

## Summary Report

# **Rights of Trafficked Persons during Criminal Proceedings**

## **A Study of the Implementation of EU Anti-trafficking Directive 2011/36 in Germany**

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Summary Report



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## The Rights of Trafficked Persons during Criminal Proceedings

### A Study of the Implementation of EU Anti-trafficking Directive 2011/36 in Germany

From October 2019 to April 2021, KOK carried out a project examining the newly introduced criminal offences relating to trafficking in human beings and their tangible impact on criminal proceedings. Its aim was to shed light on the practical aspects of criminal cases as well as on affected persons' situations and rights since the change in law.

#### Newly introduced criminal offences relating to trafficking in human beings

The German Act Implementing *Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA* entered into force in 2016. This led to the introduction of new criminal offences relating to trafficking in human beings, among others. Many hoped that this would simplify how legislation is applied. Besides sexual and labour exploitation, the new law added forced begging, the exploitation of criminal activities and organ trafficking as forms of trafficking in human beings, with the aim of implementing Directive 2011/36/EU, which refers, among other things, to the Victim Protection Directive 2012/29/EU.

In the five years since implementation, there has been very little research into the impact of these changes and into trafficked persons' situations. It is therefore unclear whether the implementation has helped achieve the desired results and whether trafficked persons' situations have actually changed for the better.

#### Observation of criminal proceedings and interviews with stakeholders involved in criminal proceedings

Originally, the project's goal was to focus on monitoring criminal proceedings and to follow at least two criminal proceedings relating to trafficking in human beings for the purpose of sexual exploitation and two criminal proceedings relating to trafficking in human beings for the purpose of labour exploitation. After the project was launched mid-October 2019, KOK immediately identified and observed the proceedings in a case of trafficking in human beings for the purpose of sexual exploitation in Berlin. Unfortunately, no other opportunity arose after that, for two reasons. Firstly, we presume that due to the pandemic investigations into cases of trafficking in human beings could not be carried out as in previous years and some court hearings (with the exception of detention hearings) had to be cancelled. Secondly, criminal proceedings in cases of trafficking in human beings, especially relating to the new forms of exploitation, remain rare.

The plan was to interview staff members of specialised counselling centres, lawyers and prosecutors all over Germany to complete the observation activities. As it was impossible to observe trials as planned due to the pandemic, trafficked persons' situations during criminal proceedings were mainly assessed on the basis of the interviews. In total, staff members of specialised counselling centres from nine German federal states were interviewed, along with three lawyers and three prosecutors.

All in all, we were able to examine the situation of trafficked persons throughout Germany to a large extent, regarding certain aspects at least. For other aspects we would have needed additional data



that was unavailable, or which could only be provided by one group of interviewees. The project therefore only offers partial, yet useful insights into the situation of trafficked persons in Germany.

### Presentation and analysis of the observation of proceedings and interviews

Based on an explanation of the guidelines provided by Directive 2011/36/EU, the results of our observation of proceedings and interviews are presented in detail.

The full report analyses the following aspects addressed in the interviews:

- First contact of trafficked persons with the police forces; residence permit and residence restrictions;
- Accommodation; healthcare; interpreting services outside criminal proceedings;
- Access to legal advice; counselling centre staff accompanying clients to police interviews and testimonies and psychosocial support during court cases;
- Number of interviews/hearings; impact of interviews/hearings; recording of interviews/hearings; application for in-camera hearings, for the defendant to be removed from the courtroom, for examination by way of audio-visual transmission; interpreting during investigations and hearings; support workers from specialised counselling centres being required to testify as witnesses;
- Security during each step of the investigations and proceedings; non-punishment principle;
- Access to records; specialised competence of specific prosecution offices and courts; court before which prosecution is filed, i.e. *Amtsgericht* [district court] or *Landgericht* [regional court]; representation as a private accessory prosecutor (subdelegation, multiple representation);
- Seating arrangements; outcomes of proceedings; information provided regarding the outcome of proceedings and information as per Section 406d para. 2 of the German Code of Criminal Procedure [Strafprozessordnung]; consolidated civil and criminal/penal procedure and proceedings under the Crime Victims Compensation Act [Opferentschädigungsgesetz]; collaboration between stakeholders involved in anti-trafficking work; trafficked persons abroad; needs of specialised counselling centres;
- National reporting bodies or similar mechanisms; training needs and changes since the criminal offence reform.

We compared the results obtained with regard to these aspects with the different articles of Directive 2011/36/EU and assessed their compliance with the Directive. However, it was not possible to gain insights into all specifications in the course of the study, but to provide an assessment of most articles relating to criminal proceedings.

