

CHAPTER 1: RECENT DEVELOPMENTS IN THE LEGAL AND POLITICAL FRAMEWORK

In this chapter, Myria presents the most recent developments in the legal and political framework in terms of human trafficking and smuggling both on a European and a Belgian level.

1. Developments in the legal and political framework

1.1. Human trafficking

In 2012, the European Commission adopted its human trafficking strategy for the period 2012-2016²³². In October 2014, the Commission published a mid-term report on the implementation of this strategy²³³. Myria presented them in previous annual reports²³⁴.

The five priorities defined in the strategy are as follows:

- to detect, protect, and provide assistance to the victims of trafficking;
- to reinforce the prevention of human trafficking;
- to increase prosecutions against traffickers;

The European agenda on security and migration adopted in 2015, provides for the adoption of a new European strategy on this matter, which should be adopted by the end of 2016.

- to improve coordination and cooperation between the main stakeholders and the coherence of policies;
- to better define the latest concerns relating to various forms of human trafficking and respond to them efficiently.

The mid-term report presented the efforts made relating to the first four priorities; the fifth one was covered by each of the key priorities.

Since then, several studies have been published. Concerning detection, protection, and assistance to victims, a comparative study on the regulation of labour market middlemen and the role of social partners within the framework of trafficking for the purpose of labour exploitation was published in April 2016²³⁵.

In terms of prevention, the study concerning the impact of prevention measures in terms of trafficking was published in October 2015²³⁶. Again in October 2015, the Commission also published a study on risk groups²³⁷. In May

²³² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *The EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016*, 19 June 2012, COM(2012) 286 final.

²³³ Commission Staff working document, *Mid-term report on the implementation of the EU strategy towards the eradication of trafficking in human beings*, Brussels, 17 October 2014, SWD(2014)318 final, COM(2014) 635 final.

²³⁴ For the strategy, see: Annual Report 2011, *Trafficking in and smuggling of human beings, The money that matters*, pp. 71-72 and for the mid-term report. Annual Report 2015, *Trafficking and smuggling of human beings, Tightening the links*, pp. 56-57.

²³⁵ This study was executed by Eurofound (European Foundation for the Improvement of Living and Working Conditions) and is available at the following link: https://ec.europa.eu/anti-trafficking/sites/anti-trafficking/files/regulation_of_labour_market_intermediaries_and_the_role_of_social_partners_in_preventing_trafficking_of_labour.pdf.

²³⁶ https://ec.europa.eu/anti-trafficking/sites/anti-trafficking/files/study_on_prevention_initiatives_on_trafficking_in_human_beings_0.pdf.

²³⁷ https://ec.europa.eu/anti-trafficking/sites/anti-trafficking/files/study_on_children_as_high_risk_groups_of_trafficking_in_human_beings_0.pdf.

2016, a study on gender as a factor in human trafficking was published²³⁸.

Concerning the 'investigation and prosecution of traffickers' part of the strategy, the Commission published a study on the case law and practices regarding trafficking for the purpose of labour exploitation in October 2015²³⁹.

A handbook for experts, presented in January 2016,²⁴⁰ should also be acknowledged. It was compiled within the framework of the European *TeamWork!* project on multidisciplinary cooperation in the fight against human trafficking for the purpose of labour exploitation, under the Dutch presidency.

Through its European Anti-Trafficking Coordinator, Ms Myria Vassiliadou, the Commission began a major written consultation among other things, as part of its preparatory work, with the Member States and the National Rapporteurs, on the priorities to be implemented within the framework of a new strategy to combat human trafficking. The European agenda on security and migration adopted in 2015²⁴¹, provides for the adoption of a new European strategy on this matter, which should be adopted by the end of 2016.

²³⁸ https://ec.europa.eu/anti-trafficking/eu-policy/study_gender-dimension-trafficking-human-beings_en.

²³⁹ https://ec.europa.eu/anti-trafficking/sites/anti-trafficking/files/study_on_case-law_on_trafficking_for_the_purpose_of_labour_exploitation_2.pdf.

²⁴⁰ This is a joint project between the Netherlands, Luxembourg, Slovakia and Malta. The handbook can be accessed via the following the link: <http://english.eu2016.nl/documents/publications/2016/01/18/manual-for-experts-on-multidisciplinary-cooperation-against-trafficking-in-human-beings-for-labour-exploitation>.

²⁴¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A European agenda on migration*, 13 May 2015, COM(2015) 240 final.

Myria made several suggestions within this framework.

Finally, on 19 May 2016, on the same day the meeting of the National Rapporteurs and Equivalent Mechanisms concerning trafficking was held, the Commission published its first report on the progress made by the Member States regarding the fight against human trafficking²⁴². This report, which must be compiled every two years in accordance with Article 20 of the European directive on human trafficking²⁴³, presents the trends within the framework of this fight, examines the progress made, and emphasises the key challenges the EU and the Member States still face.

1.2. Human smuggling

Following the dramatic events in the Mediterranean, the European Commission presented a series of measures in May 2015 in reaction to the current challenges around migration²⁴⁴. One of these is the 2015-2020 action plan against migrant smuggling²⁴⁵, dealt with in our previous annual report²⁴⁶. In the past few months, the European

²⁴² Report from the Commission to the European Parliament and the Council on the progress made in the fight against trafficking in human beings (2016), 19 May 2016, COM(2016) 267 final. The report is accompanied by a staff working document.

²⁴³ European Parliament's and Council's Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, replacing the Council Framework Decision, 2002/629/JHA, O.J., L 101 of 15 April 2011.

