

RECOMMENDATIONS

ON IDENTIFICATION AND REFERRAL TO SERVICES OF VICTIMS OF TRAFFICKING IN HUMAN BEINGS

1. Identification of victims

1.1. Identification process

A human rights centred approach requires early identification and assistance to victims of trafficking in human beings.¹ Identification is crucial to ensure both the protection of the rights of trafficked persons, and successful prosecution of the traffickers.

Due to the complexity of the trafficking phenomenon, the final identification of victims might require a prolonged and ongoing process. Failure in identifying victims at an early stage can result in insufficient protection of victims and violation of their rights.

In the absence of factual evidence that indicates trafficking crime, which may be difficult to obtain at an early stage of investigation, the authorities may be unwilling to treat the person concerned as a victim. Understanding the difficulties entailed in proving the crime of trafficking and the time needed to establish all the facts of a case, it is recommended that States give the benefit of the doubt to a person claiming that he/she is subjected to severe exploitation which might be related to trafficking, or to a person identified as a presumable victim by a civil society organisation recognised by the State.

Self-identification might be difficult, especially in cases where a position of social vulnerability has been abused by traffickers. In addition, there are many barriers for victims to come forward such as fear for reprisals against them or their children or families, fear for deportation, or the situation of dependency in which they find themselves. Therefore, Member States should enhance a pro-active approach to identification, which is especially important for child victims, and strengthen policy aimed at empowering trafficked persons and encouraging them to come forward and denounce exploitation.

¹ An identical definition of trafficking is contained in Article 3 of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Palermo 2000), and in Article 4 of the Council of Europe Convention on Action against Trafficking in Human Beings (Warsaw 16/05/2005). A similar definition appears in Article 1 of the EU Council Framework Decision on combating trafficking in human beings (2002/629/JHA). For the purpose of the EU Council Framework Decision on the standing of victims in criminal proceedings (2001/220/JHA), victim shall mean any natural person who has suffered harm, including mental or physical injury, emotional suffering or economic loss, directly caused by acts or omissions that are in violation of the criminal law of a Member State (article 1, paragraph a). For the purpose of the (2005) CoE Convention on Action against Trafficking in Human Beings (Warsaw 16/05/2005) victim shall mean any natural person who is subject to trafficking in human being as defined in Article 4 of the same Convention. All the present recommendations apply to any presumed victim from the beginning of the identification process.

Therefore, since the beginning of the identification process any expulsion order must be suspended. Arrest and detention should be avoided.² Furthermore, where there is an indication that the person has been trafficked, unconditional access to assistance services, regardless of whether the person has reported to the police or given a statement in criminal proceedings, will enhance self-identification of trafficked persons.³

A presumed trafficked person shall be considered and treated as a victim as soon as the competent authorities have an indication that she/he has been subject to the crime of trafficking.

During the identification process the presumed trafficked person shall be treated as a victim and have access to assistance and support, regardless of whether she/he is able or willing to testify.

No expulsion order shall be enforced until the identification process has been completed by the competent authorities.

1.2. Identification and referral of trafficked persons

National practices show that the majority of trafficked persons or a great proportion of them is not identified by law enforcement but by civil society and citizens.⁴ Therefore, Member States should support civil society organizations' services aimed at empowering trafficked persons and helping them to seek redress.

A mechanism (which could be called National Referral Mechanism⁵) must be established in every Member State, aimed at ensuring co-ordination of government action and co-operation with civil society organizations or other service providers such as public or private recognised and specialised centres. The mechanism should ensure that presumable trafficked persons are immediately informed in a language that they understand about their rights and options, and referred to the assistance services when they are claiming to be victims of trafficking or when the competent authorities have an indication that she/he has been subject to trafficking. On the other hand, when a trafficked person voluntarily asks for assistance from an NGO or other service provider, the mechanism must ensure that the said service provider is entitled to assist the presumed trafficked person. For this purpose, co-operation on a regular basis is needed between law enforcement, prosecutors' offices, immigration authorities, trade unions and NGOs or other service providers. As trafficking most often has transnational nature, the mechanism should also ensure referral of victims across the borders.

² For offences eventually committed by the victim as a consequence of her/his situation of trafficked person a specific non-punishment clause should be introduced in national legislation. See below, paragraph 3.1.

³ The EC Experts Group Report (recommendations 89 - 101), the OSCE Action plan (chapter V, s.4) and the 2005 CoE Convention (Article 12) require unconditional assistance to victims of trafficking. In compliance with the EU Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (Article 6 and Article 7) assistance must be unconditional during the reflection period.