The main study outcomes are outlined below:



## **I. Full implementation of Directive 2011/36/EU**

The first and most important outcome relates to the fact that although the 2016 reform did amend existing criminal offences in the form of Sections 232 et seq. of the German Criminal Code, and therefore broadly implemented art. 2 to 6 of Directive 2011/36/EU, this did not have any notable positive impact on trafficked persons' situations. The Act implementing the Directive clearly focuses on revising criminal offences pertaining to trafficking in human beings. Directive 2011/36/EU also provides for 'common provisions, taking into account the gender perspective, to strengthen the prevention of this crime and the protection of the victims thereof', a point that is hardly mentioned in the amended act. The aforementioned common provisions refer to very important aspects of the protection afforded to trafficked persons, an issue that had already been found lacking and had not been satisfactorily resolved prior to the change in legislation. Only full implementation of these provisions can bring about tangible positive changes for trafficked persons. Full implementation is therefore still needed.

## **II. Identifying trafficked persons and enforcing their rights**

Trafficked persons face very different situations. Improving the chances of trafficked persons being identified as such and therefore being able to enforce their rights is conditional upon regular and proactive investigations into criminal networks in the field, information on trafficking in human beings and possible evidence, knowledge of existing infrastructure, how and to what extent services are funded and, ultimately, how familiar stakeholders are with existing infrastructure. None of these aspects are a given, and large areas of Germany offer absolutely no services for trafficked persons, or only very meagre support. Our study reveals that the situation tends to be better in cities than in the countryside and that Eastern-German regions are comparatively worse off. Support for trafficked persons requires that stakeholders within the police forces, prosecution, the authorities in charge of monitoring illegal employment, immigration authorities, job centres, public health departments, specialised counselling centres and civil society have knowledge of the issue and are able to identify and interpret the signs. This also means that funding must be provided for proactive investigations into criminal structures in the case of investigation units and outreach work in the case of specialised counselling centres. The likelihood of trafficked persons of receiving appropriate support also depends heavily on how well public authorities work with counselling centres, that are not always sufficiently funded. Ultimately, having knowledgeable counselling centre staff is pointless if the public authorities they have to work with are not competent and properly staffed/funded and do not react efficiently. All this means that the initiation and realisation of investigations need to be improved, the aim being to make sure that trafficked persons are identified as such, are provided with sufficient information and can therefore enforce their rights. Both specialised counselling centres and public authorities must have sufficient human resources and funding to be able to support trafficked persons in line with the Directive's requirements.

## **III. The situation of persons affected by labour exploitation (and other forms of exploitation)**

Persons affected by labour exploitation often face a situation even more precarious than that of victims of sexual exploitation. Although a series of cases have come to light in the past few years, there



is probably a substantial number of unreported cases. Authorities are also less aware of these issues and have less knowledge about what to look out for, making it more difficult for affected persons to enforce their rights. There are too few accommodation options and access to benefits for specific needs remains difficult. An urgent need for action on a large extent remains. This is particularly true for persons affected by forced begging or by the exploitation of criminal activities. Identification of victims, access to protection measures and support are patchy and prosecution is very rare.

#### **IV. The situation of intersex, transgender and non-binary persons**

Transgender persons affected by trafficking in human beings are seldom offered appropriate accommodation. This issue is also likely to be a problem for intersex and non-binary persons. Adequate accommodation facilities would have to ensure a certain level of anonymity/privacy while promoting social inclusion. Intersex, transgender and non-binary persons have no or little access to (specialised) psychotherapy or psychiatric care, at least not in the short term. Compliance with the Directive in this regard must be ensured.

#### **V. The non-punishment principle**

One of the many issues trafficked persons often face is the fear of risking prosecution. The current practice is that criminal proceedings are initiated categorically against the affected person in the event of any relevant evidence. The victims' fears are therefore entirely founded. This is also used as a deterrent by perpetrators. To offer better protection to trafficked persons, we suggest the following measures, although the level of protection would diminish with every scenario as listed: 1. an exception to the principle of mandatory prosecution by not initiating preliminary investigations, 2. termination of criminal proceedings as a non-discretionary decision, 3. termination of criminal proceedings as intended discretion (i.e. as a general rule).

#### **VI. The reflection and stabilisation period**

The reflection and stabilisation period is codified in Section 59 para. 7 of the German Residence Act [Aufenthaltsgesetz] and defines, that immigration authorities set a period for departure when they have concrete grounds to suspect that the foreigner was a victim of trafficking in human beings, which will allow the foreigner sufficient time to decide whether he or she is prepared to testify.

However, the reflection and stabilisation period is sometimes not enforced. Either officers are not aware of this guideline, or the interview takes place before the trafficked person has been informed of this right. All involved authorities must be familiar with this provision and their knowledge of it must be checked on a regular basis. It would be preferable to clarify that both counselling centre staff and police forces/prosecution offices are entitled to confirm to immigration authorities that there is evidence that a person has been trafficked. Immigration authorities should accept the documentation provided by any of the three aforementioned stakeholders, with equal weight, as a basis for issuing a residence permit as per Section 59 para. 7 of the German Residence Act.

If specialised counselling centres request police forces/prosecution offices to issue a written document confirming the existence of such evidence for immigration authorities, their written request must be



deemed sufficient. The affected person should not have to be interviewed by the police before they have made the decision whether they are willing to testify or not.

