to shelter, social security benefits and medical care.¹⁴¹ When the reflection period has ended victims have to leave the specialised COSM shelter though in practice some victims are permitted to remain longer. From that point onwards the respective municipalities are responsible for providing continued access to shelter and assistance to victims and the regional care coordinators will support the individual arrangement for the victims.¹⁴² The continuity of support and assistance for Dutch and European nationals can be problematic, as access to general victim support services is decentralised and is the responsibility of municipalities. Similarly, capacity of shelters appears to be stretched in cases where multiple victims have been identified. While in some municipalities clear arrangements for shelter and care seem to be in place, in others a more *ad hoc* solution for the respective victims need to be found.¹⁴³

I even see that when you look at European victims or Dutch victims that might be much more difficult to get the right support because it needs to come from a different channel – mostly municipalities – and that is even more difficult to acquire.

CoMensha, the Netherlands

In **Belgium**, following the reflection and recovery period, the willingness of the victim to lodge a complaint or make a statement against the perpetrator, is one of the five elements that will be applied by the public prosecutor when making the decision as to whether or not to grant human trafficking victim status.¹⁴⁴ The five-stage test is as follows:

1. Is there still an ongoing investigation or ongoing judicial proceedings?
2. At this stage of the proceedings, can the individual be considered as a presumed victim?¹⁴⁵
3. Is the individual concerned willingly cooperating with criminal proceedings?
4. Has the individual ensured that any links to the alleged perpetrators have been removed?
5. Can the individual be considered as a risk to public order or national security?

If granted human trafficking victim status, a victim will receive a residence permit as well as a work permit for six months renewable until the end of the criminal proceedings.¹⁴⁶ Whilst the investigation and criminal proceedings are ongoing, the victim can stay in the specialised shelter,¹⁴⁷ receive assistance

140 FRA (2015), *supra* n. 87, p. 10; GRETA, *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Netherlands*, First Evaluation Round, GRETA (2014) 10, para 148.

141 Chapter B8.3, 3.4, Immigration Circular 2000 (B) (*Vreemdelingscircular 2000 (B)*).

142 GRETA (2018) *supra* n.23, p.59.

143 GRETA (2018) *supra* n.23, p.125.

144 Circular of 23 December 2016 relating to the implementation of a multidisciplinary cooperation concerning victims of human trafficking and/or certain aggravated forms of human smuggling (*Circulaire relative à la mise en œuvre d'une coopération multidisciplinaire concernant les victimes de la traite des êtres humains et/ou certaines formes aggravées de trafic des êtres humains*), *Belgian Official Gazette*, 10 March 2017.

145 A victim of the criminal offence envisaged in Article 433quinquies of the criminal code (human trafficking) and Article 77quater of the criminal code (aggravated human smuggling).

146 Article 61(4) of the Law of 15 December 1980. M5.2.4, Circular of 23 December 2016 relating to the implementation of a multidisciplinary cooperation concerning victims of human trafficking and/or certain aggravated forms of human smuggling (*Circulaire relative à la mise en œuvre d'une coopération multidisciplinaire concernant les victimes de la traite des êtres humains et/ou certaines formes aggravées de trafic des êtres humains*), *Belgian Official Gazette*, 10 March 2017.

147 Though some victims decide to move out of the shelter and find a room/apartment but receive continued support from the shelter and are kept up to date with the developments of their case.

with their legal proceedings and have access to an interpreter.¹⁴⁸ During this time, victims will receive counselling and support with regard to their future lives (language classes, integration course, training, help with job applications etc.). The victim is also entitled to financial social assistance granted at the level of the municipality by the Public Centre for Social Welfare (*Centre Public D'Action Sociale/ Openbaar centrum voor maatschappelijk welzijn*).

In both Belgium and the Netherlands, if the offender is convicted following the criminal proceedings, the victim can apply for a permanent residence permit, which is normally granted (see Sections 4.5 & 4.6 for discontinuation of criminal proceedings and acquittals).

4.4. Non-identification as a victim of human trafficking due to refusal to cooperate

Non-cooperation after the reflection and recovery period in both countries generally means victims are not granted their human trafficking victim status¹⁴⁹ and its associated rights (including access to shelter and other assistance).¹⁵⁰ Hence, this has a severe negative impact on the life of the victims. For third-country nationals without a valid residence permit, this will mean that they are no longer permitted to remain on territory and will receive an order to leave, even if criminal proceedings are ongoing for other offences. Potential victims who have a legal status may be entitled to access social security benefits.¹⁵¹

In the Netherlands, in practice, where a victim refuses to cooperate or the case ends with a dismissal the support is not immediately withdrawn. Where victims are unwilling or unable to participate in proceedings, e.g., due to trauma or a medical or mental disability, they are eligible to apply for a one-year temporary humanitarian residence permit under the harrowing path (*schrijnend pad*).¹⁵² The inability of the victims to participate has to be confirmed by the police and/or a medical practitioner. After this year, the person can apply for a permanent residence permit (residence permit on humanitarian grounds).¹⁵³ However, according to the interviewees from victim support organisations, applications for residence permits on humanitarian grounds are usually denied and in practice, trafficked persons rarely make use of this option.

148 Circular of 23 December 2016 relating to the implementation of a multidisciplinary cooperation concerning victims of human trafficking and/or certain aggravated forms of human smuggling (*Circulaire relative à la mise en œuvre d'une coopération multidisciplinaire concernant les victimes de la traite des êtres humains et/ou certaines formes aggravées de trafic des êtres humains*), *Belgian Official Gazette*, 10 March 2017.

149 Or in the case of Belgium might not even be identified if they refuse cooperation from the outset, in the NL they are not granted B8 status.

150 B8, 3.1 & 3.2, *Vreemdelingscirculaire 2000 (B)*. In Belgium, even if the victim is willing to cooperate, the prosecutor may decide not to grant victims status, if the other criteria are not met [see the 5 stage test applied by the prosecutor above and in Circular of 23 December 2016 relating to the implementation of a multidisciplinary cooperation concerning victims of human trafficking and/or certain aggravated forms of human smuggling (*Circulaire relative à la mise en œuvre d'une coopération multidisciplinaire concernant les victimes de la traite des êtres humains et/ou certaines formes aggravées de trafic des êtres humains*), *Belgian Official Gazette*, 10 March 2017.

151 Dutch Social Support Act (*Wet maatschappelijke ondersteuning*).

152 Chapter B8.3, 3.1, *Immigration Circular 2000 (B) (Vreemdelingscirculaire 2000 (B))*. Victims who are unable or unwilling to cooperate. The IND can grant a suspected victim of human trafficking a residence permit on the grounds of Article 3.48, first paragraph, under d, Vb, if the suspected victim demonstrates that he cannot or will not report or otherwise cooperate with the criminal investigation. and prosecution of the trafficker in connection with a serious threat; and / or a medical or mental disability; and / or minority.

153 Chapter B9. 10, *Immigration Circular 2000 (B) (Vreemdelingscirculaire 2000 (B))*.

It is used, but not to the extent that it should be used. It is only granted in exceptional cases.

CoMensha, the Netherlands

In addition, in both countries victims can apply for asylum if their case is closed.¹⁵⁴ However, the asylum track was not identified as an option in practice by the practitioners that were interviewed for this study.¹⁵⁵

In cases where a potential victim initially refuses to cooperate, a Belgian prosecutor did suggest that there could be the possibility to delay or prevent such an order for removal of a third country national from the territory by requesting for the individual to be re-interviewed or indeed to be interviewed for the first time with an interpreter. This could give the individual one final opportunity to agree to cooperate with proceedings.

One can coordinate again with Surya [specialised centre] or possibly with a social inspection service to request that the person be re-heard, or met again, or just met if initially it was not possible to meet them, with an interpreter. Sometimes you have a person who initially says, “No, I’m not a victim, everything is fine etc.” maybe it then allows him to confide or at least gives him a new opportunity. But beyond that possibility, it’s true that we don’t have many tools.

Labour Prosecution, Belgium

Interviewees revealed that potential victims frequently refuse to cooperate with authorities. This confirms existing findings, which even indicate that in **the Netherlands** there is an increased tendency for victims to refuse to cooperate with authorities, as victims fear lengthy proceedings and reprisals from perpetrators, who are often awarded light sentences.¹⁵⁶ Other reasons for non-cooperation include lack of trust in the authorities, the wish to get on with life and others.¹⁵⁷

Interviewees in both countries noted that it was not clear to what extent EU nationals and Belgian and Dutch nationals really make use of the support and assistance offer available under the NRM. As they are not in need of a residence permit, their priorities appear to be more related to re-entering the labour market, returning to their country of origin, or moving onto another EU country. Hence, they may not be interested in cooperating with authorities and in participating in a lengthy judicial process. As a result, there may be a disengagement from these particular individuals.

What I have found or experienced is that, when somebody has EU nationality, I have a feeling that it’s sometimes much more difficult to have an EU national referred to a shelter and recognized as a potential victim of human trafficking, because he’s an EU citizen and he can take his car and leave, he can find another new job, he can stay in the country.

ONSS-RSZ Labour Inspectorate, Belgium

154 US State Department (June 2020), *supra* n.23, p.368-370.

155 GRETA (2018) *supra* n.23, para 114.

156 US State Department (June 2020), *supra* n.23, p.368-370.

157 See reference to EU GDPR Regulation in US State Department (June 2020), *supra* n.23, p.368-370.

In practice, many of those victims who do not cooperate “disappear” in the informal economy and consequently are very vulnerable to new exploitation and re-trafficking. Third-country nationals in an irregular situation appear not to be systematically informed that they have rights to claim remedies (back wage and social security) even if they have been working informally (see Sections 3.4 & 5.4). Those who still wish to pursue these avenues, however, rely strongly on assistance by civil society organisations as in practice, civil proceedings and other complaints (see Section 5.4) require engagement from victims and often entail significant costs, thus rendering this avenue very difficult to use. For instance, in **Belgium**, if victims do not wish to cooperate with authorities, the specialised centres might refer the victim to FAIRWORK Belgium for possible assistance. In **the Netherlands**, FairWork is also an important organisation in this regard.

I think it is for the victim themselves then to follow up on that. And, of course, in most cases they don't know how to do that, that's the problem. So what happens then, if they don't pass by us [where we can] reorient them towards FAIRWORK? Maybe some of them, if they're proactive enough to find some help, they will get to FAIRWORK or to a [union] or another service or a pro deo lawyer. But then it will be up to their own initiative to do that.

PAG-ASA, Belgium

Such **well-established professional contacts between the different actors bring about benefits for victim's access to protection and remedy**. For instance, an interviewed specialised prosecutor stated that he is sometimes approached informally by specialised centres in situations where the centre is convinced that a person is a victim of human trafficking, but the responsible prosecutor does not want to take it up as a trafficking case.¹⁵⁸ In these cases, he tries to engage with this colleague.

That's really what's almost the most valuable thing in our organisation, it's the contacts. Sometimes I'm contacted by specialised centres about a situation they're explaining to me and saying “the magistrate doesn't want to take him in. But we are convinced that he is a victim, can you do something about it?” I cannot impose myself upon the magistrate, we are not in a system like that, but it allows me to question the magistrate if necessary and to attract his attention.

Labour Prosecution, Belgium

Given the negative impact of the conditionality on victim's rights, **the Netherlands** recently launched a pilot project aimed at decoupling victim identification from cooperation with the authorities. However, despite positive independent evaluation, the government decided to stop this pilot project in December 2019.¹⁵⁹

158 In 2013, the National Rapporteur reported that such a discrepancy between the specialised centres and prosecutors rarely occurs Myria (2014), *supra* n.115, p. 13.

159 Ministerie van Justitie en Veiligheid, [Kamerbrief evaluatie pilot multidisciplinaire advisering slachtofferschap mensenhandel](#) (13 November 2019); Dutch Rapporteur on Trafficking in Human Beings and Sexual Violence against Children, [Geen vervolg op pilot vaststellen slachtofferschap mensenhandel](#) (2019); W. Smit and J. Klaver, *Evaluatie pilot multidisciplinaire advisering slachtofferschap mensenhandel: Eindrapport* (September 2019).

▶ **Box 6. Spotlight on the pilot project: Multidisciplinary identification for victims of human trafficking in the Netherlands**

In January 2018, the Dutch government launched a pilot project setting up an independent multidisciplinary model for the identification of victims. A core element of the model was an independent multidisciplinary board consisting of seven members (amongst them a professor specialised in human trafficking, a former Dutch national human trafficking rapporteur, an anthropologist, a civil society representative and a lawyer). This Victim Identification Board issued an expert opinion on the plausibility of victimhood of trafficking to those victims whose report of human trafficking was followed by an **acquittal, dismissal, or premature termination of the case.**

For cases to be examined by the board they had to fulfil the following conditions:

- ▶ The victim must have reported to the police;
- ▶ The case has been dismissed or the suspect acquitted by a court after 2017;
- ▶ An application was submitted within four weeks of the date of the dismissal decision or the acquittal;
- ▶ The presumed victim was exploited in the Netherlands or brought to the Netherlands to be exploited, using coercion and/or violence.

In total, 59 of the 81 applications were accepted for processing, four applications were withdrawn, and eighteen applications were declared inadmissible. In respect of the withdrawn applications, the lawyer was no longer able to reach their client or the client was no longer willing to cooperate. The reasons for declaring the application inadmissible were an incomplete application (n=6), the human trafficking had occurred abroad (n=5), a pro-forma application was not submitted within four weeks of the dismissal/acquittal and the period of delay was not justifiable (n=4), and the dismissal/acquittal occurred before 1 January 2018 (n=3). By mid-April 2019, the committee had issued an expert opinion in 44 applications: 32 positive and 12 negative. In the twelve cases in which the committee issued a negative expert opinion, the committee had to conclude that it did not have sufficient information to be able to assess the plausibility of victimhood. In doing so, the committee did not rule whether or not there had been victimhood, but that it had been unable to establish this.

Overall, the project was seen to be a success as in the majority of cases it was possible for the committee to deliver a plausible decision for the victimhood of the applicant.¹⁶⁰ However, according to the government the project concluded that formal decoupling of designation as a victim from cooperation with law enforcement was unnecessary and lessons learned from the pilot would be incorporated into immigration procedures.¹⁶¹ The national rapporteur and NGOs criticised the decision not to continue and expand the pilot.¹⁶²

160 Smit and Klaver (2019), *supra* n. 160.

161 Ministerie van Justitie en Veiligheid (2019), *supra* n. 160.

162 US State Department (June 2020), *supra* n.23, p.370.

4.5. Discontinued criminal proceedings and human trafficking victim status

In this section, we examine the impact on the victim if the criminal investigation is discontinued. While there are some exceptions, **generally if the criminal investigation for trafficking is discontinued, victims lose their human trafficking victim status** and associated rights and support in both countries.

They lose their special status of victim of human trafficking, they lose the specific rights that they have in the framework of this procedure and they will have to leave the centre. At that moment it is out of our hands. It would be the task of the shelter/centre to inform the victims that the procedure has come to an end, why it has come to an end and to inform them about [any] alternatives.

ONSS-RSZ Labour Inspectorate, Belgium

In most cases, from the moment it really starts running [either] they simply become a victim, or it ends. Here we have a difference between third-country nationals and workers from the EU. If a third country national talks, he doesn't get the status and he loses his job, will he be repatriated to his own country? For workers inside the EU it is much easier, they take the train home and then look for a new employer.

FNV-VNB, the Netherlands

The decision to stop a criminal investigation for trafficking in human beings, or to close a case is communicated to immigration authorities and third-country nationals are ordered to leave the country.

In **Belgium**, an interviewee from the prosecutor's office revealed that the good cooperation between e.g., the prosecutor and the specialised centres can also facilitate exploration of other avenues of protection and remedy prior to the decision not to pursue the prosecution is formally established.

But when I am required to accept that there is no objective element in relation to what the person says, as I cannot gather objective information, I always contact Surya [specialised centre], saying "I, at this stage, I have to admit that I can't provide more elements [of proof]." This allows Surya to advise the victim to get a lawyer and the lawyer can then ask to come and see the file. And when he has consulted the file, but this is like any criminal case, he obviously has the possibility to ask for other duties to be carried out. That way, the file is not closed and Surya does not receive the document from the Immigration office one day and says, "Well, the file is closed." That's not what we do. We phone Surya and say, "Well, that's where we are." And that allows Surya to prepare the person.

Labour Prosecution, Belgium

In case the criminal investigation is discontinued, in **both countries, under certain conditions there is a possibility for victims to apply for a permanent residence permit**. In **Belgium**, if a criminal investigation for trafficking in human beings has been going on for two years and the victim has been accompanied by a shelter, he or she can be granted a long-term residence permit.¹⁶³ In such cases, the immigration authorities also look at elements of integration.¹⁶⁴ This policy is not formally enshrined in law and in theory is at the discretion of the prosecutor, but is applied in practice. However, if an investigation is discontinued before the respective time period has elapsed, no residence permit or other compensation is granted. In **the Netherlands**, there is a similar procedure, which in contrast to Belgium, is formally enshrined in the legal framework.¹⁶⁵ Where proceedings have been ongoing for three years the victim may apply for a permanent residence permit. When prosecutions for trafficking are launched, these generally take several years. However, in the Netherlands it appears that many cases are dismissed quickly if there is not enough evidence or the perpetrator cannot be identified and as a consequence it is not uncommon that the B8 status is terminated.¹⁶⁶ This means that only a small number of cases ever make it to court, and that many of these cases are dismissed within a year, hence many victims do not benefit from this option.¹⁶⁷

4.6. Acquittals in criminal proceedings and human trafficking victim status

In **Belgium**, where the trafficker is acquitted for the offence of human trafficking following criminal proceedings, the victim retains the human trafficking victim status and is eligible for a permanent residence permit. This is a very important outcome for many victims (particularly those in an irregular situation) as it enables them to build a new life in Belgium. This residence permit appears to be granted in practice.

Formally, in **the Netherlands**, where criminal proceedings have been started but the trafficker is acquitted, a victim in an irregular situation is theoretically also entitled to apply for a permanent residence permit, however such a residence permit following an acquittal appears not to be granted on a regular basis in practice. As criminal proceedings for trafficking in human beings tend to take several years, in cases where proceedings continue until a verdict is given, in practice victims may benefit from the three-year rule outlined above.¹⁶⁸ Theoretically, victims have the possibility to apply for asylum following a closure/dismissal of a case,¹⁶⁹ however the interviewees did not mention this option.

163 Card B/THB (Article 61/5 of the law of 15/12/1980) grants indefinite leave to remain to a victim of human trafficking once a conviction has been secured or once a prosecutor decides to pursue a prosecution.

164 PAG-ASA asbl, Assistance to victims of human trafficking in Belgium, Volunteers meeting (14 June 2017).

165 GRETA (2018) *supra* n.23, para. 166; US State Department (2018), *supra* n. 124, p.321. PRO-ACT (2015), *supra* n.124, p.22.

166 GRETA (2018) *supra* n.23, para. 160 & para. 188.

167 FRA (2015), *supra* n. 87, p. 56.

168 GRETA (2018) *supra* n.23.

169 US State Department (2020), *supra* n.23, pp. 368-370.

▶ **Box 7. Key findings, good practices and action points – 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 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 the 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.

