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**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND
THE COUNCIL**

**assessing the impact of existing national law, establishing as a criminal offence the use of
services which are the objects of exploitation of trafficking in human beings, on the
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Directive 2011/36/EU**

1. Background and Purpose

This Report responds to the requirement of Article 23(2) of the Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, according to which: *"The Commission shall, by 6 April 2016, submit a report to the European Parliament and the Council, assessing the impact of existing national law, establishing as a criminal offence the use of services which are the objects of exploitation of trafficking in human beings, on the prevention of trafficking in human beings, accompanied, if necessary, by adequate proposals"*.

Reference to the criminalisation of the use of services of victims of trafficking is set out in Article 18 (entitled "Prevention") (1) and (4) of Directive 2011/36/EU which states as follows: *"1. Member States shall take appropriate measures, such as education and training, to discourage and reduce the demand that fosters all forms of exploitation related to trafficking in human beings. [...] 4. In order to make the preventing and combating of trafficking in human beings more effective by discouraging demand, Member States shall consider taking measures to **establish as a criminal offence the use of services which are the objects of exploitation as referred to in Article 2, with the knowledge that the person is a victim of an offence referred to in Article 2**"*.

This Report provides a description of existing national legislation that criminalises the use of services of victims of trafficking and an assessment of the impact of any such legal measures. It is beyond the scope of Art.23(2) to examine other non-legislative measures that may exist at national level or legislative measures that do not touch upon the criminalisation of the use of services of victims of trafficking. Of note, this is not a report assessing compliance with the provisions of the Directive 2011/36/EU. It should be read in conjunction with the "Report assessing the extent to which Member States have taken the necessary measures in order to comply with Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims in accordance with Article 23(1), COM(2016) 722. It also takes into account the first Commission Report on the progress made in the fight against trafficking in human beings trafficking in human beings and protecting its victims (hereinafter "Progress Report").

In the drafting of this report, the Commission made use of information received from the Member States, through a questionnaire that was sent in May 2016, and consulted with the civil society via the EU Civil Society Platform against Trafficking in Human Beings¹ as well as via the European Commission's Group of Experts on Trafficking in Human Beings².

¹ For more information, please see Communication from the Commission to the European Parliament and the Council, Report on the progress made in the fight against trafficking in human beings (2016) as required under Article 20 of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, COM(2016) 267 final.

² Commission Decision (2011/502/EU) of 10 August 2011 on setting up the Group of Experts on Trafficking in Human Beings and repealing Decision 2007/675/EC.

2. Existing national law establishing as a criminal offence the use of services which are the objects of exploitation of trafficking in human beings

2.1. Summary of replies

The analysis below is based on the replies provided by Member States. The Commission cannot exclude that other national provisions or developments may exist. In view of the analysis, the Commission asked Member States to report on *"Existing national law establishing as a criminal offence the use of services which are the objects of exploitation of trafficking in human beings; who is precisely criminalised; if criminalisation for all forms of exploitation is envisaged; if legislation requires proving the element of knowledge that the person is a victim of trafficking and how it impacts the applicability of the legislation; what measures were taken to ensure that the public is aware of the law to ensure better implementation; available statistical data on prosecutions and convictions and hurdles faced; if there is no existing national law, what are the reasons and what alternatives are in place to fulfil the obligation of considering criminalisation; how they assess the impact of such laws and if they have relevant suggestions; what consultation processes are in place and; if they have commissioned any evaluation and research of such laws."*

It should be highlighted from the outset that Member States did not elaborate in the information furnished on how they fulfilled the legal obligation to **consider** the criminalisation of users of victims stemming from Art.18 (4) Directive 2011/36/EU.

The analysis of the replies by Member States demonstrates that, at the time of drafting this report, there are **ten (10) Member States that have established as a criminal offence the use of services which are the objects of all forms of exploitation of victims of trafficking in human beings, and fifteen (15) Member States having established only a limited and selective criminalisation for the use of services of victims of trafficking in human beings.**

More specifically:

1) Member States that have established such a criminal offence for all forms of exploitation (BG, EL, HR, CY, LT, MT, PT, RO, SI, UK)

Ten (10) Member States reported having existing national law establishing as a criminal offence the use of services which are the objects of exploitation of trafficking in human beings (**BG, EL, HR, CY, LT, MT, PT, RO, SI, UK**³), addressing all forms of exploitation.

