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10 Years After the Directive 2011/36/EU

Lights and shadows in addressing the
vulnerability of trafficked and exploited migrants

Several EU countries do not apply the 'reflection period' and/or do not have a formal National Referral Mechanism (NRM) in place to identify and assist victims and support their full social inclusion.

Assistance is nearly always dependent on victims' cooperation with the authorities, in contrast with the principle of unconditional assistance.

The non-punishment principle is not implemented or not implemented correctly. Also, trafficked persons are not addressed adequately regarding their vulnerabilities and their gender-related needs.

Anti-trafficking institutions and organisations do not receive sufficient resources, and, in many countries, political and legal anti-trafficking measures tend to focus mainly on criminalisation and to conflate with restrictive migration policies, increasing persons' vulnerability to exploitation.

Many EU member states lack National Rapporteurs or fully independent equivalent mechanisms.

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Ten Years of the Anti-Trafficking Directive 2011/36/EU

Directive 2011/36/EU on Preventing and Combating Trafficking in Human Beings and Protecting its Victims adopted a holistic, human rights and gender-sensitive approach, following the 2005 Council of Europe Convention on Actions against Trafficking in Human Beings (THB). It draws attention to the need of protecting victims and preventing THB, in addition to prosecuting traffickers.

The Directive also contains the important definition of 'position of vulnerability' which is a situation in which the person has no real alternative but to submit to the abuse involved. Rather than limiting vulnerability to the person's inherent characteristics, this definition also considers the circumstantial and structural factors that make them vulnerable to abuse and exploitation and leave them without an alternative.

Ten years after the adoption of Directive 2011/36/EU, its progressive character has not been reflected in most of the member states' legislations, and it has not been implemented sufficiently on a national level, notably with regard to the identification, protection and assistance of victims (EPRS, 2020).

To assess the challenges and gaps in the implementation of Directive 2011/36/EU, the VULNER project organised a High-Level Policy Expert Meeting in October 2021. **Letizia Palumbo** (Ca' Foscari University of Venice) presented preliminary research findings of the VULNER project regarding THB and moderated the meeting alongside **Sabrina Marchetti** (Ca' Foscari University of Venice). **Maria Grazia Giammarinaro** (Civil Court of Rome) gave insights on the discussions leading to Directive 2011/36/EU.

Other participants included **Davor Derenčinović** (former President of the Council of Europe Group of Experts on Action against THB), **Giulia Garofalo Geymonat** (Ca' Foscari University of Venice), **Catriona Graham** (European Women's Lobby), **Suzanne Hoff** (La Strada International), **Giulia Laganà** (Open Society Foundations), **Francesca Nicodemi** (Independent expert, Italian lawyer), **Fabrizio Sarrica** (United Nations Office on Drugs and Crime), **Sarah Schwarze** (German NGO Network against Trafficking in Human Beings), **Enrico Somaglia** (European Federation of Food, Agriculture and Tourism Trade Unions), **Anna Triandafyllidou** (Ryerson University, Toronto). **Lilana Keith** (PICUM) was unable to attend but contributed to the writing of this Policy Brief.

Key Issues

Identification

As participants highlighted, a lack of adequate identification systems of victims of trafficking is overall acknowledged. Several European countries have not developed a formal National Referral Mechanism, which is a cooperative framework involving relevant government actors and civil society organisations and is aimed at identifying, assisting and supporting victims of THB (OSCE 2004). The identification process is often affected by a lack of knowledge of persons' situations of vulnerability and about the complexity of THB among actors dealing with the phenomenon, such as police officers, judges and prosecutors. In many cases, THB is still perceived as a problem of sexual exploitation which is the most common registered form of trafficking (about 60% of registered victims [Com(2020)0661]), although there are clear indications about the occurrence of THB for other purposes such as labour exploitation (e.g. in sectors like agriculture, construction, care and domestic work), criminal activity, forced begging, sham marriages and even organ removal. Additionally, trafficked persons can be found not only among irregular migrants but also among regular migrants and national citizens.

The identification of irregular migrants as victims of trafficking is particularly challenging. When intercepted (e.g. during labour inspections or anti-trafficking operations), they are often subjected to immigration enforcement, detained and repatriated without being informed of their rights as potential victims. Likewise, many undocumented migrants are reluctant to report abuses and engage with authorities for the fear of being deported.