5. Access to remedy: Belgium and the Netherlands

5.



In this Chapter, we outline the different avenues for remedy mentioned by our interviewees that our (potential) victims have in theory and in practice under criminal, labour, civil law and more informal mechanisms. The findings reveal that access to remedy for human trafficking victims for the purpose of labour exploitation is very difficult to achieve in practice.

5.1. Access to remedy from the victim's perspective

In both countries, most interviewees emphasised that for the victims, receiving their unpaid wages is of paramount importance and thus constitutes a central element of remedy for them.

Justice for workers is simply money.

FNV-VNB, the Netherlands

The importance victims give to receiving their wages is illustrated by the fact that many of them appear to prefer to negotiate with the employer to receive the agreed amount immediately versus the much higher wage they would be entitled to under the respective national laws or collective agreements that might be available to them by going through formal proceedings (see Section 5.7).

[...] in some cases they tell me “No I don’t want to get the minimum wage, [the employer] told me that I would be paid €800 for the month, and I agree with that because I need the money now and not after 2 or 3 months.”

CSC-ACV Brussels, Belgium

While receiving due wages is a primary concern, many victims with an irregular migration status seem to be willing to forego remedy including receiving their wages completely (by refusing to engage with formal proceedings), as above all, they do not wish to run the risk of being returned to their country of origin. For such victims receiving a permanent residence permit and/or having his or her employment situation formalised, may be the most important forms of remedy.

I think for an undocumented worker [the residence permit] can be the most important. For citizens of the European Union, it’s totally different, because they want to get back what they receive and then sometimes they go back to their home country.

Myria, Belgium

Furthermore, some of the interviewees across several categories had the impression that many potential EU victims seemed to prefer to start over quickly and find a new job over getting involved in potentially lengthy formal proceedings and dealings with authorities. This raises concerns about how their needs can best be formally addressed in a practical way that allows them to both move on quickly and have redress through the existing criminal, civil and administrative channels that will be outlined in the subsequent sections.

► Box 8. Key findings and action points – 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. This would allow workers without residence status to remain in the country during proceedings to claim back due wages and social security contributions.

5.2. Access to remedy in human trafficking through criminal proceedings

The main route to compensation for victims identified as human trafficking victims is to join criminal proceedings as civil parties in Belgium or by submitting an injured party claim in the Netherlands.

Interviewees in both countries highlighted that the **threshold to starting criminal proceedings for trafficking in human beings is very high in both countries**. The judicial interpretation of the offence of trafficking appears to be narrow in both countries and as a result, the burden proof required for this offence is quite onerous. For example, despite the **Belgian** law appearing to encompass a broad definition – in comparison with international and regional definitions due to the lack of the means and the interpretation of labour exploitation as “conditions contrary to human dignity” – a prosecutor emphasised that nevertheless, the judicial interpretation is strict and is assimilated to slavery, servitude and very serious forms of exploitation. However, it is worth noting that in Belgium many more human trafficking cases for labour exploitation have been brought to court than in the Netherlands (see Box 1).

In **the Netherlands** an interviewee from CoMensha, equally stressed that prima facie human trafficking for labour exploitation is criminalised, but that there are difficulties in the application of this concept to concrete cases.

If we look at how judges decide exploitation cases, the bar is quite high. If you look at how you interpret it, then you have to ask yourself is everything that is criminalised in the Netherlands, actually criminalised?

CoMensha, the Netherlands

Along those lines, the Dutch National Rapporteur on Trafficking in Human Beings in a special report on labour exploitation highlighted the low number of cases and prosecutions of human trafficking for labour exploitation and noted that the explanation of what constitutes 'labour exploitation' was not as clear in the Dutch criminal code as for instance that of 'sexual exploitation'¹⁷⁰. He also noted that case law does not provide clear guidance as to where labour exploitation (*ernstige benadeling*)¹⁷¹ ends and human trafficking begins¹⁷² and emphasised the need for more case law in order to gain a better understanding of the concept in Dutch law.

Interviewees in both countries stated that **prosecutors are very aware of the judicial interpretation and the kind of evidence required in practice to build a successful case for human trafficking**. These considerations appear to influence a prosecutor's decision on whether or not to pursue a trafficking case (see Section 5.3). Whether a case is pursued seems to be heavily reliant on the evidence that was gathered in the very early stages of the investigation by those frontline professionals who detect and identify possible situations of human trafficking (see Section 4.3).

We are also hindered by the experiences that we have many cases [that] are not followed up as human trafficking cases. As you might know, in the Netherlands, the threshold to proceed and to bring a case before court by the public prosecutor is very high.

FairWork, the Netherlands

In practice, this has consequences particularly in cases where multiple victims have been identified. The prosecutor will need to decide exactly which victims to include on the indictment with a view to securing a successful prosecution. In the experience of several interviewees **prosecutors will only include those victims on the indictment who can provide the most proof in order to build a strong case**. However, it does mean that victims who have experienced the same situation of exploitation will have different experiences of access to remedy. In addition, it is procedurally in the interest of the prosecutor to keep the indictment brief, as the lengthier the indictment, the more likely it is for the defense to try to prolong the proceedings.

170 National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children, [Dadermonitor Mensenhandel 2015-2019 \(21 January 2021\)](#).

171 See Box 3 Spotlight on the Dutch Labour Inspectorate's thematic programme on labour exploitation in Section 4.1.1.

172 National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children (2021), *supra* n.23.

They're all able to file a complaint but then you see that the public prosecution office will only use the [strongest] or most convincing complaints. [...] So they then have no other option than to ask me to make a selection, because otherwise it will mean a disproportionate burden on the criminal proceedings. If there are too many [victims] the defence will try to hear all of them, to prolong everything, which is not beneficial.

FairWork, the Netherlands

That is also problematic particularly in labour exploitation cases because you do see that – say we have a case with 10 victims – for the labour inspectorate and the [prosecutor] when they are on trial, every story needs to be proved. So they decide to take the strongest cases, let's say 3, and they put those on the indictment but that means that the others are not part of the criminal proceedings and cannot get the compensation. They can maybe do civil proceedings, but then it becomes very difficult.

CoMensha, the Netherlands

In **the Netherlands**, for an injured party claim to concern damages that were caused by the criminal act, it has to be laid down in the indictment.¹⁷³ As a result, omission from the indictment has a severe impact on victims' right to compensation. In practice, this means that the individual cannot benefit from the mechanisms available under criminal proceedings that aim to ensure effective receipt of any compensation awarded.

173 Article 361(2) Code of Criminal Procedure (*Wetboek Strafvordering*).

► **Box 9. Spotlight on the Mushroom case:
Securing access to remedy (compensation) for all workers**

Prime Champ organised transport by bus for Polish mushroom pickers to the Netherlands.¹⁷⁴ After arriving, they were obliged to agree to employment contracts which included incorrect references to the minimum wage. Workers received falsified payslips. The picking standard required to receive the minimum wage was set too high and not reached by most workers. Workers were obliged to use accommodation and accept one hot meal per day offered by Prime Champ and were not at liberty to make other arrangements in this regard. The Polish mushroom pickers had to work very long hours with almost no days of leave. They were not free to refuse overtime and threatened with a fine if deciding to end their employment contract early.

As of 2010, Prime Champ changed its time registration system which reduced the salaries of mushroom pickers. In case the workers took breaks considered too long, these were noted and deducted from their hours worked (often by 10% to 15%).

On 10 November 2016, Limburg District Court found that the mushroom farm Prime Champ Production B.V. was responsible for malpractices that had taken place between 2009-2012. The director and the company were convicted for falsifying pay slips, business records and, importantly, for human trafficking for the purpose of labour exploitation. The court was not in a position to determine the total number of Polish employees who had been exploited. However, the court held Prime Champ Production B.V. (together with another company belonging to this group) accountable for human trafficking for the purpose of labour exploitation of at least six Polish mushroom pickers. The director of the company was convicted as well and sentenced to prison for two years. Prime Champ Production B.V received a fine of €75,000. Furthermore, the court held an ICT specialist and a financial manager working for the company responsible for forgery of documents (the former received 100 hours of community service, the latter received a six months prison sentence).¹⁷⁵

This case was discussed by FairWork, which stressed that when the case first came to their attention, there were about 100 to 200 potential victims who were all provided with information about their right to file a complaint. However, difficulties arose when it came to maintaining contact with all of the workers as the labour inspector(s) had only noted down where they were residing at the time of the inspection.

In total 60 workers filed a complaint but only 10 were included on the indictment and were, as a result, eligible for filing an injured party claim. For those workers who were not included on the indictment, FairWork had to seek alternative solutions.

The case is currently in appeal, with a class action claim being prepared through FairWork and with the support of a law firm. In the appeal a claim for monetary damages will presumably be included. The victims can no longer join the case as injured parties. There is an ongoing confiscation investigation in which it is still to be determined what can be done for the victims.¹⁷⁶

¹⁷⁴ Description of the case in the box is based on the GRETA, [Reply of the Netherlands to the Questionnaire for the evaluation of the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Parties](#), Second evaluation round (Reply submitted on 19 September 2017), footnote 76.

¹⁷⁵ GRETA (2018) *supra* n.23, para 203.

¹⁷⁶ GRETA (2018) *supra* n.23, para 203; See more on Polish migrant workers in the Netherlands in McGauran, K., de Haan, E., Scheele, F., and Winsemius F., [Profiting from dependency Working conditions of Polish migrant workers in the Netherlands and the role of recruitment agencies](#) (June 2016).

5.2.1. Where a human trafficking criminal prosecution is pursued

If a criminal prosecution for human trafficking is pursued, in both **Belgium** and **the Netherlands**, victims of human trafficking can **seek to claim compensation in criminal proceedings**.¹⁷⁷ The inclusion of compensation claims in criminal proceedings is considered to be in the best interest of the victim, as it means that they then do not need to begin separate proceedings in civil courts once the criminal proceedings have ended.¹⁷⁸ Compensation awarded in criminal proceedings in both countries can include compensation for immaterial and material losses.¹⁷⁹

In **Belgium**, a victim has to request to join as a civil party (*partie civile*) in order to be eligible for compensation. Such a request can be made at any point during the investigation and proceedings and in addition to being entitled to claim compensation, the victim also benefits from additional procedural rights, such as the right to consult the file, or to request additional investigative measures.¹⁸⁰ A victim can also request to be considered as an injured party (*personne lésée*). In Belgium, a declaration of injured party is an intermediary status that gives further rights to the victim. He or she will be informed of the next steps of the proceedings (possible dismissal, opening of an investigation, setting of a hearing date before the investigative and trial court). He or she will also have the right to adjoin to the file (*joindre au dossier*) any document that he or she deems relevant. As an injured party, the individual will be informed of the status of proceedings but is not automatically eligible to claim compensation. Interviewees in Belgium from the specialised centre, labour prosecution and labour inspection were aware of these options but reported that sometimes there are instances where injured parties are not always kept updated of the status of proceedings:

Sometimes the prosecutor's office forgets to warn us when the case goes to court. We recently had a case with a "déclaration personne lésée" and the case was handled in front of the court and nobody was there, because they didn't warn us, the victim nor the lawyer [...] It happens. It's not frequent but it still happens.

PAG-ASA, Belgium

In **Belgium**, where a victim decides not to join the proceedings as a civil party, he or she cannot claim compensation. However, this will have no implications on the access to support the victim is receiving under the NRM.

¹⁷⁷ The possibility to join criminal proceedings as a civil party or injured party applies also more broadly to victims of crime more generally, and not just victims of human trafficking.

¹⁷⁸ For brief summary of some cases where compensation has been successfully awarded to human trafficking victims during criminal proceedings see GRETA (2020), *supra* n.64, pp.40-41.

¹⁷⁹ BE: Law of 1 August 1985 on Fiscal and other Measures (*Loi portant des mesures fiscales et autres*) *Belgian Official Gazette* 6 August 1986; Royal Decree of 18 December 1986 on the commission for financial assistance to victims of intentional acts of violence and occasional rescuers, *Belgian Official Gazette* 20 February 1987; Royal Decree of 17 January 2007 approving the internal regulations of 20 March 2006 of the Commission for financial assistance to victims of intentional acts of violence and to occasional *Belgian Official Gazette* 11 February 2007. NL: material (Article 6:96 Dutch Civil Code) and immaterial losses (Article 6:106 Dutch Civil Code) in full or in part.

¹⁸⁰ Article 5*bis* Code of Criminal Procedure; Article 61*ter* Code of Criminal Instruction; Article 61*quinquies* Code of Criminal Instruction.

You can have the victim status but not be willing to be a civil party as well. And so you won't ask for compensation so that's also important then you can be in the status having the residence permit and for you it's the most important and so you get protection and so on but not willing [in] anyway to receive compensation.

Myria, Belgium

In the Netherlands, victims of a crime join criminal proceeding as an injured party (*benadeelde partij*)¹⁸¹ with a view to claiming damages that were caused by the criminal act as outlined in the indictment.¹⁸² As an injured party, they can submit a compensation claim¹⁸³, at the latest before the closing speech of the prosecutor. It is the criminal judge who will make a decision about the admissibility of the claim¹⁸⁴ and the amount of compensation to be awarded.¹⁸⁵ In the Netherlands, research examining claims under the Dutch injured party system for victims of human trafficking found that only an estimated 4% of all registered victims claim compensation in the criminal court, with 1/5 of the above claims declared inadmissible and for admissible claims only half of the claimed amount was awarded on average.¹⁸⁶

While the inclusion of compensation claims in criminal proceedings prevents victims from having to launch civil proceedings afterwards to claim compensation, there are procedural elements of the Injured Party Claim procedure that can have important implications for the victims.

First, as the injured party claim falls under Dutch civil code, the civil procedure requirements apply. This means the victim might have to hire a lawyer for the compensation claim.¹⁸⁷ Second, the Dutch Criminal Code stipulates that, civil compensation claims are admissible as long as they do not pose a disproportionate burden on the criminal procedure. This means that if a claim is considered to be too complex, going beyond the expertise of the criminal court, or is considered too time consuming,¹⁸⁸ it can be ruled as inadmissible in whole or in part.¹⁸⁹ In fact, there is evidence from existing research that points to the fact that calculating wages is often considered a complex issue and that judges are not used to calculating wages resulting in erratic outcomes for the victims with regard to amounts awarded or claims accepted¹⁹⁰ or could lead to the criminal judge sending the claim to civil court.

When it is about [calculating] wages it is too difficult, so the criminal judge will not take it into account and you have to go to the civil court.

SZW Inspectorate, the Netherlands

181 Article 51f Code of Criminal Procedure (*Wetboek Strafvordering*).

182 Article 51f(4) Code of Criminal Procedure (*Wetboek Strafvordering*).

183 The civil compensation claim needs to apply to the criminal offence as stated on the indictment (Article 361(2) Code of Criminal Procedure (*Wetboek Strafvordering*)).

184 Article 361(2) Code of Criminal Procedure (*Wetboek Strafvordering*) and admissibility criteria: The defendant is convicted or found guilty and pardoned by the court; - The damages are a direct result of the criminal act. Article 361(3) Code of Criminal Procedure (*Wetboek Strafvordering*) the claim imposes a disproportionate burden on the criminal procedure.

185 Article 361(1) Code of Criminal Procedure (*Wetboek Strafvordering*). Another reason may be that in both countries legal assistance is means tested. As the injured party claim in the Netherlands is governed by the civil code, the victim needs legal representation (Article 51f(4) Code of Criminal Procedure (*Wetboek Strafvordering*)).

186 Cusveller J., and Kleemans, E, 'Fair compensation for victims of human trafficking? A case study of the Dutch injured party claim' (2018) *International Review of Victimology*, 1-15. Examined 190 files covering the period 2013-2014.

187 Article 51f(4) Code of Criminal Procedure (*Wetboek Strafvordering*). Free legal aid is available for victims of violent crime or sexual offense with serious physical and/or emotional injuries.

188 Cusveller and Kleemans (2018) *supra* n.186.

189 Article 361(3) Code of Criminal Procedure (*Wetboek Strafvordering*). If a claim is declared inadmissible under criminal proceedings a victim could still go through civil proceedings for that part of the claim.

190 It has also been noted in the latest GRETA country report that criminal judges are considered not the most competent to calculate E.g., future loss of income GRETA (2018) *supra* n.23, para 171. Cusveller and Kleemans (2018) *supra* n.186.

Pursuing the case in civil proceedings will have an impact on the individual, as they will have to then chase the enforcement of the order themselves.

[Going to civil court] has totally different implications because in civil proceedings you have to go after the money yourself. [This is not so in] criminal proceedings. So it's a huge difference.

FairWork, the Netherlands

In addition, a civil procedure is generally expensive and time consuming.¹⁹¹ As a result, FairWork observed that when claims for compensation are introduced in criminal proceedings, it is important to ensure that they are presented in clear and comprehensive terms, without much reference to labour law provisions. Instead, there should be a clear reference to how many days a person has worked, how many hours and what the salary should be.

It is possible to get compensation but it has to be a clear case [...] when you are talking about compensation of wages.

SZW Inspectorate, the Netherlands

In both countries, legal provisions are enshrined that would allow the prosecutor to make a three months' (or in the Netherlands a six months') presumption of an employment relationship to calculate back wages for a worker and to include this in his or her compensation claim. However, this provision is still underused by prosecutors. It is not clear why this is the case, however, indications from the interviewees point to a lack of awareness and unwillingness to use it (see Section 5.4).

► Box 10. Spotlight on the advance payment option in the Netherlands

In principle, the enforcement of compensation orders is the responsibility of the victim who has been awarded compensation. However, interviewees emphasised that it is possible to transfer the responsibility to the State where a Criminal Compensation Order has been imposed by the court or requested by a prosecutor.¹⁹² In such a case, the Central Judicial Collection Agency (*Centraal Justitieel Incassobureau*) pay the amount of the order to the victim if within a period of eight months after conviction the perpetrator has not paid the amount in full.¹⁹³ The state will then recuperate the amount from the perpetrator.

A Compensation Measure can be imposed even in the absence of an injured party claim, but in practice the prosecutor and the court appear to be reticent about requesting or imposing the compensation measure when there is no injured party claim.¹⁹⁴

¹⁹¹ Wijers, M. *Compensation of victims of trafficking under international and Dutch law*, (La Strada International, 2014).

¹⁹² Cusveller and Kleemans (2018) *supra* n.186.

¹⁹³ Wijers (2014), *supra* n. 191.

¹⁹⁴ Wijers (2014), *supra* n. 191.

Other research has identified a number of practical obstacles which seem to prevent victims from making full and effective use of avenues available in criminal proceeding.¹⁹⁵ These have been reiterated in the findings from the interviewees in the present study.