BG informed the Commission that according to the Bulgarian Criminal Code (Art.159c) an individual who uses a person affected by trafficking in human beings for debauchery, forced labour or begging, removal of organs, tissues, cells or body fluid or for keeping him/her in forceful subjection, regardless of his/her consent, shall be punished by deprivation of liberty of three to ten years and a fine of 10 000 to 20 000 leva. **HR** has a similar provision but goes even further, as it imposes the same penalties on anyone who knowingly uses a victim or the services thereof with those who are charged for committing the offence of trafficking in human beings. **CY** reports that

³ **UK** conveyed to the Commission that England and Wales have such existing measures for trafficking in human beings, while Scotland has no such measures in place and Northern Ireland reported to have such measures targeting only trafficking for the purpose of sexual exploitation.

Article 17 of Law 60(I)/2014 stipulates that any person who can reasonably assume that the labour or services s/he uses are provided by a victim of human trafficking shall have committed an offence under the anti-trafficking law. **EL** established such national legal provisions in 2013 with the Law 4198/2013, which criminalises those persons who knowingly accept the labour of a person who is a victim of trafficking as well as those persons who knowingly perform a sexual act with a person who is a victim of trafficking. **LT** reported that under Article 147-2 of the Criminal Code any person who uses services provided by victims of trafficking and who knew or should have known that they are victims shall be punished by a fine or freedom restricting measures. Of note, a person who commits such an act and subsequently voluntarily informs the law enforcement agencies and actively cooperates, before being declared a suspect, can be absolved of criminal liability. In addition, legal entities shall also be held liable for such acts. **MT** informed the Commission that any person engaged in or making use of services or labour in the knowledge that the person providing such services or labour has been trafficked, shall be guilty of an offence and be held liable, on conviction, to imprisonment for a term of eighteen months to five years. Similar provisions exist in **PT** and **SI** (imposing prison sentence of up to three years and a fine). **RO** informed the Commission that under Art. 216 of the Romanian Criminal Code any person who uses the services as set out in Art.182 of the Criminal Code (on exploitation) other than the trafficker, and who knows that the services are provided by a victim of trafficking in human beings shall be criminalised.

2) Member States that have not established explicit national legal provisions or that have established limited and selective criminalisation of the use of services of victims of trafficking in human beings⁴

Fourteen (14) Member States reported having no explicit national legal provisions in place for establishing as a criminal offence the use of services which are the objects of all forms of exploitation of victims of trafficking in human beings (**AT, BE, CZ, DE, EE, ES, FR, HU, IT, LV, LU, NL, PL, SK**). However, some Member States (**FI, IE, SE**) have instituted legislation targeting the use of victims of trafficking but only in respect to particular forms of exploitation. More specifically, **FI** and **IE** reported having existing national legislation targeting only at the use of victims of trafficking for sexual exploitation. **SE** reports that while there is no specific provision that criminalises the use of services of a victim of trafficking, they apply provisions under the law on banning the purchase of sexual services, which can cover the use of services exacted by victims of trafficking for sexual exploitation.

Of those Member States that have not established such explicit provisions, according to information provided by them, in some instances recourse could be made to provisions which relate to sexual offences or child sexual exploitation (e.g. **IT, ES, NL** and **BE**). While **IT** has no such explicit provisions, it reports having established as a criminal offence under Art. 603 *bis* of the Italian Criminal Code the unlawful brokering and exploitation of labour generally. While **AT** has no explicit provision on victims of trafficking in human beings, there is a recently adopted provision on engaging in a sexual act with persons against their will, by exploiting a predicament or after previous intimidation.

⁴ **FI, IE, SE** have established legal provisions only for trafficking for sexual exploitation and **AT, BE, DE, EE, FR, HU, IT, LV, LU, NL, PL, SK** only within the context of the Employers' Sanctions Directive.

