



Twinning Project RO2006/IB/JH 08

**“Improving the institutional capacity of the agencies involved in the prevention of trafficking in human beings in line with the current European standards and best practices”**

# Feasibility study on confiscation and compensation for victims of trafficking in human beings

Activity C.2.1

Final Report

Mission Bucharest, 14 – 23 September 2009

Name of experts (STEs):

Juergen Dehn

Hans-Dieter Hilken

(IRZ – Stiftung für internationale rechtliche Zusammenarbeit, Germany)

George Douvas

(European Public Law Centre, Greece)

*This publication has been produced with the assistance of the European Union. The contents of this publication are the sole responsibility of the project partners and can in no way be taken to reflect the views of the European Union.*

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# 1 Introduction

## 1.1 Current situation of THB, general remarks

Since THB is an issue of human rights and of organized crime, it has been moved higher on the agenda of governments in many countries of Europe.

The concept of THB implies a strong role of criminal organizations. It includes the threat or use of force, coercion, fraud, deception or other means; it includes several distinct but interrelated acts, and the exploitation is not a one time event but is carried out over certain period of time. Organized crime groups and networks exploit market opportunities for sexual services and cheap labour on the one hand and the vulnerable situation of women and children on the other. They also can count on high profits and a relatively low risk of control and sanctions. THB is not necessarily transnational, but may also take place in-country, often from poor or rural to urban areas.

Although there are many forms of exploitation in Europe most victims of trafficking are women and girls who are exploited for sexual reasons. As Europeans spend billions of Euros per year for prostitution and other commercial sexual activities, THB is a highly profitable business. The market for commercial sexual services is considered as a major force driving trafficking. In a number of countries, prostitution or the “red light milieu” serve as an entry point for organized crime groups and networks in a given area. It is therefore no coincidence that the large majority of victims are found in the prostitution sector, and the share of migrant sex workers appears to be ever increasing.

Typically:

- Women respond to job advertisements for babysitters, models, hairdressers, dancers, waitresses, encouraged or recruited by friends or relatives.
- Transport and papers are arranged by organized crime groups and networks.
- Identity documents are taken away on arrival and women are confronted with a large debt owed to traffickers which is to be repaid through prostitution.
- Violence may be used to coerce women into prostitution. There were women kept in isolation, beaten or raped in order to “break” them.
- Victims are resold or exchanged between criminal groups and countries in order to ensure the availability of “fresh meat” on the market.

Recent reports on the trafficking situation suggest the following:

- In many parts of Europe, THB continues to increase.
- In south-eastern Europe in general, THB appears to be declining – or at least has become less visible.
- The number of investigations, prosecutions and convictions is growing.
- Children account for a considerable share of victims.
- Virtual sex is an expanding market. Information and communication technologies facilitate the sexual exploitation of women and children. Reports suggest that the trafficked women are mainly from Central and Eastern Europe

who are exploited for the production of pornography. Child pornography on the internet is of particular concern.

- Trafficking generates large amounts of proceeds which need to be laundered. No necessarily new techniques are used when laundering the proceeds of trafficking, there are certain typologies which are used more frequently than others. These include in particular money remittance services, but also cash couriers, purchase in real estate and cars or other tangible objects, and investment in the legal cash business activities (bars, restaurants etc).

## **1.2 Special situations in Romania**

Romania is a source, transit and destination country for men, women and children trafficked for the purposes of commercial sexual exploitation and forced labour. Romanian men, women and children are trafficked to Spain, Italy, Greece, the Czech Republic and Germany for commercial sexual exploitation, forced begging and forced labour in the agriculture, construction and service sectors. Men and women from Romania are trafficked to Cyprus, the Netherlands, Slovakia, Poland, Portugal, Belgium, Turkey, Sweden, Hungary and Denmark for the purposes of commercial sexual exploitation and forced labour. Romanian men, women and children are trafficked within the country for commercial sexual exploitation and forced labour including forced begging and petty theft. In 2008, sixty-nine percent of the identified victims were trafficked for forced labour. But on the other side Romania is a destination country for a small number of women from Moldova, Colombia and France trafficked into forced prostitution and a small number of men from the Democratic Republic of the Congo and Honduras trafficked for forced labour.

Romania prohibits all forms of trafficking in persons through Law no. 678/2001, which prescribes penalties of 3 to 15 years' imprisonment. These penalties are sufficiently stringent and commensurate with penalties prescribed for other grave crimes, such as rape. In 2008, authorities investigated 494 new cases, up from 232 new cases in 2007. The government prosecuted 329 individuals for trafficking in 2008, compared to 398 individuals prosecuted in 2007. During the reporting period, Romania convicted 125 trafficking offenders, down from 188 individuals convicted in 2007. During the reporting period, 106 of the 125 convicted traffickers were jailed for some time in prison; 19 traffickers were given suspended sentences and did no time in prison. In 2008, forty-eight traffickers were sentenced to one to five years' imprisonment, 56 traffickers were sentenced to five to 10 years' imprisonment and two traffickers were sentenced to more than 10 years' imprisonment.

In 2008, the government provided \$270,000 in support to four NGOs to provide assistance to victims of trafficking compared to \$72,000 in 2007. 306 victims were provided with government-funded assistance, down from 669 victims assisted by the government in 2007. An additional 234 victims were assisted by non-government funded programs. In 2008, the government identified 1,240 victims, compared to 1,662 victims identified in 2007. In 2008, there were at least 649 identified victims of forced labour and at least 287 identified victims of sexual exploitation. The government operated nine shelters for victims of trafficking, though their quality varied and most victims preferred to go to NGO-operated shelters. Victims were encouraged to participate in trafficking investigations and prosecutions; 1,053 victims assisted such law enforcement efforts in 2008. Foreign victims receive a 90-day

reflection period to decide whether they would like to cooperate in a criminal proceeding. Law enforcement proactively identified and referred 540 victims of trafficking for assistance.