In both countries, access to **legal aid is available but to some extent is means-tested** – despite regional instruments proscribing victims’ right to free legal aid¹⁹⁶ – which may be an additional obstacle for victims to put forward a civil claim. For instance, in Belgium, where victims enter the labour market during the time of the proceedings it is easy to surpass the threshold of €1,200, discouraging victims from having legal representation throughout the proceedings¹⁹⁷ and even refusing to become a civil party due to their personal financial situation.¹⁹⁸ In **the Netherlands**, all victims can contact the national Victim Support Centres which provide support in the form of advice/assistance and guidance and some victims of human trafficking will qualify for free legal aid from a lawyer of their choice (provided that the lawyer concerned takes cases which are reimbursed through the system of State subsidised legal aid).¹⁹⁹ However, for many victims, legal assistance is means tested.²⁰⁰

Generally speaking, even where compensation is awarded there are then **barriers to receiving the compensation in practice**.²⁰¹ As a result, the interviewees stressed the importance of taking steps during the investigation phase that will ensure that compensation is effective. For instance, in **Belgium**, it is possible to request that any confiscated assets be for the benefit of the victims. This is a significant procedural step during the criminal proceedings, but also means that labour inspectors or police officers have to make an inventory of assets and to ensure that they are confiscated.²⁰² Again, in both countries, the ability to ensure that the compensation is received by the victims once it has been ordered also requires up-to-date contact details, including bank details so that the victims can receive the compensation.

If the case is dismissed or the suspected perpetrator is acquitted, victims may launch civil proceedings, but, in practice this is unlikely to happen and difficult, particularly for victims in an irregular situation (see Section 5.4 below).

5.2.2. Where potential human trafficking victims are not referred to the NRM or refuse to cooperate

The research revealed that where a potential victim is not referred to the NRM, refuses to cooperate with authorities, or in the case of the Netherlands is not placed on the indictment, they have very limited options for remedy in practice. As discussed in Section 4.4, the likelihood of being informed of future avenues for access to remedy e.g., civil party status and/or injured party declaration may depend upon whether or not they are being supported by victim support organisations or lawyers.

In **the Netherlands**, potential victims who do not wish to cooperate with authorities as a human trafficking victim can still join criminal proceedings as an injured party to claim compensation. However, they must be mentioned on the indictment as a victim. In **Belgium**, such potential victims are nevertheless entitled to be informed by frontline services of their right to join proceedings as a civil party or injured party

195 Ferčíková Konečná, I., *Working Paper: Cooperation on Access to Compensation in Cross-Border Context* (La Strada International, 2018).

196 Article 15(2) COE Convention ; Article 13, Directive 2012/29/EU.

197 GRETA (2017), *supra* n.23, p.35.

198 On legal aid and access to a lawyer see Myria (2019), *supra* n.89, pp.36-41; Caritas International (2017), *supra* n.76, p.21; PAG-ASA asbl, [Rapport Annuel 2017](#), pp.14-15.

199 Wijers (2014), *supra* n. 191.

200 Those not included under Article 51f(4) Code of Criminal Procedure. Free legal aid is available for victims of violent crime or sexual offense with serious physical and/or emotional injuries. See *Ferčíková Konečná* (2018), *supra* n.196.

201 Wijers (2014), *supra* n. 191.

202 Myria (2019), *supra* n.89, p. 68.

(if these take place without the victim) (see Section 5.2.1). However, in practice, such potential victims appear not to be categorically informed of this possibility and as a result they may not be aware of any subsequent proceedings against the employer/perpetrator. Hence they do not have the possibility to claim compensation. The situation may well be different where victims have legal representation.

Labour Prosecutor 1 : [...] when it is a person who does not enter the procedure at all because he does not want to or there are no elements [of trafficking], we do not informLabour Prosecutor 2: unless there is a lawyer who has intervened.

Labour Prosecution, Belgium

5.3. Access to remedy in criminal proceedings for other non-human trafficking offences

As the threshold to successfully prosecute a case for human trafficking is very high, oftentimes prosecutors choose to prosecute not for human trafficking but for “lower offences” (e.g., hiring migrant workers in an irregular situation). This has severe negative consequences for victims as they lose the rights tied to the status of human trafficking victim. Nevertheless, in this case it might still be possible for the victims to claim compensation (see Section 5.3.2). In **Belgium**, potential victims can file a complaint directly to the labour prosecutor who may decide to initiate criminal proceedings (Section 5.3.1). In **the Netherlands**, criminal proceedings are initiated by the public prosecution office.

5.3.1. Filing a complaint to the prosecutor

In **Belgium**, it is possible to directly file a complaint with the labour prosecutor about a potential situation of severe labour law violations under the Social Criminal Code.

It’s also possible to go to the labour prosecution and not pay anything but you are the only interlocutor...interlocutor in front of the prosecution and so on and you are the one who is mentioned for example in the discussions with the employers and their lawyers and so on, and it is so difficult.

CSC-ACV Brussels, Belgium

This possibility is used in practice and involves no costs for the complainant. Support organisations and trade unions will refer, on behalf of workers, cases involving accidents at work and in some instances cases involving the recovery of outstanding wages. FAIRWORK Belgium also explained that where the labour inspectorate has closed a case, but the decision is disputed based on the evidence available, they will contact the labour prosecutor.

According to the day-to-day practical experience of support organisations and trade unions, the labour prosecutor can take the following action upon receipt of a complaint.

First, he or she **might close the case based on the evidence** available. Before deciding to do so, the labour prosecutor may request the police or the labour inspectorate to carry out further investigations (either to follow up on the investigation or to address new issues). As part of the investigation the victim

might be questioned by the police. In cases accompanied by FAIRWORK Belgium, in these circumstances, the organisation seeks assurances that any involvement of migrant workers will not have any impact on their irregular migration status, and in practice these assurances are respected.

We always check with the police beforehand to be sure that the undocumented migrants will not have any issues with his documents. They never do. They always go in, do their story and leave.

FAIRWORK Belgium

On the basis of these investigations the prosecutor will decide whether or not to pursue the case in court. If the prosecutor closes the case, the victim could launch civil proceedings. Although according to FAIRWORK Belgium, chances of success would be very low, and the civil court might take into consideration that the criminal case was dismissed.

A second possibility is that the prosecutor **will seek to settle the case** by requesting that the employer pays a fine and social security contributions. However, according to FAIRWORK Belgium, the prosecutor will typically not ensure that the employer also pays back the victim's outstanding wage. In the experience of FAIRWORK Belgium this is frustrating for them and for the victim, as he or she makes the complaint but is not compensated or awarded the due wages.

We have also seen that the labour prosecutor negotiated with the employer, “you [the employer] can choose. I have enough to go to court but you could also pay social security and a fine.” [...] But for a worker that doesn't do anything, they don't negotiate for the wage and that's a bit the frustrating part [...]. You filed a complaint; the labour prosecutor is [only] aware of this exploitation and this employer who has paid no social security because he [the victim] filed a complaint; otherwise the labour prosecutor would not be aware of it. And in the end [...] the employer gets a fine and has to pay social security. But for [the victim] their wage is not paid and then [they] have to start a civil case based on what happened with the labour prosecutor [...].

FAIRWORK Belgium

A third possibility is that in serious cases²⁰³ the **prosecutor will pursue a case for violations of the Social Criminal Code that are sanctioned by both administrative fines and criminal penalties**, as will be discussed in Section 5.3.2.

A fourth possibility is that the prosecutor decides not to pursue criminal proceedings but rather will instead **pursue violations of the Social Criminal Code that are sanctioned by administrative fines**. According to FAIRWORK Belgium, this happens in particular in cases where employers have refused to cooperate and negotiate with either the labour inspection or the prosecutor. It is important to note, again, that administrative fines will not enable automatic access to remedy for the victim.

²⁰³ European Migration Network, [Illegal employment of third country nationals in Belgium: study of the Belgian contact point](#) (July 2017), p. 9. In practice, the prosecutor will only do so for serious social security law infringements (which includes hiring several migrant workers in an irregular situation) and will let the labour inspection service handle the other or less serious infringements, leading to an administrative fine.

Very often these cases are just passed without any follow up – and they are just sent to the system of administrative fines and thus the employer maybe gets a fine for not complying with an investigation but for the worker that doesn't do anything.

FAIRWORK Belgium

A fifth possibility is that the labour prosecutor could also aim to **file a claim to get a declaratory sentencing**. Workers can then claim unpaid wages or general compensation. However, it appears this is not used in practice as it is difficult to keep the contact with the victims and it is not sure whether victims would use the sentencing in court.²⁰⁴

In practice, a Belgian CSC-ACV trade union representative pointed out that it is very unlikely that potential victims would file a complaint directly with the labour prosecutor without the assistance of support organisations such as trade unions or civil society support organisations. Even if they were informed of this option, the CSC-ACV trade union indicated that the potential victim would have to deal directly with the prosecutor and the lawyers from the employer. Given the fact that many potential victims are third-country nationals in precarious working and living situations, do not speak the local language and do not have much trust in authorities, there is limited capacity for them to make use of this option. This underlines the crucial role played by civil society support organisations and trade unions.

5.3.2. Criminal prosecutions for “lower-level” offences

Even where victims are open to cooperate with the authorities, it was reported that in both countries the prosecutor may not necessarily launch criminal proceedings for trafficking in human beings. As the threshold to successfully proving and thus prosecuting a case for human trafficking is high and fairly resource intensive in both countries. In practice, the prosecutor often appears to often chose to prosecute for other offences, that are typically less severe offences, such as social fraud, smuggling, illegal employment (in Belgium under the Social Criminal Code), and deception.²⁰⁵ In the experience of one of the interviewees, this has been the case even in instances which seemed to clearly fall under the offence of human trafficking.

We understand that in some cases in the past the public prosecution office prosecuted the employer for human smuggling instead of human trafficking. (...) I think it's because it's easier to prove and you get a conviction. The investigation has its use, but it does not feel right for the victims of human trafficking – if it was human trafficking of course.

FairWork, the Netherlands

²⁰⁴ FRA (2014), *supra* n. 101, p. 44.

²⁰⁵ The prosecutor might also decide not to press criminal charges and refer the case to other authorities, such as the labour inspectorate which will impose fines for administrative violations.

The burden of proof is quite difficult I think, certainly concerning trafficking. All the other elements, non-payment of wages, non-declaration of Dimona²⁰⁶, it's easier to prosecute that's why they often drop [the human trafficking charge] at the end.

PAG-ASA, Belgium

► Box 11. Spotlight on the non-recognition of Polish workers on human trafficking indictment

A **Belgian** labour inspector referred to a case in which Polish workers were severely exploited and where the prosecutor prosecuted for all the violations listed in the inspection report, except for human trafficking, even though it was one of the worst cases she had ever seen. In the experience of this inspector, where potential victims do not enter the human trafficking procedure (and are not taken care of by the specialised centres) it seems to happen fairly often that prosecutors prosecute for lower level offences.

[...] it's much [easier] for a prosecutor to follow up a criminal report that refers to undeclared work, underpayment, too many hours, as it's far easier to prove than human trafficking. So, we have some really bad cases where everything was taken up in the report, but the prosecutor didn't keep the violation of human trafficking. We have had a really bad case of Polish people, it was really bad, they had to work 7 days a week, 12 hours a day, there were 8 people working during the day and 8 people during the night. And there were only 8 beds. So, they [all] slept in the same beds. We made a criminal report for all of these infractions and we also included economic exploitation. The people were not residing in the [shelter of the specialised] centre because they all went back to Poland. The public prosecutor prosecuted for everything except for human trafficking because it was too hard to prove. But for us it was very clear, it was one of the worst cases we ever saw. (Labour Inspectorate, Belgium)

Prosecuting for offences other than trafficking increases the chance of successfully prosecuting the perpetrator. However, **it has extremely serious consequences for the victims** making it more difficult for victims to get compensation. This is particularly the case if criminal charges are completely dismissed. Beyond its implications for access to compensation and damages, the prosecution for lower-level offences means that victims will lose their access to the shelter and assistance services²⁰⁷ as well as to their residence and work permits (see [Chapter 4](#)).²⁰⁸

In **the Netherlands**, if the prosecutor decides to prosecute for deception or fraud, as these are criminal offences, it is still possible to try to claim some compensation for damages suffered. However, if the prosecutor drops criminal charges and instead only an administrative fine is imposed, the victim will have to launch civil proceedings to claim back wages.

206 A declaration that an employer must submit once an employee begins working for them/upon the establishment of an employment relationships.

207 Though in the Netherlands EU nationals and those with a residence permit may have access to some support under the Dutch Social Support Act.

208 It is to be noted that in 2013 the National Rapporteur reported it did not happen very frequently that a prosecutor did not grant human trafficking victim status to a person, if a specialised centre or frontline services indicate that they have detected a human trafficking victim. Myria (2014), *supra* n.115, p. 31.

In contrast, in **Belgium**, if a prosecutor is of the opinion that there are not enough elements to prosecute for trafficking in human beings, he or she can continue with other offences – including those related to unpaid wages. This is possible under the Belgian Social Criminal Code, which allows for combining administrative and criminal offences in criminal proceedings and thus allows a prosecutor to prosecute an employer in criminal court for serious social infringements.

Even if the labour prosecutor decides not to grant the [human trafficking] victim status, because there are not enough elements concerning trafficking in human beings, he can continue the investigation for all the other elements, bring the case to the criminal court.

PAG-ASA, Belgium

Here again, the victim will be entitled to request to join the case as a civil party in order to request compensation for non-payment of wages, subject of course to them being informed of the opportunity (see *supra*). Furthermore, another condition for victims to successfully claim their back wages and/or social security contributions requires the prosecutor to include these issues on the indictment (Section 5.3.1). In the experience of the Belgian Federal Migration Centre Myria, the more detailed the offences on the indictment the higher the chance for the victim to receive compensation. Furthermore, in Belgium, in cases of labour accidents it is very important that the prosecutor includes the offence of the employer not having labour accident insurance²⁰⁹ as this can then lead to compensation for the workers. However, it is also important to include the fact that this labour accident has not been declared to authorities²¹⁰ as this can assist in subsequently proving to the state fund FEDRIS (see Section 5.6.2) that there has actually been a work accident, when making an application for compensation.

The problem with this kind of case is that if we go to court and the worker says ‘look I’m the civil party and I claim my back wages’ he can’t because it is not yet on [the] agenda. So then after this ruling we have to go to civil court for exactly the same case with exactly the same facts to just ask [for] the [unpaid] wages.

FAIRWORK Belgium

In the experience of FAIRWORK Belgium, labour prosecutors do not systematically include non-payment of wages on the indictment. The organisation indicated that a possible reason for this may be that the fine for an employer for the offence of non-payment of wages is low, compared to the fine that is imposed on an employer for employing migrant workers in an irregular situation. From the point of view of a prosecutor, prosecuting for employing migrant workers in an irregular situation has a greater impact on the employer than prosecuting for non-payment of wages. However, from the perspective of the victim this is very significant, as receiving their back wages is a great concern for them. Theoretically, if the prosecutor omits putting the back wages on the indictment, the worker could take the verdict from the administrative case and on this basis commence civil proceedings based on the same exact facts, though this is time consuming in practice.

209 Article 184, Belgian Social Criminal Code.

210 Article 223 §1 (3), Belgian Social Criminal Code.

Statements from the labour prosecutor, who elaborated on this point, corroborate the observation from FAIRWORK Belgium. Belgian prosecutors explained that in cases where criminal offences and violations of labour and social law under the social criminal code are combined, the judge often hands down one single penalty. In practice, this means the penalty for human trafficking or human smuggling does not differ significantly from the penalties for social penal law violations.²¹¹ This impacts on the prosecutor's decision regarding the inclusion of human trafficking or not on the indictment, since the evidentiary threshold is much higher, but the outcome is not substantively different.

You don't get a heavier sentence, when you have this offence. You have to prove a lot more but the sentence is the same.

Labour Inspectorate, Belgium

A prosecutor referred to an on-going case, which included a trafficking victim amongst other undeclared workers. Such a composition, risks the judge only handing down a lesser fine for social security violations, with a severe impact on access to protection and remedy for the potential trafficking victim. For a Belgian prosecutor, the distinction between the two cases would merit additional consideration and justification when it comes to handing down the sentence but in practice this seems too often not be the case.

I am thinking of a file we have at the criminal court. I have undeclared workers, mainly Belgian, but I have a worker who was recruited in Italy. So, I have a trafficking offence because he is an African gentleman who has been exploited by the bosses. So, there are really two situations, on the one hand - all those who were not declared to take advantage of the savings in social security contributions and on the other hand - this gentleman, was totally exploited.

Labour Prosecution, Belgium

Professional relationships between the different actors in Belgium are well established and there is a high level of trust. This can help to find creative solutions for the benefit of victims. A Belgian prosecutor described a case in which an inexperienced judge agreed to a plea agreement with an employer of a domestic worker in an embassy to pay back the victim's wages in exchange of not prosecuting for human trafficking. While the victim received her back pay, she was in an irregular situation and a prosecution for trafficking would have afforded her a permanent residence permit in Belgium as well as compensation. As the immigration office participates in the interdepartmental meetings on trafficking, the prosecutor was able, in this specific case, to approach immigration authorities to explain the case and to ask whether there was any way for the person to be regularised, given the way her case had been handled and received a positive reply.

²¹¹ Human trafficking or human smuggling (maximum penalty of five years imprisonment or a maximum fine of €50,000), as to lesser offences such as labour law violations for non-payment of social security contributions (maximum administrative fine of €2,000).

▶ Box 12. Key findings, good practices and action points – access to remedy through 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.

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 months (BE)/ six months (NL) in order to determine back wages due for compensation claims.

5.4. Access to remedy through civil proceedings

In **both countries**, potential victims who do not pursue remedy in criminal courts can file complaints with labour and civil courts. In principle, this avenue to remedy is open also to victims with an irregular migration status.²¹² However, realistically those victims who refuse to cooperate with authorities out of trauma or fear are unlikely to pursue an avenue under civil proceedings, as they could face confrontation with the employer in such proceedings.²¹³ Once again, the research points to the importance of support organisations in assisting potential victims for making use of these avenues in practice.

Civil society respondents in both Belgium and the Netherlands confirmed that in practice, where proceedings are ongoing, there is no risk of them being reported to immigration authorities during civil and labour tribunal proceedings. This is because the actors involved in the civil proceedings have no duty to report to immigration authorities.²¹⁴

212 PICUM (2020), *supra* n.15, p. 6.

213 As referred to in Section 4.4 in theory it is possible in exceptional cases for those who are too traumatised to cooperate to receive a Harrowing path visa (NL).

214 This assumes that the potential victims have not come to the attention of the immigration authorities already, such as by being detected by the police or labour inspectorate. In this case, if not identified as human trafficking victims, they would have received an order to leave the country. However, if the person is controlled for papers by the police e.g., in the street and found without paper he or she might be detained asked to leave the country in BE, even though the case is still pending.

In the practical experience of FAIRWORK Belgium, in civil court cases there appears to be often a focus on ensuring the employer is convicted for violations committed rather than on ensuring compensation for the worker. To illustrate this point, the organisation explained that if, for instance a court finds an employer guilty of non-payment of social security contributions, the employer is only convicted for his wrongdoing but is not necessarily ordered by the judge to pay the arrears of these contributions for the worker.

What I always find very interesting is [that] you [the employer] are found guilty for not having paid the social security but you still don't pay the social security [arrears].