Furthermore, some Member States report having in place only measures which transpose and implement **Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third country nationals**⁵ (so-called **Employers' Sanction Directive**) (e.g. PL or HU). In this respect, the **Communication on the application of Directive 2009/52/EC of 18 June 2009** notes that Member States have in general criminalised illegal employment in all the circumstances described in Article 9 (including instances where the employer knows that the worker is a victim of human trafficking). According to this Communication, CZ and ES did not specifically penalise illegal employment in situations where 'the employer was aware that the worker was a victim of human trafficking'.⁶

It should be noted, however, that the personal scope of **Directive 2009/52/EC is limited only to third country nationals illegally staying in the EU**. Hence, it does not cover victims of trafficking who are EU nationals or victims of trafficking who are third country nationals but lawfully residing in the EU. In addition, while the Directive applies to instances of dependent employment⁷, it does not cover cases where victims are self-employed or cases where the user is not the employer. Thus, the criminalisation set forth in **Directive 2009/52/EC is adapted to its subject matter and scope, which is limited and not sufficient** in addressing all instances of trafficking in human beings. However, it serves as a good example of measures that could be used in this direction to further develop and consolidate the anti-trafficking legal framework.

3) Alternatives to the lack of criminalisation

As mentioned above, according to the Art. 18(4) of the Directive, Member States have an obligation to at least consider criminalising those who knowingly use the services of victims of trafficking. However, Member States provided limited information to the Commission on alternatives when there are no national measures criminalising those who use the services of victims of trafficking. From the replies to the questionnaires it appears that only NL and ES provided information in this respect. NL reported information campaigns on anonymous reporting of crimes, raising awareness and publicity on prosecutions of child sexual abuse where recourse is made to payment, covenants with business sectors on promoting respect for human rights. ES reported that despite not having a provision explicitly on the criminalisation of the use of the sexual services of a victim of trafficking in human beings, where there is knowledge of the state of vulnerability of the victim any such act could be considered as an offence against the sexual freedom and integrity of a person, and relevant articles of the Penal Code would be applicable.

⁵ Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32009L0052>

⁶ Bearing in mind the period lapsed since the adoption of the Communication on the application of the Directive 2009/52/EC, it cannot be excluded that relevant legislation was adopted in the meantime. For more information see the Communication from the Commission to the European Parliament and the Council on the application of Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third country nationals, COM (2014) 286final.

⁷ The definition of employment encompasses the exercise of activities whatever form of labour or work regulated under national law or in accordance with established practice for or under the direction and/or supervision of an employer (Article 2 (c) Directive 2009/52/EC); the preamble specifies that this should be irrespective of the legal relationship (Recital 7).

4) Evaluations

A limited number of Member States reported having commissioned **evaluations** of such laws or relevant research (e.g. **FI**, **SE**). **SE** reported to the Commission that the inquiry report on the Ban against the Purchase of Sexual Services was published in 2010. Among the key findings were: (a) street prostitution had been reduced by half; (b) the internet had become a new arena for prostitution; (c) the ban on the purchase of sexual services had counteracted the establishment of organized crime; and (d) public support for the ban had increased. Furthermore, an Anti-Trafficking Inquiry is expected which will evaluate the application of the penal provision on trafficking in human beings, and which will also scrutinize how law enforcement authorities investigate and handle human trafficking matters.

FI has commissioned research following a landmark judgment of the Supreme Court on the so-called partial criminalisation of the purchase of sexual services from procured prostitutes and victims of trafficking in human beings. The research concluded that the major problem in the application of the law was that very few cases of abuse of a victim of sex trade had been detected, investigated, prosecuted and punished. The requirement of *mens rea* in the partial criminalisation of sex purchasers was reported to be problematic. The report stated that the situation favoured sex buyers who avoid gaining any knowledge of the prostitute's circumstances but were intimately familiar with the letter of the law. The researchers proposed the full criminalisation of the buying of sex. Following this report, the Government proposed the amendment of the offence establishing it on the user's negligence⁸.

