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Subject:	Trafficking in Human beings Directive – written comments

Following the request by the Presidency in the COPEN meeting on 18-19 January 2023, please find attached written comments provided by the Belgian, Croatian, Dutch, French, Irish, Lithuanian, Portuguese and Romanian delegations.

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Comments on the Proposal for a Directive on the definition of criminal offences and penalties for the violation of Union restrictive measures

BELGIUM

File: Proposal for a Directive of the European Parliament and of the Council amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims

BE (written) comments regarding document 16322/22

With this writing, please allow us to start by wishing the Swedish Presidency the best of luck in on this important file in which you can count on the full support of Belgium (BE).

Please find hereunder the preliminary written comments by Belgium as regards document 16322/22 as discussed during the COPEN of 18 & 19 January. However, a scrutiny reservation is applicable on this entire document.

I. General remarks in regards to the proposal

Belgium very much welcomes the initiative to further strengthen the European legal framework in regards to human trafficking – a problem that continuous to impacts all sectors and levels of society. Belgium will treat this file as a priority – we stand ready to cooperate and make this instrument a modern instrument, adjusted to nowadays' challenges.

II. Inclusion of 'forced marriages' and 'illegal adoption' within article 2 under §3 on exploitation

Belgium welcomes the idea of reflecting on referencing to both concepts 'forced marriage' and 'illegal adoption' in the context of human trafficking in this instrument. A special attention to these specific types of cases, even if they are limited in comparison with other more common forms, can be useful in the context of the detection of victims of trafficking of human beings (hereafter: THB), the protection and the enforcement of the prosecution against the authors.

However, we would like to express some general but substantial concerns.

The definition of THB in the directive of 2011 is common to the international definition (UN Protocol and Convention of Council of Europe) which most of EU members have ratified. It is paramount that coherence between these two instruments is safeguarded. The coherence must also be kept with the UN instruments on slavery, forced labour and sale of children which define illegal adoption and forced marriage.

Illegal adoption:

More specifically on **illegal adoption**, it is important to specify in the debate that even if illegal adoption is not mentioned in the Palermo protocol or the Convention of Warschau, it is mentioned in their explanatory texts:

- *Explanatory Report CoE : "94. The definition of trafficking in human beings does not refer to illegal adoption as such. Nevertheless, where an illegal adoption amounts to a practice similar to slavery as defined in article 1 (d) of the Supplementary Convention on the Abolition of*

Slavery, the Slave Trade and Institutions and Practices similar to Slavery, it will also fall within the Convention's scope."

- *Preparatory work for the United Nations Convention against Transnational Crime (A/55/383/Add.1, para.66):* an interpretative note to the definition of Article 3 says the same.

It is important to underline that monitoring by the Group of Experts on Action against Trafficking in Human Beings (hereafter: GRETA) (CoE) of the State parties is done on these legal basis.

Furthermore, it should be understood that, during the negotiations on the 2011 Directive, it also became apparent that illegal adoption could fall under 'slavery-like practices'. It was therefore not considered necessary to include it in the Directive as it already covers such practices. Recital 11 of the directive therefore provides that: *The definition also covers trafficking in human beings for the purpose of the removal of organs, which constitutes a serious violation of human dignity and physical integrity, as well as, for instance, other behaviour such as illegal adoption or forced marriage in so far as they fulfil the constitutive elements of trafficking in human beings.*

Indeed, adoption can constitute « a practice similar to slavery ». A definition that is linked to the aim of exploitation, can be found in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1956: "(d) Any institution or practice whereby a child or young person under the age of eighteen years is delivered by either or both of his or her parents or by his or her guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his or her labour."

At the UN level, the Handbook for Parliamentarians "Combating Trafficking in Persons" (No. 16-2009) explains on page 15 that, in general, exploitation can take three forms:

- *Trafficking for sexual purposes, which may include the exploitation of the prostitution of others or other forms of sexual exploitation, such as pornography, sex shows and sex tourism;*
- *Trafficking for non-commercial sexual purposes, which may include, inter alia, early marriage, servile or forced marriage, various forms of arranged marriage such as marriage as a means of settling a debt or family dispute or of making amends for a crime, temporary marriage, or marriage for reproductive purposes;*
- *Labour trafficking, which may include domestic servitude, sweatshop, agricultural or construction work, recruitment into armed conflict.*

(...) It should be noted that children adopted for the same purpose are also considered exploited.