⁴ Also noted by the EC Experts Group Report.

⁵ OSCE – National Referral Mechanism Handbook.

The mechanism should be sensitive to issues of age, gender, ethnic and religious background of identified or presumed victims of trafficking. In particular, it should include specific child friendly services and be based on a gender-sensitive approach.

Early identification requires raising awareness and training on a regular basis of all actors likely to come into contact with trafficked persons, especially the front-line police and other relevant officials such as immigration officials, health care officials or labour inspectors. A multi-agency approach to identification and referral also requires a confidence-building process involving all the above mentioned actors, trade unions, NGOs or other specialised service providers, including through joint meetings and joint training sessions.

In some Member States law enforcement actions have only been carried out for the purpose of immigration control, or the sanctioning of employers for the use of irregular migrant labour, without any further enquiry aimed at identifying victims and protecting their rights. Therefore Member States should put in place procedures aimed at detecting any clues of trafficking at an early stage. Considering that cases of trafficking can be hidden behind any kind of exploitation especially of migrants, the procedure should apply to any law enforcement operations and workplace inspections.⁶

Identification of trafficked persons in some areas such as labour exploitation, domestic servitude, begging, forced marriage are relatively new issues to be tackled in the context of trafficking, more research is needed to develop more effective approaches and methods.

In order to improve the knowledge of the phenomena to be tackled, and provide law enforcement, policy makers and judicial authorities with essential information, the establishment or the strengthening of a national system for the gathering of data and information is recommended. The system should be based not only on official data but also on information coming from the victims. The system should also be integrated in a national system of data collection based on agreed criteria at the European level, with a view to reaching comparable results.

Member States should establish a mechanism to refer trafficked persons immediately to services, based on a close and regular cooperation between law enforcement, immigration officials, labour inspectors, trade unions, child protection agencies, prosecutors' offices and NGOs or other service providers. The mechanism should be gender sensitive and include child friendly services.

Member States are encouraged to cooperate to develop or improve cross-border referral of victims.

Member States shall adopt measures to support outreach services, hotlines, free telephone advice including on legal issues, drop-in centres, information materials, community development with migrant communities in cooperation with civil society

⁶ Although the EC Experts Group Report accepts that various means are used to identify victims including law enforcement action (raids), it also notes that there are cases in which law enforcement raids fail to protect trafficked persons. Trafficked persons are often subject to prosecution for immigration related offences and deportation. Therefore, victims' rights should always been the primary consideration in any law enforcement operation involving presumed trafficked persons.

and trade unions to establish contacts with presumed trafficked persons and empower them to seek redress for trafficking and exploitation

Member States should ensure regular awareness raising and training for all the actors likely to come into contact with trafficked persons, especially the front-line police forces and other relevant officials.

Member States should provide for identification procedures aimed at detecting indicators of trafficking and referral of victims to services, applicable to all the law enforcement operations and to all the situations in which exploitation might be involved, especially when migrant workers are concerned.

The protection of the human rights of trafficked persons and a victim oriented approach should be central in any anti-trafficking law enforcement operations or workplace inspection.

The development of research on identification of trafficked persons in specific areas is recommended.

The establishment of a national system for the gathering of data and information based on agreed criteria at European level is recommended.

1.3. Identification modalities

In a number of Member States law enforcement authorities or agencies have developed 'profiles' or checklists or indicators for the identification of victims and perpetrators of trafficking. This methodology might ensure consistency and transparency in identification.

Member States should develop such checklists and/or indicators based on national practice and legal experience, in close cooperation between law enforcement, prosecutors' offices and service providers. However, checklists should only assist in the identification and should be regarded as a flexible instrument, to be used for case by case assessments. Moreover, such practices should avoid further stereotyping and victimisation of presumed trafficked persons.

Check-lists and/or indicators should be assessed and eventually revised on a regular basis, taking into account new information and trends.

Indicators concerning various forms of coercion and abuse such as the retention of documents or the debt bondage or the withholding of wages should be taken into account for any forms of trafficking. Additional specific indicators should be identified for different forms of trafficking.

With regard to the identification of child victims, indicators have to reflect the international definition of child trafficking⁷ according to which trafficking occurs even if no illicit means of coercion or abuse have been used.