This statistic material is based on Trafficking in Persons Report 2009 – US Undersecretary for Democracy and Global Affairs, Office to Monitor and Combat Trafficking Persons.

### **1.3 Significance of confiscation of proceeds of crime and compensation of victims of trafficking in human beings**

The pursuit of profit is the common denominator of all forms of THB. Proceeds from the crime may be consumed by criminals or hidden away. However, in order to prevent them from being traced by law enforcement and in order to permit their investment in other business, crime proceeds need to be laundered in a way that they become indistinguishable from legitimate property. Against the above mentioned *modi operandi* of the organized crime groups and networks in THB, it is critical issue for the legal order to be supplied efficiently, on the one hand with the arms of seizure and confiscation (of instruments and the proceeds of crime) and on the other hand with an active anti - money laundering system. The aim is to deduct the means of THB activity and to discourage the criminals.

Besides the punishment of the perpetrator, it is vitally important for a State of Law to provide compensation to the THB victim for the suffered harm and attempt to correct geographical inequalities. Compensation will necessarily have to take into consideration the future care, which the THB victim will have to receive if he/she has to cope with what has happened and with damage to a possibly young life. The reparable harm is often moral damage – or possibly material damage if physical after-effects persist. However, it is difficult to put a figure on compensation for moral damage. Even so, it is extremely important to enable the victim to bear the financial burden of psychological treatment, which is seldom reimbursed by health schemes.

Expecting the trafficker to provide compensation for the offence comes down to a question of his means. In this context, money should be no barrier to compensation for the THB victim. Regardless of the type of THB penalized, it is therefore desirable for the State to guarantee compensation for the harm where the perpetrator lacks means.

It also appears desirable for such compensation to cover the costs involving the best possible psychological or psychiatric treatment which the victim may need after the perpetrator's conviction.

## **2 Mission's targets**

### **2.1 Tasks for activity C.2.1**

Main task for this activity was to analyse gaps in national legislation and procedures regarding confiscation (of instruments and proceeds of crime) and compensation for THB victims. For this purpose the Romanian legislation should be analysed under the light of international conventions and MS-best practises.

In combating THB besides measures of victim assistance and protection, establishing THB as a special criminal offence and a consistent prosecution and punishment of offenders are the crucial objects.

Confiscation of proceeds of crime and compensation of victims are most necessary and effective parts in these fields of legislation. The implementation of mechanisms for confiscation and compensation of victims of trafficking in human beings is of the highest interest for all EU-member states at the moment.

MS STE's and BC Staff on activity C 2.1 were commissioned to analyse law as well as other measures regarding confiscation and compensation of victims of THB and to make proposals of improvement in case of need. To fulfil this commission the working group has looked at the legislative situation as well as administrative (police) regulations.

### **2.2 Existing international instruments on confiscation of proceeds of crime and compensation of THB victims**

#### **2.2.1 General existing provisions in the area of THB**

The UN Convention on the Rights of the Child, adopted in 1989 seeks to protect children from all forms of sexual exploitation and sexual abuse. This obligation extends to sexual exploitation and abuse perpetrated against children in the context of trafficking in human beings. In 2000, the UN adopted a Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the UN Convention against Transnational Organized Crime. The Protocol was the first comprehensive international instrument dealing with trafficking in human beings. As of March 2009, the Protocol has been ratified by 23 EU Member States, and the remaining 4 have signed it. The European Community signed and approved the Protocol. The Council of Europe Convention on Action against Trafficking in Human Beings provides a comprehensive and coherent framework covering prevention, cooperation between different actors, protection of and assistance to victims and an obligation to criminalise trafficking in human beings. Implementing such measures would lead to significant improvements. The Convention has been ratified by 12 EU Member States. Another 13 have signed it and are going through the ratification process. The Framework Decision (FD) on combating trafficking in human beings was adopted on 19 July 2002 as a response to a generally perceived need to address the serious criminal offence of trafficking in human beings at EU level. A report on the implementation of the FD was adopted by the Commission in May 2006. Directive 2004/81/EC provides for assistance and residence status for victims who are third country nationals. The Commission will report on the implementation of Directive 2004/81/EC in autumn 2009 and will

consider appropriate measures to further reinforce the protection offered to victims by Member States.

## **2.2.2 Existing international instruments on confiscation of instrumentalities and proceeds of THB crime**

### **The United Nations Convention against Transnational Organized Crime (2000)**

Art. 12 par. 2, 3, 4 and 6 recommends:

“Article 12 Confiscation and seizure

1 States Parties shall adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of:

(a) Proceeds of crime derived from offences covered by this Convention or property the value of which corresponds to that of such proceeds;

(b) Property equipment or other instrumentalities used in or destined for use in offences covered by this Convention.

2. States Parties shall adopt such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.

3. If proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.

4. If proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to this assessed value of the intermingled proceeds

5. Income or other benefits derived from proceeds of crime, from property into which proceeds of crime have been transformed or converted or from property with which proceeds of crime have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds of crime.

6. For the purposes of this article and article 13 of this Convention, each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized. States Parties shall not decline to act under the provisions of this paragraph on the ground bank of secrecy.

7. - 9.....”