²⁴⁴ http://europa.eu/rapid/press-release_IP-15-5039_fr.htm. For Myria's opinion on this subject, see the 2015 Annual Report: *La migration en chiffres et en droits*, Chapter 3, *Accès au territoire*, available at www.myria.be.

²⁴⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *EU Action Plan against migrant smuggling (2015-2020)*, Brussels, 27 May 2015, COM(2015) 285 final.

²⁴⁶ Annual Report 2015, *Trafficking and smuggling of human beings, Tightening the links*, p. 52.

agenda has indeed been strongly focused on the management of the asylum crisis²⁴⁷, where the fight against smugglers is only one of the factors.

The action plan defines concrete measures to prevent and counter migrant smuggling on four levels: enhanced police and judicial response; gathering and sharing of information; prevention of smuggling, and assistance to vulnerable migrants, through stronger cooperation with third countries.

Several of the action plan's measures have already been implemented. For instance, a European Migrant Smuggling Centre (EMSC) has been set up within

Even if Belgian legislation largely complied with the European directive, there were, however, some remaining gaps in its criminal law and criminal procedure that the new law intends to fill.

Europol, and a theme group has been created within Eurojust. At the same time, operational points of contact should be appointed in the Member States. In Belgium, the Interdepartmental Coordination Unit for the Fight against Trafficking and Smuggling in Human Beings was designated.

According to Europol, human smuggling was the fastest-growing criminal activity in Europe in 2015. A whole series of services - transport, accommodation, supply of false papers - are offered to migrants and refugees at exorbitant prices. Europol believes that these criminal networks made a turnover in the region of EUR 3 to 6 billion in 2015 alone, and that this amount could double or triple in 2016²⁴⁸. Europol and

Interpol also expect an increase in the sexual or labour exploitation of these migrants in the coming years, mainly in destination countries, owing to the fact that they are obliged to pay the smugglers for the debts they have incurred²⁴⁹.

Between January and April 2016, the Commission undertook a public consultation to support the assessment in progress and the impact analysis of the European legislation on migrant smuggling, and to gather different points of view on possible legislative improvements²⁵⁰. One of the European action plan's points does indeed consist of improving the current European legal framework for combatting migrant smuggling.

2. Developments in the Belgian legal and political framework

However, in Belgium, the most significant developments occurred in 2015 and at the beginning of 2016, regarding the legal and political framework, both in terms of human trafficking and smuggling.

2.1. Human trafficking

The most significant developments in human trafficking in 2015 and at the start of 2016, were the adoption of a law aimed at finalising the transposition of the European directive on human trafficking (point 2.1.1.) as well as the adoption of a new 2015-2019 action plan (point 2.1.2.).

In addition, there are several other recently-adopted measures worth taking into

²⁴⁷ For a detailed and critical analysis of this issue, see the 2016 annual report, *La migration en chiffres et en droits*, focus: l'Europe en crise (de l'asile), pp. 26-54.

²⁴⁸ Europol, *Migrant Smuggling in the EU*, February 2016. Available at: <https://www.europol.europa.eu/>.

²⁴⁹ Joint Europol-Interpol Report, *Migrant smuggling networks*, Executive summary, May 2016: <https://www.europol.europa.eu/content/europol-and-interpol-issue-comprehensive-review-migrant-smuggling-networks>.

²⁵⁰ http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2015/consulting_0031_en.htm.

account; while they do not specifically relate to human trafficking, they are nevertheless likely to have an impact on this area. On the one hand, there is the justice reform currently being led by the Minister of Justice²⁵¹. One of these measures, the 'guilty plea' (initial admission of guilt), may well have an effect on the fight against human trafficking, especially victim protection (point 2.1.3.).

On the other hand, there is the recent amendment to the Social Criminal Code, which aims to sanction undeclared workers (point 2.1.4.).

2.1.1. Finalisation of the transposition of European Directive 2011/36/EU on human trafficking

On 4 May 2016, parliament adopted a bill during a plenary session completing the implementation of the European obligations, especially in terms of human trafficking²⁵². The law was published in the Belgian Official Gazette of 8 June 2016²⁵³. There are three parts to this law. The first one aims to complete the compliance of Belgian legislation with European Directive

After the 2008-2012 and 2012-2014 action plans, Belgium adopted its third action plan, setting out the working framework for the years 2015 to 2019.

2011/36/EU on human trafficking²⁵⁴. It also sets out to bring greater coherence to the legislation on human trafficking relating to sexual abuse and the exploitation of prostitution. The second part - which we will not be dealing with here as it exceeds the framework of this report - aims to pursue the transposition of the directive relating to the fight against the sexual abuse and sexual exploitation of children, as well as child pornography²⁵⁵. In particular, it adapts the criminalisation of pornography and plans for Child

Focus to have the role of 'facilitator'. As for the third part, which concerns attempts to facilitate illegal immigration, we shall deal with this in the point dedicated to legal and political developments in human trafficking (see below, point 2.2.1.).

Even if Belgian legislation largely complied with the European directive, there were, however, some remaining gaps in its criminal law and criminal procedure that the new law intends to fill:

- As regards aggravating circumstances of the charge of trafficking: Article 433septies of the Criminal Code, relating to the *modi operandi* is completed, integrating the *modi operandi* mentioned in the European Directive: the abduction, deception, the abuse of power, giving or receiving of payments or benefits to allow for a

²⁵¹ See the justice plan on the Minister of Justice's website: <http://www.koengeens.be/fr/>.