⁷ Article 3c and Article 3d of the (2000) UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children; Article 1 of the Framework Decision on combating trafficking in human beings

There is a need to ensure the identification and protection of victims of all forms of exploitation including labour exploitation and domestic servitude. Especially concerning trafficking for the purpose of labour exploitation, the ILO's indicators on forced labour⁸ might be used as a starting point to establish indicators on trafficking for labour exploitation. Due consideration should be given to indicators such as living and work conditions, wages, labour contract, social security, freedom of movement of workers.⁹

Member States should cooperate at EU level and beyond to harmonise indicators and checklists in use, also with a view to enhancing law enforcement and judicial cooperation in cross-border cases.

Member States should ensure that checklists and/or indicators are developed, in cooperation between law enforcement, prosecutors' offices and service providers, to assist in the identification of presumed victims of trafficking for any form of exploitation. Check-list and/or indicators should be assessed on a regular basis.

Such checklists and/or indicators should include at a minimum retention of identity documents, threats or physical harm, restriction of movement, abusive working or living conditions, withholding of wages, debt bondage, and threats of denunciation to the authorities where the person is in an irregular immigration status or threats to harm families in the country of origin. Additional indicators should be identified for every form of exploitation such as labour exploitation, domestic servitude, sexual exploitation, begging, illicit activities etc.

Specific indicators for the identification of child victims should be developed in line with the international definition of child trafficking.

1.4. Multi-agency cooperation to identification and referral

Cooperation between law enforcement and NGOs or other service providers should be set out in a memorandum of understanding or other forms of official recognition including cooperation agreements, in which the roles and responsibilities of different actors are identified and they can be held accountable. Both public officials and social workers should be adequately and preferably jointly trained for this purpose¹⁰.

(2002/629/JHA); Article 4c and Article 4d of the (2005) CoE Convention on Action against Trafficking in Human Beings.

⁸ ILO Human Trafficking and Forced Labour Exploitation: Guidelines for Legislators and Law Enforcement (2004). It should also be noted that Anti-Slavery International also recently developed guidelines for identification. See Protocol for Identification and Assistance to Trafficked persons, Anti-Slavery International 2005.

⁹ In the identification of cases of trafficking for the purpose of labour exploitation, Member States should avoid confusion between trafficking, economic exploitation, illegal employment and illegal status of the worker. Therefore Member States should ensure that investigators are trained to identify the difference between these notions and give priority to the detection of trafficking cases.

¹⁰ The NRM and EC experts report recommend that multiple actors should be responsible for the identification and referral of victims including civil society organisations. The COE Convention also refers to multiple authorities collaborating with each other so that victims can be identified, and encourages cooperation with civil society.

Cooperation modalities must take into account that the relationship between the service provider and the trafficked person is based on confidentiality and trust. The definition of responsibilities does not imply that NGOs are obliged to disclose personal information to the police, unless the person concerned agrees. However, the obligation to report a crime and issues related to criminal investigation such as disclosure and confidentiality are regulated by national criminal law.

Migrants' rights organisations and trade unions are calling for partnerships between civil society and state agencies with a labour protection mandate.¹¹ This cooperative approach aims at not only identifying and protecting victims but also contributing to the prevention of future exploitation by improving working conditions and the enforcement of labour law standards in labour market sectors prone to exploitation such as agriculture, construction, food processing, domestic work, restaurants.

Member States shall ensure that all government actors likely to encounter trafficked persons are trained and aware of their role and responsibility to identify and protect those persons, and that they are adequately trained and aware of the special needs and rights of child victims.

Member States shall support the development of cooperation agreements between service providers, law enforcement and other stakeholders defining their roles and responsibilities, taking into account the confidentiality of the relationship between the service provider and the person concerned.

Partnerships between trade unions, employers' organisations, civil society and state agencies with a labour protection mandate should be supported especially to monitor working conditions and the enforcement of labour standards, provide support to exploited persons and intervene in labour sectors prone to exploitation to deter further abuse.

1.5. Identification and referral of child victims¹²

International, regional and EU legal standards recognize the particular vulnerabilities of children and the legal obligations of Governments to afford special protection and assistance, and ensure legal safeguards to child victims.

Identification and referral of child victims is crucial in order to ensure that they get access to special protection measures that they are entitled to under international law and as victims of human rights violations.

However, the identification of child victims is challenging due to possible difficulties in establishing the age of the child, and in cases where child victims are exploited in hidden

¹¹ Correspondence with OSCE/ODIHR on the protection of victims of labour exploitation.