**The Council of Europe Convention on action against THB (CETS 197)** in the Art. 23 par. 3 provides:

*“ Each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate or otherwise deprive the instrumentalities and proceeds of criminal offences established in accordance with Articles 18 and 20, paragraph a, of this convention, or property the value of which corresponds to such proceeds”.*

**The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds of Crime (CETS 141)** in the article 2 par. 1 has an almost similar formulation for the same issue. Furthermore the same Convention provides:

*“Article 3 – Investigative and provisional measures*

*Each Party shall adopt such legislative and other measures as may be necessary to enable it to identify and trace property which is liable to confiscation pursuant to Article 2, paragraph 1, and to prevent any dealing in, transfer or disposal of such property.*

*Article 4 – Special investigative powers and techniques*

*1 Each Party shall adopt such legislative and other measures as may be necessary to empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized in order to carry out the actions referred to in Articles 2 and 3. A Party shall not decline to act under the provisions of this article on grounds of bank secrecy.*

*2 Each Party shall consider adopting such legislative and other measures as may be necessary to enable it to use special investigative techniques facilitating the identification and tracing of proceeds and the gathering of evidence related thereto. Such techniques may include monitoring orders, observation, interception of telecommunications, access to computer systems and orders to produce specific documents.”*

**The Annex of E.U. Council conclusions of 8 May 2003 (C 137/1)** recommends in the chapter for police and judicial cooperation:

*“In order to identify, sequester and confiscate the criminal assets and proceeds of traffickers, legislative provisions should be further developed with a view to facilitate the confidential proactive and parallel investigation of the financial affairs of suspected traffickers. These provisions should include a legal duty on financial institutions to disclose suspect money laundering transactions to law enforcement agencies and should impose a strict legal duty on financial institutions not to disclose the existence of police enquiries into a suspect's financial affairs”.*

### **2.2.3 Existing international instruments on compensation for THB victims**

**The Council of Europe Convention on action against THB (CETS 197)** in the Art. 15 provides:

*“Par. 3: Each party shall provide, in its internal law, for the right of victims to compensation from the perpetrators.*

*Par. 4: Each Party shall adopt such legislative or other measures as may be necessary to guarantee compensation for victims in accordance with the conditions under its internal law, for instance through the establishment of a fund for victim compensation or measures or programmes aimed at social assistance and social integration of victims, which could be funded by the assets resulting from the application of measures provided in Article 23”.*

**The Annex of E.U. Council conclusions of 8 May 2003 (C 137/1)** recommends in the chapter for police and judicial cooperation:

*“National legislation must ensure the victims right to seek and secure compensation for the injuries and harm they have suffered”.*

According to the Proposal for a **Council Framework Decision on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA** in the article 9 par. 6 is provided that:



“Each Member State shall ensure that particularly vulnerable victims have in the course of criminal proceedings access to free legal counselling, and to legal representation on the same grounds envisaged by national legislation for the defendant, including for the purpose of claiming compensation. This paragraph shall be without prejudice to the application of Article 11 when the victim is a minor”.

**According to Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings it is provided:**

*“Article 9- Right to compensation in the course of criminal proceedings*

1. Each Member State shall ensure that victims of criminal acts are entitled to obtain a decision within reasonable time limits on compensation by the offender in the course of criminal proceedings, except where, in certain cases, national law provides for compensation to be awarded in another manner.
2. Each Member State shall take appropriate measures to encourage the offender to provide adequate compensation to victims.
- 3....”

Article 10 -Penal mediation in the course of criminal proceedings

1. Each Member State shall seek to promote mediation in criminal cases for offences which it considers appropriate for this sort of measure.
2. Each Member State shall ensure that any agreement between the victim and the offender reached in the course of such mediation in criminal cases can be taken into account.”

### **3 Performance of the activity**

#### **3.1 Romanian legal framework**

Romania has ratified all international instruments in the field of trafficking in persons. The legal instruments on combating trafficking in persons set forth specific provisions in the field of prevention, combating of trafficking as well as victim protection and assistance.

The main legal instruments on combating trafficking in persons adopted by Romania are:

1. **Law 678/2001** on preventing and combating trafficking in persons, subsequently amended and supplemented; This law criminalizes the various forms of trafficking and sets up the legal framework for specialist agencies to use modern investigative techniques in detecting such crimes. Measures to protect and assist to trafficked victims and their families, as well as witnesses, were introduced.
2. **Law 565/2002** to ratify the U.N. Convention against Transnational Organized Crime, of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children which supplements the U.N. Convention against Transnational Organized Crime, of the Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the U.N. Convention against Transnational Organized Crime.

3. **Government Decision no. 299/2003** to approve Standard Rules for Application of Law 678/2001 on preventing and combating trafficking in human beings.

4. **Law 39/2003** on preventing and combating organized crime.

5. **Law 211/2004** concerning measures to ensure protection to victims of crime.

The law transposes the requirements contained in the following European instruments:

- Council Framework Decision on the standing of victims in criminal proceedings (2001/220/JHA) – based on Title VI of the Treaty on European Union, the decision provides that victims of criminal acts are entitled to obtain a compensation by the offender in the course of criminal proceedings;
- Council Directive 2004/80/EC of 20 April 2004 relating to compensation to crime victims;
- European Convention on the compensation of victims of violent crimes (Strasbourg, November, 1983);
- Recommendation No. R (85) 11 on the Position of the Victim in the Framework of Criminal Law and Procedure;
- Commission Communication on “Crime victims in the European Union-standards and action”, (14 July 1999);
- European Commission - “Compensation to crime victims”, green paper.

The law sets up four categories of measures addressing directly the victim’s needs (victims of crimes under Law 678/2001 are also included):

- informing victims of crime about their rights
- psychological counselling
- free legal assistance
- state compensations for victims of specific crimes.

