



ANNEX 1 – LSI Submission upcoming report UNSR on Non-Punishment

Conditions Specific Provisions

1. The specific NP provision in the **United Kingdom** applies only to a few offences.
2. In **Spain** Article 177 bis 11 of the Criminal Law provides for the non-imposition of penalties on victims of trafficking. However, it is conditional on 3 requirements 1) The offence must be committed at the exploitation stage; 2) The participation of the victim in criminal activities must be a direct consequence of the situation of violence, intimidation, deception or abuse and 3) Proportionality between the means of commission and the offence. To these three requirements, a fourth one of practical application must be added. It is necessary that the person who has committed the offence has been officially recognised as a victim of trafficking. For the courts, this means that a previous conviction must have been handed down by a trafficking conviction, in which the person is recognised as a victim. All these requirements make the implementation of the non-punishment provision practically impossible in Spain.¹
3. In **Germany**, the law is only applicable on crimes, which are to be penalised with a custodial sentence less than one year or a fine, so there is already a limit for offences, which are too grave. In addition, this law only allows public prosecutor and not courts or judges to refrain from prosecuting.²

Lack of clarity implementation provisions

4. In **Belgium** ‘victims of trafficking for sexual exploitation were compelled by their traffickers to recruit other victims via internet, using online tools. However the prosecutors and judges tend not to see them as victims but as perpetrators and do not apply the NP provision’. We also assisted a victim, who had to use a fake passport and fake residency document, but this was not seen as a directly consequence of her trafficking situation, so the (separate) provision did not apply in practise’.³
5. In **Spain**, many of the victims commit crimes in the pre-exploitation phase (when, according to the crime of anticipated consummation, it is already considered THB), secondly the dominance of the victim's will does not depend on a concrete and direct means of commission. In many cases, it is not the direct consequence of the exercise of violence, intimidation, deception or abuse, but simply the consequence of the total domination and absolute uprooting achieved over the victim and the situation of vulnerability achieved by the prior use of the means of commission, even if not directly. On the other hand, the requirement of proportionality

¹ Written input provided by Sandra Camacho/SICAR cat, February 2021

² Written input of the German NGO network against trafficking in human beings (KOK) on the implementation of the non-punishment principle - Contribution on the UNSR call for written submissions, 11 February 2021

³ Information provided by Sarah de Hovre, PAG-ASA Belgium, LSI members meeting 26/2/21

conditions the application of the measure, so that the courts tend to interpret that certain crimes are not covered by this circumstance. Lastly, victims have no real alternative to committing the crime due to the vulnerable situation in which they find themselves.⁴

Absence specific legal provisions

6. For example, in **Austria**⁵, the **Netherlands, Switzerland** and **France** – there are no specific legal provisions and these countries still rely on general provisions.
7. In **Austria**, the Federal Chancellery issued a circular on the implementation of the non-punishment provision in the context of administrative law. It clarifies that Section 6 of the Administrative Penalties Act 1991 (Verwaltungsstrafgesetz, BGBl. No. 52/1991) is the legal basis for implementing the non-punishment principle to victims of THB in the administrative penalty procedure. Since February 2017, the Austrian Federal Ministry of Justice issued an internal decree aimed at raising awareness of the non-punishment provision. It states that Article 10 of the CC on an exculpating state of necessity is the legal basis for implementing the non-punishment provision to victims of THB, and complements the judicial interpretation of Article 10 of the CC with regard to trafficking victims. The decree describes characteristics of trafficking cases and, by way of example, lists offences that could be committed by trafficking victims, such as theft, fraud (in connection with prostitution or in the case of contracts where the victim is a contracting party), documentary offences and drug-related offences. The decree clarifies that if, during the proceedings, it is suspected that the offences were committed under such circumstances, Article 10 of the CC must be examined ex officio.
8. In **Switzerland**, since there is no clear provision, there remains leeway for interpretation and no clear standards on when it should be applied. Rather, it is currently at the discretion of the public prosecutor's office to waive prosecutions for acts that have been committed under the influence of traffickers. In some cases, orders of summary punishments are not waived completely but only deferred and could be re-activated any time, especially once the victim ends collaboration with authorities.⁶