¹² For the purpose of the Framework Decision on combating trafficking in human beings (2002/629/JHA), 'child' shall mean any person below 18 years of age (article 1, paragraph 4).

circumstances, lack of access to information and support services, for which reason they are therefore under particularly strong influence of traffickers.

When the age of a person presumed or identified as a victim of trafficking is uncertain and there are reasons to believe that the person is a child, she/he shall be presumed to be a child and receive immediate access to assistance and protection.

Upon identification of a child victim, Member States shall ensure that a legal guardian or equivalent authority is immediately appointed to represent the best interest of that child.

Member States shall, in consultation with the child and her/his legal guardian, take the necessary steps to establish her/his identity and nationality. Upon establishment of the nationality, Member States shall initiate proceedings to establish cooperation with the competent authority of the State of which the child is a national or the state of habitual residence of the child in order to begin the process of identifying a durable solution in the best interest of the child.

Member States shall assure to the child the right to seek, receive and impart information, and to express her/his views freely in all matters affecting the child and to participate in any relevant administrative or judicial proceeding. The views of the child shall be given due weight in accordance with his or her age and maturity. In doing so, Member States shall at the same time ensure the child's right to protection in the broadest possible manner.

2. Assistance to victims

2.1. Assistance measures¹³

The human rights approach emphasises unconditional assistance to all victims of trafficking. Trafficked persons, as victims of human rights violation, have a right to protection, assistance and redress irrespective of their interest in the criminal justice process.

National good practices show that assistance to trafficked persons in most cases is managed by NGOs and other civil society organizations, which can more easily ensure a victims' friendly approach. In addition, only a critical review by civil society actors can assist governments to implement international human rights obligations in the framework of national anti-trafficking policies. Therefore, civil society service providers should be adequately funded by governments and local institutions. It is also important that the civil society service providers and public services involved can cooperate in accordance with clear guidelines. The independent status of NGOs towards the state should be respected at all times.

¹³ The OSCE NRM and the OSCE Action Plan include a number of recommendations on medical, psychological, social, financial, legal assistance, education and employment opportunities, some of which are reflected under Palermo and the COE Convention (article 12). The EC Experts Group Report also includes numerous recommendations on assistance provision focusing on both short-term and long-term assistance provision (recommendations 99 – 103).

International instruments indicate a minimum standard of assistance measures which must be ensured to trafficked persons at different stages of the identification process, during the reflection period and the duration of the residence permit.¹⁴ However, Member States should go further, and ensure to any trafficked person the assistance measures which are appropriate, taking into account the individual needs of the person involved.

Assistance services for women should be based on a gender-sensitive approach. In particular, services for women who have been victims of sexual exploitation should integrate the support of other women.

The types of assistance made available to any trafficked persons should be adequate to help them in their physical and psycho-social recovery, especially in the first stage of the identification process. The final aim of assistance is facilitating their long-term social inclusion in the country of destination or in the country of origin.

In order to grant victims of trafficking all the social benefits they are entitled to, it would be very helpful to have an overview of existing EU *acquis* on social rights of citizens of one EU member State in another Member State and of general social rights of third country nationals in the EU.

Regardless of whether services are provided by public agencies or civil society organisations, assistance must be provided on a voluntary and confidential basis, in a non-discriminatory and non judgemental manner and in compliance with basic principles derived from international human rights norms, in particular the respect for privacy, confidentiality, self-determination and freedom of movement. Service providers should offer tailored solutions through professionals who are specifically trained with cross-cultural and gender-sensitive approach, including insights about the effects of physical and sexual abuse.¹⁵

Therefore, assistance measures should be established according to an individual needs assessment, and agreed with the person concerned.¹⁶ Service providers for trafficked persons should develop standards based on clear and measurable indicators, to regularly monitor and assess the quality of their services.

Member States should adopt appropriate measures to assist victims in their physical and psycho-social recovery, with the aim of long-term social inclusion in the country of destination or in the country of origin.¹⁷

Member States should ensure that civil society organisations are adequately funded to provide appropriate assistance and services to trafficked persons.

¹⁴ Article 6 of the UN Palermo Protocol to prevent, suppress and punish trafficking in person, especially women and children; Article 12 of the CoE Convention on action against trafficking in human beings; Articles 6-12 of the EU Council Directive 2004/81/EC 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.

¹⁵ EC Experts Group Report, 5.4, p. 71-73.

¹⁶ In particular, the decision concerning the type of assistance measures such as sheltering or individual housing should be made on individual basis, and in agreement with the person concerned. In any case freedom of movement must be ensured to any trafficked person who is sheltered.