The law clearly refers to **psychological counselling** for victims of crimes stipulated by Law 678/2001 on preventing and combating trafficking in persons, subsequently amended and supplemented. The institutional mechanism to provide psychological counselling for victims is represented by probation services attached to the courts of justice. These services provide free psychological counselling for a maximum period of 3 months to 6 months in cases involving victims under the age of 18. Services for psychological counselling or other forms of assistance can also be established by NGOs independently or in partnership with public administration authorities. To this end, NGOs can benefit, under legal provisions, from government financial assistance.

**Free legal assistance** is granted primarily to direct crime victims but also to indirect victims of serious crimes (husband and wife, children, dependants of direct victims deceased as a result of the crime). Such measures complete the common law provisions stipulating that, on a regular basis, in cases of legal representation where a person has legal counsel or financial means to pay for qualified legal counselling, the court will provide free legal assistance.

**Financial compensation:** The law establishes several categories of terms/conditions for granting financial compensations to direct or indirect victims of the given crimes. This includes also information to the prosecution authorities about the crime committed within a specified period of time and takes into account the fact that for objective reasons victims, who make a minimum contribution to the detection of crime in due time are entitled to compensation (victims under the age of 18 and those under interdiction have no obligation to notify the investigative bodies about the crimes they committed). The law also regulates the possibility to pay some of the compensation money in advance to crime victims in difficult financial situations. Law 211/2004 stipulates that, through the Ministry of Justice, victims of crime (including trafficking related crimes) are entitled to request financial compensation and sets up the modalities by which the victim can obtain this compensation in cases where the crime was committed in another EU Member State territory, other than the state of his/her legal residence.

6. **Government Decision no. 1295/2004** to approve the National Action Plan on preventing and combating trafficking in children.

7. **Government Decision no. 1584/2005** concerning the establishment, organization and operation of the National Agency against Trafficking in Persons, subsequently amended and supplemented.

8. **Law 300/2006** for the ratification of the Council of Europe Convention on action against Trafficking in Human Beings.

9. **Government Decision no. 1654/2006** to approve the National Strategy against trafficking in persons 2006-2010.

10. **Government Decision no. 1720/2006** to approve the National Action Plan 2006 – 2007 for the implementation of the National Strategy against Trafficking in Persons 2006 – 2010.

11. **Government Decision no. 1238/2007** to approve the National Standards for Specialized Assistance Services provided to trafficking victims.

12. **Government Decision no. 983/2008** to approve the National Action Plan 2008-2010 for the implementation of the National Strategy against Trafficking in Persons 2006-2010.

13. **Joint Order by competent ministers and agency presidents no. 286/2007** to set up organizes and brings into operation the Thematic Working Group to nationally coordinate activities for the protection of and assistance to victims of trafficking (document approved by order MIRA)

14. **Joint Order by competent ministers and agency presidents no. 335/2007** to approve the National Victim Identification and Referral Mechanism.

**Regarding confiscation of proceeds of crime the following Romanian laws have to be used:**

1. **Criminal Procedure Code, especially art. 109 ff.**

2. Penal Code, especially art.118.
3. Law 78/2000 on the Prevention and Sanctioning of Corruption Acts,
4. Law 656/2002 on the Prevention and Sanctioning of Money Laundering
5. Law 508/2004 on the setting up, organisation and functioning within the Public Ministry of the Directorate for Investigating Organized Crime and Terrorism (OUG – Emergency Ordinance of the Government no. 7/2005 and 131/2006).
6. Law 535/2004 regarding Prevention an Countering Terrorism

### 3.2 Check-list

MS STEs and BC Staff on activity C 2.1 were commissioned to analyse law as well as other measures regarding confiscation and compensation of victims of THB and to make proposals of improvement in case of need.

To fulfil this commission the working group has looked at the legislative situation as well as administrative (police) regulations.

The following questions are the result of this check. Questions were disregarded, when already answered in law documents (for example: are there established measures to enable confiscation of proceeds of crime derived from THB-offences or property, equipment or other instrumentalities used in or destined for use in this offences?) or in case they belong to special topics of other activities. On the other side, strictly speaking questions were not confined to legislation. Areas were included, that needed to be addressed when reviewing anti-trafficking-legislation in substantive criminal law and criminal procedural law.

#### 3.2.1 Confiscation

- What measures did Romania adopt to enable the identification, tracing, freezing or seizure of any proceed of crime derived from THB-offences or property, equipment or other instrumentalities used in or destined for use in such offences?

(See United Nations Convention against Transnational Organized Crime,2000, Article 12 para 2, also The Council of Europe Convention on Laundry, Search, Seizure and Confiscation of Proceeds of Crime (CETS 141), Chapter II, Art. 3)

- If proceeds of crime have been transformed or converted, in part or in full, into other property, is such property liable to measures of confiscation and seizure instead of the proceeds?

(See above, Article 12 para 3, also The Council of Europe Convention on action against THB (CETS 197), Article 23 para 3; )

- If proceeds of crime have been intermingled with property acquired from legitimate sources, is such property liable to confiscation up to the assessed value of the intermingled proceeds?

(See above, Article 12 para 4)

- Are the courts or other competent authorities empowered to order that a bank, financial or commercial records have to be made available or seized?

(See above, Article 12 para 6; also Convention on Laundry, Search, Seizure and Confiscation of the Proceeds of Crime, Chapter II, Article 4))

Did Romania take measures in accordance with Annex 16 of Council Conclusions of 8/5/2003 (2003/C 137/01)?

*“In order to identify, sequester and confiscate the criminal assets and proceeds of traffickers, legislative provisions should be further developed with a view to facilitate the confidential proactive and parallel investigation of the financial affairs of suspected traffickers. These provisions should include a legal duty on financial institutions to disclose suspect money laundering transactions to law enforcement agencies and should impose a strict legal duty on financial institutions not to disclose the existence of police enquiries into a suspect’s financial affairs.”*

### **3.2.2 Compensation**

- Does national legislation ensure the victims right to seek and secure compensation for the injuries and harm they have suffered?