Forced marriage:

About **forced marriages**, this is mentioned in the list "Practices Similar to Slavery" of the UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (art.1, c):

Any institution or practice whereby:

- *a woman is, without the right to refuse, promised or given in marriage for a consideration in money or in kind by her parents, guardian, family or any other person or group of persons*
- *a woman's husband, family or clan has the right to transfer her to a third party, whether for consideration or otherwise;*
- *the wife may, on the death of her husband, be transferred by succession to another person;"*

Therefore, forced marriage is well covered by the Directive through the reference to slavery-like practices.

At the UN level, the UN Handbook for Parliamentarians (2009) quoted above, provides the following explanation:

Non-commercial sex trafficking, which may include, inter alia, early marriage, servile or forced marriage, various forms of arranged marriage such as marriage as a means of settling a debt or family dispute or of making amends for a crime, temporary marriage, or marriage for reproductive purposes;

For both illegal adoption and forced marriage, it may be useful to recall that the notion of forced labour is taken from Article 2.1. of ILO Convention No. 29 for the elimination of all forms of forced and compulsory labour:

"For the purposes of this Convention, the term forced or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."

In Belgium, convictions have taken place for trafficking of human beings with the aim of sexual and economic exploitation in cases of marriage coutumiers. *See report of our national rapporteur – Myria 2015 Annual Report on trafficking and smuggling in human beings: Tightening the Links -RATEH-EN (myria.be), p. 14-15:*

"The notion of transfer of control lay at the heart of a recent decision rendered by the Criminal Court of Verviers. The court concluded the existence of human trafficking in the case of the early (customary) marriage of two minors. It considered that the obligation for the young girl to be subjected to non-consensual sexual relations within the framework of a customary union could be considered as a form of sexual exploitation falling within the scope of Article 433quinquies of the Criminal Code (trafficking of human beings)."

In conclusion – BE proposal:

- a) Complete the article containing the definition of THB in the directive with a paragraph explicitly underlining (recalling) that illegal adoption and forced marriage can constitute practices assimilated to slavery;
- b) consider (if in the opinion of COM or MS this could be useful for a harmonized application) specifying in a recital that forced marriage in the context of THB means any type of marriage (customary, civil ...), even if the country in which it was performed does not recognize this type of marriage.

In addition, we would like to suggest for the commission to provide certain examples of situations they envisage to be remedied by including these concepts in a future text to give the possibility to the MS to discuss it. It is important for the later (effective) implementation that all member states and the Commission have a similar understanding of these concepts in regards to this instrument.

III. Insertion of an article 2a: Offences concerning trafficking in human beings committed or facilitated by means of information or communication technologies

No specific comments – for now, we can support this new article.

IV. Article 6 replacing old article 6 on sanctions on legal persons

A specific scrutiny reservation applies on this subject matter.

As regards the proposed new article 6 on sanctioning legal persons, some questions and concerns arise and would need clarification.

As stated during the first COPEN on this file by several member states, the difference in the proposal by the commission on this subject matter between this instrument and other recently proposed initiatives such as the directive on environmental crime, the proposal on the EU restrictive measures and the proposal on gender based violence should be further examined. We have noted the information by the Commission stating that different forms of crime justify a difference in approach. However, to maintain a certain level of coherence on EU level in regards to providing for obligatory criminal sanctioning mechanisms for legal persons in sectoral instruments, a cautious approach would be advisable, according to BE.

Further examination of existing legal instruments, both on national and European level, is therefore required.

V. Article 7 replacing old article 7 on the seizure and confiscation

During the last COPEN some confusion arose on whether the explicit referencing to the *proposed directive on asset recovery and confiscation* would be required and consequently, what the purpose was of changing old article 7. The Commission explained this was merely a clarification.

BE, however, questions whether the explicit reference to the abovementioned instrument would be legally sound? This so, because Directive 2011/36 on preventing and combatting human trafficking falls within the scope of the (current &) proposed directive. Any modifications to directive 2011/36 will therefore also fall within the scope of the confiscation directive. Therefore a reference in this article would, according to BE, not be required here. We invite the Commission and the council legal service to further elaborate on this issue.