²⁵² Bill completing the implementation of the European obligations concerning the sexual exploitation of children, child pornography, human trafficking and facilitation of unauthorised entry, transit and residence, *Parl. doc.*, Chamber, 2015-2016 session, 54-1701/005.

²⁵³ Law of 31 May 2016 completing the implementation of the European obligations concerning the sexual exploitation of children, child pornography, human trafficking and facilitation of unauthorised entry, transit and residence, *Belgian Official Gazette*, 8 June 2016.

²⁵⁴ European Parliament's and Council's Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, replacing the Council Framework Decision, 2002/629/JHA, *O.J.*, L 101 of 15 April 2011.

²⁵⁵ European Parliament's and Council's Directive 2011/92/EU of 13 December 2011 on combating sexual abuse, sexual exploitation of children and child pornography, replacing the Council Framework Decision 2004/68/JHA, *O.J.*, L 335 of 17 December 2011.

- person having control over another person²⁵⁶.
- The extraterritorial responsibility of the Belgian judge regarding human trafficking (Article 10ter of the preliminary title of the Criminal Procedure Code) extends to simple forms of human trafficking and attempted human trafficking²⁵⁷.
 - The 15-year limitation period is prolonged when the victim reaches adulthood in the case of attempted trafficking with a sexual purpose (amendment to Article 21, para. 1, 2nd point of the preliminary title of the Criminal Procedure Code)²⁵⁸.

The law has also provided for special protection measures for victims (in the interests of harmonisation with the legal provisions concerning prostitution and sexual abuse):

- a ban on publishing or distributing elements revealing the identity of a victim of trafficking for the purpose of sexual exploitation²⁵⁹ in the absence of the latter's written authorisation or the consent of the crown prosecutor or investigating judge for the needs of information or investigation (new Article 433novies/1 of the Criminal Code)²⁶⁰;
- the possibility for the victim of trafficking for the purpose of sexual exploitation (or its attempt) to ask the court to handle the case in camera (amendment to Article 190 of the Code of Criminal Procedure)²⁶¹.

The right to speak, covered by article 458bis of the Criminal Code for certain professionals whose main activity consists of working with children, is now specifically provided for in cases of trafficking (and attempted trafficking), and for all forms of trafficking²⁶². This right to speak allows these professionals to inform the crown prosecutor in case of the trafficking of a minor, either if there is a serious and imminent threat to the child's physical or mental integrity, or if there are indications of a serious and real threat that other minors are victims of trafficking and that the professional is unable to protect their integrity by themselves or with the help of a third party. During parliamentary debates, a member reiterated that caregivers are not always in favour of the right to speak because they are afraid that the victims will be less willing to give a statement²⁶³.

Finally, the law also makes certain amendments regarding ancillary penalties, whose application is extended (Article 433novies of the Criminal Code). Hence, the deprivation of rights will be pronounced in the case of a conviction for the simple form of trafficking (and no longer only for aggravated forms). At the same time, all the convictions for forms of trafficking committed against minors will now be combined with a ban on operating an establishment and a ban on exercising an activity²⁶⁴.

²⁵⁶ See Article 8 of the law; *Parl. doc.*, Chamber, 54-1701/005, p. 5 and the commentary on the bill's articles, *Parl. doc.*, Chamber, 54-1701/001, p. 20.

²⁵⁷ Article 12 of the law.

²⁵⁸ Article 13 of the law.

²⁵⁹ This ban also applies in the case of attempt.

²⁶⁰ Article 10 of the law.

²⁶¹ Article 14 of the law.

²⁶² Article 11 of the law.

²⁶³ Report of the Justice Commission of 28 April 2016 on the bill completing the implementation of the European obligations concerning the sexual exploitation of children, child pornography, human trafficking and facilitation of unauthorised entry, transit and residence, *Parl. doc.*, Chamber, 2015-2016 session, 54-1701/003, p. 7.

²⁶⁴ See Article 9 of the law and the comments on the articles, *Parl. doc.*, Chamber, 54-1701/001, p.20.

There is also a technical amendment linked to Article 11, §1, 1 of the Law of 13 April 1995 containing provisions with a view to cracking down on human trafficking and smuggling. This article concerns the follow-up and execution of the law, especially reporting tasks and the capacity of various organisations to engage in legal proceedings. This article has been amended in such a way that it now only refers to articles 433quinquies to 433octies of the Criminal Code. Indeed, given the existence of the specific offence of human trafficking since the Law of 10 August 2005²⁶⁵, there was no longer any need to also refer to articles 379 and 380 of the same code, relating to various offences in terms of prostitution²⁶⁶.

2.1.2. New action plan to combat human trafficking 2015-2019

After the 2008-2012 and 2012-2014 action plans, Belgium adopted its third action plan, setting out the working framework for the years 2015 to 2019²⁶⁷. While it is essentially a continuation of the previous action plans, it also introduces a few new proposals for initiatives in areas that are, as yet, relatively unexplored.

As with previous action plans, this new action plan deals with various aspects: the legislative and regulatory infrastructure,

training, protection of victims, international attention to the phenomenon, awareness raising and providing information, and coordination. A new - and no less important - aspect consists of also supporting initiatives in the federated entities. The Royal Decree of 21 July 2014²⁶⁸ does indeed extend the composition of the Interdepartmental Coordination Unit against the Smuggling and Trafficking of Human Beings to the federated entities. Therefore, it is logical that one of points in the action plan should concern them in particular.