Successful applications

9. In **Austria**, LEFÖ-IBF has supported cases of administrative law where the non-punishment principle was applied. This entails administrative penalties regarding violation of prostitution law of a certain federal state, costs linked to detention and violation of alien law. Based on a statement by LEFÖ-IBF as the recognized victim protection facility to the publicly authorities

⁴ Written input provided by Sandra Camacho/SICAR cat, February 2021

⁵ Written information received from LEFO IBF, February 2021

⁶ Submission by Swiss Platform against Human Trafficking for the UNSR report 'Situation in Switzerland regarding the non-punishment of VOTs', February 2021

penalties were lifted. In criminal law, LEFÖ-IBF has supported cases concerning use of false documents and forced criminality⁷.

10. In **Serbia**, a woman was trafficked for sexual exploitation abroad under false promises of a job as a waitress. She was under control of her traffickers through threats and violence, and provision of drugs. At a certain point she was allowed to go home on agreement that she would return with another girl. Traffickers threatened her child and family back home, she felt she had no other choice but to comply with their request. She found another woman and told her that she would work as a waitress. During the criminal investigation of the case, the prosecutor realized that she was a victim of trafficking and that she had committed the offence under the use of threats and violence. She was forced by the trafficker to commit the offence and there was no guilt on her side. The prosecutor hence discharged the investigation.⁸
11. In **Germany** proceedings because of unlawful entry or residence are indeed often closed due to the non-punishment-principle. Counselling centres regularly report this improvement of an in general deficient situation'.⁹
12. In **Spain** there were also successful cases of victims that had been compelled to commit drug offences or robbery, who were identified as victims and referred to support.¹⁰
13. In the **Netherlands** in one specific case four Ukrainians were convicted with probational sentences. Those who returned home (two of them) even received prohibition to enter the EU for two years. Only because the lawyer of these victims was paying attention, he notified CoMensha. He brought the non-punishment and their victimhood forward in the court proceedings but both the public prosecutor and the judge did not take it up/into consideration. They even said afterwards: 'what is the fuss, it is only a probational sentence, not even recognizing the potential great impact of the prohibition to enter the EU'. After consulting with CoMensha and in appeal the lawyer managed to get the sentences dropped.¹¹

Lack of awareness

14. In **Bulgaria**, even though the provision is adopted more than 7 years ago, it has never been applied in practice for victims of trafficking. Not only Bulgarian judges fail to apply Article 16a in practice, but they also consider that the victims of trafficking for the purpose of exploitation in prostitution are committing a crime themselves. They rely on Article 329 (1) of the CC, which

⁷ Written input received from LEFO IBF, February 2021

⁸ Interview with a lawyer in Serbia

⁹ Written input (submission) of the German NGO network against trafficking in human beings (KOK) on the implementation of the non-punishment principle - Contribution on the UNSR call for written submissions, 11 February 2021

¹⁰ Information provided by Marta Gonzalez, Proyecto Esperanza, February 2021

¹¹ Written input provided by Eefje de Volder, CoMensha, February 2021

provides that a full age person, fit to work, who gains income in immoral way, shall be punished'.¹²

Violations non-punishment provision - fines

15. In **Switzerland** NGOs note that it is not primarily the lack of identification, which leads to violations of the non-punishment provision, but rather that victims' offences are intentionally held against them for leverage. This is in stark contrast to the intention of the provision as another pillar of protection; ¹³ exploitation for criminal activities such as theft, fraud or illicit begging, but also in the context of trafficking for labour exploitation. CSP Genève alone reports 5 cases in which victims were not considered as such but rather, once they turned towards authorities, were considered offenders against labour or immigration laws and received fines or were expelled from the country.