¹⁷ This recommendation is without prejudice of national regulation concerning residence permit and return.

Assistance should include safe and appropriate accommodation, counselling and information, legal assistance, health care, psychological and material assistance, translation and interpretation services, language training, education for children, vocational training, employment opportunities, and protective measures, where necessary and possible also for family members at risk in countries of origin.

Assistance measures must be respectful of the rights of the person, based on a gender-sensitive approach, and established in agreement with the person concerned.

Assistance measures should meet quality standards and be monitored by a recognised monitoring system or inspectorate on a regular basis.

2.2. Assistance measures for child victims

The best interests of the child shall be a primary consideration in all actions concerning child victims, whether undertaken by public or private social welfare institutions, judicial authorities, administrative authorities or legislative bodies.¹⁸

Critical to the best interest determination is that the child is provided with accessible information regarding her/his situation and rights, including protection mechanisms, other available services, and on the processes of family reunification and/or repatriation. Based on this information, the views of the child shall be sought and given due weight for the determination of the child's best interests in all matters affecting the child.

The particular physical, psychological and psycho-social harm suffered by trafficked children and their increased vulnerability to exploitation require that specific attention is paid to child trafficking and the rights of affected children in laws, policies, programmes and interventions.¹⁹ In order to ensure that Member States fulfill their legal obligations to safeguard the human rights of children, special measures need to be established to provide child victims of trafficking with appropriate assistance and protection and legal safeguards and to take full account of their special rights and needs.

Individual case management for each child identified as a victim of trafficking must be ensured. This includes an individual needs and risk assessment and the

¹⁸ The best interests determination is a formal process with specific procedural safeguards and documentation requirements that is conducted for children, whereby a decision-maker is required to weigh and balance all the relevant factors of an individual child's situation, giving appropriate weight to the human rights of children and legal obligations of Governments under the UN Convention on the Rights of the Child and other human rights instruments, so that a comprehensive decision can be made that best protects the rights of the individual child. See UNHCR Guidelines on the Formal Determination of the Best Interests of the Child. 2006. p. 32.

¹⁹ See United Nations Economic and Social Council: Recommended Principles and Guidelines on Human Rights and Human Trafficking - Report of the United Nations High Commissioner on Human Rights to the Economic and Social Council - E/2002/68/Add.1. May 2002. Guideline 8: Special measures for the protection and support for child victims of trafficking. The UN Convention on the Rights of the Child (CRC), which is in force in all EU Member States, states that State Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of any child victim of any form of neglect, exploitation or abuse, including trafficking. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child. See UN Convention on the Rights of the Child, article 39 and article 3.

determination of the best interests of each individual child in all actions concerning the child and taking into account the child's views.

The relevant competent authorities must be charged with taking measures directed to the protection of the child and ensuring that final disposition regarding jurisdiction and competence over child victims is established as swiftly as possible.

Child victims must receive immediate care and protection. Under no circumstances shall child victims of trafficking be placed in a law enforcement detention facility.

In addition to the measures available to adults, child victims must have access to education and/or vocational training. In accordance with relevant international standards and national labour regulations, child victims of trafficking shall have the right to access work independently of their legal status in the country in which they find themselves.

2.3. Treatment of presumed trafficked persons during the reflection period

When the competent authorities have an indication that a person has been trafficked, this person should be immediately granted the reflection period. This implies that the granting of the reflection period must not be subject to further legal requirements, since it would undermine and even contradict the aims of the delay.

The reflection period has multiple goals, since it prevents immediate expulsion, and allows the person to start the recovery process,²⁰ avoid possible reprisal from traffickers and escape their influence, make an informed decision about his or her options such as whether to assist with criminal proceedings, to pursue compensation claims, and/or to participate in a social assistance programme.

Directive 2004/81/EC does not provide for a minimum duration of the reflection period, while the CoE Convention provides for a minimum length of 30 days. The European Commission 2004 Experts Group Report recommends a duration of at least three months. Taking into account national best practice, it is recommended that the reflection period has adequate duration bearing in mind its multiple goals, especially victims' recovery

Given its legal basis (Art. 63 (3) TEC), Directive 2004/81/EC only applies to third country nationals. However, EU nationals should be entitled at least to the same assistance measures granted to third country nationals during the reflection period, with a view to allowing them to recover, escape the influence of perpetrators and take an informed decision as to whether to cooperate with the competent authorities.²¹

²⁰ See the Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report, in particular article 13, paragraph 1. See also Council Directive on 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 (2004/81/EC). Article 6 clearly states that the reflection period aims at allowing trafficked persons to recover.