Let's look at the main points of this new action plan:

a) Legislative and regulatory aspects: As the current legislation is particularly complete, it did not require any more major changes apart from a few modifications in order to guarantee optimum compliance with the 2011 European Directive. This point was achieved through the adoption of a new law²⁶⁹ (on this subject, see point 2.1.1. above).

We should also mention that the question of a text providing for the joint responsibility of the principal, specific to human trafficking, features on the agenda of the successive action plans but has not yet received a response,

²⁶⁵ Law of 10 August 2005 amending various provisions with a view to reinforcing the fight against human trafficking and smuggling and the practices of slum landlords, *Belgian Official Gazette*, 2 September 2005. On this subject, see the 2005 Annual report on human trafficking, *Belgian policy on trafficking in human beings: shadows and lights*, pp. 10-21. For comments on this law, see M.A. BEERNAERT and P. LE COCQ, "La loi du 10 août modifiant diverses dispositions en vue de renforcer la lutte contre la traite et le trafic des êtres humains et contre les pratiques des marchands de sommeil", *Rev. dr. pén.*, 2006, pp. 335 and foll.

²⁶⁶ Article 18 of the law.

²⁶⁷ http://www.dsb-spc.be/doc/pdf/ACTIEPLAN_MH_2015_2019-FRpr%2013072015.pdf.

²⁶⁸ Royal Decree of 21 July 2014 amending the Royal Decree of 16 May 2004 relating to the fight against human smuggling and trafficking, *Belgian Official Gazette*, 1 September 2014. For an analysis of this extension, see: Annual Report 2015, *Trafficking and smuggling in human beings, Tightening the links*, pp. 53-57.

²⁶⁹ Law of 31 May 2016 completing the implementation of the European obligations concerning the sexual exploitation of children, child pornography, human trafficking and facilitation of unauthorised entry, transit and residence, *Belgian Official Gazette*, 8 June 2016.

owing to a lack of political agreement²⁷⁰.

A directive relating to the exploitation of begging should also soon appear²⁷¹.

Similarly to previous ones, this action plan also highlights the importance of financial investigations in terms of human trafficking. In this respect, the important role played by the Financial Intelligence Processing Unit (CTIF-CFI) is reaffirmed²⁷².

b) Training: the organisation of training sessions is provided for in the action plan for frontline players on the basis of cycles, as well as the elaboration of a handbook (also available electronically) for training sessions on human trafficking for professionals.

c) Protection of victims: victim reception centres do not always benefit from structural funding to cover their tasks. Their subsidies were also reduced, especially following the withdrawal of the immigrant policy support fund (FIPI) at federal level following the sixth state reform. In line with the action plan, Myria would like a solution to found to this - recurring - problem, once and for all.

The action plan also aims to improve the victim protection procedure on the one hand, by replacing the document granted during the period of reflection (order to leave the territory within 45

days) with another document and, on the other hand, updating and adapting the multidisciplinary circular of 2008²⁷³ to also include Belgian victims. Discussions on these two points were still ongoing when this report was concluded.

d) International attention to the phenomenon: the action plan includes updating the flyer intended for Belgian diplomatic posts and elaborating a summary sheet featuring basic information on the protection of victims in Benelux. The last point has already been addressed through the publication of a brochure²⁷⁴.

e) Raising awareness and informing both professional parties and civil society players and citizens: the action plan provides for measures as varied as the creation of a learning tool for basic training, the elaboration of an information sheet for guardians in order to improve the detection of child victims²⁷⁵, continued awareness-raising in hospitals, and the elaboration of an information booklet relating to domestic work.

f) Coordination of actions and development of knowledge on the phenomenon: the action plan provides for the improvement of statistics, especially by better distinguishing the forms of exploitation in the conviction data, as well as the disaggregation of

²⁷⁰ The last text submitted for consideration provides for penalties as regards criminal and civil responsibility when the principal knew or must have known that the middleman they employed was exploiting people in work conditions contrary to human dignity.

²⁷¹ This new COL still had not yet been adopted when this report was concluded (June 2016).

²⁷² On the role of the CTIF, see: Annual Report 2011, *Trafficking and smuggling in human beings, The money that matters*, pp. 9-10.

²⁷³ Circular of 26 September 2008 relating to the implementation of a multidisciplinary cooperation concerning victims of human trafficking and/or certain forms of aggravated human trafficking, *Belgian Official Gazette*, 31 October 2008.

²⁷⁴ <http://www.benelux.int/fr/publications/publications/cooperation-benelux-en-vue-de-lacceuil-des-vistimes-de-la-traite-des-etres-humains>.

²⁷⁵ This point was implemented in 2015.

the available information according to the 'gender' aspect.

g) Projects concerning the federated entities: reinforced synergy with the federated entities primarily aims to raise awareness among the regional labour inspection services and develop prevention and raise awareness in civil society such as in the school sector and among other stakeholders such as youth welfare services²⁷⁶.

2.1.3. The guilty plea: the forgotten victims of trafficking?

Within the framework of the reform concerning criminal law and criminal procedure implemented by the Minister of Justice - better known as the "Potpourri Act II"²⁷⁷ - a new procedure, inspired by British law, has just been introduced in the Code of Criminal Procedure: the guilty plea²⁷⁸. It

²⁷⁶ The issue of loverboys could be dealt with within this framework. On this subject, see this report, Part 3, Chapter 3 (best practices and experiences) as well as the focus in the previous report: Annual Report 2015, *Trafficking and smuggling in human beings, Tightening the links*, Part 1, Chapter 2.