UK (Northern Ireland) expects an evaluation in 2018 and reported that **Scotland** commissioned research on the subject matter during the scrutiny of the Human Trafficking and Exploitation Act (2015).

Generally, **statistical data** provided to the Commission by all Member States is scarce with only a limited number of prosecutions and convictions communicated. Moreover, it is questionable whether such disaggregated data on this offence is available at national level. For example, **IT** stresses that at present there is no separate data concerning the use of services provided by victims of trafficking. This is an area that the Commission will further look into in the context of the work delivered in improving the quality and comparability of statistical data on trafficking in human beings collected at EU level.

2.2. *Assessing the impact and the application*

The information conveyed to the Commission shows that Member States follow rather diverse approaches and practices. In all Member States where there are national measures establishing as a criminal offence the use of services which are the objects of exploitation of trafficking in human beings, the personal scope of those provisions is limited only to those who directly use services or labour provided by the victims.

⁸ For more information see Johanna Niemi & Jussi Aaltonen, "Abuse of a victim of sex trade: Evaluation of the Finnish sex purchase ban", Ministry of Justice of Finland, 2014 available at http://ec.europa.eu/anti-trafficking/publications/abuse-victim-sex-trade_en

In the vast majority of Member States where there is a national law establishing as a criminal offence the use of services which are the objects of exploitation of trafficking in human beings, Member States report that it is too soon to assess their impact. This is due to the fact that the measures came into force following the deadline of transposition of the Directive 2011/36/EU in 2013 due to the short period for the implementation of the Directive.

Of those Member States that have such provisions, all require that the user had prior knowledge that the person whose services are being used is a victim of trafficking in human being. In these cases, a general difficulty with regard to evidence building has been reported. In most of the Member States concerned, the burden of proof rests primarily with the prosecutor: the suspect/defendant benefits from the presumption of innocence and has no obligation to prove his innocence. Only, in the case of **IE** the burden of proof is shifted and it rests with the defendant to show that he or she did not know, and had no reasonable grounds for believing, that the person against whom the offence was committed was a victim of human trafficking.

In this regard, the Explanatory Report of the Council of Europe Convention on Action against Trafficking in Human Beings notes that "[...] Proving knowledge may be a difficult matter for the prosecution authorities. A similar difficulty arises with various other types of criminal law provision requiring evidence of some non-material ingredient of an offence. However, **the difficulty of finding evidence is not necessarily a conclusive argument for not treating a given type of conduct as a criminal offence**". In this context, difficulties in building evidence for a crime should not result in not criminalising certain conduct.

While the number of successful investigations, prosecutions and convictions has unquestionably a deterrent effect, it is questionable how such statistics may be interpreted, particularly in relation to assessing the impact or success of relevant measures. **Given that the greatest impact of such measures lies in preventing the crime from occurring in the first place, statistics on prosecutions and convictions cannot give a safe indication of the efficacy of the measures.** As stated above, statistical data provided for this report are scarce. For 2014 and 2015, **BG** reports that there were respectively four (4) indictments and one (1) conviction and five (5) indictments and two (2) convictions. **EL** reported that according to the statistical data of the Hellenic Police there was one (1) prosecution since the entry into force of the new Law. **RO** further informs that in 2015 the first cases were reported to the Directorate for Investigating Organized Crime and Terrorism and nine (9) persons were prosecuted for the offence of using the services of trafficking victims. According to the Superior Council of Magistracy, up to May 2016, 15 people had been convicted for the offence of using the services of an exploited person. These sentences were not final however, and could be appealed before the Supreme Court.

In this respect, the Commission wishes to recall the findings of the Progress Report *"The information gathered by the Commission clearly shows that it is important for Member States to strengthen efforts to increase the number of investigations and prosecutions, and to reduce the burden placed on victims and their testimonies during proceedings for evidence gathering. They could do this by developing regular and tailor-made training for investigators, prosecutors and judges and by systematically using financial investigations (as recommended by the Financial Action Task Force) and other effective intelligence-led investigative tools, which can provide a*

diversity of evidence to be used in addition to victims' testimonies. They should also dedicate sufficient financial and human resources to properly address this crime".