FAIRWORK Belgium

Both countries have **implemented laws that protect and enforce workers' rights, including migrant workers in an irregular situation**, with a view to claiming unpaid wages²¹⁵ even for those employed in the lower tiers of supply chains. On this basis proceedings in labour or civil courts can be started.

For instance, a CSC-ACV trade union representative referred to a case currently in appeal that awarded an exploited migrant worker in an irregular situation his back wages of €50,000 (€43,206,09 back pay of wages gross and compensation of approximately €8,000 for costs of working clothes, travel expenses, non-respect of the notice period and wrongful dismissal). In this case, on 4 May 2018, the Brussels Labour Tribunal ruled in favour of a worker who had been working irregularly for four years as a cleaner.²¹⁶ The court was asked to rule on the question as to whether or not the applicant had, within the meaning of Section 2 of the Law of the 3 July 1978 on Employment Contracts, established that he had provided services, in return for remuneration, under the authority of the three respondents. The court decision is significant because the court recognised the chain liability of two subcontracting companies.

One of the three subcontractors, [...] has gone bankrupt [...] so we don't know where he is nowadays, we think that he went back to Portugal because he is a Portuguese, but that's why [chain] responsibility is so important. Because he disappeared. There are two other subcontractors who we can accuse of the situation [and] could be [obliged] to pay the minimum wages, in the case of [X]²¹⁷ there are more than €50,000 because he worked for them for years.

CSC-ACV Brussels, Belgium

The worker was supported by a lawyer of the CSC-ACV trade union and was held in detention for parts of the duration of the proceedings and even after the case was ruled in his favour.

215 Which is equivalent to those workers regularly staying in the country.

216 Brussels Labour Tribunal, 4 May 2018 ([13/17144/A](#)).

217 Name replaced to protect identity.

Interviewees also referred, in particular, to provisions of the Employers' Sanctions Directive,²¹⁸ which has been transposed in both countries. As discussed above in Section 3.4, Article 6 of the Directive stipulates that an employer found to have employed a third country national in an irregular situation is liable to pay the full wages to this worker. In addition, the employer has to pay applicable taxes and social security contributions and the cost arising from sending back payments to the country to which the worker may have been returned to.

Both countries have provided for the presumption of an employment relationship of at least three months.²¹⁹ In **the Netherlands** this presumption has been extended to six months.²²⁰ However, it appears the application of this provision is – to date – still very limited in both countries and not yet systematically applied in civil and criminal proceedings.

In **Belgium**, interviewees shared that several years after the transposition of the Directive there is now more awareness about these provisions²²¹ and it has been clarified that the provisions can both be used in criminal proceedings, in civil proceedings and by the labour inspector when calculating the back wages²²² (see Section 5.5). The interviews revealed that the implementation of the three-month presumption of an employment relationship if the employer cannot prove otherwise seems to vary across different regions in Belgium. It appears this provision is particularly used in the Flemish region by the labour inspection service when calculating back wages.

In contrast, a Belgian prosecutor indicated that this provision is not really used in the indictments unless the worker can provide proof that he or she has worked for the employer during this period.

Always starting from what is called the incontestable basis[base incontestable], because if you have to go to the criminal court with a request for a conviction, it is certain that if you have proof that the person has worked for two months, I cannot claim two years. So this is the incontestable basis, so sometimes, obviously, the person will say “yes, but I worked more and I am entitled to more”, but legally we must look at the evidence we have.

Labour Prosecution, Belgium

For me, I assume that if I do not have any evidence to confirm that the person has been working for more than 3 months or for at least 3 months, I do not think it is fair to the employer to ask for a conviction for 3 months. It will again depend on each case and the elements [of proof] that we have in each case.

Labour Prosecution, Belgium

218 BE: Article 4 & Article 5 of the Law of 11 February 2013 providing for sanctions and measures against employers of illegally staying third-country nationals, (*Loi du 11 février 2013 prévoyant des sanctions et des mesures à l'encontre des employeurs de ressortissants de pays tiers en séjour illégal*) *Belgian Official Gazette* 21 February 2013; NL: Article 23(1), Aliens Employment Act (*Wet arbeid vreemdelingen*).

219 Article 6(3) & Article 7 of the Law of 11 February 2013 providing for sanctions and measures against employers of illegally staying third-country nationals, (*Loi du 11 février 2013 prévoyant des sanctions et des mesures à l'encontre des employeurs de ressortissants de pays tiers en séjour illégal*) *Belgian Official Gazette* 21 February 2013.

220 Article 23 (2) Aliens Employment Act (*Wet arbeid vreemdelingen*).

221 See role of ONSS-RSZ in Myria (2019), *supra* n.89, p.83-84.

222 FAIRWORK Belgium, [Travailleurs sans papiers : Rapport annuel 2018](#), (2019), p. 19.

For the Netherlands, FairWork stated that they try to encourage the use of this provision in civil court cases. FairWork was only aware of one case where this provision had been used in practice.

Both countries have adopted specific legislation on chain liability and have transposed Article 8 of the Employers' Sanctions Directive. This legislation allows migrant workers in an irregular situation to claim back wages even if the worker finds him/herself at the **lower tier of a subcontracting chain by allowing to hold the main contractor liable or any intermediate subcontractor.**²²³

In the Netherlands, legislation on chain liability²²⁴ permits workers to launch civil proceedings to recuperate their unpaid wages even if they find themselves in the lower part of a subcontracting scheme and their immediate employer has disappeared. Under this legislation the worker can hold higher up employers responsible or under certain circumstances launch proceedings against the main client in a supply chain.²²⁵ Interviewees from the trade unions however pointed out that to use this procedure the onus is on the individual to begin civil law proceedings.

The authorities do not deal with that law – there are now court rulings on it – we think we can do it in a class action also which we are trying. But it is civil law. In my opinion, it also shows the lack of priority of the authorities, why is it civil law? Why can the authorities not go up the supply chain? In some areas they can, if it is about human smuggling, illegal labour they can, but here they can't.

FNV-VNB, the Netherlands

In Belgium, reference was made to several recent additions to the Law on the Protection of the Remuneration of Workers (*Loi concernant la protection de la rémunération des travailleurs*) which transposes Article 8 of the Employers' Sanctions Directive.²²⁶ This law enshrines several regimes of joint and several liability for wages in subcontracting chains. They include a general regime, a specific one for the construction sector (that excludes migrant workers in an irregular situation) and one applying to third-country nationals staying and working irregularly in the country. These provisions are governed by the Belgian Social Criminal Code and hence allow the labour prosecutor to commence both administrative and/or criminal proceedings if needed. Third parties (e.g., trade unions, Myria) are explicitly mandated to take legal action on behalf of potential victims.

On 23 July 2018, the Brussels Labour Tribunal ruled in favour of a migrant worker in an irregular situation who was awarded the right to recuperate unpaid wages and severance pay even after the employer had gone bankrupt. The court, made reference to the Employers' Sanctions Directive, the judgment sought to fulfil the labour rights of all workers, regardless of migration status.²²⁷

223 BE: Law on the Protection of Workers' Remuneration 1965 (*Loi concernant la protection de la rémunération des travailleurs 1965*); NL: Article 23(3) Aliens Employment Act (*Wet arbeid vreemdelingen*).

224 Dutch Labour Market Fraud (Bogus Schemes) Act (*Wet aanpak schijnconstructies or WAS*) entered into force on 1 July 2015, thereby introducing new chain liability for wage payments (*Ketenaansprakelijkheid voor loon*). A number of other parts of the Act entered into force on 1 January 2016, including the obligation to pay at least the amount of the statutory minimum wage by bank transfer and the obligation to itemise the payslip. See Dutch Ministry of Social Affairs and Employment, [Chain liability for wage; information for employers and clients](#) (5 February 2016).

225 Dutch Ministry of Social Affairs and Employment, [Chain liability for wage; information for employers and clients](#) (5 February 2016).

226 Law on the Protection of Workers' Remuneration 1965 and its amendments, Chapter IV Joint and several liability for the payment of remuneration (a) General regime; Special regime dealing exclusively with the joint and several liability of the direct contractor in the case of activities in the field of construction, Special regime in the case of occupation of a third-country national staying illegally.

227 FAIRWORK Belgium (2019), *supra* n.222, p. 12.

► **Box 13. Brussels Employment Tribunal, 23 July 2018 (17/2879/A)²²⁸****Facts**

The applicant irregularly resided in Brussels and worked as a handyman at a gym from March to December 2012. He was in charge of the household and chores before and after closing. After a while, he would even spend the night in the gym. His employer paid him a low salary for the months of March to June 2012. For the following months, he only received a small part of his salary. His employer promised to pay him later. When he finally asked his employer to pay him, he was fired.

Complaints procedure

He lodged a complaint against his former employer to the social inspectorate in April 2013. In November 2013, with Myria's support, he put his former employer in default for non-payment of the salary. The employer did not respond and went bankrupt. In early 2014, the worker's lawyer then filed a claim to the curator in order to make a claim for restitution of the debt. After a lengthy process in which the curator challenged full-time employment and the allowance requested for unjustified dismissal, and after several negotiations with the curator, the case was finally brought before the labour court to settle the dispute.

Decision of the court

In a judgment of 23 July 2018, the labour tribunal held the request to be well-founded and concluded that it was proven that the man had worked at the gym. This was on the basis of testimonies, photographs, the report and the investigation report of the social inspectorate, the fact that he knew the names and phone numbers of other employees and managers of the gym. The constant absence and inaccessibility of the employer vis-à-vis the social inspectorate also played a role.

The Court also found that the Sanctions Directive 2009/52/EC of 18 June 2009 was applicable despite its late transposition into Belgian law. At the time the man was working irregularly, Belgium had not yet adopted the law. Nevertheless, the court found that the obligations of the Directive already applied to the situation of the worker. In the absence of a written contract of employment, the court has considered that the applicant was employed under a full-time employment contract of indefinite duration and that they are entitled to the corresponding compensation. The court granted the applicant the right to arrears of salary (€8,667.46), severance pay (€1,838.92) and a severance allowance for wrongful dismissal (€11,821.68).

The curator accepted the judgment and facilitated access to the Business Closure Fund, who paid the applicant. As the Fund is limited to a maximum amount for outstanding wages (€6,750), this amount was unfortunately less than the amount the applicant should have actually earned.

Despite these legal possibilities, while there are some cases in which victims successfully claimed back their wages, however, the majority of our interviewees in both countries strongly emphasised that for potential victims **claiming remedy through civil proceedings is nigh on impossible**.

²²⁸ Brussels Employment Tribunal, 23 July 2018 ([17/2879/A](#)).

For the civil side, it's very much unattainable now, because there are so many risks and so many impediments to starting a civil procedure. So the system is not accessible enough for vulnerable workers.

FairWork, the Netherlands

Although available in theory, launching civil proceedings is problematic in particular for **migrant workers in an irregular situation**.

The moment you start civil proceedings then you are also in the picture, and you don't want to be in the picture when you are undocumented. So, I don't think that this is a valuable option.

CoMensha, the Netherlands

While Article 13(4) of the Employers' Sanctions Directive stipulates, that EU Member States should consider offering irregularly staying third country nationals or minors who experienced particularly exploitative working situations a temporary residence permit at least for the duration of the proceedings, both countries appear not to have seized this possibility.²²⁹ Implementing this possibility of having a temporary residence permit for such migrant workers in an irregular situation during the course of proceedings would likely contribute to them coming forward about their situation. In view of the interviewee from the Belgian trade union CSC-ACV there was an incoherence between the Single Permit Directive and the Employers' Sanctions Directive as the former does not include provisions related to temporary residence permit.

As these are civil proceedings, **the burden of proof is on the applicant**.²³⁰ As a result, the nature of civil proceedings is **much more confrontational**, hence victims who are fearful are less likely to use them.

Interviewees highlighted a number of key obstacles that render the use of civil proceedings very difficult in practice. These include the length of the proceedings, which can be problematic if the applicants have already left the country of exploitation.

Another obstacle identified by the interviewees is the **cost of proceedings**. For instance, in **the Netherlands**, where the compensation award is higher than €10,000, the complainant must pay all court fees, and if the case is lost (and the income threshold is reached) the losing party may have to pay court costs of the employer. In practice, there have been cases where the judge awarded compensation just below this threshold for this reason.²³¹

[...] mostly you have to pay a legal fee to start your proceedings. So that is difficult, [if] you don't have money, or you have left the country.

SZW Inspectorate, the Netherlands

229 Although, Belgium considers to have implemented this provision as severe economic exploitation falls under their definition of trafficking in human beings. See PICUM (2015), *supra* n.59.

230 NB since the introduction of the Law of 23 August 2015 on the protection of the salaries of workers regarding the payment of the salaries (*la loi du 23 août 2015 modifiant la loi du 12 avril 1965 concernant la protection de la rémunération des travailleurs en ce qui concerne le paiement de la rémunération / Wet van 25 augustus 2015 tot wijziging van de wet van 12 april 1965 betreffende de bescherming van het loon der werknemers wat de uitbetaling van het loon betreft*) Belgian Official Gazette 1 October 2015, the prohibition in Article 2 of payment in wages in cash by the employer shifts the burden of proof onto the employer in cases where there is a dispute. The employer must demonstrate the salary was paid in accordance with the law. See more in Section 5.5.1.

231 Case information shared with authors by La Strada International.

The **lack of access to legal aid** and reliance on pro deo lawyers has been identified as a key obstacle in civil proceedings. In addition, interviewees reported that it was often difficult to **find specialised and affordable labour lawyers**.

Even in cases in which civil proceedings are successful, it is very difficult to effectively recuperate any **compensation awarded**, which may entail additional costs, such as hiring a bailiff.

► Box 14. Key findings and action points – access to remedy through 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.

5.5. Access to remedy via the labour inspectorate

As outlined above, labour inspectors are important actors in detecting potential victims of human trafficking for the purpose of labour exploitation (Section 4.1.1). They can also facilitate access to remedy for potential victims. For instance, in Belgium, in cases where workers are found in exploitative situations and have not been paid, labour inspectors can make the employer pay wage arrears on the spot (Section 5.5.1). There is also the possibility for the worker to proactively submit a complaint to the labour inspection (Section 5.5.2). When a complaint is made, there are a number of ways in which labour inspectors can support workers in claiming back their wages and social security contributions. Labour

inspectors are also instrumental in ensuring employers respect applicable labour law and have a range of tools available to encourage compliance (Section 5.5.3).

5.5.1. “On the spot payments” requested by labour inspectors

A practical tool the **Belgian** labour inspectorate applies in practice to support workers to claim back their wages are “**on the spot payments**”. Formally, the legal framework prohibits cash payments,²³² however, the labour inspectors from the Social Legislation Inspectorate can order the employer to pay wages on the spot when they come across unpaid workers during inspections. The payment can be requested where the employer is present during the inspection, subject to the following conditions: everybody (including the employer) agrees, there is a witness, it is written down in the formal interview and the employer is also issued with a formal warning.²³³

If we can, and if it’s possible, we make them pay at that moment [during an inspection]. So, if it’s a Saturday night in a bar, we order the employer to immediately pay the 3 months wages. If it’s not possible, we write to them and we say you have to pay.

Labour Inspectorate, Belgium

A presumption of a three months’ employment relationship is applied where the employer cannot demonstrate otherwise. This is a pragmatic approach that is in the spirit of the transposition of the Employers’ Sanctions Directive as discussed above (see Section 5.4.). The “on the spot payments” enforced by the Social Legislation Inspectorate also recognises the importance of receiving what is owed to the workers. If this is a suspected case of trafficking, the victim is given the option to be referred to the NRM and a criminal investigation may start. Potential victims of human trafficking who refuse to enter the NRM can also benefit from this payment.

We always stress to our inspectors [that] it’s so important that the person gets their money, it’s the most important thing. Normally it’s not [permitted] to pay [in] cash in Belgium, but if it’s a victim of human trafficking and if he wants to go back to the country of origin, [we] make sure they get their money. That’s the most important thing, that’s our priority. And if they don’t, we report it to the public prosecutor.

Labour Inspectorate, Belgium

In **the Netherlands**, labour inspectors do not have a similar mandate, however they can impose an administrative fine for underpayment of wages (see Section 5.5.3 below). From 2021, in the Netherlands, the SZW Inspectorate intends to refer workers who receive a very low a salary to lawyers (see Section 4.1.1) to facilitate their claims to receive the full wages.²³⁴

232 Law of 23 August 2015 modifying the law of 12 April 1965 on the protection of the salaries of workers regarding the payment of the salaries (*la loi du 23 août 2015 modifiant la loi du 12 avril 1965 concernant la protection de la rémunération des travailleurs en ce qui concerne le paiement de la rémunération*) Belgian Official Gazette 1 October 2015.

233 Correspondence on file with authors.

234 Follow up correspondence with the interviewee from the SZW Inspectorate, November 2020.

5.5.2. Complaint to the labour inspection

In **both countries**, potential victims can file a complaint to the labour inspection. The complaint does not need to be filed by the victim her/himself.

Everyone can file a complaint, even the neighbour. Everyone can file a complaint. We had a case of human trafficking/economic exploitation and that was an African girl who was in a church and it was one of the church members who filed the complaint.

Labour Inspectorate, Belgium

In both countries, for a migrant worker in an irregular situation, it makes a great difference as to whether a complaint is made proactively or whether the labour inspector comes across a migrant worker in an irregular situation on the work floor during the inspection. In the latter case, when there are no indications of human trafficking, **Belgian** inspectors are obliged to report migrant workers in an irregular situation to immigration authorities. In **the Netherlands** migrant workers in an irregular situation may also come to the attention of immigration authorities following workplace inspections (see Section 4.1.1). However, if a worker files a complaint, even if in an irregular situation, he or she will not be reported to immigration authorities, as the complaint is treated confidentially.

In practice, however, most potential victims who are in a very exploitative situation that may amount to trafficking in human beings, appear not to file complaints proactively. Rather they are detected through inspections.²³⁵

Where complaints are proactively made, it is with the assistance and guidance of a support organisation or trade union. For instance, in **Belgium**, FAIRWORK Belgium takes an active role in lodging and following up on complaints for potential victims that seek their assistance. In their experience, only “the layer of snow on top of the iceberg”, a very small number of victims seek their help. The organisation will assist workers to file a complaint.

We will write down the complaints of the worker. We’ll read it together, [they] sign because we don’t have a mandate. We are not a recognized organization to have a mandate [as] foreseen in the Sanctions Directive which should be completely possible but doesn’t happen.

FAIRWORK Belgium

The important role of FAIRWORK Belgium in bringing potential situations of exploitation to the attention of the labour inspectorate via complaints was recognised by an interviewee from the Belgian labour inspectorate.

²³⁵ See also European Migration Network, [EMN Annual Report – Belgium](#) (2017) p. 37; The Belgian report, the comparative EU Synthesis Report and the EMN Inform (which summarises the main findings of the EU Synthesis Report) are available on the website of the [Belgian Contact Point of the EMN](#).

We don't have that many people who come to us to complain, so that's a bit of a dark hole, but mostly it goes to FAIRWORK Belgium. We have a cooperation with them that FAIRWORK files the complaint, mostly for the people who are undocumented and then we follow up.