²⁷⁷ See the Law of 5 February 2016 amending the criminal law and criminal procedure and containing various provisions in terms of the law, *Belgian Official Gazette*, 19 February 2016, p. 13130. We should mention that this law has, among other things, amended the aggravating circumstance of incapacity for a series of offences. This is particularly the case concerning human trafficking (Article 433septies, 5° of the Criminal Code) and human smuggling (Article 77quater, 5° of the Law of 15 December 1980 on foreign nationals). The new law extended the scope because the terms 'permanent physical or psychological incapacity' were replaced with: 'minimum four months' work incapacity'.

²⁷⁸ New Article 216 of the Code of Criminal Procedure, introduced by Article 97 of the Law of 5 February 2016. The guilty plea came into force on 29 February 2016. For a detailed analysis of this new procedure, see. M. FERNANDEZ-BERTIER and M. GIACOMETTI, 'La "reconnaissance préalable de culpabilité" ou "plaider coupable": une révolution dans notre arsenal procédural?', *Rev. dr. pén.*, 2016/4, pp. 268-301.

aims to provide a solution to the concern for faster and more efficient criminal justice: the criminal court's workload would thus be lightened and the duration of the criminal proceedings reduced. It also aims to support a more efficient execution of the sentences since the suspect has already accepted their sentence.

The public prosecutor can propose that this procedure either be applied automatically, or on the suspect's, the defendant's, or their lawyer's request. However, several conditions must be met:

- the acts do not appear to be of the sort to be punished by a primary prison sentence of more than five years: this is not the penalty set by the legislator *in abstracto* but the one the public prosecutor's office would request *in concreto* if the case were brought before the judge²⁷⁹;
- the suspect or the defendant plead guilty for the acts of which they are accused;
- if the case was referred to an investigating judge, this procedure can only be proposed after the ruling or decision of referral to the trial judge;
- if the case has already been referred to the trial judge, no ruling or final judgement can have already been made on a criminal level;
- the suspect's or defendant's guilty plea must be made in the presence of a lawyer;
- the defendant or the suspect benefit from a 10-day period of reflection before informing the crown prosecutor of whether or not they are pleading guilty to the acts they are accused of

²⁷⁹ Taking into account the possible admission of mitigating circumstances, see the preamble of the bill amending the criminal law and criminal procedure and containing the various provisions in terms of the law, *Parl. doc.*, Chamber, session 2015-2016, 54-1418/001, p. 90.

and whether or not they accept the charges and the proposed penalties.

However, the procedure is excluded in four cases:

- if the acts, not transmuted into offences, were punishable with a maximum sentence exceeding 20 years in prison. In practice, the most serious offences are excluded (for instance: the kidnapping or detention of a minor that caused their death);
- regarding the acts referred to in articles 375 to 377 of the Criminal Code, i.e. rape and the most serious forms of indecent assault (such as torture, false imprisonment, or incest);
- for the acts referred to in articles 375 to 387 of the Criminal Code if they are committed against minors or with the help of minors. These are offences concerning corruption of the youth, prostitution, and gross indecency (including child pornography);
- for the acts referred to in articles 393 to 397 of the Criminal Code (murder and assassination).

This guilty plea is officialised in an agreement, signed by the parties. It is only at this stage that the possible victim will be contacted: the crown prosecutor will then send a copy of the signed agreement to the known victims. At this moment, the victim and their lawyer have the right to access the file.

The agreement must then be approved by the court, which hears the defendant and their lawyer regarding the agreement made and the recognised acts. The court can also hear the victim and their lawyer regarding the acts and compensation. The victim can institute civil proceedings and claim compensation at the court hearing, which must officialise the agreement made.

Therefore, compensation will be assessed during court proceedings²⁸⁰.

The public prosecutor can, in the case of a guilty plea, offer a reduced sentence but the final decision always lies with the trial court, which is required to officialise the agreement made²⁸¹.

Parliamentary debates showed that there are many questions and queries regarding this procedure and that opinions are divided over it, even though it seems compatible with Article 6 of the European Convention on Human Rights (ECHR) (right to a fair trial)²⁸². Hence, while the public prosecutor's representatives showed they were logically in favour of this

Myria also wonders what impact the guilty plea will have on human trafficking cases.

²⁸⁰ Preamble, *op. cit.*, Doc 54-1418/001, p. 95. Please note that the text was adapted following the remarks of the Council of State, which considered that draft Article 216 was not very clear concerning the role of the victims and the fact that the way the civil action was handled was no different to the normal procedure (see the opinion of the Council of State on the draft bill amending the criminal law and criminal procedure, containing various provisions in terms of the law, *Parl. doc.*, Chamber, session 2015-2016, 54-1418/001, pp. 298-299, §§ 75, 79 and 80.)

²⁸¹ This raised criticisms especially from the League of Human Rights which considered that reduced sentences should become compulsory, regardless of the defendant who could just as well be given a shorter sentence by the court, and even benefit from an 'autonomous punishment'. See the report from the Justice Commission's first reading of, among other things, the bill amending criminal law and criminal procedure, containing various provisions in terms of the law, *Parl. doc.*, Chamber, 2015-2016 session, 54-1418/005, p. 274.