(Annex 16 of Council Conclusions of 8/05/2003 -2003/C 237/01)

-How does Romania provide for the right of victims to receive compensation from the perpetrators?

(See The Council of Europe Convention – CETS 197, Art. 15 para 3)

-Do victims of THB have access to free legal aid including claims for compensation?

(See Proposal for a Council Framework Decision repealing Framework Decision 2002/629/JHA from 25/3/2009)

- Did Romania adopt such legislative or other measures as may be necessary to guarantee compensation for victims in accordance with the conditions under its

internal law, for instance through the establishment of a fund for victim compensation or measures or programmes aimed at social assistance and social integration of victims, which could be funded by the assets resulting from the application of measures provided in Article 23 of the Council of Europe Convention?

(See The Council of Europe Convention –CETS 197, Art. 15 para 4)

-How does Romania ensure that victims of criminal acts are entitled to obtain a decision within reasonable time on compensation by the offender in the course of criminal proceedings (except cases in which compensation can be awarded in another manner)?

(See Council Framework Decision 15/3/2001, Art. 9 para1)

-Have been taken appropriate measures to encourage the offender to provide adequate compensation to victims?

(See above, Art. 9 para 2)

-Did Romania seek to promote mediation in criminal cases for offences which are considered appropriate for this sort of measure?

-Did Romania ensure that any agreement between the victim and the offender reached in the course of such mediation in criminal cases can be taken into account?

(See above, Art. 10)

### **3.3 Result of the interviews**

The real situation regarding the fight against trafficking in human beings (THB) with a focus on Confiscation and Compensation was to be assessed through interviews with different representatives of stakeholders.

For this purpose, different questions have been discussed on the basis of the following practical case:

*Four Romanian delinquents, who are suspected of having lead young women to prostitution over several years, have been captured after open and covered measures. They owned expensive cars, real estates and a big amount of cash money.*

The questions analyzed regarded the competences, the course of the investigations and the collaboration.

The safeguarding, the confiscation, but also the compensation was a main focus.

The representative of the money laundering service described the course of investigations, starting with the analysis of the initial data, their evaluation according to the 4 x 4 system and the contacting of the department of public prosecution. After evaluating the information, the prosecution is initiated in the given case by the public prosecutor, and further measures are taken, among these, the financial investigation at banks and other institutions.

In order to increase the effectiveness of the investigations, since 2001, investigation teams (DIICOT - DCCO) are collaborating more closely. This does save time and means, they explain.

For the measures of criminal proceedings, a judicial disposal must be obtained. If the attorney orders measures in case of danger and in default, a judicial disposal is to be obtained within 24 hours. Unless the judge confirms the measures, the results of the measures cannot be used in the procedure.

The confiscation of the defendant's property in the case study can occur immediately after the initiation of the investigatory proceedings by the public prosecutor. The defendant has to be informed about the initiation of the investigatory proceedings. Whether this also actually occurs was not clearly revealed in the interview.

It was explained that the judge can also confiscate property that has been assigned by the defendant to other persons. An emergency alienation in the case of imminent loss of value is also possible according to the law.

The interview partner named the code of criminal procedure and the acts 656/2002-508/2004-39/2003-535/2004 and 78/2000 as legal basis for the investigation and confiscation.

Finally, the interview partner declared that an integration of the detectives (DCCO) to the competent prosecutors (DIICOT) could increase the efficiency of the entire work. With this would also follow a general delegation of investigatory measures to the detectives.

The representative of the Direction for the Combat of Organised Crime (also Trafficking in Human Beings) basically confirmed the investigation process. He declared that the investigators often rotate during an investigation. He knew about the possibility of joint investigation teams. With this respect, he stated that they are rarely used, the reason he gave being the shortage of staff.

Asked about the compensation, the interviewee explained that there is no delinquent-victim-compensation in Romania in cases of trafficking in human beings.

The representative from DIICOT, a woman public prosecutor, explained that the provisions of the criminal procedure code (§§ 109 ff) as well as some special laws (provisions on the confiscation and retraction) are being implemented for the safeguarding of asset value in a THB-case.

After the confiscation of his assets, the accused can complain to the judge. The latter may confirm or annul the confiscation.

The confiscation of the assets is only possible in the amount of profit that the accused is proved to have made out of trafficking in human beings. A confiscation is possible for natural as well as juristic persons.

Asked with respect to the compensation for the victims of THB, the public prosecutor stated that the victim is accorded an attorney for assistance already at the beginning of the procedure and for the entire duration of it. (Law No. 678/2001 art. 43 u. 44 - Law No. 211/2005)

A victim of THB can be disbursed a financial compensation already before a pronounced sentence (Law No. 211/2005). The representative from the DIICOT did not know about such case.

If an accused is paying compensation to the THB victim during a procedure, the judge can consider this in mitigation of the sentence.

Summing up the interview results displayed until now, one can assess that the practical course of events can only partially be deduced from the descriptions of the interviewees.

The interview with the president of the Family and Juveniles Court in Brasov, Miss Ramona Szikszay, and three of her colleagues dealt with both confiscation and compensation.

Miss S. first explained the decision making process according to the Victims Compensation Law No. 211/2004.

According to this law, a commission formed of two judges is instituted on the level of the tribunals, which decides on the award of payments of compensation and also on the state's advance payment to the victims of criminal acts. The commission at the Juvenile Court is responsible, when the victims or the offenders are minors. The award depends on a request from the victim, which has to be filed within 60 days from the deed, as a rule (Art. 23 par 1). The law enforcement agencies are obligated to inform the victim with regard to its rights according to this law. However, the judges showed scepticism to whether this informing always occurs.