²¹ Article 6 of the Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.

As soon as the competent authorities have an indication that the person has been subject to trafficking, they shall grant a reflection period during which presumed trafficked persons are afforded access to support services and, if needed, legal status and protection from deportation. It is recommended that the reflection period has adequate duration, especially with respect to victims' recovery.

EU nationals should be entitled at least to the same assistance measures granted to the third country nationals during the reflection period.²²

During the reflection period or equivalent legal status the presumed trafficked person shall have access to assistance measures and will receive adequate information, especially concerning their rights in administrative and judicial proceedings.

Child victims who are not nationals or habitually resident in the territory of the Member State in which they find themselves, shall be granted a temporary humanitarian visa or other forms of judicial and/or administrative leave to stay in the Member State, pending a final decision on jurisdiction and competence relating to all measures concerning the child and in her/his best interest.

2.4. Treatment of trafficked persons during the residence period or equivalent legal status.

In conformity with conditions laid down in Directive 2004/81/EC, the Member States must grant a residence permit to persons who meet the legal requirements. One of these prerequisites is the willingness to cooperate. Nevertheless the granting of the residence permit is recommended not only in case of cooperation with the authorities but also taking into account the personal situation of the victim concerned.²³ This implies that the competent authorities should take into account the trafficked person's safety, state of health, family relationships, integration into the labour market and participation in a social integration programme.

Since the Directive only applies to third country nationals, an equivalent legal status giving access to assistance measures should be granted to nationals of the same country and EU nationals, unless they are entitled to a better treatment under national legislation.

In both cases the competent authorities must ensure that the legal status of the victim does not produce social stigmatisation or discrimination on the grounds of gender, race or on any other grounds, including through a regime of confidentiality. This is crucial especially for victims of trafficking for the purpose of sexual exploitation, who could suffer secondary victimisation or even retaliation in the country of origin, if their situation had been made known in their social and family environment.

The main aim of the residence period or equivalent legal status is to allow the trafficked persons to complete their recovery and follow a program aimed at long-term social inclusion.

²² This recommendation does not address that Member States where EU nationals are entitled to equal or better treatment under national legislation.

²³ Article 14 paragraph 1 (a) CoE Convention on action against trafficking in human beings.

During this phase the trafficked person should have access to the labour market.²⁴ When she/he obtains a gainful employment, she/he should be allowed to convert her/his legal status. If she/he is a third country national, she/he should be allowed to convert the residence permit into a work permit, or have access to a long-term or permanent residence permit.

Once the competent authorities take a favourable decision concerning the legal status of the victim, if the person concerned is a third country national and wishes to remain in the Member State, they will grant a residence permit of at least six months in conformity with Directive 2004/81/EC.

The granting of the residence permit is recommended not only in case of cooperation with the authorities but also taking into account the personal situation of the victim concerned.

When the trafficked person does not need residence status, the competent authorities should grant her/him a legal status giving access at least to the same assistance measures which are granted to third country nationals.

In both cases the competent authorities shall ensure that the residence status or other legal status granted to the trafficked person does not cause social stigmatisation or discrimination.

2.5. Risk assessment before return

Victims of trafficking are entitled to safety. No expulsion order can be enforced if the person is exposed to a serious risk in the country of origin.²⁵ Therefore, a person can only be returned following an individual risk assessment which takes due account of risks of stigmatisation, and protects the victim's privacy. Member States are encouraged to cooperate on making the risk assessment before returning the victim.

Victims of trafficking who are in need of international protection must be guaranteed access to asylum procedures.

A specialist risk assessment must be carried out for child victims, giving due consideration to the best interest and the views of the child.

An individual risk assessment shall be carried out by the competent authorities before any decision is taken concerning the return of a presumed trafficked person.

²⁴ Article 11 of the Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities. The conditions and the procedures for authorising access to the labour market, to vocational training an education shall be determined, under national legislation, by competent authorities (Article 11 paragraph 2).

²⁵ According to the European Court of Human Rights case-law, under certain circumstances expulsion can be considered illegitimate when it exposes the person to inhuman treatment in the country of origin, not only as a consequence of the behaviour of public officials but also of also of private individuals. See, in particular, Cruz Varas v. Sweden – 20.3.91; Chahal v. United Kingdom – Report of 15.11.96; H.R.L. v.s France – 29.4.97.