16. In **Spain, Austria and Serbia**, there are numerous examples of victims of trafficking for sexual exploitation, that have been misidentified and who have been administratively punished under laws and regulations dealing with public order (e.g. cases in Spain, AT, SRB). In some cases they are subjected to administrative fines that accumulate to significant amounts because they cannot pay and in some cases this has led to imprisonment for failure to pay. Victims are also subjected to administrative sanctions for other violations, e.g. we had a case of a female victim, who had been forced to drive without insurance, which lead in the end to a 9000 Euro fine, which she – although she is now formally identified, has been assisted and was a witness in court proceedings – still has continue to pay.¹⁴

Prosecution and Detention, regardless identification as trafficked person

17. In **Spain**, it is noted that in some cases victims are in a paradoxical situation in which on the one hand they are victims/witnesses in criminal proceedings for human trafficking, and in parallel there are involved in other criminal proceedings against them for offences they were compelled to commit by their traffickers.¹⁵ In **Spain**, in most cases, victims have been identified after the crimes committed have been identified and prosecuted'.¹⁶

18. In **France**, civil society specialised NGOs have - during the last GRETA visit (8th of February 2021) – shared numerous examples in which victims of trafficking, including children, were imprisoned for offenses committed under traffickers control. In some situations, victims of

¹² Written input provided by Animus Association, quote Natasha Dobrova, lawyer of Animus Association

¹³ Submission by Swiss Platform against Human Trafficking for the UNSR report 'Situation in Switzerland regarding the non-punishment of VOTs', February 2021

¹⁴ Information provided by Marta Gonzales, Proyecto Esperanza, February 2021

¹⁵ Information provided by Marta Gonzalez, Proyecto Esperanza, February 2021

¹⁶ Written input provided by Sandra Camacho/SICAR cat, February 2021

trafficking in irregular situations can be also face to be placed in detention centres without being identified, unless there is an intervention by NGOs.¹⁷

19. In 2019, the **Swiss** NGO Astrée accompanied four victims of human trafficking whose right to non-punishment was not respected. They received fines or even served time in prison for breaking the law during the time they were exploited. They would be fined for illicit prostitution or for a violation of the immigration law. Some were fined before they were identified as victims of trafficking. Some, however, were already identified as such and still received a sanction (e.g. when the status of the victim is not taken into account by the public prosecutor's office when sentencing for the violation of the immigration law).¹⁸

20. In **Serbia**, a young man from a poor and dysfunctional family was recruited by a criminal group under false promises of a good job to become financially independent. When he learned that the job he was expected to do was to stage a heist in an exchange office, he got scared, panicked and refused. Then criminals threatened to seriously hurt him and his family and forced him to rob a boutique, he was too scared and failed. As a consequence, he was brutally and sexually abused, he was kept isolated and abused till he submitted to the will of the trafficker. He saw no other choice but to “agree” to rob the exchange office with an accomplice as the criminals requested. He was arrested and charged with robbery. Meanwhile, the circumstances of his case led to another investigation was initiated for Trafficking in Human Beings and he was recognized as a victim. Following his identification as a victim by the police, he was referred to the Agency for Victim Protection and to NGOs for support. He approached ASTRA via the SOS line and was immediately supported including temporary accommodation, material assistance, psychiatric and psychological care and legal aid. During the time he was assisted as a victim of trafficking, and this notwithstanding, he was sentenced to one year home detention for robbery, the very crime he had committed as a result of being trafficked. At the same time, he took part as victim witness in criminal proceedings for THB. He was granted the status of especially vulnerable witness, but he was nevertheless questioned multiple times and he was cross-examined in court by the defendant’s lawyer at the presence of the defendant. Judicial proceedings have been ongoing for almost a decade due to procedural challenges and changes of competent adjudicating authority, thus repeatedly jeopardizing his efforts to continue with his life. ASTRA has supported him for years in the process of social inclusion, including through funding his education. He has a job and a family and continues to be committed to stand in court to seek justice.¹⁹

21. The UK based organisation FLEX documented several cases in the UK of detention of victims for immigration law violations, use of fraudulent documents, for being compelled to commit