According to Section IV of the law, the victim is accorded a lawyer for free for the whole process. The spouse or other persons entitled to maintenance of the victim are entitled with the same aid. The victims of THB belong to the beneficiaries named in the act, according to Art. 21 para 1 lit. a, last indent.

The amount of compensation for property damages is limited to ten times the average monthly wage (Art. 27 para 2), and so is the amount of an eventual payment in advance.

The proceeding can be initiated independently of the criminal proceeding and can end with a decision in the benefit of the victim even before the conviction of an offender. On this, a judge critically commented that this contravened the presumption



of innocence. In the case of THB-victims, the accordance of compensation is compulsory. If the offender is condemned, the victim's claims against him are devolved to the state, following the lawful subrogation proceedings.

In the case of a negative decision, the applicant can appeal on points of law before the appellate court.

The commission at the Juvenile Court had a single proceeding pending up to now, which was ended with a decision in the favour of the victim. So far, the commission at the tribunal had no proceeding to work on.

The victim can also plead his/her claims in the adhesive procedure. As in Germany, the adhesive procedure seems not to unfold an excessive effect, since in case of doubt, the criminal proceeding is of prior-ranking due to the acceleration reasons. Of course, the victim is free to plead independently for its claims in civil action.

The judges could not offer nationwide statistical data regarding the different ways of proceeding mentioned above.

The possibility to impose on the convict payments to the victim, in condition of probation (Art. 56 b para 2 no. 1 CC-GER, Annex 5.1) does not exist in Romania anymore. A corresponding state regulation was classified as unconstitutional.

The Department of Public Prosecution does also not have the possibility to close the proceedings on condition that the prosecuted executes monetary payment to the victim. (Art. 153 a para 1 no. 5 CPC-GER, Annex 5.2)

Similarly, the delinquent-victim-compensation (Art. 46a CC-GER, Annex 5.3) is unknown.

A state fund (as for example in Germany the Lower Saxon Victim Aid Fund) to supply money for rapid aid to the victims of criminal acts or for compensatory benefits, such as psychological assistance, does not exist. Insofar, only the NGOs offer help.

If the adhesive procedure results with a positive decision, the victim must try to get it implemented through the bailiff, through civil enforcement.

As to the confiscation of estates in the criminal proceeding, this is to conform to CPC (Art. 109 ff.); there is no special law for it.

The judges were familiar with the Institute for Recovery Aid (Art. 73 para 4 CC-GER, Annex 5.4). Due to the lacking experience, they could not say whether recovery aid was offered in cases of THB.

If criminal estate is declared forfeit in the course of a criminal proceeding, it falls to the Romanian state.

There are no acceleration prescriptions for proceedings figuring claims of victims.

The work of investigation of the Department of Public Prosecution and the police has generally been described as good. The judges could not make statements regarding

data from the estate investigations. In the cases they had worked on until then, according to the documents, the accused had no funds.

In another interview with a lawyer, it was told that the judiciary hasn't great experience in cases of THB. Especially the knowledge of the judges should be improved. The prosecutors are not effective enough in the field of investigating financial status of the offenders.

He generally complained that the state authorities don't give enough aid for the victims.

The punishment of the offenders is in the focus of prosecutors and judges and not the needs of the victims. In the most of cases the victims try to get their claims in the criminal proceedings .However the civil execution of the court decisions is interminable. The law 211/2004 is well known to the judges. Only significant damages and urgent needs were allowed.

A civil claim as a third possible way to get compensation is too difficult and needs too much time. The lawyer stressed out the need of seminars and trainings for all stakeholders in the field of compensation.

## **4 Recommendations**

### **4.1 Confiscation**

#### **4.1.1 Proactive investigations**

Obtaining suspicion and initiative investigations regarding THB should be strengthened (gaining, evaluating and routing information, structured display of the phenomena THB).

Proactive investigations are foreseen in the Romanian Police measures. The aspect of proactive financial investigations (detecting the cashflow and the financial status ) concerning identified persons involved in THB should be more considered.

For this purpose the description of a clear workflow seems very useful. If necessary legislative provisions in the Police Law should be developed ( see Council Conclusions of 8. May 2003 – C 137/01- Annex 16).

#### **4.1.2 Investigations by order of the prosecutor**

Regarding measures to enable the identification, tracing, freezing or seizure of any proceeds of crime derived from THB –offences or property, equipment or other instrumentalities used in or destined for use in such offences the Romanian legislation corresponds to international regulations.

To speed up exchange of information and the process of investigation in cases of THB the various actors of state authorities should be put together in Joint Investigation Teams (JIT).

The prosecutor (DIICOT) as leader of investigation, police officers of DCCO, money laundering service, customs, border police, tax authorities, and from case to case Aliens Department, Public Order Department, Constructions Work Department, Social Welfare Department, Employment Office and National Agency against Trafficking in Persons could be parts of it.

The members of the JIT should be available for the whole time of the investigations.

### **4.1.3 Freezing of proceeds of crime**

The Romanian legislation regarding freezing of any proceed of crime derived from offences seems to be unsatisfactory. The freezing – ordered by the prosecutor – is only possible, when the formal proceedings are opened.

About this decision the prosecutor has to inform the defendant. This process endangers an effective confiscation. The freezing should be allowed by law before the defendant will be informed about the proceedings.

## **4.2 Compensation**

### **4.2.1 General**

Although Romania has legislation relative to confiscation (of instruments and proceeds of crime) and compensation of victims of trafficking in human beings, some shortcomings can be remarked.