²⁸² On this subject, see the Council of State's opinion on the draft bill, *op. cit.*, Doc 54-1418/001, pp. 280-281. Also see M.-A. BEERNAERT, "Transactions, accords de plaider coupable et autres procédures judiciaires simplifiées - Quelques considérations sur la jurisprudence de la Cour européenne des droits de l'homme en matière de justice pénale consensuelle ou négociée, en marge de l'arrêt Natsvlishvili et Togonidze c. Géorgie du 29 avril 2014", *Rev. Trim. D.H.*, 2015/101, pp. 207-218.

new procedure²⁸³, the bar voiced strong criticisms against it²⁸⁴, while the trial judges were rather mitigated. The role of the trial judge also raised queries. Some parties spoke of the risk of this role becoming more restricted and limited to purely formal power²⁸⁵, even if the minister confirmed that this was out of the question²⁸⁶.

On the other hand, since the approval decision must have a motivation, others wondered whether this would not require a full examination of the case, which, in practice, would not really save any time²⁸⁷.

Myria also wonders what impact the guilty plea will have on human trafficking cases. While, as the preamble specifies²⁸⁸, this new procedure seems above all intended for cases where the acts are clear and the perpetrator has confessed²⁸⁹, we cannot however exclude the fact that the public prosecutor may well wish to apply it to

other, more complex cases. The scope is indeed very large²⁹⁰.

Since this procedure was explicitly excluded for the most serious acts, in particular those of a sexual nature, why did the legislator not do the same for acts of human trafficking for the purpose of sexual exploitation and the most serious forms of trafficking? Was this an oversight? We may well wonder, especially since the law expressly excludes this procedure for offences concerning prostitution when minors are concerned.

Another concern expressed by Myria is as follows: in an effort to be efficient, will the public prosecutor not tend to put aside the charge of 'human trafficking' in favour of other charges, which the defendants will accept more easily (such as criminal social law infringements), but which would have an impact on the victim, since the latter would no longer be able to benefit from the special status?²⁹¹ And what of cases where several defendants are concerned, as is often the case with human trafficking? Much as a member of parliament would do so, Myria questioned a possible violation of the principle of equality according to which the perpetrator pleads guilty and benefits, as the case may be, from a reduced sentence and other defendants, who wish to maintain their innocence, are likely to be more severely punished or acquitted: how

²⁸³ Report of the first reading on behalf of the Justice Commission, *op. cit.*, Doc 54-1418/005, p. 184.

²⁸⁴ Especially the risk of pressure regarding the suspect who wishes to avoid a public trial, despite their innocence. See the report of the first reading on behalf of the Justice Commission, *op. cit.*, Doc 54-1418/005, pp. 265 and 269.

²⁸⁵ *Ibid.*, especially pp. 38 and 293.

²⁸⁶ *Ibid.*, p.120.

²⁸⁷ *Ibid.*, especially pp. 56 and 220.

²⁸⁸ Preamble of the draft bill amending the criminal law and criminal procedure, containing various provisions in terms of the law, *Parl. doc.*, Chamber, 2015-2016 session, 54-1418/001, p. 89.

²⁸⁹ The College of Public Prosecutors and the College of Senior Crown Prosecutors underlined the interest of such a procedure for relatively simple cases, where the culpability is not contested (see the report of the first reading done on behalf of the Justice Commission, *op. cit.*, Doc 54-1418/005, p. 184).

²⁹⁰ One party asks if it would not have been better to limit it to minor infractions and assess it thereafter. On this subject, see the report of the first reading on behalf of the Justice Commission, *op. cit.*, Doc 54-1418/005, p. 258.

²⁹¹ This status consists, in particular, of the possibility of obtaining specific residence permits according to certain conditions: the alleged victim has to break contact with their exploiters, accept support from a specialised reception centre and cooperate with the judicial authorities. On this subject, see article 61/2 to 61/5 of the Law of 15 December 1980 on foreign nationals.

should the trial judge proceed?²⁹². Will this not have a negative impact on how the case is handled overall?

We might also question whether the victims' rights in this procedure are really preserved: they are indeed far less well guaranteed than within the framework of a plea agreement for instance²⁹³, where the approval of the agreement is dependent on preliminary compensation for damages or, at the very least, for the uncontested part. However, the preamble specifies that this procedure must be applied, regardless of the defendant's financial situation. Nevertheless, the victim will benefit from the procedure in case of approval of the agreement because they could take advantage of the admission of guilt that features in the agreement attached to the case²⁹⁴. In order to decide upon the approval of the agreement, the judge also takes into account the defendant's desire to compensate for the damage suffered.

A speaker in parliament did, however, point out that it would have been preferable, in terms of procedural efficiency, for civil interests to be settled at the time of approval. This way, the civil party would be sure of receiving compensation²⁹⁵. Myria is aware of the problems encountered by trafficking victims to obtain effective compensation for the damage suffered and shares this point of view.

²⁹² See the intervention of Mr. Stefaan Van Hecke in the report of the first reading on behalf of the Justice Commission, *op. cit.*, Doc, 54-1418/005, p. 292.

²⁹³ Article 216bis, §4 of the Code of Criminal Procedure.

²⁹⁴ Preamble, *op. cit.*, Doc 54-1418/001, p. 95.

²⁹⁵ Report of the first reading done on behalf of the Justice Commission, *op. cit.*, Doc 54-1418/005, p. 121.

2.1.4. Punishment of undeclared workers: the principle of non-punishment of trafficking victims at risk

Since May 2016, anyone who does undeclared work is committing an offence, punished by an administrative fine²⁹⁶, if they are knowingly and willingly doing this work in the knowledge that it is not declared, and that a police report has been established against the employer for this undeclared work. This follows a recent amendment to the Social Criminal Code²⁹⁷.