Labour Inspectorate, Belgium

In **Belgium**, where the employer does not cooperate with the labour inspector following up on a complaint, **the labour inspector might file a criminal report and refer the case to the labour prosecutor who might choose to prosecute the employer before a criminal court** (see Section 5.3.1).

We will always [draft] a criminal report for the prosecutor if they are illegal in the country and otherwise mostly, they are not declared to social security [...].

Labour Inspectorate, Belgium

In **the Netherlands**, if a complaint is made, there are several possible steps that can be taken. Suspected cases can be reported to the inspectorate and are handled by its criminal investigation unit under the authority of the public prosecutor and potential victims are referred to the NRM (see Section 4.2) following which criminal proceedings might be launched. If complaints do not include enough elements to launch a criminal investigation, a complaint may be followed up under administrative law, such as fines imposed on the employer and an inspection of the workplace. In the past this has led to detection of human trafficking victims.²³⁶ FNV-VNB remarked that it was important that labour inspectors take complaints seriously, which in their experience appears to be not always the case. When there is underpayment of wages the labour inspectorate can impose sanctions on the employer to pay back the wage (see Section 5.5.2).

In **Belgium**, depending on the severity of the situation, **the labour inspector might seek to engage with the employer** to resolve the complaint and resolve the non-payment of wages and any other alleged violations of the worker's labour and social security rights. In practice, the employer may be asked to **formalise the employment situation of the worker for the period he or she was employed**. Ensuring that the worker is granted his or her entitlements is an important outcome as it gives them access to the social security system including pension rights and health insurance.

With the regularisation [of employment], if the work is not too long ago, you can, for a certain period, get access to those three pillars of the social security. What you never have access to, are unemployment benefits, because there the law is very specific that during the work you should have been legally staying in the country.

FAIRWORK Belgium

²³⁶ Inspectie SZW, [Inspectie SZW Jaarsverlag](#) 2019, (14 May 2020), p 77.

► **Box 15. Spotlight on the recuperation of wages and the Belgian Deposit and Consignment Fund**

Where wages are recuperated from an employer in Belgium, through civil or criminal proceedings, or through administrative actions (e.g., the Social Legislation Inspectorate) and the worker cannot be reached or has no bank account, the amount is placed in the Deposit and Consignment Fund (*Deposito en Consignatiekas – DCK/ Caisse des Dépôts et Consignations - CDC*). This mechanism is offered by the Ministry of Finance and is particularly useful where there is no other way for the worker to receive the funds e.g., no access to a bank account or the worker is no longer resident in Belgium. The Social Legislation Inspectorate will contact the worker and provide them with instructions of how to access the money. To facilitate this process, they have a number of letters translated into different languages. The funds are kept for a period of 30 years and if it is not claimed during this time will eventually go to the state.

In 99 percent in the cases, it works well. (FAIRWORK Belgium)

If he [the employer] wants to pay and the person is no longer in the country we will do everything we can to contact him and let him know his bank account number to the employer. But otherwise, we have the Deposit and Consignment Fund, so we let the employer pay to that and then we send a mail to the employee with the procedure to collect his money. (Labour Inspectorate, Belgium)

However, it is important to note that access to the fund has been criticised as it requires the provision of appropriate identification, which if the worker is no longer present in Belgium (e.g., due to having been deported) then this is a significant barrier as they are not able to re-enter for a period of three years.²³⁷ Furthermore, although a Belgian labour inspector stressed that they always try to contact those workers, there is no administration department that has the obligation to inform the workers involved about the procedure.²³⁸

5.5.3. Dissuasive action such as imposing administrative fines and/or closing businesses

Labour inspectors in both countries can impose administrative sanctions on employers if they do not comply with applicable labour regulations. Penalties range from financial fines to the temporary closure of a company.

In **the Netherlands**, as referred to above (see Section 4.1.1) as part of the objective of stopping fraudulent employers, the inspectorate has toughened its approach towards those employers, who repeatedly and knowingly violate labour law. In those situations, a tailor-made policy mix is applied. Measures in this mix may include using administrative tools such as imposing fines and potentially shutting the company down²³⁹ as well as tools under criminal law such as launching proceedings. Victim support organisations are aware of this mixed policy approach but are somewhat sceptical as to whether the public prosecutor would be willing to prosecute for other (less serious criminal) offences.

237 GRETA (2017), *supra* n.23; PICUM (2017), *supra* n.59, p.5.

238 PICUM (2020), *supra* n.63, p. 28.

239 In 2019 several 'crackdowns' have been organised – these are targeted information campaigns followed by area-based inspections in a limited time. Inspectie SZW (2020), *supra* n. 236, p. 16.

[on the labour exploitation programme] [...] combines criminal offences – if it's not human trafficking – [with] other criminal offences, e.g., deceit or forgery with administrative infringements. But that's in theory. It is very interesting and could be good, but we have to ask in how many cases this has happened, because we see that the public prosecution office is not so willing to take up these [less-serious] criminal offences.

FairWork, the Netherlands

As has been mentioned in previous Sections, if an administrative fine (other than a fine for underpayment-see below) is imposed on the employer, the worker will have no automatic material benefit in terms of receiving back his or her wages. In order to claim his or her back wages the worker must commence separate civil proceedings. This is problematic, as civil proceedings in practice are fraught with obstacles, in particular for workers in precarious situations (see Section 5.4).

In the Netherlands, labour inspectors can support victims to **claim their back wages by imposing specific fines for underpayment** on the employer to oblige him/her to pay the worker. For instance, under the **Minimum Wage and Minimum Holiday Allowance Act**²⁴⁰ depending on the degree of underpayment, the inspector can impose up to €10,000 per employee if the worker has been underpaid, and up to €2,000 per employee if the worker has been paid less than the minimum holiday allowance. The back wages are calculated by the labour inspectorate based on the normal work week under the applicable collective labour agreement. In order to increase the pressure on the employer to pay, the labour inspector can order the employer to pay €500 per employee for every day this employee is not paid (up to a maximum of €40,000 per employee). However, in practice this tool seems to be underused. Interviewees remarked that typically when labour inspectors come across such situations, they will instigate administrative proceedings on the employer that will lead to a fine, leaving the worker without any recompense.

In this country, we have the minimum wage law, and the inspection has the option, theoretically, to claim underpayment, but what we often see in practice is that the inspection only puts a fine on the employer for underpayment. This way the money does not benefit the worker at all.

FairWork, the Netherlands

Furthermore, Dutch regulation stipulates that, if the employer does not keep the records, this constitutes an administrative violation where the sanction requires restoration to both the state and the worker.

If the employer doesn't keep their records, then he needs to pay back the minimum wage and pay the authority. So indirectly the worker will benefit from that financially, but as far as I know that rarely happened.

FNV-VNB, the Netherlands

240 Minimum Wage and Holiday Allowance Act (*Wet minimumloon en minimumvakantiebijslag*).

► **Box 16. Key findings, good practices and action points – 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.

5.6. Access to remedy through state compensation funds/schemes

Both case study countries have state compensation schemes in place for victims of crime, and to protect workers who have had workplace accidents and/or whose employer is facing bankruptcy.

5.6.1. Victims of violent crime compensation funds

Both, **Belgium** and **the Netherlands**, established a state compensation fund for victims of violent crime (*Fonds d'aide aux victimes d'actes intentionnels de violence et aux sauveteurs occasionnels / Fonds tot hulp aan de slachtoffers van opzettelijke gewelddaden en aan de occasionele redders* (BE);²⁴¹ *Schadefonds Gewelddismisdrijven* (NL)) with compensation awards that can amount to €125,000 in Belgium and €35,000 in the Netherlands. Interviewees were aware of the victim's compensation funds that exist in the respective countries. Both funds are accessible to anyone regardless of migration status²⁴² but subject to certain eligibility criteria.²⁴³ In the context of the current research, the most relevant criterion appears to be that the crime committed must have involved "a deliberate act of violence" (BE)/ "an intentional violent crime and serious injury" (NL).

The key distinction between the accessibility of the funds in the case study countries is whether other avenues of remedies have to be exhausted first. In **the Netherlands**, the fund has specifically been set up to cater for situations where the compensation cannot be claimed from a perpetrator and, importantly, access to the fund does not require a successful prosecution in criminal proceedings.²⁴⁴

In contrast, in **Belgium**, a subsidiarity requirement entails that the victim may normally only appeal to the fund when criminal proceedings have been completed,²⁴⁵ the compensation for the damage cannot be adequately insured by the perpetrator or the liable person, by a social security scheme or by private insurance, or in any other way and the victim has tried to launch civil proceedings²⁴⁶ and/or made reasonable efforts to obtain the compensation awarded.²⁴⁷ Consequently, victims who have not pursued these steps are not taken into account for the aid from the fund.²⁴⁸ In five anonymised human trafficking cases in the period 2015-2018, reviewed by the National Rapporteur on Trafficking in Human Beings, three cases of sexual exploitation were found to be admissible. Two cases (one relating to economic exploitation and one relating to human smuggling) were deemed inadmissible. The requirements to demonstrate "an intentional act of violence" is often cited as the main difficulty, since the concept is not

241 Law of 1 August 1985 on fiscal and other measures (*Loi du 1er août 1985 portant des mesures fiscales et autres*), Belgian Official Gazette 6 August 1985, supplemented and specified by the Royal Decree of 18 December 1986 on the commission for financial assistance to victims of intentional acts of violence and occasional rescuers (*Arrêté royal relatif à la commission pour l'aide financière aux victimes d'actes intentionnels de violence et aux sauveteurs occasionnels*) Belgian Official Gazette 20 February 1987 and the Royal Decree of 17 January 2007 approving the internal regulations of 20 March 2006 of the Commission for financial assistance to victims of intentional acts of violence and to occasional rescuers (*Arrêté royal portant approbation du règlement d'ordre intérieur de la Commission pour l'aide financière aux victimes d'actes intentionnels de violence et aux sauveteurs occasionnels*) Belgian Official Gazette 11 February 2007.

242 In Belgium, this was the result of legal reform; 2004 and Law of 30 December 2009.

243 BE: (1) a deliberate act of violence" was committed; (2) that she has suffered physical harm or serious mental harm and (3) that this harm is the direct consequence of this deliberate act of violence. NL: it has to be established that an intentional violent crime has taken place (regardless of the prosecution or conviction of the perpetrator); the victim has suffered severe injury (physical or psychological); the crime was committed in the Netherlands; the application was filed within three years of the crime; the victim was not complicit in the crime; the damage is not compensated in any other way.

244 FRA (2015), *supra* n. 87, pp. 59-60.

245 Or in cases the perpetrator could not be identified, these cases have been dismissed for this reason.

246 Or has attempted a direct summons before a court see [Federal Public Service of Justice on the Conditions to access the fund](#).

247 Article 31bis, § 1, 5 ° of the Law of 1 August 1985 on Fiscal and other Measures (*Loi portant des mesures fiscales et autres*) Belgian Official Gazette 6 August 1986.

248 Centre for Equal Opportunities and Opposition to Racism, [Trafficking in and smuggling of human beings: The money that matters \(15th Annual Report 2011\)](#) (2012) pp.59-66; Myria (2019), *supra* n.89, p. 61.

defined in law or in interpretative texts, and for cases of human trafficking for the purpose of labour exploitation, this is often a stumbling block.²⁴⁹ Hence, in Belgium, despite the fund being available in theory for victims of human trafficking, its use appears to be sub-optimal and where compensation awards are made they have, to date, been exclusively for human trafficking victims for the purpose of sexual exploitation.

In **the Netherlands**, the vast majority of human trafficking victims who submitted a claim to the fund received compensation.²⁵⁰ Victims can be awarded up to €35,000.²⁵¹ Depending on the severity of injuries, victims are awarded lump sums. The typical amount human trafficking victims for sexual exploitation appear to receive is €10,000.²⁵²

Until recently, it was difficult for human trafficking victims for labour exploitation to access the fund, as it was difficult for them to prove that they suffered from 'serious injury'. However, in July 2019, the fund changed its policy and from then on, in all cases involving exploitation, within the meaning of the national human trafficking definition (Article 273f of the Dutch Criminal Code), serious injury is presumed in such cases and no longer has to be proven by the victim. It is not necessary for a victim to have received human trafficking victim status in order to be eligible for the fund. However, the victim has to plausibly demonstrate that he or she has become a victim of that crime. In practice, this plausibility assessment is often based on the statement of the victim as filed with the police (though reporting the crime to the police is not in itself an eligibility criteria to access the fund). If no declaration to the police has been made, the fund is open to evaluate other relevant objective evidence. This might include a report of the informative interview the potential victim had with the human trafficking investigator before the decision on the recovery and reflection period was made (see Section 4.2) and additional information such as medical information from a qualified therapist, information from care providers or social workers in the shelter. However, in practice a report to the police and a subsequent criminal investigation appear to significantly contribute to the substantiation of an application and its potential success.²⁵³

5.6.2. Compensation for workplace accidents

Where workers have a workplace accident, and in the absence of workplace accidents insurance, in Belgium it is possible to claim compensation for injury/harm incurred regardless of migration status and (in theory) of the outcome of any other proceedings (see Section 5.8).

In **Belgium** the employer is required to have workplace accident insurance.²⁵⁴ A workplace accident compensation fund is administered by the Federal Agency for Occupational Risks (*Federaal Agentschap Voor Beroepsrisico's / Agence fédérale des risques professionnels - FEDRIS*). Any award of damages must be subject to demonstrating that there was an employment relationship and that a workplace accident did in fact take place. Where these conditions are met, a worker is entitled to long-term financial recompense according to their incapacity to work, regardless of migration status of the worker at the time of the accident and regardless of where they are now residing.

249 Myria (2019), *supra* n.89, pp. 62-63.

250 GRETA (2018) *supra* n.23, para 173.

251 Schadefonds Geweldsmisdrijven, [Letsellijst Schadefonds Geweldsmisdrijven](#) (1 July 2019).

252 GRETA (2018) *supra* n.23, para 173.

253 Information provided to the authors during written exchanges with representatives of the Schadefonds Geweldsmisdrijven.

254 Article 49, Law of 10 April 1971 on workplace accidents (*Loi du 10 avril 1971 sur les accidents du travail*) *Belgian Official Gazette* 28 December 1971.

If you are a victim of labour accidents and the employer doesn't have insurance then there is FEDRIS, this special fund that will intervene as if they are the insurance of the employer. And they will try to claim the money back, so even if there is not a case you have this fund. But to have access to this fund then, of course, you have to prove that there was a relationship of worker and that there was a labour accident.

FAIRWORK Belgium

An invalidity indemnity/financial support will be received where incapacity to work (temporary or long-term) has been declared. The financial assistance extends beyond the payment of loss of earning to coverage of medical costs and transportation costs to access medical care.

Compensation for the period you couldn't work, medical cost[s], transport to get access to the medical cost[s] and most importantly and – fantastic in our labour rights system- if, for example, I work for 100% and I lose my hand, there is a doctor who rules that you are able to work for 80%, for the rest of your career the 20% will be paid each month into your bank account. [This is] also for undocumented migrants staying in Belgium or [returned to their country of origin] or wherever, they can access this money.

FAIRWORK Belgium

This support will be granted regardless of migration status:

I also have one of my members, one of my activists, who [receives] a compensation each month. [...] [It is] a case of a work accident. He won and receives [approx.] €400 a month. He's undocumented but, of course, [employment] law and so on, it's not only for those who have a regular status.

CSC-ACV Brussels, Belgium

In addition, there are practical arrangements that make this fund work in practice. One of the conditions for continued receipt of financial assistance under the workplace indemnity is to undergo medical checks. These are compulsory and can only be carried out in Belgium. For those migrant workers who are entitled to it but have returned to their country of origin, the cost of travel and accommodation is covered either by the insurance of the employer or FEDRIS. A temporary visa is granted to these workers, based on an informal agreement between FAIRWORK Belgium and the Immigration Office.

In **the Netherlands**, the possibilities for potential victims to claim compensation for occupational injury from insurance schemes of the employer appear to be more limited.

I think it's very problematic, particularly when it's labour victims because most of the time they are migrants. When you have an accident at work, most of the time it's your insurance that will go after the company, but if you don't have an insurance, then who else is going to do it for you? There are of course options, but the question is do you have the money to start these options. In the end we have a lot in place, but it doesn't bring migrants anywhere.

CoMensha, the Netherlands

Where an employer does not have insurance for workplace accidents, then the worker may be entitled to state support. However, this support appears not to be available to migrant workers in an irregular situation. In principle, workers can sue their employer in civil court and claim additional financial compensation to compensate for the damage but this is difficult for potential victims (see obstacles identified in Section 5.4).

5.6.3. Insolvency fund

Interviewees identified the **bankruptcy of the employer** as a significant impediment to effective recuperation of compensation for potential victims.

In **Belgium**, where a worker is entitled to receive compensation, but the employer has gone insolvent/bankrupt then the worker is entitled to access payment from an insolvency fund. An application must be made to the **Fund for Business Closures** (*Het fond voor sluiting de ondernemingen / Le fond de fermeture des entreprises*) within 13 months of the employer's declaration of bankruptcy.²⁵⁵ In practice, FAIRWORK Belgium reported that they will initiate this procedure even when other proceedings are ongoing in order not to miss the deadline for the submission of a claim. The worker can receive up to €6,575 gross for unpaid salary, up to €4,500 holiday pay gross and compensation for dismissal. The latter does not have a cap, but the total of the three categories must not exceed €25,000 (since 1 January 2009).²⁵⁶ In Belgium, the bankruptcy of a company requires the individual to then make a claim with the curator which can be problematic for a number of reasons. First of all, it may be that the curator prioritises debts to other creditors such as banks or the state (also mentioned in the Dutch context by CoMensha).

[This is] often what happens in cases of labour exploitation, the employer's has a company and goes bankrupt... or indeed the employer organises his insolvency, then it is difficult. You can always introduce a kind of a file with a Curator but of course then there are often other people waiting for their money.

PAG-ASA, Belgium

Secondly, the curator does not send the compensation to a state organised holding fund (the **Deposit and Consignment Fund** (DCK/CDC)), so the claimant will need to have a bank account. As many migrant workers (especially those without residence permit) do not have a bank account, it is very difficult for them to effectively claim the compensation they are entitled to in practice.

²⁵⁵ Article 2244 Civil Code.

²⁵⁶ Article. 24, 1°- 3° & al. 2, of the Royal decree of 23 March 2007 implementing the law of 26 June 2002 on the closure of undertakings (*Arrêté royal du 23 mars 2007 portant exécution de la loi du 26 juin 2002 relative aux fermetures d'entreprises*) *Belgian Official Gazette* 30 March 2007.

Where an employer has gone bankrupt, the evidence that a worker submits to the curator will determine the amount of compensation awarded. FAIRWORK Belgium outlined a case where a curator had not been willing to pay the amount requested by the employer but was subsequently ordered to do so by a labour tribunal, with the judge making reference to the Employers' Sanctions Directive as the basis for the ruling, despite the transposition not yet being in affect (see summary of the case above in Section 5.4).