In establishing the appropriate protection measures and durable solution for child victims of trafficking, Member States shall give due consideration to the best interests and the views of the child.

3. Victims' rights during investigation and criminal proceedings

3.1. Non-punishment clause

The possible punishment of trafficked persons for offences committed while trafficked is an important factor deterring victims from 'self-identifying'. It is also incompatible with legal obligations of Member States to protect and assist trafficking victims.

In fact trafficked persons are often prosecuted either for the violation of immigration laws or for illicit activities they have been involved as a consequence of their situation as trafficked persons such as violations of immigration laws, the use of false documents or working without a work permit, if these are criminal offences under national legislation.²⁶

Therefore it is recommended that Member States introduce a clause in their domestic law, ensuring that a victim of trafficking is not punished for such offences committed by them as a direct consequence of the circumstances noted in Article 1 a) to d) of the Council Framework Decision 2002/629/JHA of 19 July 2002. Exceptions from non-punishment should be possible in case of extreme severity of the offence involved.

The content of the clause can be different in the framework of various legal systems. Independent of whether it is a system where prosecution is mandatory or not mandatory, the non-punishment clause should ensure that the legal system provides *in casu* opportunities for the prosecutor or the court to non-punishment of the victim of trafficking. In particular, in the framework of legal systems where prosecution is mandatory, the non-punishment clause should ensure that in cases mentioned above prosecution is not initiated, or is terminated by the judge, at an early stage of the criminal proceedings.

Member States should take appropriate measures providing that victims including children are not punished for offences they have been involved as a direct consequence of their situation as trafficked persons, such as violations of immigration law or working without a work permit, or the use of false documents. Exceptions from non-punishment should be possible in case of extreme severity of the offence.

3.2. Prevention of secondary victimisation

²⁶ The OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking and the OSCE Action plan recommend non-punishment. The COE Convention on action against trafficking in human beings includes a non-punishment provision. The EU experts report also makes a similar recommendation.

The trafficked person must be protected from secondary victimisation which can result from criminal and administrative proceedings, or even from ill-managed social assistance. In particular the vulnerability of children requires special practices and measures. During the identification process law enforcement, judicial and administrative authorities should bear in mind that such procedures can imply renewal of the trauma, gender stereotypes, discrimination and violation of victims' dignity and rights. Therefore, public officials and social workers should be specifically trained with a view to ensuring a victims' friendly approach in all the procedures and activities concerned. In particular, children should be entitled to child friendly interviews conducted by trained professionals throughout the procedure. Such interviews should be limited to only when necessary.

In conformity with Framework Decision on the standing of victims in criminal proceedings, trafficked persons must be treated with respect for their dignity.²⁷ The aim of avoiding secondary victimisation must be ensured by the law enforcement and judicial authorities from the beginning of investigation. In particular, the respect for dignity should be a major concern for the competent authorities during raids and deportation procedures.

In addition, practical conditions and appropriate procedures should be developed to avoid placing victims under unnecessary pressure, especially concerning the taking of information from the victim.

Good judicial practice should be further developed in Member States, in particular aimed at avoiding as far as possible excessive questioning, unnecessary repetition of the testimony, visual contact with the defendant through any appropriate means compatible with basic principles of the national legal system including the use of audio-video-facilities.

Law enforcement and judicial authorities should develop good practice to ensure that victims of trafficking are treated with respect for their dignity and are protected from secondary victimisation from the beginning of investigation.

In particular, good judicial practice should be further developed, aimed at avoiding as far as possible unnecessary pressure, excessive questioning, repetition of the testimony, visual contact with the defendant.

Law enforcement and judicial authorities should take particular care to develop practices that protect the rights of child victims and reflect their special needs and vulnerabilities

3.3. Right to information, protection and privacy

In accordance with the Framework Decision on combating trafficking in human beings, children shall be considered particularly vulnerable victims for the purpose of the FD on the standing of victims in criminal proceedings.²⁸ However, also trafficked adults can be in a

²⁷ Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA), Article 2.

²⁸ Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA), Articles 2 and 8.

situation of post-traumatic disorder, or in a personal situation which requires special treatment.²⁹ Therefore, an individual assessment should be carried out by competent law enforcement and judicial authorities, to establish case by case if a trafficked person should be considered a particularly vulnerable victim and therefore entitled to special treatment.

In conformity with Article 4 of FD on the standing of victims in criminal proceedings 2001/220/JHA, any victim of crime is entitled to the right to receive information from the first contact with law enforcement authorities. The information includes the type of services and organisations to which they can turn for support.