VI. Adjustment of article 11, §4 referencing to a national referral mechanism and a national focal point

Seeing that in Belgium, a referral mechanism in regards to human trafficking has already been established, we very much recognise the added value of this proposed referral mechanism.

Notwithstanding the above, for BE it is important to mention in this regard that this Belgian mechanism is based and construed, taking into account the specificities of our defederalized state system and functions on the basis of national focal points. Therefore, we would propose for a more nuanced approach where flexibility as regards the appointment of a 'national focal point' would be possible.

VII. Article 18a Offences concerning the use of services which are the object of exploitation

with knowledge that the person is a victim of an offence concerning trafficking in human beings

A specific scrutiny reservation applies on this subject matter.

VIII. Article 19a on data collection and statistics

As regards the obligations as included in article 19, some concerns arise on the feasibility to provide for all the requested types of data on a yearly basis and the reliability of these. For example, in Belgium, the data on the convictions are only available per 2 year and not per year. Furthermore, technical restrictions in this regards should be taken into consideration as well. Therefore, also in regards to this article, we would like to request for some more flexibility. We would therefore like to suggest the inclusion of following phrase: *“except for technical or reliability reasons the data must be provided...”*.

CROATIA

We would like to thank the Presidency for the opportunity to provide written comments on the Proposal for a Directive of the European Parliament and of the Council amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, which was presented at the COPEN meeting on 18 and 19 January 2023.

The Republic of Croatia supports the Proposal, considering that the area of combating trafficking in human beings is of paramount importance not only at national level but also at EU level, and more widely.

Our National Committee on Combating Trafficking in Human Beings is active and participates in all international activities in this area.

We see preventive action as an extremely important element in a comprehensive approach to combat trafficking in human beings. As part of the implementation of the National Plan against Trafficking in Human Beings for the period 2018-2021, five training sessions for judges and prosecutors were held in the Republic of Croatia to raise judicial officials' awareness of the crime of trafficking in human beings and to process this crime as effectively as possible, but also to understand the psychological impact of trauma on victims of the crime of trafficking as potential witnesses in the proceedings.

In addition to forced marriage being a separate criminal offence, the Criminal Code of the Republic of Croatia already provides for a criminal offence of trafficking in human beings which includes the purpose of entering into an illicit or forced marriage.

Given the need to involve more stakeholders at national level in the examination of the proposal, we place a general scrutiny reservation on the overall Proposal.

FRANCE

NOTE DES AUTORITÉS FRANÇAISES

Objet : Commentaires des autorités françaises sur la proposition de révision de la directive 2011/36/UE concernant la prévention de la traite des êtres humains et la lutte contre ce phénomène ainsi que la protection des victimes.

Réf. : Proposition de directive du Parlement européen et du Conseil modifiant la directive 2011/36/UE concernant la prévention de la traite des êtres humains et la lutte contre ce phénomène ainsi que la protection des victimes

En réponse à la demande de la présidence suédoise faite à l'issue de la réunion du groupe COPEN des 18 et 19 janvier 2023 aux délégations de lui transmettre leurs commentaires écrits sur la proposition de révision de la directive 2011/36/UE concernant la prévention de la traite des êtres humains et la lutte contre ce phénomène ainsi que la protection des victimes, les autorités françaises souhaitent faire part des éléments suivants :

Les autorités françaises saluent l'initiative de la Commission européenne s'agissant de cette proposition de révision de la directive 2011/36/UE concernant la prévention de la traite des êtres humains et la lutte contre ce phénomène ainsi que la protection des victimes. Cette initiative apparaît nécessaire et opportune au regard notamment de nouveaux défis comme l'utilisation des nouvelles technologies qui ont permis aux trafiquants de développer de nouveaux modes opératoires. A cet égard, les autorités françaises souhaitent attirer l'attention sur la nécessité de rester attentif à la cohérence entre les dispositions traitant des mêmes sujets dans les différentes initiatives européennes, en particulier s'agissant des dispositions relatives à l'utilisation des technologies de l'information et de la communication et de celles relatives aux sanctions des personnes morales.

Sur le fond :

- Sur l'article 2 relatif aux infractions liées à la traite des êtres humains :

Les autorités françaises formulent plusieurs interrogations à propos de l'extension du champ de la directive au mariage forcé et à l'adoption illégale.