There is actually a very good ruling on that [...] where the curator didn't want to recognise the worker and thus didn't want to include him in the communication to this fund. The judge said he was working there [and] the sanctions directive [even though] it was not transposed yet [was] still applicable because it already should have been transposed. [...] So [a] very fantastic ruling. The undocumented worker got the money out of this fund.

FAIRWORK Belgium

In **the Netherlands**, in cases of bankruptcy of the employer, workers entitlements are guaranteed by the state and benefits are paid out of the general unemployment fund. Workers have to apply through the public employment service.²⁵⁷ They may receive 13 weeks of back pay²⁵⁸ and up to a maximum of one year for holiday pay or allowance.²⁵⁹ However, the claim has to be submitted one week after the workers would have normally received his payment or one week after it was clear to the worker that the employer could fulfil its payment obligations.²⁶⁰

A determining factor to access to compensation following insolvency appears to be that a worker has to have been formally employed in the Netherlands. Interviewees from the Dutch trade union noted that this is not the case for many workers.

Furthermore, interviewees from the Netherlands highlighted the insolvency of temporary work agencies as a particularly problematic issue.

We do see a lot of problems with [temporary employment agencies] because we have 14 000 employment agencies in the Netherlands. Anyone can start one and you often see that if they get into problems with fines from inspections or claims of unpaid wages, they go bankrupt and then they or the brother or whoever starts a new employment agency, and they start all over again. So, we do have that difficult problem.

FairWork, the Netherlands

Support organisations in the Netherlands interviewed for this research did not have practical experience to claim compensation for insolvency for potential victims.

It is worth noting that a 2014 judgement by the Court of Justice of the EU clarified that under EU law migrant workers in an irregular situation have the right to claim insolvency benefits.

257 Eurofound, [European Monitoring Centre on Change](#). Netherlands: [Wage Guarantee in case of insolvency](#) (October 2019).

258 Article 64(1)(a) Unemployment Insurance Act (*Werkloosheidswet*).

259 Article 64(3) Unemployment Insurance Act (*Werkloosheidswet*).

260 Article 63 Unemployment Insurance Act (*Werkloosheidswet*).

► Box 17. Back pay and the application of EU insolvency law in the Netherlands

The application of the EU's Directive on insolvency of employers to migrant workers in an irregular situation in Dutch national law was addressed by the Court of Justice of the European Union in 2014. The *Tümer* case considered the exclusion of a migrant worker in an irregular situation from obtaining back pay of wages following insolvency under Article 3(3) of the Unemployment Insurance Act (*Werkloosheidswet*). This Act essentially stipulated that a third country national who was not residing regularly in the Netherlands for the purposes of Article 8(a) to (e) and (l) of the Aliens Act 2000 (*Vreemdelingenwet 2000*) was not to be regarded as an employee. The court held that whilst the definition of employee was at the discretion of national law, the implementation of the Directive required that the national discretion regarding the definition of 'employee' was circumscribed by the need to ensure that the 'social objective' of the Directive was obtained. The Court found that denying any employees access to back pay when their employer became insolvent was 'contrary to the social objectives of the Directive' and that the migration status of the person in this specific context was not relevant.²⁶¹

Following the *Tümer* judgment, Chapter IV of the Unemployment Insurance Act was amended and introduced a separate regulation that is the elaboration of the Insolvency Directive (Article 61).²⁶² The explanation of the term 'employee' insofar as it relates to Chapter IV therefore does not go further than the Insolvency Directive. In June 2019, a migrant worker in an irregular situation during an appeal case argued on the basis of the new regulation adopted following *Tümer* judgment that he was entitled to receive unemployment benefits following dismissal.²⁶³ The Central Board of Appeal did not accept this argument and rejected the claim on the basis of his irregular migration status.

261 *Tümer*, C-311/14 ECLI:EU:C:2014:2337; Peers (2014), [Irregular migrants and EU employment law](#), EU Analysis Blog; FAIRWORK Belgium, *Travailleurs sans papiers : Rapport annuel*, 2018, p. 12-13.

262 Chapter 4, Unemployment Insurance Act (*Werkloosheidswet*).

263 ECLI: NL: CRVB: 2019: 1990.

▶ **Box 18. Key findings, good practices and action points – 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 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.

5.7. Alternative (informal) mechanisms for recuperation of wages

5.7.1. Informal negotiations with the employer

Most of the interviewees from civil society support organisations, trade unions (see Section 5.9) but also the labour inspectorate, stated, that they had engaged in informal negotiations with an employer to help potential victims claim back their wages and/or to reach an agreement with the employer to formalise the employment status for the period the potential victim had been employed. In **Belgium**, the Federal Migration Centre Myria reported two cases during which the salary was recuperated by contacting the employer and requesting the payment of unpaid wages in 2019. In addition, in **the Netherlands**, FairWork suggested that labour attachés from embassies can also be important actors in this type of informal contact with the employer in the sense that when they call the employer they can reinforce the pressure on the employer.

[Embassies] are very important. Some of them have really good labour attachés specifically for these problems in the Netherlands, and they're highly involved. I would say they're a very important actor, and for instance, they have potential status with regard to contacting the employer.

FairWork, the Netherlands

Interviewees had a mixed experience as to the effectiveness of this approach. Nevertheless, while this informal approach does not always lead to sanctions on the employer, if it works, the advantage for the victims is that they get the wages immediately as opposed to having to wait for the result of lengthy proceedings, which is very important for them.

If we do not manage to push the company to pay the workers outside of court, the case can run easily three to five years.

FAIRWORK Belgium

If civil society support organisations or trade unions negotiate with the employer for the back wages, there appears to be often a discrepancy between **the official wage the worker would be entitled to and the amount that the worker is willing to accept as payment** (see also Section 5.1). For instance, it may be that the worker, due to his or her need to receive the wages as quickly as possible and the inability to await the completion of formal proceedings is therefore willing to accept the agreed amount. Civil society support organisations and trade unions are aware of this and are willing to settle, on behalf of the workers and with his or her agreement, for less than the national minimum wage and instead accept the agreed wage (as opposed to the wages the worker would be entitled to).

Very often on the agreement wages I ask the worker before I go, is there a margin of negotiation or do you want every single dime you agreed on? And sometimes they agree ... if I ask it is not because I want them to negotiate but they want the money ... some of them agree [€]1000 instead of [€]2000.

FAIRWORK Belgium

The interviewees also stressed that this type of contact with the employers goes beyond seeking to recuperate unpaid wages. It also gives an opportunity **to put pressure on unscrupulous employers to change their practices** and for support organisations to gather additional evidence that could **prove the existence of a working relationship** and be used at a later stage of an investigation.

I record the telephone calls, so whatever the employer says while he is [on the phone] with me is new proof [...] If you call him for the first time his guard is not up, so sometimes we have a lot of people actually telling a lot of stuff on the phone. So, I always try to have a conversation as long as possible even if I immediately feel that they will not pay. The more they talk, the better it is.

FAIRWORK Belgium

FAIRWORK Belgium reported that they try to threaten the employer by stating that they will refer the case to the labour inspectorate, but that employers are often not concerned by this threat, presumably because they do not expect difficult sanctions.

First of all, this very rarely works to be honest. Even if you talk to the employer and you say “look, to be honest if we don’t find an agreement, we’ll be obliged to go to labour inspection,” 90% of them says something like “go ahead”.

FAIRWORK Belgium

There is some indication that this method of engaging with the employer works better when the leverage of the organisation trying to negotiate is high. For instance, trade unions can threaten with collective action and the labour inspectorate/labour prosecutor can impose sanctions, whereas civil society organisations do not have any legal mandate or capacity to have a significant affect (see *infra* Section 5.9.2).

5.7.2. Sectoral initiatives: Compliance Foundation with the Collective Labour Agreement for Temporary Agency Workers in the Netherlands

Some interviewees in the Netherlands referred to a sectoral complaints mechanism for those who are employed by temporary work agencies.²⁶⁴ Temporary agency workers can report a violation to the Compliance Foundation with the Collective Labour Agreement for Temporary Agency Workers (*Stichting Naleving CAO voor Uitzendkrachten –SNCU*) which was set up by the social partners in the temporary work sector which negotiate the collective labour agreements that apply to this sector. The SNCU carries out inspection on its own but it is also possible to report violations, for instance, through the website (available in different languages) and can launch civil proceedings against temporary work agencies violating the collective labour agreements. However, the employees are not parties to the proceedings and the court verdicts impose a fine on the employment agency that is paid to SNCU. According to interviewees and other research the outcome of the complaints may not always be in favour of the worker and fines (for unpaid wages) are to be paid by the employment agency to the SNCU hence, the worker will not materially benefit.²⁶⁵ That said it was reported that in 2017, 30 completed verdicts against non-compliant employers and €2.5 million in back payments were paid to temporary work employees.²⁶⁶

They start investigations based on the notifications of underpayments and they see more successful back wages payment for workers [...] they say about two, three million per year goes back to the workers, but [they are] very lengthy procedures so it's also difficult.

FairWork, the Netherlands

There are some limitations of the SNCU complaints mechanism. This mechanism is, only available to regularly employed workers. In addition, not all temporary work agencies are covered by the collective agreement. In this context, the Dutch unions have noted the rise of the so-called “contracting companies” that provide workers to a third party (user enterprise), but do not fall within the scope of the Collective Labour Agreement for Temporary Agency Workers and for which hence the SNCU has no competence.²⁶⁷

264 We recognize that there may be other important sectorial specific initiatives, however we will focus in the present report on those that were identified and used by interviewees. E.g., in the Netherlands there are efforts to develop multidisciplinary engagement through public/private partnerships that focus on high-risk sectors such as hospitality, transport and banking. FRA, [FRANET Social Fieldwork Research Protecting migrant workers from exploitation in the EU: workers' perspectives, Country report Netherlands](#) (September 2017), p. 60-61.

265 Information shared with authors by La Strada International.

266 Foundation for Compliance to the Collective Labour Agreement for Agency Workers (SNCU), [Enforcing compliance to collective labour agreements, Netherlands](#).

267 ILO, [Observation \(CEACR\) - adopted 2013, published 103rd ILC session](#) (2014); Eurofund, [The Netherlands: Temporary agency work and collective bargaining](#) (2009).

▶ **Box 19. Key findings and action points – 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 lengthy formal proceedings).

Action Points

- ▶ In both countries, targeted sectoral initiatives involving government and social partners (e.g., 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.

5.8. Parallel use of different avenues for access to remedy

The avenues for accessing remedy that have been discussed above can, in some instances, theoretically run in parallel to each other. However, it emerged very strongly from the interviews that in practice criminal proceedings (if these are possible) take precedence. There are two main reasons for this.

First, procedurally there are a number of advantages for victims. If victims are recognised as such they have access to legal aid, do not have to pay court fees and do not have to confront the employer as they would in civil proceedings. Criminal proceedings tend to be faster, and practical reason for holding off on instigating civil proceedings whilst there is an ongoing criminal investigation may be that it could warn employers and run the risk of losing evidence for the criminal investigation.

Secondly, the outcome in criminal proceedings carries a significant weight. If an offender is found guilty and convicted, this appears to increase the legitimacy of the grievance/complaint of the victim and therefore influence any ongoing or subsequent civil proceedings and access to remedy under state compensation schemes. For this reason, some proceedings that might have been launched before criminal proceedings might be put on hold until there is an outcome.²⁶⁸

In practice, additional investigations or decisions [are] made once criminal investigations come to an end. When both are running at the same [or] when you file both at the same time [..]. The labour court will wait on the decision of the criminal court.

PAG-ASA, Belgium

²⁶⁸ Victims can also seek compensation for the damage they suffered via civil proceedings brought before the civil court (for example, if the victim did not intervene in the criminal trial or if the case has been dismissed). Before the civil court, the victim must provide proof of the fault that was committed. Furthermore, if a trial is ongoing before the criminal court the civil judge will have to wait for the closure of this criminal case before deciding. The civil jurisdiction is, in addition, bound to follow the criminal decision. Belgium, FRA report, Equal access to criminal justice for all victims of crimes against the person, p. 11 [on file with authors].

For example, in **Belgium**, where there are ongoing criminal proceedings the decision of the workplace accident agency FEDRIS (see Section 6.4.2) will await the ruling of the court. However, FAIRWORK Belgium did emphasise that it is necessary for the judgment to make specific reference to the occurrence of a workplace accident, otherwise FEDRIS may still suggest that the existence of a workplace accident has not been proven.

We have a case, it is still running now, where the labour prosecutor did [mention the employment of an] undocumented migrant, [the] non-payment of an undocumented migrant but did not include anything on the labour accident. Now FEDRIS says “ok, he worked there but there is no proof that he had a labour accident.” So, it is possible that if we want to get compensation for this labour accident that we still have to have a civil court ruling against FEDRIS that they have to intervene on the basis of the elements of the case.

FAIRWORK Belgium

Alternatively, where a criminal judgment does include a reference to a workplace accident, this can trigger an investigation by FEDRIS (where there has not yet been a report submitted by the worker or employer) and thus result in compensation of the worker.

In criminal cases where the charge of trafficking is not upheld, but the employer is prosecuted for lower-level offences or merely an administrative fine is imposed, the criminal verdict or the award of the fine may facilitate civil proceedings in order to claim compensation (see Section 5.2.1).

The success rate of civil proceedings can depend upon the existence of previous criminal proceedings. [It is] often an advantage when there has been a criminal case before. Even if the case for trafficking was not [upheld] at the end, it can continue for illegal employment, non-payment of salary, and there can be elements, concerning those aspects in the criminal file, but which you can use when you start your civil proceedings in front of the labour court.

PAG-ASA, Belgium

In administrative proceedings, there is precedence and weight given to criminal proceedings, but it is nevertheless possible to pursue administrative proceedings in parallel to a criminal investigation. For example, in Belgium, the Social Legislation Inspectorate will contribute to recuperate the wages of the employee either from the employer or through proceedings for violations of chain liability. However, in practice, the lack of enforcement of administrative proceedings and the emphasis on them appears to be often not an effective solution. Notwithstanding, in order to make best use in practice of all the avenues available, good knowledge of their existence and requirements is necessary. For instance, in Belgium in order to claim insolvency entitlements from an employer, the application must be filed within one year of the declaration of bankruptcy, hence it is important to initiate the claim via the insolvency fund regardless of the status of criminal proceedings so as not to lose the possibility of seeking remedy through this channel.

Again, the role of civil society support organisations or trade unions is crucial at this stage, as they can offer advice and guidance on the options that will lead to the most successful outcome for the worker.

▶ **Box 20. Key findings and action points – 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 a 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.

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

Taking into account the plethora of options for access to remedy that have been outlined and the overall perspective of the victim on remedy being focused on recuperation of wages as swiftly as possible (Section 5.1), it is important to emphasise that the research findings highlighted the key role of third-party organisations such as civil society support organisations (Section 5.9.1) and trade unions (Section 5.9.2). These organisations have a key role in facilitating access to remedy through victim support and providing information about their rights, regardless of migration status.

5.9.1. Civil society support organisations

The interviewees revealed very clearly the important role civil society support organisations play, in particular those focusing on advising migrant workers on their labour rights, including those in an irregular situation. Where there is a situation involving migrant workers, who have queries about their labour rights, FAIRWORK Belgium and FairWork in the Netherlands offer guidance and assistance on how best to assist, which is particularly important for migrant workers in an irregular situation in precarious situations.²⁶⁹ They play a vital role in particular for those victims who “fall through the cracks” so to speak and for the reasons discussed in **Chapter 5**, they are not granted or lose human trafficking victim status e.g., do not want/are not able to cooperate in proceedings, no prosecution pursued for human trafficking is launched, criminal investigation is discontinued or (in the Netherlands only) the trafficker is acquitted.

Support organisations seem to have **very good practical institutional knowledge on the options available in the country and the institutional knowledge of these organisations and the existing professional working relationships** between these organisations and inspectorates, prosecutor’s offices, and lawyers is a significant asset.

²⁶⁹ In addition to being reoriented to these organisations by human trafficking support organisations, it is also possible for workers to contact them by phone, email, social media. [FairWork in the Netherlands](#) has cultural mediators for instance, [FAIRWORK Belgium](#) is in touch with au pairs, domestic workers etc.

For instance, in cases where migrant workers in an irregular situation have workplace accidents, FAIRWORK Belgium will liaise with the appropriate service of the labour inspection to register the person for at least one day in the social security system for the person to be eligible under the workplace accident scheme.

Well, first of all, the ONSS [-RSZ] has to register the undocumented migrant at least for one day in their system as being a worker for this company. They don't do that automatically, we will have to beg them to do that, and then FEDRIS has to judge "ok, this is a labour accident" and will intervene.

FAIRWORK Belgium

This is a crucial result for the victim that he or she could never arrange by her/himself. Furthermore, FAIRWORK Belgium arranged with the immigration office, that those migrant workers in an irregular situation who are supported by FAIRWORK Belgium (are in the middle of civil proceedings in cases of a labour accident) can be released from closed detention centres. These agreements are dependent on the professional networks and hence not accessible to the victim without the support organisation.

If we want something more, it's the law that has to change. [...]If [immigration office contact] retires, and somebody else comes, it could be that all those agreements on the labour accidents all disappear.

FAIRWORK Belgium

This knowledge allows civil society support organisations to advise and reflect on the different options for a victim and try to set realistic expectations for them. It also helps to find the most appropriate solution for the person, taking into consideration his or her circumstances and also the evidence available. Such organisations are aware of the high threshold to prove human trafficking for instance, and will take this into consideration when deciding whether or not to participate in criminal proceedings, launch civil proceedings, or engage in informal negotiations with the employer etc.

We guide the process in that sense. We assist them [by] giving them information about the different options that are there and the possible outcomes, and if there a meeting has to be organised to file a complaint or to get an intake [interview], we do try to organise that here at our office. And we try to prepare the person for what he or she can expect.

FairWork, the Netherlands

Where a potential victim initiates contact with victim support organisations or trade unions and is still in employment, they can also **facilitate the evidence gathering process**. The evidence that is gathered/ available, will often determine the most appropriate pathway to remedy, whether it be through judicial (criminal, civil, administrative), non-judicial or informal mechanism and indeed the likelihood of success:

This is a very important aspect. We will really look together with the worker on what we have [as] of proof and what we can still collect [as] proof because every case falls or stands with the proof we have.

FAIRWORK Belgium

Evidence gathering is particularly important for victims who are not detected at their workplace, as it is particularly difficult to **prove an employment relationship**. As many victims do not have employment contracts this is not an easy feat. FAIRWORK Belgium provides advice to the worker as to how/which evidence should be gathered if the worker is still working for the employer. Where it is safe for the worker, this might include advice to return to the workplace to collect as much evidence as possible.

For us, certainly when it is a grave labour accident, very often a lot of employers are still willing to talk to negotiate with the worker. At that moment we will advise the person - if he thinks it is still safe - to meet this employer and try to tape or film the whole conversation.

FAIRWORK Belgium

If it is about wage theft, the situation between the worker and the employer is already so high that they don't talk anymore, or the employer has erased or blocked the number. Very often they don't work there anymore when they come to us, so collecting proof at that point is too late.