Lastly, in a scenario of an increasing number of asylum seekers among which there might be trafficked persons, only a few European countries (such as Italy) have implemented referral procedures for the identification of victims among applicants for international protection (Marchetti and Palumbo 2021), paying attention to their specific condition of vulnerability. Several European countries do not have clear coordination or referral mechanisms established between anti-trafficking and asylum systems.

Assistance and Protection

Even if a person is identified as a victim of human trafficking, they might not receive adequate assistance and protection. They most often do not receive unconditional assistance, as Directive 2011/36/EU provides (art. 11 (3)).

In this regard, it is worth highlighting an incongruity between Directive 2011/36/EU and 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. The latter specifies that residence permits should be granted to victims of THB who are third-country nationals **only** in case they show an intention to cooperate with authorities (art. 8). This contradicts the principle of unconditional assistance affirmed by Directive 2011/36/EU (art. 11). It is necessary to revise Directive 2004/81/EC on this issue to establish a consistent legal framework.

At a national level, assistance, support and the issuing of a residence permit almost always require cooperation with authorities and are mainly granted in the context of criminal proceedings. However, an important exception is offered by the Italian legislation (art. 18 of D.Lgs. 286/1998) which provides victims of trafficking and exploitation with assistance and residence permits irrespective of their cooperation with competent authorities. In this system, anti-trafficking NGOs and associations are assigned a crucial role in the identification and support of victims. However, despite being considered an innovative and good practice, the Italian system is not adequately implemented, and, therefore, victims are most of the time required to cooperate with authorities.

In addition, most EU countries lack safe reporting and effective complaint mechanisms for undocumented workers to report exploitation and access justice. Irregular migrants face arrest, detention and deportation if they come forward to seek help or to report abuse. Moreover, there are disadvantages for trafficked persons when they report and testify against their exploiters: they may lose their work, income, housing and residence for example.

In general, assistance and protection measures are insufficiently tailored to victims' needs and vulnerabilities. Residence permits are rarely granted and when granted are mostly temporary depending on the criminal proceedings without any long-term perspectives in terms of trafficked persons' social and labour inclusion. Interestingly, the Belgium system provides for a long-term perspective: indeed, if the victim collaborates and the case goes to court, they can receive a long-term residence permit.

Non-punishment of Victims of Trafficking

There is also a risk that trafficked persons put themselves in danger when they testify and might be criminalised –

e.g. for illegal entry or working in prostitution – even if these were committed as a consequence of being trafficked. Some EU countries, such as Italy, still lack a specific clause concerning the principle of non-punishment of victims of trafficking for status offences according to art. 8 of Directive 2011/36/EU, while general provisions such as duress or state of necessity are very rarely applied. In a growing number of European countries, specific legal provisions on the non-punishment principle have been adopted. However, they often do not apply to all types of unlawful acts victims commit under compulsion. There also remains a lack of clarity about the interpretation of these provisions by legal professionals, and restrictive interpretations tend to prevail.

Gender Perspective

Directive 2011/36/EU also stresses the need to adopt a gender-sensitive approach to trafficking. However, many participants emphasised that national prevention, assistance and support measures are often not able to address different positions and experiences of women, men and trans people concerning vulnerabilities and their gender-specific needs. For example, most countries have not adopted gender-based protocols or indicators for the identification of victims of trafficking and exploitation. Relevant actors often overlook the role of family responsibilities, commitments and/or dependence on male relatives in creating vulnerability. In addition, there is not much awareness of forms of exploitation experienced by women in sectors other than the sex industry (e.g. in domestic work or agriculture), nor much attention to the fact that men and boys can also be trafficked for sexual exploitation.

Lastly, reception systems in many countries are inadequate to address gender-related issues – including family-related issues – and the needs of people with different gender identities.

Lack of Resources and Political Commitment

Institutions and organisations aimed at identifying and supporting victims of THB do not receive sufficient resources. In many countries, specific national funds for victims of trafficking and exploitation are insufficient, and victims do not have adequate access to receive remedies including compensation, as Directive 2011/36/EU requires.