D'abord, elles invitent la Commission à préciser les raisons qui l'ont conduite à juger nécessaire cette extension, les éléments communiqués à ce stade se limitant principalement à juger qu'elle pourrait répondre à un besoin et qu'elle permettrait une pénalisation plus efficace de cet acte dans davantage d'États membres. Tout en comprenant ces objectifs, les autorités françaises se demandent si d'autres moyens pour ce faire ne pourraient être trouvés que l'inclusion du mariage forcé et de l'adoption illégale dans les finalités de la TEH.

En deuxième lieu, les autorités françaises s'interrogent sur la définition possible du mariage forcé et de l'adoption illégale au sein de cette directive. S'agissant du mariage forcé : faudrait-il aussi tenir compte des mariages hors du cadre légal (coutumier, religieux) et hors du territoire européen ? S'agissant de l'adoption illégale, les autorités françaises souhaitent l'utilisation de termes plus précis afin de cibler les comportements.

Troisièmement, tout en reconnaissant qu'il est primordial que les victimes de TEH aux fins de mariage forcé et d'adoption illégale soient protégées, les autorités françaises observent que l'élargissement du champ de la traite des êtres humains est susceptible d'avoir des conséquences dans d'autres domaines qui doivent être pris en compte, notamment en matière de délivrance de titre de séjour conformément à la directive 2004/81. Il est donc nécessaire à cet égard d'avoir parfaitement démontré le véritable besoin opérationnel avant d'envisager un tel élargissement.

- Sur un nouvel article 2a relatif aux infractions commises ou facilitées au moyen de technologies de l'information et de la communication :

Les autorités françaises sont favorables à la prise en compte de ce phénomène dans la révision de la directive mais invitent à être prudent quant à l'articulation de cette disposition avec la position défendue par l'Union européenne dans le cadre des négociations relatives au projet de convention de lutte contre la cybercriminalité, actuellement en cours à l'ONU.

Les autorités françaises soulignent plutôt l'opportunité, afin de lutter contre l'utilisation des plateformes numériques aux fins de la traite des êtres humains, de mobiliser les nouveaux outils procéduraux offerts par le règlement eEvidence, outil important pour l'obtention des éléments de preuves électroniques qui sont aujourd'hui particulièrement difficiles à obtenir dans ce domaine. A cet égard, elles rappellent que des sanctions sont encourues par les fournisseurs de services qui ne répondraient pas aux injonctions de production de données.

- Sur l'article 6 relatif aux sanctions applicables à l'encontre des personnes morales :

Les autorités françaises soulignent l'intérêt de s'aligner sur des systèmes déjà existants comme des sanctions à l'encontre des personnes morales portant sur leur chiffre d'affaires mondial et, a minima, de s'assurer d'une position constante, cohérente et commune au regard d'autres négociations en cours, notamment celle sur la directive portant sur la protection de l'environnement par le droit pénal.

Les autorités françaises suggèrent par ailleurs d'ajouter l'exclusion des marchés publics à titre de peine complémentaire à l'encontre des personnes morales.

- Sur l'article 7 relatif à la saisie et à la confiscation :

Les autorités françaises soutiennent le renforcement des dispositions en la matière, en lien avec la proposition de directive relative à la confiscation et au recouvrement des avoirs. Elles suggèrent de clarifier que la future directive relative à la confiscation et au recouvrement des avoirs constitue la source de ces dispositions.

- Sur l'article 11 relatif à l'assistance et l'aide aux victimes de la traite des êtres humains :

Les autorités françaises accueillent favorablement la proposition de la Commission d'instituer un point focal national et des mécanismes nationaux d'orientation.

- Sur le nouvel article 18a relatif aux infractions concernant l'utilisation de services qui sont l'objet d'exploitation avec la connaissance que la personne est victime de traite :

Les autorités françaises poursuivent leur analyse de cette proposition et suggèrent d'apporter des précisions quant au champ de la disposition. Si celui-ci devait être limité à l'exploitation sexuelle, le critère de la connaissance du fait que la personne concernée est victime de traite pourrait être supprimé afin de ne pas prévoir un seuil probatoire trop élevé et difficilement caractérisable.

- **Sur l'article 19a sur la collecte des données et les statistiques :**

Les autorités françaises accueillent favorablement cette proposition portant sur la collecte des données, sous réserve de leur compatibilité avec les règles européennes de protection des données à caractère personnel, et dans le respect du secret statistique (non-diffusion des effectifs inférieurs à 5).