FAIRWORK Belgium

The typical types of evidence collected are correspondence between the employer and the worker (e.g., through social media/text messages/ WhatsApp messages, recordings of phone conversations) and other documents that demonstrate that the worker was at the workplace (e.g., delivery notes of vendors). It can be particularly useful to take pictures of the licence plates of the employer, as – in most cases - the victim often only knows their first name and does not know the address of the workplace.

We advise them to keep a record of the hours worked, for instance. That's very important. Now I start advising people to install google maps with the tracing, so that they can make use of location to prove that they have been to the [factory].

FairWork, the Netherlands

Civil society support organisations will also **accompany victims through proceedings**. For instance, FairWork in the Netherlands, will continue to assist workers who are being given access to shelter and accommodation, to ensure that their compensation claims are correctly filed:

We try to keep in contact with the client with regard to the compensation claim because we want to make sure this option isn't disregarded, by the lawyer or the social workers [who] do not always have full knowledge of all the different options that are there because sometimes you need [to be] creative.

FairWork, the Netherlands

While both FAIRWORK Belgium and FairWork in the Netherlands cannot start civil or criminal proceedings on behalf of victims; they will assist with the preparation of a complaint to a labour inspection or labour prosecution (see Section 5.5.1) they will follow them closely and in some instances accompany victims to court hearings.

We [often] go with them and sometimes in a court case for instance, the lawyer arranges official translators.

FairWork, the Netherlands

► Box 21. Despite central role FAIRWORK Belgium are not a designated third-party

While under the Employers' Sanctions Directive 2009/52/EC (see Section 3.4) third parties should be designated to represent irregularly staying third-country nationals with regard to their wage and social security claims, it is notable that the organisation FAIRWORK Belgium has not been designated as such a third party (despite Royal Decrees that remain in draft version). For a Belgian labour prosecutor, this situation was puzzling as FAIRWORK Belgium is one of the most relevant organisations in helping victims filing complaints in civil and administrative proceedings to claim compensation.

Indeed, there is "FAIRWORK Belgium" which is there to help these people. My solution would be to establish more direct links with this organisation, and to have- and this is perhaps wishful thinking, because it will have to be written down in a binding document at some point - a reference to FAIRWORK Belgium when we come across people who are illegally [present] on the territory and who are working. Actually, to do the same thing as you do with "Surya", "PAG-ASA" and "Payoke" - but with "FAIRWORK Belgium". On the other hand, "FAIRWORK Belgium" is not well subsidised, is not well known, and there, there is a significant gap. (Labour Prosecution, Belgium)

Despite the very important role of victim support organisations, the interviewees emphasised that such organisations remain severely underfunded. Giving the estimated number of potential victims that need assistance, this is a huge obstacle to their effective access to remedy.

5.9.2. Trade unions

Trade unions are key labour market actors and represent millions of workers in both countries. They can also play an important role in detecting and supporting access to remedy for potential victims of human trafficking. However, while there was some recognition for the role trade unions can play in supporting potential human trafficking victims amongst the interviewees for this study, the visibility of trade unions in the narrower context of human trafficking in both countries appears not to be well developed. Practitioners from support organisations, the labour inspectorate and the prosecution interviewed for this study reported not working with trade unions very much.

There is the impression - the feeling - that the trade unions are interested in protecting workers who are in a legal working situation, with a contract, etc., with social benefits. From time to time, there are statements about social fraud ... But on trafficking in human beings, it is very, very weak.

Labour Prosecution, Belgium

Several interviewees suspected that the limited engagement of trade unions on the issue of human trafficking had to do with the fact that a main focus of trade unions appears to be serving their members. Many of the potential victims are in an irregular situation and are not affiliated to a trade union. As indicated in Section 4.1, the research findings did reveal, some pockets of promising practice that exist in the detection of potential victims. A notable example is the Dutch FNV-VNB union's engagement in the transport sector, which has had cross-border impact including better cooperation with the Belgian labour inspectorate. In a recent example, the FNV-VNB has cooperated with the prosecutor's office to support remedy for potential victims (see Box 22 below).

► **Box 22. Spotlight on trade union cooperation with prosecution in case of human smuggling involving exploitation in the transport sector**

In one instance, the FNV-VNB had investigated and detected several possible cases of human trafficking in the transport sector. As the prosecutor chose to prosecute for human smuggling instead of human trafficking, potential victims were not eligible for the specific rights and protection available to human trafficking victims. Following this decision of the prosecutor, the FNV-VNB has advocated for potential victims to be included as injured parties in the criminal proceedings to be able to at least claim back their wages. The FNV-VNB has also been assisting the prosecution by collecting evidence and calculating the wages of the potential victim.

In the case that the prosecutor will prosecute for human smuggling and not for human trafficking, they lose their status and they have nothing, and in this case, for the first time, we try to make the workers who are victims of smuggling a formal part of the criminal trial, with their wage claims. At the request of the prosecutor, we calculated the wage claims of these workers in preparation for a criminal charge on trafficking or smuggling. This is something new. (FNV-VNB, the Netherlands)

While in both Belgium and the Netherlands, trade unions provide a range of important services, such as legal advice and support, these services are usually only available to trade union members. As many of the (potential) victims are not affiliated to a trade union, they typically do not benefit from these services. Importantly, the Brussels branch of the CSC-ACV trade union offers a weekly legal helpdesk. It receives complaints from and provides advice to any worker, including non-members and migrant workers in an irregular situation. To allow all workers to benefit from its services, the Belgian CSC-ACV provides a special membership for €4 per month for migrant workers in an irregular situation. The CSC-ACV legal team may provide legal assistance to members whose case has enough evidence to start legal proceedings. The representative from the CSC-ACV referred to a case in which the union provided assistance to a potential victim – who was not formally identified as a trafficking victim – to join proceedings as a civil party and thus be eligible for compensation.

[Y] filed a complaint to be recognised as a human trafficking victim. PAG-ASA told him ‘no it’s not possible’ but in fact it was a matter of opinion, and for us it was [a case of trafficking]. We couldn’t accept that situation, I mean it was really an awful case. [...] We also accompany some cases in [criminal courts for civil parties]. And so [Y] is a civil party in the case and is followed by a lawyer who’s paid by the trade union.

CSC-ACV Brussels, Belgium

If I see that there is enough proof and I think it could go to the labour prosecution, then I’ll send them [the worker] to the professional pillar of the CSC [service juridique de la CSC].

CSC-ACV Brussels, Belgium

A common obstacle CSC-ACV Brussels reported is that often workers cannot prove their employment relationship or their exploitative working conditions. In such cases, where proceedings are likely not to stand a chance the CSC-ACV Brussels offers such workers the opportunity to join its networks and become engaged in advocating for policy change. For instance, the CSC-ACV Brussels is actively engaged in organising migrant workers with or without a residence permit (*Comité des travailleurs.euse.s migrant.e.s avec et sans papiers*) and has a specific network for domestic workers (including those without residence permit) (*la Ligue des travailleuses domestiques*).²⁷⁰

Due to limited resources, however, cases in which trade unions appear to provide active **support in proceedings are particularly those that are considered to be of strategic importance**. Such cases may exemplify certain structural problems in view of the trade union and are expected to lead to policy change or a change in regulation.

[on whether they often represent a case][...] Not so very often. Because it’s also a matter of priorities, I mean as a trade union we want to change the law.

CSC-ACV Brussels, Belgium

We are looking for a specific case that can show the public [and] can also show the European Union, that there is a problem, with the sanctions directive and so we want, through a specific case, [to] tell them.

CSC-ACV Brussels, Belgium

In both countries, **trade unions can lodge complaints and start legal proceedings on behalf of potential victims**, though there are indications that this does not happen frequently.²⁷¹ However, the Dutch FNV-VNB reported that in the road transport sector, they brought cases to the attention of the prosecutor. In many of those cases the workers were in very precarious situations and hesitant to engage with authorities and lodge complaints (see also Section 4.1 on detection).

²⁷⁰ For more information on the action of the CSC-ACV see [Travailleur.euse.s migrant.e.s avec et sans papiers CSC Bruxelles](#).

²⁷¹ FRA (2015), *supra* n. 87, p. 62.

In most of the cases, the workers are not ready for it yet, and we are also not sure how the authorities [will] deal with it, so in those cases we do a charge ourselves. So, we do a criminal charge on several areas of the criminal law, it could be human smuggling, trafficking, falsifying documents and other types of fraud.

FNV-VNB, the Netherlands

Interviewees identified trade unions as important actors in particular when it comes to **organising class actions** against fraudulent employers in **civil court**. In these cases, trade unions put together a file of an individual worker that is representative of the situation of the majority of workers in a company. Trade unions can also play a **useful role in pursuing the compensation** after it has been awarded by a court.

Moreover, trade unions may **provide support in direct informal negotiations with employers** to help potential victims to claim back their wages. They do so for instance by calling the employer, sending a formal letter or in some cases threatening legal or collective action.

I phone the employer and I speak with him or with them, explaining that sanctions directive [...], but you know [...] in a very technical way, and a large part of them don't know you know the law and so on. And I tell them that they have two weeks to pay otherwise I will send the social inspection and so on. I [then] write to them because, of course, what I tell them is true, there is a sanctions directive, I can call the social inspection and so on.

CSC-ACV Brussels, Belgium

In the experience of the interviewees, trade unions can be very effective in such informal negotiations. In addition, **trade unions support potential victims in their interactions with government authorities**. A Belgian trade union representative gave an example where she was asked to seek the release of two migrant workers in an irregular situation who had been detained by the police after trying to file a complaint about their exploitative working conditions. However, because of their irregular migration status, the police detained them rather than following up their complaint:

I went [twice] to the police in Molenbeek, because they detained two members of one of the collectives [union organised networks for undocumented workers] , [...] and why [did they go to the police in the first place]? Because they had been beaten [and] they wanted to file a complaint against the employer.

CSC-ACV Brussels, Belgium

Moreover, trade unions in both countries are **actively involved in organising campaigns, advocacy events and demonstrations to raise in awareness amongst the public and policy makers** and highlight particular cases of exploitation to trigger legal and policy change. In the most recent resolution²⁷² of the CSC-ACV Congress, the union calls for the regularisation of migrant workers in an irregular situation that have found employment in Belgium and have been working for a certain time. The resolution also calls for effective complaint mechanisms for migrant workers at EU level in cases where their rights are not respected.

272 CSC, *Lignes de Force #queltravaildemain #22* (Congrès National 2019), pp. 23-25.

► **Box 23. Key findings and action points – the role of third-party organisations in facilitating access to remedy**

Key findings

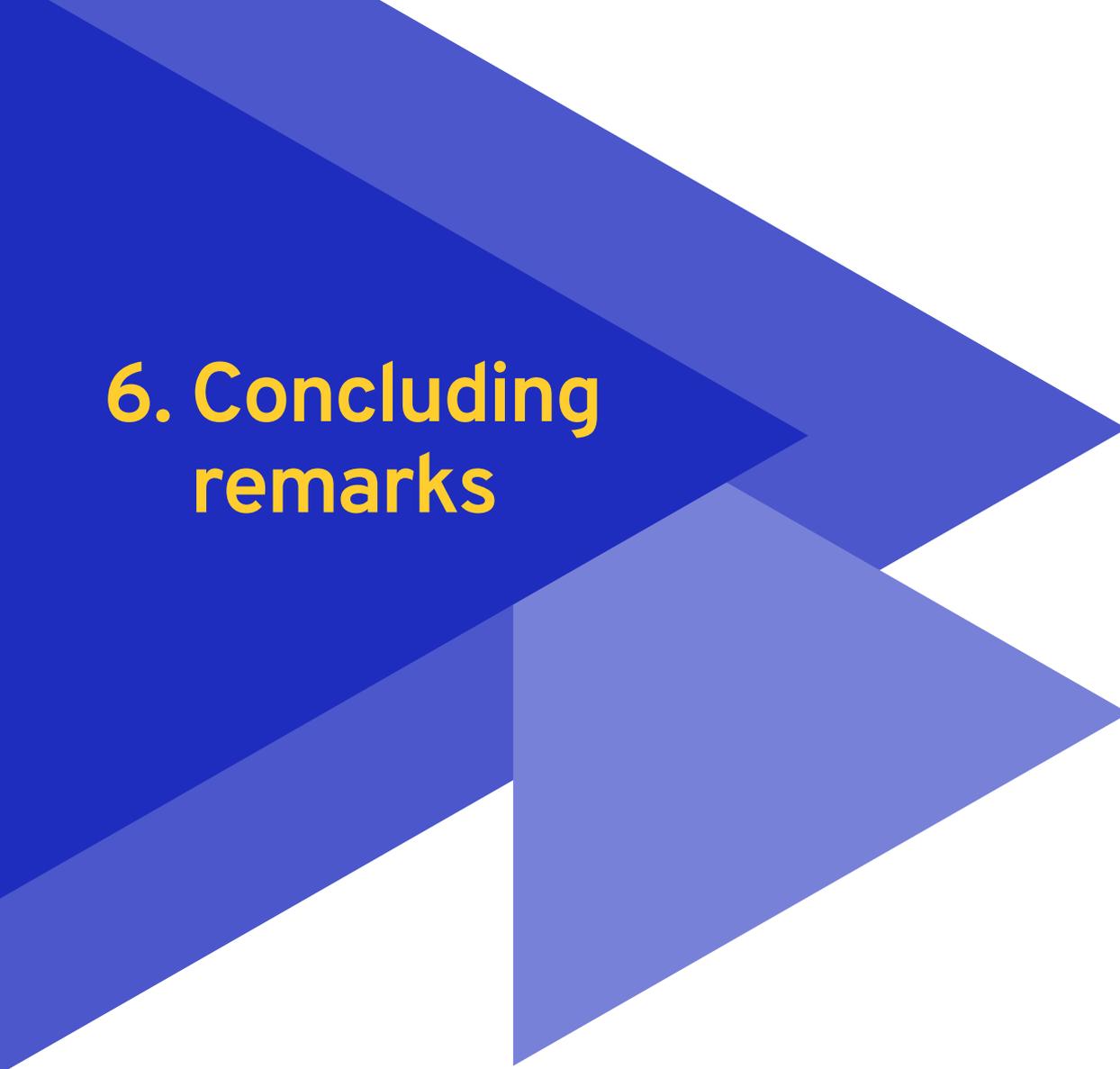
- Access to effective remedy for individual potential victims appears to be high on impossible without the advice and guidance of civil society support organisations or trade unions.
- Specialised support organisations (for human trafficking victims) and civil society organisations have amassed key institutional 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 (e.g., Dutch FNV-VNB foundation in the transport sector and 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

- 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 migrant workers in an irregular situation are not detained and can have access to benefits).
- 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 out-reach with workers in the transport sector facilitates the detection victims of human trafficking and provides support with their complaints.

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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6. Concluding remarks

Overall, we found that in both countries, multiple mechanisms exist that theoretically allow victims and potential human trafficking victims for the purpose of labour exploitation to access protection and remedy, including compensation and/or possibilities to claim back wages. We also noted that in both countries, there are a number of very committed professionals that aim to support victims in their access to remedy and protection across the different professional categories interviewed and whose commitments undoubtedly make a difference for the victims. However, the practitioners we interviewed also pointed to a number of obstacles that impede effective access to these remedies by many (potential) victims in practice. In this chapter, we summarise our key findings, highlight good or promising practices and provide some recommendations for actions in both countries. We hope that these findings and recommendations can inspire action and reflection in other countries as well.

Our findings can be categorised into three broad themes. First, making existing rights of access to protection and remedy for trafficking victims more effective; second, enabling effective complaint and compensation mechanisms for all workers who are not identified as human trafficking victims, and third tightening labour market governance and strengthening enforcement of labour law.

6.1. Making existing avenues for protection and remedy more effective in practice for human trafficking victims

Both countries have solid institutional frameworks that ensure access to protection and remedy for human trafficking victims.²⁷³ Notwithstanding these existing institutional set ups, our research reveals that there is a need to **strengthen and better enforce the respective anti-trafficking framework in both countries.**

Investing in training and awareness raising to improve detection rates of potential victims

Both countries need to improve the detection rate of victims (Chapter 4). As such there is a need for continued training and awareness raising amongst frontline professionals such as labour inspectors and police to ensure staff turnover or internal reforms do not cause any loss of expertise. On a positive note, an experienced Belgian labour inspector noted that there is now an increased awareness for the need of training to a degree he had never experienced in his 20 years of service.

Given the fact that human trafficking for the purpose of labour exploitation is often a hidden crime, it may be difficult to identify a trafficking situation at first glance. The thematic programme on labour exploitation (Box 3) 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. The approach of the Dutch labour inspectorate of working together with a variety of actors such as municipalities to carry out joint

273 See e.g., ILO Committee of Experts, Direct Request to Belgium on C29 (2018), ILO Committee of Experts, Direct Request to the Netherlands on C29 (2018); GRETA (2018) *supra* n.23; GRETA (2017), *supra* n.23. See also PICUM (2020), *supra* n.15, pp.3-4.

inspections is positive to better detect potential victims in high-risk sectors and helps raise awareness amongst those actors, too (e.g., construction and agriculture). To improve detection rate of victims this type of awareness raising should also be extended to services and professions, which might come into contact with potential victims (such as hospitals, schools, labour lawyers).

Ensuring comprehensive information gathering at the detection stage

Given the importance of information and evidence gathered in the detection/early investigation phase, it is of key importance that detailed information on the work environment, the role of the person and importantly the contact details of potential victims are noted down. Having the **correct contact details** of potential victims is also important to be able to inform them of whether proceedings are launched and if this is the case, keep them informed about the state of play, the outcome and the procedure for accessing any compensation (e.g., the DCK-CDC in Belgium). Interviewees reported difficulties in staying in contact with persons who returned to their country of origin. More efforts should be made to maintain contact and to ensure that the collected contact details take into consideration the mobility of many workers.

Importance of providing assistance and information to victims

The study emphasises the importance of providing potential victims with information and legal assistance at an early stage to assess the different possibilities for receiving protection and remedy.²⁷⁴ Particularly, the legal assistance of a lawyer is beneficial as they can advise as the case proceeds, request access to the potential victim's file and ask for complimentary investigations. In the case of the Netherlands, it would be beneficial to permit potential victims to speak to a support organisation before or have representatives of such organisations present during the informative interview. It was suggested that the reassurance provided might lead potential victims to be more willing to share important details of their situation.

Better implementation of the unconditional reflection and recovery period

The unconditional reflection and recovery period for potential victims of human trafficking in situations in which indicators of exploitation are present must be better respected and implemented. The latter is particularly pertinent to potential victims without residence status who are identified during workplace inspections as they are at risk of coming to the attention of immigration authorities. It is important that considerations about future criminal investigations do not influence the decision whether or not to grant the reflection and recovery period.

Unconditional access to support and assistance

In both countries, access to protection and assistance provided by the National Referral Mechanisms should be brought in line with international and regional law and thus be decoupled from cooperation in criminal proceedings²⁷⁵ (Section 4.3). A promising practice that has emerged from the study is the Dutch pilot model uncoupling victim identification from access to support and assistance. It received a positive evaluation and, as such, could be reconsidered. In the Netherlands, more efforts should be made to ensure long-term access to accommodation for victims after the recovery and reflection period and improve capacity to provide accommodation in case larger groups of potential victims are discovered.