In partnership with the centres specialising in the reception of victims of human trafficking and O.R.C.A. (Organisation for Undocumented Workers), Myria expressed grave concerns, before the adoption of the law, regarding the introduction of this sanction. This particularly affects (potential) human trafficking victims as well as illegally staying workers²⁹⁸ insofar as it risks creating an additional barrier to asserting their rights (especially at work) if they are not respected.

²⁹⁶ This is a level 1 sanction. A level 1 sanction consists of an administrative fine of EUR 10 to 100 (Art. 101 of the Social Criminal Code). This amount is multiplied by six (current indexation value). For more information see: <http://www.emploi.belgique.be/defaultNews.aspx?id=36145>.

²⁹⁷ Art. 32 of the Law of 29 February 2016 completing and amending the Social Criminal Code, containing various provisions of social criminal law, *Belgian Official Gazette*, 21 April 2016. This article inserted a new article 183/1 in the Social Criminal Code.

²⁹⁸ On this aspect see the 2016 annual report, *La migration en chiffres et en droits*, p. 192. Indeed, undocumented workers will be all the more afraid of the consequences that may arise owing to the discovery of their irregular or precarious situation (being ordered to leave the territory, receiving an entry ban, or being detained or removed). This will also make support work for this group more difficult.

As regards (potential) victims of trafficking, this measure goes against the principle of non-punishment, which the latter should benefit from. The idea behind the concept of non-punishment is that, despite committing an offence, the victim has not in fact acted independently, either because of the level of control exercised by the traffickers or the methods used by the latter²⁹⁹. This is why the principle of non-punishment of victims was included in various international and European instruments. Hence, an explicit provision features in the Council of Europe's Convention on Action against Trafficking in Human Beings³⁰⁰. The recognition of a non-punishment obligation was also enshrined in Article 8 of Directive 2011/36/EU on human trafficking³⁰¹. The European directive seems to go even further than the Council of Europe convention since it establishes an express obligation to not prosecute.

Non-punishment is part of the human rights approach to trafficking. The criminalisation of victims not only constitutes negligence on the part of the state when taking into consideration offences committed against

the victim by the traffickers – who should be investigated – but also a failure to acknowledge the victim as a victim of a serious crime, thus increasing their trauma or victimisation by imposing an unfair punishment on them³⁰². The principle of non-punishment therefore consists of states guaranteeing that the victims are not punished for offences committed within the framework or as a result of the process of human trafficking.

Even if new Article 183/1 of the Social Criminal Code states that the worker must do this undeclared work knowingly and willingly, which can be difficult to prove in the case of trafficking victims, this measure is nevertheless likely to be an additional means of pressure for unscrupulous employers. The latter could use this argument to further intimidate their employees and reinforce the exploitation which these workers may be victim to.

2.2. Human smuggling

In Belgium, the two major new items regarding human smuggling concern, on the one hand, the harmonisation of certain provisions concerning human smuggling with those relating to human trafficking, implemented within the framework of the finalisation of the transposition of the European directive on trafficking (see above, point 2.1.1). On the other hand, the government adopted a specific action plan concerning human smuggling for the first time.

²⁹⁹ For a detailed analysis of this principle, see the Annual Report 2012, *Trafficking in and Smuggling of Human Beings, Building trust*, pp. 9-35.

³⁰⁰ Article 26 of the Council of Europe Convention on Action against Trafficking in Human Beings of 16 May 2005. This article stipulates that 'each party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so'.

³⁰¹ Article 8 of the directive (titled: 'Non-prosecution or non-application of penalties to the victim') states that 'the Member States shall, in accordance with the basic principles of their legal system, take the necessary measures to ensure that the competent national authorities are titled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to one of the acts referred to in Article 2' (i.e. of being the victim of the offence of human trafficking).

³⁰² OSCE, *Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking*, 22 April 2013, p. 4.

2.2.1. Harmonisation of certain provisions regarding human smuggling

Via various amendments made regarding human trafficking, the legislator sought to harmonise the criminalisation of human smuggling³⁰³:

- The aggravating circumstance linked to the *modi operandi*, provided for in Article 77quater of the Law of 15 December 1980 on access to the territory, stay, establishment, and return of foreigners (see hereafter: law on foreigners) is completed in the same way as for trafficking³⁰⁴.
- The deprivation of civil and political rights is extended to the simple form of migrant smuggling³⁰⁵;
- The extraterritorial powers of the Belgian judge are extended to simple forms of migrant smuggling and attempted smuggling³⁰⁶.

Moreover, the charge of facilitating illegal immigration should also be acknowledged. This amendment follows an analysis carried out on behalf of the European Commission, which reveals the non-conformity of Belgian legislation with Council Directive 2002/90/EC of 28 November 2002, defining

Belgium is one of the rare European countries with specialised judges, who have been active for almost 20 years in investigations concerning the fight against human smuggling.

the facilitation of unauthorised entry, transit and residence, and with the Council Framework Decision of 28 November 2002 aimed at reinforcing the criminal framework to crack down on the facilitation of unauthorised entry, transit and residence³⁰⁷. This non-conformity relates to a particular point: that of the clear non-criminalisation of the attempt in Article 77 of the Aliens Act. However, the draft bill's preamble³⁰⁸ specifies that the Belgian position was based on the principle that Article 77 of the Aliens Act complied with the European instruments considering the broad interpretation given to this article ('crime preparation'). Nevertheless, considering the Commission's position and the case law which followed the same line, the government preferred to amend this article for reasons of legal safety. Subsequently, the attempted facilitation of illegal entry is not explicitly criminalised in Article 77 of the Aliens Act.