Restricting criminal liability only to the situation where the user has direct and actual knowledge that the person is a victim of human trafficking creates a very high threshold for achieving prosecutions. In this respect, consideration of the level of knowledge that should be required for this offence should be a matter for close examination.

3. Ensuring effective prevention of trafficking in human beings

This chapter reflects the deliberations⁹ by the Commission on the matter, guided by the EU Anti-Trafficking Strategy¹⁰ and other key policy instruments¹¹, and provides a backbone to the analysis thereof. The abovementioned analysis has demonstrated an incomplete and diverse legal framework at national level on the legal treatment of users of victims of trafficking, which impacts the effective prevention of the crime. It is in this environment, that trafficking in human beings remains pervasive despite efforts made, with no indications that this serious crime is decreasing.

In this respect, a foundation **for any decisive deterrent action for trafficking in human beings is accountability of the perpetrators.** This is also reflected in other key international and European legal instruments.¹² It was further touched upon by the **European Parliament**¹³ and the **Parliamentary Assembly of the Council of Europe**,¹⁴ and by the **civil society**.¹⁵

The Commission has stipulated in the **European Agenda on Security** and repeatedly stressed in its reports and studies that trafficking in human beings, as a serious, cross-border and organised crime, has huge human social and economic costs.¹⁶ It is driven by **demand** for all forms of exploitation and by high **profits**. The profits, in both the legal and illegal economies, result in a complex

⁹ Such as the Commission studies i.e. on prevention initiatives on trafficking in human beings and on gender dimension of trafficking in human beings, which were deliverables of the EU Anti-Trafficking Strategy.

¹⁰ Communication on The EU Strategy towards the Eradication of Trafficking in Human Beings 2012–2016, (COM(2012) 286 final).

¹¹ Such as the European Agenda on Security, the European Agenda on Migration, the EU Strategic Engagement on Gender Equality, the EU Human Rights and Democracy Action Plan.

¹² For example, the 2000 United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Art. 9) and the 2005 Council of Europe Convention on Action against Trafficking in Human Beings (Art. 6 and 19).

¹³ European Parliament resolution of 12 May 2016 on implementation of the Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims from a gender perspective (2015/2118(INI)), European Parliament resolution of 5 July 2016 on the fight against trafficking in human beings in the EU's external relations (2015/2340(INI)), European Parliament Resolution of 26 February 2014 on sexual exploitation and prostitution and its impact on gender equality (2013/2103(INI)).

¹⁴ Council of Europe Parliamentary Assembly Resolution Prostitution, Trafficking and Modern Slavery in Europe Resolution 1983 (2014).

Available at: <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=20716&lang=en>

¹⁵ Organisations participating in the EU civil society platform against trafficking in human beings note that legislation is the most important measure that Member States should take in order to ensure prevention and demand reduction. Commission Staff Working Document Accompanying the document Report on the progress made in the fight against trafficking in human beings trafficking in human beings and protecting its victims, COM(2016) 267 final, SWD(2016) 159 final, p. 64.

¹⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "The European Agenda on Security", COM (2015) 185 final.

interplay between supply and demand that must be addressed if the crime is to be eradicated¹⁷. Addressing this demand and reducing it is a legal obligation in Directive 2011/36/EU and aims at preventing the harm from happening, by changing the wider environment so as to reduce incentives for trafficking in human beings.

3.1. Identifying the user of services exacted by victims of trafficking in human beings

In this context, demand encompasses all those individuals, groups or legal persons, that are driven by the objective of exploiting victims in order to make a profit on many levels, those who directly use and abuse the victims, as well as those who act as promoters or facilitators and generally those who create and contribute to creating an enabling environment for this.

Businesses using trafficking victims and taking profits from trafficking are not restricted to criminal organisations and trafficking often involves a chain of legitimate businesses. Profit-takers range from relatives of victims, to informal or formal recruitment agencies, labour market intermediaries supplying labour in specific sectors or sub-contractors in global supply chains, as well as travel agencies and transport enterprises, as well as information and communication technologies companies.