The right to protection is enshrined by Article 8 of FD on the standing of victims in criminal proceedings 2001/220/JHA, which in appropriate cases must be extended to their families and persons in a similar position. The right to protection includes the protection of their privacy, avoidance of contacts with the offenders in the court premises, protection from the effect of giving evidence in open Court.³⁰ Therefore, Member States shall ensure that appropriate protection measures are available to any presumed trafficked persons, on the basis of an individual risk assessment. National witness protection schemes should also be adapted and applied to trafficking victims, if needed.

The right to protection includes the protection of privacy. In the context of trafficking for labour exploitation there have also been calls by trade unions and migrants rights organisations for the protection and anonymity of ‘undocumented migrants’ who denounce forced labour/exploitation.³¹

Sometimes relatives of trafficked persons, especially children, are seriously threatened in the countries of origin by the same criminal groups which are connected with the exploiters, with a view to preventing the person from making statements against them in criminal proceedings. In the most serious cases, when it is impossible to protect relatives in the home country, the facilitating of family reunification could ensure both protection of relatives and successful prosecution.

An individual assessment should be carried out on a case by case basis, to establish if a victim can be considered a particularly vulnerable victim, and therefore will be entitled to specific treatment.

An individual risk assessment shall be carried out on a case by case basis, to establish protection measures for the presumed trafficked person, and if appropriate for their families or persons in a similar position.

In appropriate cases, when relatives have been subject to threats in countries of origin, Member States should consider, on a case by case basis, facilitating family reunification.

²⁹ Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA), Article 2 (2).

³⁰ Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA), Article 8.

³¹ See Anti-Slavery International report on forced labour in the UK calling for protection for ‘whistle-blowers’, i.e. those who come forward to the authorities to denounce exploitation. Also see TUC report on exploitation of migrants in UK: ‘Overworked and over here’.

Member States shall ensure full implementation of all the rights enshrined in the Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA), including the right to information, protection, privacy.

3.3. Right to compensation

Member States are obliged to ensure the right to compensation to victims of trafficking according to FD on the standing of victims in criminal proceedings, the Council Directive relating to compensation to crime victims³² and other relevant instruments on trafficking such as the (2000) UN Protocol on trafficking in persons and the (2005) CoE Convention on trafficking.

Victims of trafficking should be considered victims of a violent intentional crime for the purpose of the access to compensation in cross-border situations, according to Article 1 of the said Directive on compensation. In particular, the State where the crime was committed is responsible for paying compensation and is obliged to provide for a national scheme on compensation which guarantees fair and appropriate compensation to victims. However, in reality in most of the cases victims still do not receive compensation. Therefore the establishment of national funds for compensation is recommended.

All the investigative measures aimed at early seizure and confiscation of proceeds should be implemented. The use of confiscated proceeds for the benefit of victims, and the establishment of national funds for compensation have been recommended by the EC Experts Group Report.³³ In order to ensure compensation, Member States are encouraged to take into consideration the use of confiscated proceeds in the establishment of national compensation schemes including funds for compensation.

In order to ensure that the right to compensation be effective, specific measures should be established from the beginning of the identification process. In particular, assistance measures should include legal counselling and free legal assistance aimed at enabling the person to present her/his civil claims, including before labour courts. In particular, Member States must ensure full implementation of Articles 4 and 5 of the Directive on compensation, providing for information and assistance to potential applicants.

The right to compensation and labour law rights must be guaranteed even if criminal proceedings are terminated for whatever reason. Therefore residence status and legal assistance to presumed trafficked persons should be extended until civil proceedings have been completed.

Member States must ensure full implementation of the provisions related to the access to compensation of victims of violent intentional crime in cross-border situations. Trafficked persons should have access to any compensation schemes for victims of violent intentional crime.

³² Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims.

³³ EC Experts Group Report - Recommendations 123-133

Member States should take appropriate measures to identify and trace proceeds of trafficking. These proceeds have to be subjected to confiscation and other measures such as freezing and seizing.

In order to ensure effective compensation to victims, the establishment of national compensations funds is recommended.

Consideration should be given to the use of confiscated proceeds in the establishment of a national scheme on compensation.

Member States should ensure that trafficked persons are provided with legal counselling and free legal assistance with a view to enabling them to claim compensation and/or their employment rights in civil and criminal proceedings.

In cases where criminal charges for trafficking have led to a conviction, legal status and legal assistance should be extended until civil claims, including those before labour courts, are completed.