IRELAND

Re: Proposal for Directive of the European Parliament and of the Council amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims- Ireland's written comments

Following the COPEN meeting on 18-19 January to discuss the above referenced proposal, Ireland now submits the following observations. Our observations are preliminary and subject to ongoing engagement with the relevant stakeholders.

1. Article 1- the introduction of forced marriage and illegal adoption to the list of non-exhaustive list of forms of exploitation in Article 2(3).

Ireland welcomes in principle the addition of forced marriage and illegal adoption to the list of non-exhaustive forms of exploitation. However, we would welcome further clarification from the Commission about the concept of illegal adoption, and what situations it is intended to cover.

2. Article 7- Freezing and Confiscation

We note that Article 7 proposes to make explicit reference to the EU rules on tracing, freezing, management and confiscation, particularly to the Proposed Directive on asset recovery and confiscation. Ireland maintains a scrutiny reservation in relation to this Article.

We also look forward to receiving further clarifications from the Commission as to whether the purpose of this article is to widen the scope of the possibilities for freezing and confiscation.

Article 19a- Data Collection and statistics

As highlighted during the COPEN meeting, Ireland has an independent rapporteur which is not part of the Ministry or central government structure. We understand this is so in one or more other Member States also. The obligations of the rapporteur in article 19 *to gather statistics in close cooperation with relevant civil society organisations active in this field, and report* and the obligations on Member States as set out in Article 20 *to transmit to the ATC the information referred to in Article 19* could usefully be clarified. Ireland would invite the Swedish Presidency to consider how an appropriate division of tasks might be articulated in the revised directive that would cater for the situation of those Member States with independent rapporteurs.

In Ireland's case our rapporteur is our A rated National Human Rights Institution (NHRI). While the Ministry and the rapporteur work closely together on human trafficking issues, the roles of independent commentary including in liaison with civil society – which Ireland regards as extremely valuable – and reporting on behalf of the Member State's government are quite distinct. The proposed new Article 19A obligation that *Member States shall collect statistical data* would in Ireland's view bring the tension between the current Article 19 and Article 20 reporting obligations into sharper focus and in that context clarification would be very welcome. The UN treaty monitoring body practice of shadow reporting might be useful in informing thinking on this question.

While we fully support the Commission's proposals in regard to gathering of comparable data in understanding trends, and improving methods for combating human trafficking crimes, we are concerned at the reference to *suspects* at 2(b), 2(f) and 2(g), given that information on suspected cases is not compiled in a way that would allow access to such statistical data and the definitional difficulties that relate to questions about when an individual whose activities come to police attention is to be formally regarded as a suspect.

In conclusion, Ireland supports the timely amendment of the Anti-Trafficking Directive, and we look forward to working with you and the rest of our colleagues in progressing this important work.

LITHUANIA

Regarding Art. 6

Lithuania agrees that the general approach reached in the ENVI Directive should be the starting point for formulating provisions on sanctions for legal entities in the proposal.

Regarding Art. 19a(2) (a)

We suggest that Article 19a(2) (a) should be worded as follows: the number of victims of offences referred to in Article 2, registered by pre-trial investigation institutions, disaggregated by registering organisation, sex, age groups (child/adult), citizenship, and form of exploitation.

NETHERLANDS

The Netherlands would like to thank the Commission for the proposal for a directive amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims

The Netherlands supports and endorses the objective of the proposal: The aim of the proposal is to strengthen the Union legal framework on human trafficking to achieve the following objectives. First, ensuring adequate prevention, detection and improved monitoring at EU level of human trafficking by strengthening the capacity of all stakeholders. Second, strengthening the criminal justice approach, nationally and internationally. Third, ensuring appropriate help, support and protection to victims. Fourth, reducing the demand for services from victims of human trafficking within the EU with respect to all forms of exploitation.

Human trafficking is a serious crime and has a great impact on the lives of victims. Combatting this crime is a priority for the Netherlands and an integrated and cross border approach is necessary. The Netherlands is of the opinion that the proposal of the Commission will contribute to the fight against this crime. However, the Netherlands would like to raise a few points regarding the proposal.