¹⁷ Information provided by Mona Chamass, CCME, France, February 2021

¹⁸ Report from ASTRÉE from 2019/ Submission by Swiss Platform against Human Trafficking for the UNSR report ‘Situation in Switzerland regarding the non-punishment of VOTs’, February 2021

¹⁹ ASTRA, 2019

offences (stealing). In several cases they remain in prison, also after a reasonable ground decision that they may be trafficked.²⁰

22. Hope Now in **Denmark** reported cases of male victims of trafficking for forced criminality from Nigeria (compelled to sell drugs), in one of such cases the young man was apprehended, convicted and detained while trying to escape his traffickers. He was formally identified, but remains in prison, despite the appeals and efforts of the NGO, and he has no access to proper support. In Denmark, the Attorney General has ordered that victims who are identified officially as Trafficked should benefit from a non-prosecution of offences committed as a consequence of the trafficking (for instance when carrying forged documents or staying and working in Denmark without permission). A migrant without legal residency and/or working permit who is identified as a trafficked person should thus be released to a shelter for a period of reflection until s/he is sent back to a transit country or the country of origin. In spite of this, research from Aalborg University (in collaboration with the NGOs HopeNow and Reden) has uncovered a de facto criminalization of trafficked persons. Women trafficked to work in prostitution have been imprisoned for up to six months. In one case, this was allegedly because the woman was not considered to be in a current situation of exploitation. Furthermore, women who are released after identification, are frequently released without having their fines, expulsion decisions and bans upon re-entry lifted. This means they will be treated as criminals next time Danish authorities meet them.

Hope Now also reported cases of male victims of trafficking for forced criminality from Nigeria compelled to sell drugs. In December 2019 a young man was apprehended while trying to escape his traffickers. He received a sixty day sentence for possession of 150 grams of hash, a 6 year ban and a deportation order. In September 2020 HopeNow found him in prison and as a result he was therefore finally officially identified as trafficked. In February 2021 he still has not been released from a Danish prison and awaits deportation.²¹

23. What we see in the **Netherlands** is that since different forms of criminality are dealt with in different procedures, that victimhood in and of itself will not lead to the application of the non-punishment principle, simply because lower judges are not always aware. Our worry is that in most cases we are unaware and so are the involved stakeholders and thus many victims are prosecuted nonetheless.²²

24. In **Germany** every public prosecutor has discretion to decide whether he or she is going to proceed a prosecution against a victim. In addition, it is an individual case-by-case decision of the public prosecutor whether the criminal offence was too grave to refrain from prosecuting.

²⁰ Resources by Focus on Labour Exploitation (FLEX) UK, <https://www.labourexploitation.org/publications>

²¹ Written input received from Michelle Mildwater, Hope Now Denmark, between October – February 2021

²² Written input provided by Eefje de Volder, CoMensha, February 2021

After proceedings are pending, judges cannot close the case under the (non-punishment) law. When public prosecutors refrain from prosecuting at one point, they can still resume proceedings under the condition that the factual circumstances have changed and no double jeopardy will take place. Due to the high uncertainty, whether prosecutors apply the non-punishment principle or not, the experiences which are made by practitioners vary widely.²³

25. In the **Netherlands** we have had cases of more serious crimes (man slaughter) were it is much more difficult to free victims of any charge because public prosecutors are of the opinion that the seriousness of the crime demands a trial/conviction. Currently there is a victim detained in alien detention for stabbing his employer. A well-known case in the Netherlands, is a case of an Indian girl (2007 – 2010) who was convicted for man slaughter of a child although she was acknowledged as a victim of human trafficking, the crime was seen as too grave and the causation could not directly be linked. She was later – due to interference by the Dutch former Rapporteur, granted residence.²⁴

²³ Input of the German NGO network against trafficking in human beings (KOK) on the implementation of the non-punishment principle - Contribution on the UNSR call for written submissions, 11 February 2021

²⁴ Written input provided by Eefje de Volder, CoMensha, Feb 2021, see also

<https://www.nationaalrapporteur.nl/publicaties/publicaties/2013/04/05/artikel-het-mensenhandelslachtoffer-als-dader>