However, the Minister of Justice explicitly specified that the humanitarian clause could continue to be applied, whether the crime is committed or attempted³⁰⁹.

³⁰³ Law of 31 May 2016 completing the implementation of the European obligations concerning the sexual exploitation of children, child pornography, human trafficking and facilitation of unauthorised entry, transit and residence, *Belgian Official Gazette*, 8 June 2016.

³⁰⁴ Hence, the abduction, deception, the abuse of power, giving or receiving of payments or benefits to achieve the consent of a person having control over another person, have been added. See Article 16 of the law.

³⁰⁵ Article 17 of the law.

³⁰⁶ Article 12 of the law.

³⁰⁷ These two instruments were published in the Official Journal (O.J.) L328 of 5 December 2002.

³⁰⁸ The bill's preamble completing the implementation of the European obligations concerning the sexual exploitation of children, child pornography, human trafficking and facilitation of unauthorised entry, transit and residence, *Parl. doc.*, Chamber, 2015-2016 session, Doc 54-1701/001, pp. 6-7.

³⁰⁹ Report of the Justice Commission of 28 April 2016 on the bill completing the implementation of the European obligations concerning the sexual exploitation of children, child pornography, human trafficking and facilitation of unauthorised entry, transit and residence, *Parl. doc.*, Chamber, 2015-2016 session, 54-1701/003, p. 7.

2.2.2. New action plan against human smuggling 2015-2018

In the current context of the migration crisis, where many migrants use smuggling networks and find themselves in a highly vulnerable situation, the government considered it necessary to elaborate and adopt a specific action plan to fight human smuggling. Belgium is traditionally a transit country, and sometimes a destination country for human smuggling. The E40 highway is known for being a route used by smugglers, with parking areas or their surrounding area along the highways serving as embarkation points. Designed as a sort of addendum to the action plan against human trafficking, this action plan against human smuggling was adopted in December 2015. It exists in its own right but must be read alongside what has already been provided for in terms of human trafficking, of which certain planned measures may also concern human smuggling³¹⁰. In this respect, we should also mention that Belgium is one of the rare European countries with specialised judges, who have been active for almost 20 years in investigations concerning the fight against human smuggling. Hence, despite Belgium's broad range of expertise in this area, this is the first specific action plan concerning this particular subject.

This action plan focuses on repressive measures, better knowledge of the phenomenon, training, prevention and attention to migrant victims. The emphasis is therefore on the fight against smugglers and not against migrant victims.

The following repressive measures are envisaged:

- modification of the legislation so that it is possible to use special investigation techniques for 'non aggravated' forms of human smuggling. Myria questions the need for such a measure given that wide-scale smuggling cases involve all the aggravating circumstances. It is these smuggler networks that must be made a priority and phone taps should subsequently be limited to these specific cases.
- updating the circular relating to the investigation and prosecution of acts of human smuggling;
- better identification of smuggling situations through cash flows and money laundering, by developing information tools on human trafficking and smuggling for the attention of the financial community;
- continuation and increase in the number of law enforcement actions conducted within the framework of the itineraries used by smugglers.

The action plan also aims to provide better knowledge of the phenomenon, especially by ensuring the improved entry of conviction data regarding human smuggling, and by collecting more case law reports³¹¹ on the subject.

Care will be taken to ensure more aspects concerning human smuggling will be included in the training provided for the various stakeholders (police officers, judges, Immigration Office, guardians, etc.). It is a shame that these training projects have not been extended to the different stakeholders involved in receiving unaccompanied foreign minors (UFM) and asylum seekers: the Red Cross, Caritas, private players, as

³¹⁰ Action plan against smuggling in human beings 2015-2018, p. 5, available at: <http://www.dsb-spc.be/doc/pdf/TEH%20Plan%20action%202015-18%20FR.pdf>.

³¹¹ Myria would like to point out that there are already a large number of case law decisions concerning human smuggling. On this subject, see this part, Chapter 4, point 3. The decisions presented in Myria's reports are also published on its website: www.myria.be.

well as social services staff at detention centres where potential victims of smuggling (by air, land or sea) maybe housed, at first.

Prevention will be developed for the countries of origin, in particular through an information leaflet on the risks associated with human smuggling. The action plan also plans to examine how to inform the communities concerned in Belgium.

Finally, adults who are the subject of serious forms of human smuggling, as well as minors, must be properly guided. Under certain strict conditions, they can indeed benefit from assistance applicable to trafficking victims. Information tools will therefore be developed by the different stakeholders; a third assessment component of the 2008 multidisciplinary circular³¹², specifically aimed at aggravated human smuggling, will be set up and a handbook on referring UFM will be finalised.

Myria considers that it would also have been useful to include a specific section on social media and communication networks in order to better detect and identify human smuggling networks³¹³.

³¹² Circular of 26 September 2008 relating to the implementation of a multidisciplinary cooperation concerning victims of human trafficking and/or certain aggravated forms of human smuggling, *Belgian Official Gazette*, 31 October 2008.

³¹³ See this part, Chapter 3 (best practices and experiences). On this subject, also see EMN, *A study on smuggling of migrants. Characteristics, responses and cooperation with third countries*, general summary: http://www.emnbelgium.be/sites/default/files/publications/study_on_smuggling_of_migrants_executive_summary_french_091115_pdf.pdf.