Speaking in abstracto, the STE'S have the opinion that Romania disposes the legislative means to enable the identification, tracing, freezing or seizure of any proceed of crime derived from THB-offences or property, equipment or other instrumentalities used in or destined for use in such offences.

But on a practical level there are difficulties - hesitations for the law enforcements agencies to impose seizure to transformed or converted, in part or in full proceeds, into other property. This involves weakness of the legal order to impose a definite confiscation in such a case.

Furthermore, the STE'S have doubts if the courts impose confiscation up to the assessed value of the intermingled proceeds in the case where proceeds of crime have been intermingled with property acquired from legitimate sources.

In addition the above mentioned organs may have practical impediments regarding the possibility of seizure of banks' or other financial institutions' records, which involve delays in the reveal of the truth.

Regarding compensation of the THB victims, Romania has the Law No. 211/2004. But the above mentioned law has certain ambiguities. For example, it is not sure whether it covers the future care the victim will have to receive if he/she is to cope with what has happened and with the damage to a possibly young life. However it is difficult to put a figure on compensation for moral damage, Romania has established a maximum of 10 average salaries for rather material damages. Even so, it is extremely important to enable the victim to bear the financial burden of psychological treatment, which is seldom reimbursed by health schemes.

Expecting the trafficker to provide compensation for the offence often comes down to a question of his/her means. In this context, money should be no barrier to compensation for the victim. Regardless of the THB penalised, it is therefore desirable for the State to guarantee compensation for the damage where a perpetrator lacks means.

It also appears desirable for such compensation to cover the costs that will incur the ensuring of the best possible treatment of any psychological or psychiatric conditions which the THB victim may develop after the perpetrator's conviction. The aim is to enable THB victims to rebuild their lives.

**It is vitally important to provide compensation for all the harm suffered by the victim.**

**The State must guarantee compensation for harm where a perpetrator lacks means.**

**Compensation for harm must allow for the costs that will have to be incurred to ensure the best treatment of any psychological or psychiatric conditions on the part of victim.**

#### **4.2.2 Informing victims of crime**

According to the Art. 4 para 1 Law No. 211/2004 police prosecution and judiciary are obliged to inform the victim about the possible procedures to claim compensation, including the possibility of putting forward a civil claim in the criminal proceedings and to obtain legal assistance to do so.

In practice, only a small minority of trafficked persons claim damages and still fewer victims receive a compensation payment. The possible conclusion is that information system can be improved.

According to the AGIS Handbook 2006 "Trafficking in THB for Police, Prosecutors and Judges" following recommendations are given:

The start for collecting information about the damages suffered by the victim lies with the police. To this aim, the police should include in the record of the statement of the

victim or in an annex to the record relevant information about the material and immaterial damages suffered by the victim.

If the victim has expressed her or his wish to claim compensation and/or to be kept informed about the proceedings following her or his pressing charges, the police should do the best of their abilities, inform the victim about the progress and disposition of the case up till the moment the record is sent in to the prosecutor. From that moment on, the prosecutor should be responsible for the proper providing of the information the victim about the progress of the proceedings.

**In addition an improved instruction thereabout for all involved staff seems necessary.**

#### **4.2.3 Recovery aid**

A legal obligation for the prosecutors to secure recovery aid connecting with freezing of proceeds of crime seems to be unknown in cases of THB.

**Legislative provisions should be developed if necessary.**

(German legislation see Annex 5.4)

#### **4.2.4 Reconciliation between offender and victim**

Appropriate measures should be taken to encourage the offender to provide adequate compensation to the victim.

For MS best practises see German legislation Annex 5.3.

#### **4.2.5 Provisional Termination of Proceedings**

Romanian legislation should provide the possibility to terminate the proceedings if the offender in an effort to achieve reconciliation with the victim, has made full restitution or the major part thereof for his offence, or has earnestly tried to make restitution.

#### **4.2.6 Mediation**

Romania should seek to promote mediation in THB-cases, which it considers appropriate for this sort of measure.

It should be ensured that any agreement between the victim and the offender reached in the course of such mediation in the criminal proceedings can be taken into account.

#### **4.2.7 Civil claim in the criminal proceedings**

Romanian legislation in this point seems to correspond to MS – best practises. But there is only a small number of cases. Nevertheless the civil claim in criminal proceedings is a good and useful instrument for the victims to get compensation by the offenders.

**To increase the number of cases the legislation should eliminate the legal regulations that allow rejection of such claims in the criminal proceedings.**

#### **4.2.8 State fund for compensation of victims**

Romania should adopt the recommendation in Art. 15 para 3 of the Council of Europe Convention on action against THB (CETS 197) and dispose a state fund for victims. This fund can support victims of THB fast and unbureaucratic.

Capital stock can be given to the fund from the state budget.

Further financing of the fund seems to be possible by fines and by the assets resulting from measures of Confiscation and seizure of the proceeds of crime.

Experience in Germany (for example in the state of lower Saxony has shown, that this fund is very effective and has a good acceptance by the victims.

The state fund`s regional offices are close by the prosecutor`s offices and the tribunals.

This regional principle is useful in gaining fines from them.

## **5 Annex**

### *Annex 5.1*

#### **Article 56 b German Criminal Code**

##### **Conditions**

(1) The court may impose conditions on the convicted person directed at repairing the harm caused. No unreasonable demands shall be made from the convicted person.

(2) The court may order the convicted person

1. to make restitution to the best of his ability for the harm caused by the offence;
2. to pay a sum of money to a charitable organisation if this appears appropriate in light of the offence and the character of the offender;
3. to perform community service; or
4. to pay a sum of money to the public treasury.

The court shall not impose a condition pursuant to the 1st sentence of this subsection No.s 2 to 4 unless the fulfilment of the condition does not impair the restitution for the harm caused.