Another source of demand is consumers, who may be individuals purchasing products manufactured by victims but with no knowledge of how they have been produced, or knowing users of victims of trafficking, who ignore obvious signs of trafficking and labour/sexual exploitation, such as very low prices or signs of violence and intimidation. In this respect, this report refrains from using terms such as "client" in the context of trafficking for sexual exploitation of either adult or child victims, since such terminology would obscure the suffering, abuse and violations that victims of trafficking have endured.

As stated in the Commission Staff Working Document accompanying the document Report on the progress made in the fight against trafficking in human beings and protecting its victims: “The final objective of eradication of trafficking in human beings can only be achieved **if the crime is prevented from happening in the first place and using the wide range of available tools at EU and national level [...]** This means **not only addressing the root causes that make people more vulnerable to trafficking** – such as poverty, gender inequality and violence against women, ethnic discrimination, societal marginalisation, irregular migration – but **also ensuring that those who profit from the crime and exploit the victims are brought to justice**”.¹⁸

It is clear that trafficking in human beings and any aspect of it is always illicit. There is nothing legitimate about trafficking in human beings. Exploitation of a person in coercive circumstances from another person is reprehensible conduct in every criminal justice system. Trafficking in human beings has no legal or moral face. It is a serious crime and a grave violation of human dignity, as per the prohibition in Article 5(3) of the Charter of Fundamental Rights of the European Union. The

¹⁷Progress Report.

¹⁸ Commission Staff Working Document Accompanying the document Report on the progress made in the fight against trafficking in human beings trafficking in human beings and protecting its victims, COM(2016) 267 final, SWD(2016) 159 final, p. 39

lack of criminalisation of the use of services of a trafficked person, **especially with the knowledge that she or he is a victim of human trafficking**, renders the overall fight against trafficking in human beings less effective and hinders the attainment of the objectives of Directive 2011/36/EU. Even if national legislations do not establish as a criminal offence the use of services which are the objects of exploitation of trafficking in human beings, the fact of the matter remains: victims often have been repeatedly raped, mentally and psychically abused, suffered offences against not least their freedom, dignity, sexual self-determination, bodily integrity.

4. Concluding remarks and way forward

As stipulated in Article 18(4) of the Directive 2011/36/EU, in order to make the preventing and combating of trafficking in human beings more effective, Member States shall consider taking measures to establish as a criminal offence the use of services which are the objects of exploitation of victims of trafficking. The analysis made in this Report, in the context of assessing the impact of existing relevant national legislation, as per Article 23(2) of the Directive, demonstrates **a rather diverse legal landscape which fails to effectively contribute to discouraging demand of such services**.

In the complete absence or inadequate criminalisation of the use of such services in the context of trafficking in human beings, **the activity of traffickers which by definition includes exploitation of their victims, may not only be less discouraged, but adversely may be even fostered including through a culture of impunity**. Obviously, the challenge of discouraging demand implies to **focus more on those who actually use the services of different forms of trafficking** with the knowledge that the person is victim of an offence.

Currently, several Member States' legal systems do not, or only partially, outlaw those who make use of such services with relevant knowledge, **impacting on legal uncertainty with regards**, for example, the criminal liability linked to the relation of the user with the victim, the legal treatment of those who profit from or enable and facilitate such exploitation, the distinction between a user and an exploiter, the liability of intermediaries, as well as the broader supply chains.

Member States should step up their efforts to ensure a more unified and dissuasive action against this element of the cross-border crime of trafficking in human beings. The ultimate aim of this Report is to contribute to meeting the objectives of the Directive 2011/36/EU on reducing demand and prevent trafficking in human beings, in order to ensure that criminal groups are not benefiting from the diverse legal treatment of users of victims of trafficking. In this respect, the Commission draws important conclusions from monitoring the situation in the Member States and will further examine potential options and consider in the future, if necessary, appropriate legislative proposals, as per Article 23 (2) of the Directive 2011/36/EU.