### **VII. Unconditional right of residence for trafficked persons**

Another issue that is a particular burden for trafficked persons is their precarious residence situation and the fear of having to leave Germany. The main argument against an unconditional residency is that there could be cases of misuse, i.e. persons using false testimonies to obtain residence permit. However, counselling centres have noted that on the whole, the number of persons having lied to try to gain access to benefits is insignificant. Their observations are the best indicators of the real situation and should not be distorted by myths around applicants seeking asylum or a residence permit. This is why an unconditional right of residence for trafficked persons should be enshrined in law, as well as an entitlement to benefits ensuring a decent minimum standard of living in line with Section 1 para. 1 in conjunction with Section 20 para. 1 of the German Basic Law [Grundgesetz].

Family reunion must also be facilitated (in accordance with Section 25 para. 4a of the German Residence Act during criminal proceedings) and appropriate accommodation provided.

### **VIII. The right to refuse to give evidence/professional secrecy for counselling centre staff**

The duty of confidentiality is under threat as unlike other professionals bound to secrecy, counselling centre staff have no right to refuse to give evidence before courts. This right must be enshrined in law as a matter of urgency.

### **IX. No multiple representation**

The possibility of multiple representation, as envisaged for private accessory prosecution representatives by the legislation, is an issue, as the court cannot assess whether there are conflicts of interest in the early stages of proceedings. Conflicts of interests can also emerge in the course of proceedings. In certain situations, multiple representation can have a detrimental impact before that point, e.g. in terms of submitting applications (on time).

### **X. Protection during interviews/hearings**

Trafficked persons are not always protected against victimisation, intimidation and disrespectful attitudes on the part of police officers and judges interviewing them. They are sometimes treated as though they were on trial themselves, or had acted wrongfully. In some cases like this, they often have to put up with an accusatory tone. Trafficked persons are often expected to be able to provide a level of rationality impossible to provide due to their circumstances. For example, trafficked persons from very poor regions may be told that they *should have had* a real plan of action before setting off abroad. In some cases, the plausibility of their testimony is called into question due to the culture they may belong to or to the gender identity they ascribe themselves.



Overall, hearings are very rarely recorded and hearings by way of audio-visual transmission are carried out even more rarely. Some federal states simply lack the equipment to do so. In most cases, defendants are not asked to leave the courtroom, despite a provision allowing this, as judges fear this could be used as grounds for an appeal.

All in all, there is much room for improvement, most of which could be addressed through training.

#### **XI. Training needs**

All stakeholders likely to come into contact with trafficked persons must be trained, i.e. police forces, prosecution offices, judges, interpreters, officers from welfare, public healthcare, immigration authorities, the Federal Office for Migration and Refugees and the authorities in charge of monitoring illegal employment. Where criminal proceedings are concerned, the main professionals in need of training are the police and judges, although the latter generally seem to have received less training in this area than police forces or specialised units of the State Office of Criminal Investigations.

Any training for police forces or judges should take place at their workplace, ensuring better integration into their work. Training must focus on dealing appropriately with trafficked persons, specific challenges such as trauma, but also antidiscrimination, including issues relating to intersex, transgender and non-binary persons.

#### **XII. National reporting bodies or similar mechanisms**

No national reporting body or similar mechanism has been created to date. This body would have to be politically independent, and be sufficiently staffed and funded. Existing structures should be taken into account and duplication avoided. Duties and responsibilities must be clearly defined and include, among other things, the following: collecting data on reported and non-reported cases; identifying areas for improvement in line with international and European requirements as per treaties ratified by Germany and European directives; monitoring and competence to instruct public authorities.

#### **XIII. Adequate support for counselling organisations operating nationwide**

The existence of specialised counselling centres, their staffing and funding levels and the closeness of their relationships with public authorities have a great bearing on the lives of trafficked persons. The employees of counselling centres are the people who have the most direct contact with affected persons. They have close experience of their clients' situations during criminal proceedings, but also in other matters (such as applications for asylum, residence permits and benefits, accommodation, mental health). Many staff members have overseen countless cases of trafficking in human beings and some have been working in this field for decades. Specialised counselling centres therefore play a central role: for trafficked persons, for significant areas of criminal proceedings and for evaluation from a legal standpoint. How well such organisations are funded and staffed is absolutely crucial for the combat against trafficking in human beings.



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**Conclusion: enforcing rights conferred by Directive 2011/36/EU**

It is essential to always examine the question of criminal proceedings and to what extent trafficked persons can be required to be available to public authorities for prosecution purposes, taking into account the interests of affected persons. Instead, the focus tends to be on public interests and trafficked persons tend to be seen as a simple means to an end, which is something that must change.

Compliance with human rights requirements also must not be forgotten once criminal proceedings are over (whether after investigations, hearings or once the sentence is served). It is therefore crucial that rights afforded by the Directive be enforced at any time, instead of being limited to the duration of criminal proceedings.

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