So far, EU member states rather focus on combating irregular migration. As some participants mentioned in our meeting, the trafficking paradigm tends to be used to justify restrictive migration measures that actually foster great-

er dangers and exploitation for migrants. Member states recognise the issue of human trafficking, but they should pay even more attention to the topic and focus on root causes creating people's vulnerability to exploitation and THB.

Lastly, many EU countries have not established a National Rapporteur on THB as provided by Directive 2011/36/EU (art. 19) but have designated government departments as 'equivalent mechanisms', resulting in ineffective systems because of a lack of independence.

The Need of a Holistic Approach

Directive 2011/36/EU explicitly adopted an integrated, holistic, human rights and gender-sensitive approach. It relies on the idea that trafficking is a complex phenomenon that cannot be addressed only through the instruments of criminal law.

Indeed, the primary focus on criminalisation is not only a problem for the trafficked persons themselves but also for combating human trafficking in general. It may even have counter effects, as the criminalisation of clients of sexual services demonstrates: trafficked persons who are exposed to sexual exploitation might be even more stigmatised, marginalised and dependent on their exploiters when prostitution is, in general, regarded as illegal (Giammarinaro, 2021).

To take the diverse social and structural elements of trafficking and exploitation into account, it is necessary to develop a coherent policy framework and coordinated initiatives aimed at addressing the interplay of legal, economic and social factors that contribute to persons' situations of vulnerability. The aim should be to provide people with decent livelihoods and work opportunities, as well as more legal pathways for labour migration, and to reduce gender, income and racial inequality.

Policy Recommendations

Recommendations for EU Policy-makers

1. Amend both Directive 2004/81/EC and Directive 2011/36/EU to establish a consistent legal framework. Directive 2004/81/EC should include a provision on unconditional assistance and recovery and reflection period, and it should establish clear and secure opportunities for

trafficked people to receive residence permits irrespective of cooperation in criminal proceedings, ensuring access to long-term residence permits. Revise art. 11(1) of Directive 2011/36/EU, clearly stating that the duration of assistance and support provided to victims should not be linked to criminal proceedings.

2. Develop and strengthen safe and regular labour migration channels, including for low skilled workers, ensuring access to long-term residence permits.

3. Adopt a new Directive to increase the effectiveness of labour inspections and complaints mechanisms – especially for undocumented migrant workers – regulating the role and activities of national enforcement authorities, increasing resources, strengthening the role of the European Labour Authority (ELA) and supporting workers to file complaints and providing access to justice.

4. Bolster actions – e.g. under the EU Gender Equality Strategy (2020-2025) – to encourage the member states to adopt gender-sensitive measures in national interventions aimed at addressing exploitation and trafficking in labour market sectors, including domestic/care work and agriculture.

Recommendations for the EU Member States

1. Provide reflection period, unconditional assistance, long-term residence permits and work permission for victims, independent from cooperation with authorities or outcomes of legal procedures. In this system, organisations and NGOs should be assigned a key role in the identification and support of victims.

2. Apply the non-punishment principle as in art. 8 of Directive 2011/36/EU through the adoption of trafficking-specific non-punishment provisions.

3. Appoint National Rapporteurs or fully independent equivalent mechanisms to monitor the adequate implementation of the Directive 2011/36/EU and other anti-trafficking measures.

4. Develop or strengthen the National Referral Mechanism allowing all actors dealing with THB and exploitation to cooperate at a national and a local level in accordance with a multi-disciplinary approach.

5. Improve relevant actors' knowledge on different and complex forms of vulnerability to exploitation and their capability to identify victims of THB.

6. Implement coordination procedures between national anti-trafficking and asylum systems to identify asylum seekers who are victims of THB.

7. Promote safe reporting and effective complaint mechanisms for all workers, ensuring that undocumented migrants can report a violation of their rights without risking deportation.

8. Enhance information on persons' rights and access to justice and remedies (including compensation funds) through qualified legal counselling to victims and supporting free legal assistance.

9. Support victims' full social inclusion, promoting individualised programmes that consider their actual desires and needs (including the need for accommodation and for finding a non-exploitative job).

10. Integrate a gender perspective in all trafficking related measures and policies, including policies on asylum and reception, paying attention to the different gender-specific needs.

11. Provide secure and sufficient funding to anti-trafficking organisations, shelters and counselling centres for trafficked persons. ■

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