(3) If the convicted person offers to perform appropriate services for the purpose of repairing the harm caused, the court shall typically preliminarily refrain from imposing conditions if it is to be expected that the offer will be fulfilled.

### *Annex 5.2*

#### **Article 153a German Criminal Procedure Code**

##### **[Provisional Dispensing with Court Action; Provisional Termination of Proceedings]**

(1) In a case involving a misdemeanour, the public prosecution office may, with the consent of the accused and of the court competent to order the opening of the main proceedings, dispense with preferment of public charges and concurrently impose conditions and instructions upon the accused if these are of such a nature as to eliminate the public interest in criminal prosecution and if the degree of guilt does not present an obstacle. In particular, the following conditions and instructions may be applied:

1. to perform a specified service in order to make reparations for damage caused by the offence,
2. to pay a sum of money to a non-profit-making institution or to the Treasury,
3. to perform some other service of a non-profit-making nature,
4. to comply with duties to pay a specified amount in maintenance,

5. to make a serious attempt to reach a mediated agreement with the aggrieved person (perpetrator-victim mediation) thereby trying to make reparation for his offence, in full or to a predominant extent, or to strive therefore, or
6. to participate in a course pursuant to section 2b subsection (2), second sentence, or section 4 subsection (8), fourth sentence, of the Road Traffic Act.

The public prosecution office shall set a time limit within which the accused is to comply with the conditions and instructions, and which, in the cases referred to in numbers 1 to 3, 5 and 6 of the second sentence, shall be a maximum of six months and, in the cases referred to in number 4 of the second sentence, a maximum of one year. The public prosecution office may subsequently revoke the conditions and instructions and may extend the time limit once for a period of three months; with the consent of the accused it may subsequently impose or change conditions and instructions. If the accused complies with the conditions and instructions, the offence can no longer be prosecuted as a misdemeanour. If the accused fails to comply with the conditions and instructions, no compensation shall be given for any contribution made towards compliance. Section 153 subsection (1), second sentence, shall apply *mutatis mutandis* in the cases referred to in the second sentence, numbers 1 to 5.

(2) If public charges have already been preferred, the court may, with the approval of the public prosecution office and of the indicted accused, provisionally terminate the proceedings up until the end of the main hearing in which the findings of fact can last be examined, and concurrently impose the conditions and instructions referred to in subsection (1), first and second sentences, on the indicted accused. Subsection (1), third to sixth sentences, shall apply *mutatis mutandis*. The decision pursuant to the first sentence shall be given in a ruling. The ruling shall not be contestable. The fourth sentence shall also apply to a finding that conditions and instructions imposed pursuant to the first sentence have been met.

(3) The running of the period of limitation shall be suspended for the duration of the time limit set for compliance with the conditions and instructions.

### *Annex 5.3*

#### **Article 46a German Criminal Code**

##### **Reconciliation; restitution**

If the offender

1. in an effort to achieve reconciliation with the victim, has made full restitution or the major part thereof for his offence, or has earnestly tried to make restitution; or
2. in a case in which making restitution for the harm caused required substantial personal services or personal sacrifice on his part, has made full compensation or the major part thereof to the victim,



the court may mitigate the sentence pursuant to section 49 (1) or, unless the sentence to be imposed on the offender is imprisonment of more than one year or a fine of more than three hundred and sixty daily units, may order a discharge.

#### *Annex 5.4*

### **Article 111 b German Criminal Procedure Code**

### **Article 73 German Criminal Code**

### **Article 111b CPC**

#### **[Securing of Objects]**

(1) Objects may be secured by seizure pursuant to Section 111c if there are grounds to assume that the conditions for their forfeiture or for their confiscation have been fulfilled. Section 94 subsection (3) shall remain unaffected.

(2) If there are grounds to assume that the conditions have been fulfilled for forfeiture of equivalent value or for confiscation of equivalent value of the object, attachment *in rem* may be ordered pursuant to Section 111d in order to secure such equivalent value.

(3) If there are no cogent grounds, the court may revoke the order in respect of the measures referred to in the first sentence of subsection (1) and in subsection (2) after a maximum period of six months. Where certain facts substantiate the suspicion of the offence and the time limit referred to in the first sentence is not sufficient given the particular difficulty or particular extent of the investigations or for another important reason, the court may, upon application by the public prosecution office, extend the measure provided the grounds referred to justify their continuation. Unless there are cogent grounds, the measure shall not be continued for longer than a period of twelve months.

(4) Sections 102 to 110 shall apply *mutatis mutandis*.

(5) Subsections (1) to (4) shall apply *mutatis mutandis* insofar as forfeiture may not be ordered for the sole reason that the conditions under section 73 subsection (1), second sentence, of the Criminal Code apply.

### **Article 73 CC**

#### **Conditions of confiscation**

(1) If an unlawful act has been committed and the principal or a secondary participant has acquired proceeds from it or obtained anything in order to commit it, the court shall order the confiscation of what was obtained. This shall not apply to the extent that the act has given rise to a claim of the victim the satisfaction of which would deprive the principal or secondary participant of the value of what has been obtained.

(2) The order of confiscation shall extend to benefits derived from what was obtained. It may also extend to objects which the principal or secondary participant has acquired by way of sale of the acquired object, as a replacement for its destruction, damage to or forcible loss of it or on the basis of a surrogate right.

(3) If the principal or secondary participant acted for another and that person acquired anything thereby, the order of confiscation under subsections (1) and (2) above shall be made against him.

(4) The confiscation of an object shall also be ordered if it is owned or subject to a right by a third party, who furnished it to support the act or with knowledge of the circumstances of the act.