1) Scope

It is crucial that the proposal is proportional, effective and enforceable in order to achieve the objective of the proposed directive. Further guidance will be required for this purpose since the proposal fails to provide clarity on certain points in relation to the scope of certain amendments:

- With regards to Article 2: The crimes of forced marriage and illegal adoption are already punishable under the Dutch Criminal Code. However, the Netherlands does not consider all cases of forced marriage and illegal adoption to be human trafficking as intended on the basis of the directive. We would like to ask the Commission to provide additional clarity on the delineation of these cases as forms of human trafficking by including them into the Directive itself. As far as we are concerned, illegal adoption and forced marriage are not by definition exploitation, and therefore this demarcation is important.

We would also like to ask the Commission what the added value would be of including these two types of crime in the anti-trafficking directive, when they are probably already punishable as separate crimes in Member States, the overlap with trafficking is quite small and it would therefore only cover a small percentage of cases of forced marriage and illegal adoption, the measures needed to tackle them are different from those to tackle THB and they are already mentioned in the recitals of the existing directive.

To be able to assess the competence of the EU, the subsidiarity and the proportionality of this proposal, more information about the definition and demarcation of the proposed changes is necessary.

- With regards to Article 6 on sanctions, we would like to ask the Commission to further clarify whether the additional sanctions mentioned in this article (exclusion from public benefits, closure of establishments, etc) should be available in criminal procedures, or whether Member States have the opportunity to make the imposition of these measures possible in administrative proceedings. In this regard we would like to refer to the recent similar discussions in COPEN with regards to the revision of the Environmental Crime Directive. In the latest general approach concerning this directive that was adopted by the Council in December 2022, MS are given the choice to implement these additional sanctions as criminal sanctions or as administrative measures.
- In addition to the previous question, we would like to ask the Commission if MS are required to make *all* the mentioned additional sanctions/measures possible in national law, or can they *choose* which measures to implement and which not? Also in this regards we would like to refer to the similar discussions regarding the Environmental Crime Directive.
- With regards to Article 11 on the National Referral Mechanism we would like to ask the Commission to clarify how the practical outcome of such a system should work. Would it for example be an online instrument?
- With regards to Article 18a, about the establishment 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 exploitation, the Netherlands would like to ask the Commission for further clarification on the following issues.
 - o What is the scope of this provision?
 - o Does this provision apply to all users of services or objects that have been offered or created with by means of exploitation? Who are those users? Do they also include consumers?
 - o What would be the type of services offered?
 - o How should 'knowing use' be explained?
 - o As an example: should someone visiting a nail studio make sure that the persons working there are not a victim of exploitation? How would this work in practice and how far reaches this responsibility?
 - o With that in mind, we would like to ask the Commission also to explain the consistency between this proposal and the also proposed Regulation Prohibiting Products Produced with Forced Labour in the Union Market (COM (2022) 453 final) and the consistency with the proposed Due Diligence Directive (COM (2022) 71).
 - o How would the Commission see this provision be enforced?
- With regards to Article 19a, about the data that would have to be sent in. It would be very important to have clear definitions about the several numbers and figures we would like to collect together. This to make sure Member States send in the same information and therefore it would be possible to compare to the information. We would like to ask the Commission how will this take place in practice? Who will decide upon these definitions?

PORTUGAL

Portugal is preparing and coordinating its national position as regards this proposal and looks forward to be able to share its views in the future.

At this point in time, after a preliminary view, we would like to address one point only, as regards the transposition deadline of one year determined in article 2(1) of the proposal. This is clearly a too short deadline, especially when considering that possible changes in criminal law will determine legislative proceedings running through Government and Parliament as well.

ROMANIA

Proposal for a Directive amending the 2011 THB Directive

RO comments

I. Art. 1

- **Para. (1): with regard to the extension of the concept of exploitation to forced marriages and illegal adoptions, we make the following clarifications:**

First of all, we consider it necessary to define the two concepts (forced marriage and illegal adoption), the meaning of which is in no way reflected in the proposal for the directive. At the same time, we would point out that these two concepts are not defined in the Criminal Code.

Then, with regard to forced marriage, we draw the attention to the fact that, according to the Romanian Civil Code, marriage can also be concluded by minors who have reached the age of 16 (i.e. minors between 16 and 18 years of age who have not yet reached the age of 18), so when drafting the definition of the concept of forced marriage, we suggest that this hypothesis should also be taken into account in order to avoid certain overlaps with the provisions of the marriage regime.