Tackling the high threshold of human trafficking when seeking to successfully prosecute a case for human trafficking

It is clear that human trafficking is a serious crime and not all severe labour law violations will amount to a situation of human trafficking for the purpose of labour exploitation. In both countries, interviewees reported a high threshold applied in practice to prosecuting human trafficking offences as judges and prosecutors apply a narrow definition of this crime (**Chapter 3**). This appears to be an obstacle to

274 In Belgium, the right to assistance and information early on was a key finding of the report of the Belgian National Rapporteur (Myria) in their 2019 annual report: See Part 2, Chapters 2 and 3 Myria (2019), *supra* n.89.

275 In the Netherlands, for third country nationals, technically it is the B8 status that is conditional upon cooperation with authorities.

victim identification.²⁷⁶ The interviewees in our research indicated that **frontline actors such as police, labour inspectors and civil society support organisations anticipate this threshold when detecting or advising on their options.**

The high threshold applied in practice can have particularly detrimental effects for victims of group cases. Only those victims who are named on the indictment are entitled to claim compensation in criminal proceedings and where multiple victims are found, the prosecutor only includes those with the strongest evidence on the indictment (as seen in [Chapter 5](#)). Hence, some victims are deprived of their right to remedy and protection. This is particularly severe for third-country nationals in an irregular situation as they no longer have the possibility to apply for a permanent residence permit following proceedings. Both countries should explore what types of protection and remedy could be made available to those victims who have been excluded from the indictment but whose situation is comparable to those who have been included. Given the additional rights attached to a human trafficking victim status and in light of the high threshold of human trafficking, it is very positive that in both countries victims in an irregular situation can apply for a permanent residence permit, if proceedings have been going on for some time (see Section 4.5). In Belgium, **victims retain their human trafficking victim status**, regardless of the outcome of the prosecution. For victims in an irregular situation this is a crucial element that allows them to redesign their life.

As prosecutors' and judges' interpretations of the human trafficking offence is so critical, it is important to include human trafficking in their training curricula and promote and encourage exchanges of these professions within countries and across EU Member States. This could include exchanges on recent case law and reasoning for the awarded compensation. A regularly updated good practice guide for judges and prosecutors on case law in the EU could equally be a useful tool. Potential victims whose victim status is 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 contributions).

Ensuring adequate resources for prosecutors and labour inspectors

A lack of resources and time constraints make it very difficult for competent investigative authorities including prosecutors, or labour inspectors to fully investigate and collect evidence for every suspect case. This may lead to many victims not receiving their entitled support and access to remedy. A concern here is that in recent years, in both countries public resources have been diverted away from counter trafficking to ensure internal security following terrorist attacks²⁷⁷ and more emphasis has been placed on immigration and human smuggling.²⁷⁸ This has further reduced the already limited resources for prevention/combating of human trafficking and according to a Belgian specialised labour prosecutor has had a detrimental effect on the work of specialised prosecutors. In Belgium, during the COVID-19 pandemic labour inspectors focused very much on compliance with the COVID-19 measures, which according to some interviewees, had a detrimental effect on the detection of victims. In order to be able to follow up cases that present indicators of human trafficking, **prosecutors and labour inspectors must be adequately funded and have enough resources** to fully investigate potential trafficking situations. It is positive in this regard that in the Netherlands, in 2017, an additional €50 million was made available for the SZW Inspectorate by the Dutch Government, to recruit some 300 more staff members and expand its operations. Approximately 75% of the additional funding was used to expand labour inspections and criminal investigations.²⁷⁹

276 E.g., in the first GRETA country report for Belgium, GRETA expressed some concern over the definition, however in its latest report came to the conclusion, that there are issues with the application of the definition see GRETA (2017), *supra* n.23, p.37; The remarks from GRETA on overly broad definition in Belgium were reported on in the 2020 TIP report, US State Department (June 2020), *supra* n.23, p.102.

277 Myria (2019), *supra* n.89, p.35 & p.63. In the Netherlands, following the MH17 disaster law enforcement resources were diverted: Elsevier Weekblad, [MH17-proces eist hoge tol van politie en justitie](#) (2020).

278 National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children, [Monitor Mensenhandel. Cijfers mogelijke slachtoffers 2011-2015](#) (30 August 2016).

279 GRETA (2020), *supra* n.64, p.15.

Improving mechanisms to effectively recuperate compensation once awarded

Efforts should be made by both countries to improve access to effective compensation for human trafficking victims. In both countries, there are formal avenues to claim compensation (see Section 5.6). Where compensation has been awarded, its recuperation is very difficult if the victims themselves have to enforce compensation orders. Efforts to recuperate compensation are further hampered by the fact that often the perpetrator has disposed of any assets in the meantime. The **advance payment option of compensation awarded by the state** is a good practice in the Netherlands (see Section 5.2.1) as it shifts the burden of recuperating the compensation awarded from the victim to the state. It should be considered in other countries as well. Furthermore, the confiscation of assets and thorough financial investigations in the initial stages of a human trafficking investigation should be improved to ensure that if there is a conviction, assets can be used for compensation claims.

As outlined in previous chapters, both countries have **state compensation funds** that are open to victims of human trafficking (see Section 5.6.1). However, whereas the Belgian fund requires the exhaustion of other remedies (e.g., civil proceedings) in the Netherlands, this is not the case. Hence the threshold to receiving effective compensation is lower. In Belgium, a particular obstacle for human trafficking for the purpose of labour exploitation, is the condition of an “intentional violent act”, which is often not evident in a cases of severe labour law violations. In the Netherlands, the recent policy changes facilitating access for human trafficking victims for the purpose of labour exploitation, appear to have the potential to meaningfully increase successful applications from human trafficking victims for labour exploitation.

Importance of multidisciplinary cooperation

Interviewees in Belgium and the Netherlands reported very good cooperation between the different actors in the National Referral Mechanism and support organisations. In both countries, mechanisms exist that bring together the different actors and allow them to exchange information. This seems to benefit individual cases as it allows for their particular situation to be accommodated through informal channels (see Section 4.4). In the study several examples have been identified of emerging cooperation between labour inspectors and prosecutors and the trade unions in the transport sector (notably FNV-VNB) in both Belgium and the Netherlands (Section 4.1 and Section 5.9.2). These could be examined in more detail at a later stage to see whether any lessons can be learnt that could be applied to other sectors.

Collecting better and more comparable data

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 when collecting this data.

6.2. Enabling effective complaints and compensation mechanisms for potential human trafficking victims for the purpose of labour exploitation

In the law, the distinction between victims of human trafficking for the purpose of labour exploitation and those persons whose situation does not amount to such a crime is absolute and very clear-cut. In reality, the distinction between these two situations is much more nuanced and can be thought of as a continuum. At one extreme of the continuum there are decent working conditions and at the other extreme there are situations of human trafficking for the purpose of labour exploitation, with labour violations increasing in severity moving across it.

In the Netherlands, an experienced labour inspector – based on his personal long experience carrying out inspections – indicated that **there might be thousands of workers in a severe situation of labour law violations on this figurative continuum**. Such workers, including potential human trafficking victims, are often very reluctant to report their situation (see Section 4.1) as **they have everything to lose by taking a chance and cooperating and/or reporting their situation**. If they are not detected and identified as a potential human trafficking victim they risk losing their job, income, housing and stay in the country. This risk may be aggravated by the fact that for instance, in Belgium labour inspectors have the obligation to report migrant workers in an irregular situation to authorities which can be problematic and reiterates that training of inspectors is all the more important. In this context the ILO Committee of Experts has repeatedly observed that *“the main objective of the labour inspection system is to protect the rights and interests of all workers and to improve their working conditions rather than the enforcement of immigration law”*.²⁸⁰ While in the Netherlands there is no formal reporting obligation for labour inspectors, in practice checking compliance of employers with the obligation not to hire third country nationals in an irregular situation, requires the presence of police to check the identity of workers. The AVIM police units accompanying the labour inspectors are specialised in trafficking and immigration matters. Hence if migrant workers in an irregular situation who show no indicators of trafficking are detected, they will be reported to immigration authorities. Ideally, the AVIM immigration mandate would be decoupled from its anti-trafficking competence.²⁸¹ The possibility to verify employers' obligation with the above law by using the employer's liability (*Werkgeversverplichting*) under Article 15a of the Aliens Employment Act (*Wet Arbeid Vreemdelingen*) (see Section 4.1.1) could be used more in practice.

Both countries offer **multiple formal avenues for claiming remedy (such as back wages and social security contributions)** for potential victims and (migrant) workers (in an irregular situation). However, practitioners reported these to be fraught with obstacles and very difficult to use in practice. **This begs the question of how governments and authorities can make these existing avenues more effective.**

Facilitating and expanding possibilities to lodge complaints

While potential victims, including migrant workers in an irregular situation, have the right to claim back their wages and social security contributions there is currently no formal support provided to them for this purpose i.e., accommodation or even the guarantee that they can stay in the country until their complaint or resulting proceedings have had an outcome. Better support for reporting and lodging complaints is needed for migrant workers (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 lodge complaints. For example, a multilingual brochure could be developed for them which includes contact details of organisations where they can get support. If such workers do make complaints these should be taken seriously by the authorities. The intention of the Dutch labour inspectorate to refer underpaid workers to lawyers to help them claim back their wages is positive in this regard.

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. When wages are recuperated but a worker does not have access to bank account, it should be possible for them to receive it, even if they have returned to their country of origin.

Facilitating access to compensation in civil proceedings

A common obstacle to participation in civil or labour proceedings for potential victims, in particular migrant workers in an irregular situation, are costs, duration and absence of legal aid which should be tackled. At the same time there appear to be possibilities to improve access to compensation in civil proceedings, which could be applied more systematically. For instance, in Belgium where employers are fined for non-payment of social security contributions in proceedings, the employer should also be ordered to pay the arrears of social security contributions in the same judgment. This prevents the

²⁸⁰ ILO, [General Survey Labour Inspection](#), (2006), paras 78 and 161.

²⁸¹ GRETA (2018) *supra* n.23, para. 118.

worker from having to lodge additional proceedings for compensation on the same case based on the fine of the employer. Similarly, in Belgium prosecutors could include more routinely the charge of non-payment of wages on the indictment as this would allow workers to claim them rather than having to launch separate civil proceedings in order to claim them. Another example for both countries would be for judges to apply the three or six months' presumption of an employment relationship derived from transposition of the Employers' Sanctions Directive when determining due wages.

Offering protection for the duration of complaints/proceedings

Migrant workers in an irregular situation should be protected during the period their complaint is examined or proceedings are ongoing. Both countries should consider making use of the temporary residence permits provided for in Art 13(4) of the Employers' Sanctions Directive granting workers leave to remain during proceedings to claim back due wages and social security contribution.²⁸² While migrant workers in an irregular situation are not reported to immigration authorities when they participate in labour/ civil proceedings, they are not protected from deportation when they come to the attention of immigration authorities in another way while proceedings are ongoing. The case of [X] (see Section 5.4) is a case in point, even though the judge found in his favour he was not only held in detention during the proceedings but even after the verdict.

Replicate mechanisms that are proven to facilitate the effective access to remedy

Interviewees identified a few mechanisms that seem to facilitate the effectiveness of remedies available. Some of them exist locally and could also be applied in other countries. The so-called **"on the spot" payments** of the Social Legislation Inspectorate in Belgium fall into the category of existing measures that can be considered a good practice. Regardless of how the case continues, the potential victim at least receives the 3-months presumption of his or her wages.²⁸³ It should also be noted positively, that migrant workers in an irregular situation can file complaints to the labour inspectorate which are treated confidentially in both countries. As referred to in the section on workers' perspective, receiving their due wages is a key concern of workers.²⁸⁴ The **Deposit and Consignment Fund (DCK-CDC)** is also an important tool in this regard as it allows workers without a bank account to receive funds and to transfer them to be withdrawn to their country of origin and has been deemed to be effective by some Belgian interviewees. Third, in the Netherlands, it appears that there is scope for labour inspectors to use more the mechanism **to claim underpayment** (see Section 5.5.2) and ensure the employer pays any due wages. A Dutch labour inspector emphasised the need here to raise more awareness amongst his colleagues on the potential significance this has for the potential victims.

In both countries, mechanisms exist that allow potential victims to claim **compensation in cases of workplace accidents and insolvency**. It is very positive that in **Belgium** any worker can claim invalidity damages when there have been workplace accidents and that practical solutions have been found in case migrant workers in an irregular situation have returned to their country of origin (see Section 5.6.2). This practice could be of interest to other countries as well.

Strengthen civil society support organisations and trade unions

What emerges very clearly from the research is that the role of civil society support organisations and trade unions in supporting potential victims is key and their capacity and resources should be strengthened. Civil society support organisations cannot follow up all cases with severe violations or indicators of trafficking due to a lack of resources. **Without assistance and support from specialised support organisations or trade unions**, it is nigh on impossible for potential victims to use the existing avenues for remedy in the two countries. In both countries, the civil society support organisations had a

²⁸² Belgium considers to have implemented this provision as severe economic exploitation falls under their definition of trafficking in human beings. See PICUM (2015), *supra* n.59.

²⁸³ To be very clear it is not suggested that instead of making more efforts to detect victims of trafficking they should just get paid for three months.

²⁸⁴ Of course, if there is a suspicion that the persons are potential victims of trafficking they should benefit from the reflection and recovery period.

clear understanding of the different options for remedy available in the respective systems and pointed out that in their experience other actors often are not aware. In Belgium, this concerns in particular the role of FAIRWORK Belgium. All of the Belgian interviewees recognised the important role this organisation plays in advising and supporting migrant workers in an irregular situation to claim their back wages and social security contributions. A strong recommendation that emerged was for FAIRWORK Belgium to be legally mandated as a designated third-party in accordance with Article 13 of the Employers' Sanctions Directive.

In general, trade unions should be encouraged to strengthen their engagement with the anti-trafficking actors, including detecting victims and supporting access to remedy. Strengthening their outreach to migrant workers in an irregular situation would seem to be a key element for such an approach. The CSC-ACV resolution on the subject of migrant workers in an irregular situation is important in this regard and the CSC-ACV provision of a reduced membership fee to migrant workers in an irregular situation is very positive as it enables access to legal support services the union offers.

6.3. Tightening labour market governance and better enforcement of labour law

The research revealed a need to better enforce existing labour laws and rights to ensure respect for decent working conditions and a level-playing field for employers. This concerns the effective implementation of applicable international law, the full transposition of EU Directives and the implementation of existing national legislation and collective agreements, including the enforcement of sanctions in order to dissuade fraudulent employers. Furthermore, an increased emphasis should be placed on making administrative sanctions imposed for violations of labour law benefit the workers.

Better enforcement of existing laws and sanctions

An important piece of EU legislation that was referred to by several interviewees is the **Employers' Sanctions Directive**. Both countries have transposed the directive, but from the interviews it emerged that there is a need to raise awareness for its provisions amongst practitioners. This concerns in particular Article 6(3) of the directive which allows for a presumption of an employment relationship of three months (six months in the Netherlands). Our research shows that this presumption is not yet consistently applied and used in practice by labour inspectors, prosecutors and judges. 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). Furthermore, there are provisions of the Employers' Sanctions Directive that are not yet enforced in both countries (see *supra*). For example, it is not possible to receive a temporary residence permit for the duration of proceedings as foreseen in the Directive.²⁸⁵

Trade unions and civil society also referred to the need to **better apply existing regulations in certain sectors**, such as in construction and road transport (e.g., Driving Time Regulation²⁸⁶) and the guidance given by the Court of Justice of the European Union²⁸⁷ (see Section 5.6.2). Such judgments and guidance should be applied at the national level in all EU Member States. Better regulation of the temporary work agency and liability when those go insolvent in the Netherlands appears to be necessary.

²⁸⁵ Belgium considers to have implemented this provision as severe economic exploitation falls under their definition of trafficking in human beings. See PICUM (2015), *supra* n.59.

²⁸⁶ Regulation (EC) No 561/2006 of the European Parliament and of the Council of 15 March 2006 on the harmonisation of certain social legislation relating to road transport and amending Council Regulations (EEC) No 3821/85 and (EC) No 2135/98 and repealing Council Regulation (EEC) No 3820/85 (Text with EEA relevance) – Declaration OJ L 102, 11.4.2006, p. 1–14.

²⁸⁷ Such as in 2017 in the case C102-16 [Vaditrans BVBA v Belgische Staat](#) on weekly rest periods of drivers. the *Tümer* case C 311/13.

Moreover, it is important to ensure that the **imposition of sanctions is sufficiently dissuasive for fraudulent employers**. In the Netherlands, the SZW Inspectorate noted that in cases of severe labour exploitation current sanctions appear not to prevent employers from re-engaging in the same fraudulent behaviour. In the framework of the thematic programme on labour exploitation, the Dutch SZW Inspectorate aims to make more use of its full toolbox. This might include applying more frequently the measure of **temporarily closing down companies**, as this is expected to have a more dissuasive character. Finally, one Dutch interviewee from the labour inspection suggested that it might be more effective to prosecute more frequently such fraudulent employers for small criminal offences. This would entail a higher reputational cost for employers and may even preclude them from participating in tenders for public procurement and hence, potentially have a strong dissuasive effect.

Make administrative sanctions also work for the victim/worker

In both countries, possibilities exist for potential victims/workers (even those in an irregular situation) to launch civil proceedings against their employer. What emerges clearly, however, is that a migrant worker in an irregular situation, unfamiliar with the legal system and the local language is in no position to take on his employer in lengthy and costly civil proceedings on his or her own (Section 5.4). It may therefore be worth exploring how administrative fines imposed on employers for underpaying or not paying workers can (at least in part) be better used, to directly materially benefit those workers. This would respond to the importance many potential victims attach to receiving their unpaid wages as quickly as possible (Section 5.1).²⁸⁸ The “**on the spot payment**” method used by the Belgian Social Legislation Inspectorate already goes some way to adopting an approach that is centred on the immediate needs of the worker.

More generally, interviewees from both countries highlighted the imbalance between the recuperation of financial assets that are retained by the State and fulfilling the rights of potential victims or workers to effective access to remedy. In Belgium, prosecutors referred to existing mechanisms by the state to effectively recuperate outstanding fines imposed on companies. These seem to be very effective and could provide inspiration. A victim-centred approach should be embedded at all stages of the legal proceedings, with the seizure or confiscation of assets during initial searches of business premises, the inclusion of offence on indictment e.g., non-payment of wages that ensures recuperation of back pay (Section 5.1), and the recuperation of debts following insolvency and seizure of financial assets in supply chains.

To conclude, both countries do provide victims and potential victims of human trafficking with important rights. There is a need to enable them to effectively claim in practice including by providing the support needed to navigate the different avenues. **Overall, when it comes to tightening labour market governance and enforcing labour laws, workers’ rights to protection and access to remedy for labour violations and poor working conditions suffered deserve much more attention.**

²⁸⁸ This is of course not to say that there should not be a criminal investigation also if there are indicators of trafficking in such a situation.



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