- **Para. (2): concerns the commission of the offence of trafficking in human beings also by means of information and communication technologies.**

It should be noted that, under Romanian criminal law, the offences of trafficking in human beings and trafficking in minors do not distinguish between the means of committing the offence. As a result, they also allow the offence to be committed by means of information and communication technologies, and the relevant doctrine and case law unanimously recognise this possibility.

In these circumstances, in order to avoid any difficulties when assessing the transposition of this proposal for a directive, we would point out that, in our view, there is no need for an express provision on this method of committing the offence, since the purpose of the directive is to achieve the result of the offence, not the manner in which it is committed.

- **Para. (3): on the mandatory nature of additional penalties applicable to legal persons.**

A first observation - which concerns both points 1 and 2 - relates to the fact that, although the COM stated at its meeting of 18-19 January 2023 that the mandatory regime is aimed at providing for these penalties in the legislation, the wording of the proposed text does not lead to this conclusion, but rather to the establishment of an optional regime regarding their provision in the legislation ("if appropriate"). The regulatory intention therefore needs to be clarified.

Then, as regards the sanction in point 2(a) ("temporary or permanent disqualification from the practice of commercial activities"), we consider it necessary to mention that the Romanian Criminal Code already provides for the complementary penalty of suspending the activity, in whole or in part, of the legal person. In our opinion, this penalty (whether it concerns the suspension of activity or the prohibition to carry out commercial activities, as provided for in the proposal for the directive) is by its nature temporary. Under these circumstances, the perpetual nature of this penalty means that the legal person is unable to carry out its activities indefinitely, which is tantamount to producing consequences similar to dissolution (a separate penalty, the most serious of the additional penalties provided for by Romanian law).

At the same time, para. (1) of Art. 140 of the Criminal Code provides as follows:

"(1) The complementary punishment of suspension of the activity of the legal person consists in prohibition of carrying out the activity or one of the activities of the legal person in the performance of which the offence was committed".

Therefore, the current form of Article 1(3) of the proposal (relating to the amendment of Article 6 (2) (a) of Directive 2011/36/EU), which governs "(a) temporary or permanent disqualification from the practice of commercial activities;" seems excessive - a permanent prohibition from carrying out any commercial activity has similar effects to a dissolution. Consequently, we believe that the text needs to be reworded to clarify whether it is a prohibition which refers to any commercial activity or only to the prohibition of the commercial activity in the course of which the offence was committed - in our opinion, the latter is the one that can be supported.

- Para. (6): criminalisation of the use of the services of an exploited person

In view of the discussions in the working group of 18-19 January this year, although COM stated that the intention of the regulation (with regard to the phrase "with the knowledge that the person is a victim...") was to have certain knowledge of the victim's situation, there were also views in favour of a liability regime based not only on certain knowledge but also in situations where the perpetrator should have known.

In our view, the variant proposed by COM ("with the knowledge that the person is a victim...") is preferable. Another variant - which has been evoked by some MS and envisages a lower standard in terms of the subjective position of the perpetrator (should have known) - is problematic. Such a regulation would pose problems of transposition and later of application because, first of all, it is difficult to establish on the basis of which elements the possibility of the perpetrator to know the victim's situation can be established or, in other words, how it will be established that the perpetrator should have known that the person whose services have been used is a victim of trafficking in human beings. Secondly, not adopting the variant proposed by the COM would lead to an unjustified extension of the criminalisation and, at the same time, to a lack of predictability of the regulation (it would be difficult to determine which situations would be covered by the criminalisation rule).

- Para. (7): data collection

We consider that the concept of "registering organisation" (Article 19a(2)(a)) needs to be clarified, as it is unclear in the current draft what is meant by this concept. We consider that any institution and/or organisation that comes into contact with a victim of trafficking in human beings by virtue of its tasks will register the victim, so that, as a consequence, a victim can be registered with different organisations and institutions. From a statistical and indicative point of view for anti-trafficking actions, we consider it necessary to provide data on the organisation/institution that carries out the identification/detection of a victim/potential victim and not those that carry out the registration.

II. Art. 2

With regard to the transposition deadline of one year laid down in Article 2, we consider that a longer deadline (at least two years) should be set in view of the time needed for the internal transposition procedures.
