

EU Directive on preventing and combating trafficking in human beings and protecting victims: Will it be effective?

Katarzyna Gromek-Broc*

INTRODUCTION

In recent years the EU intensified its efforts to deal more effectively with human trafficking. The new Directive on this subject was finally adopted on the 5th of April 2011¹. The text has a potential to make a significant progress

¹ Directive 2011/36/EU of 5 April 2011 at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:101:0001:0011:EN:PDF>

ABSTRACT In recent years, tackling effectively human trafficking has become priority for the EU legislator. The Directive on this subject was adopted on the 5th of April 2011. It is designed to provide the powerful measures to prevent crime, to protect victims and to punish the offenders. It also promises to offer more interaction among different platforms and international instruments at the European and International level: the EU, the Council of Europe, the UN and the ILO.

This article examines the gains and the weaknesses of the new text. It also discusses the challenges and questions the effectiveness of some ambiguous provisions. It underlines the importance of the victim-centred, holistic and human rights' approach. It looks at some legislative novelties such as a stronger definition of human trafficking, definition of offences, penalties or the non-penalisation clause for the victims. It emphasises the significance of a far-reaching protection of the victims during criminal proceedings and after. The article also discusses unresolved issues and backdrops of the directive. In conclusion, it interrogates: 'Is the Directive efficacious enough to make a change?'

KEY WORDS: Human trafficking, approximation of penalties, non-penalisation clause, victim-centred approach, position of vulnerability, trafficking offences, trafficking crime, protection of victims, European Criminal law.

RESUMEN ¿Son eficaces las directrices de la Unión Europea relacionadas con la prevención y lucha contra la trata de seres humanos y proteger a las víctimas?

Una respuesta eficaz contra el tráfico de seres humanos se ha convertido en una prioridad para los legisladores de la Unión Europea durante los últimos años. Directrices con respecto a este tema se adoptaron en marzo de 2011, diseñadas para proporcionar medidas de gran alcance para prevenir la delincuencia, proteger a las víctimas y castigar a los delincuentes. También se comprometió a ofrecer una mayor interacción entre las plataformas europeas e internacionales y los instrumentos internacionales como la Unión Europea, el Consejo de Europa, la ONU y la OIT. En este artículo no solo se examinan las ganancias, directrices y debilidades, sino que también se analizan los desafíos emergentes y se cuestionan la efectividad de algunas disposiciones ambiguas. Se subraya la importancia de una perspectiva centrada en las víctimas, lo cual es integral, humano y basado en los derechos. Se examinan algunas novedades legislativas como una definición más fuerte de la trata de personas, la definición de determinados delitos, multas o la cláusula de no penalización de las víctimas. Se hace hincapié en la importancia de la amplia protección de las víctimas durante y después del proceso penal. El artículo también analiza las cuestiones no resueltas y los antecedentes de las directrices. Por lo tanto, pregunta si estas directrices serán verdaderamente eficaces para hacer el cambio.

PALABRAS CLAVE: La trata de personas, las penas, la impunidad en la cláusula, perspectiva centrada en las víctimas, la vulnerabilidad, la trata de personas, el delito de trata de personas, protección de las víctimas, el derecho penal europeo.

RESUMO Como eficazes são as directivas da União Europeia em matéria de prevenção e combate ao tráfico humano e proteger as vítimas?

Uma resposta eficaz contra o tráfico humano se tornou uma prioridade para os legisladores da União Europeia nos últimos anos. Orientações sobre esta questão foram aprovadas em março de 2011, concebido para proporcionar medidas eficazes para prevenir a criminalidade, proteger as vítimas e punir os criminosos. Ele também prometeu oferecer uma maior interação entre as plataformas europeias e internacionais e os instrumentos internacionais como a União Europeia, o Conselho da Europa, da ONU e da OIT. Este artigo analisa não só os lucros, diretrizes e fraquezas, mas também analisa os desafios emergentes e questiona a eficácia de algumas disposições ambiguas. A importância de uma perspectiva centrada na vítima, que é abrangente e baseada nos direitos humanos. Ele olha para alguma nova legislação como uma forte definição de tráfico, a definição de determinadas infrações, multas ou a não criminalização das vítimas. Ela enfatiza a importância da proteção das vítimas extensa durante o processo penal e depois. O artigo também discute as questões não resolvidas e fundo das orientações. Por isso levanta a questão: "Essas orientações serão mudança verdadeiramente eficaz?"

PALAVRAS CHAVE: tráfico de pessoas, as penalidades, a impiedade na cláusula, centrado na vítima perspectiva, a vulnerabilidade, o tráfico humano, o delito de tráfico de pessoas, a proteção das vítimas, direito penal europeu.

* PhD (IUE, Florence); MPhil/LLM (Paris II, Pantheon - Sorbonne). In charge of Postgraduate Admissions Senior Advisor for Academic Matters Chair of the Lib. Committee, York Law School, University of York (UK).

e-mail: katarzyna.gromek-broc@york.ac.uk

CORREO IMPRESO: York Law School, University of York, Heslington, York, UK. YO10 5DD

Gromek-Broc, Katarzyna. 2011. "EU directive on preventing and combating trafficking in human beings and protecting victims: Will it be effective?". *Nova et Vetera* 20(64): 227-238.

Recibido: junio de 2011 / Aprobado: octubre de 2011

in fight against human trafficking, in particular regarding prosecutions and sanctions. Its adoption has been coupled with another victory: the UK decision to 'opt in'. Initially, the UK declined its participation in this initiative arguing that the Directive does not contain any benefits for the UK. The aim of the new text is to create more robust framework and to empower the Union with stronger tools to prevent the crime, to prosecute offenders and to protect the victims. It is designed to replace Framework Decision 2002/629/JHA, which is currently in force but is obsolete in light of the latest Council of Europe and International developments in this area. For example, the 2005 Council of Europe Convention against Trafficking in Human Beings, ratified in 2009 by the UK, provides more effective tools to tackle the problem. The Directive is a part of Global EU Action Plan against Trafficking in Human Beings. One of the new objectives of this Plan is to strengthen the EU external dimension and to expand the measures to third countries where often trafficking originates.

The EU's commitment in combating human trafficking has amplified with the willingness to incorporate the human rights' visibility into the Treaty. Previously, human trafficking was essentially a labour market matter and covered by the rights of a worker. The 1989 Delors' European Social Charter in its Article 1 protects the right of worker 'to earn his living in an occupation freely entered upon'. Therefore, the labour exploitation of people by use of force, threat, coercion infringes Article 1. Alas, Charter is not legally binding and the EU in the 90's did not dispose efficacious mechanisms to combat labour exploitation. With the expansion of the European integration, the EU Citizens' well-being has increasingly appeared to be a primary objective of the Union. The draft Constitutional Treaty proclaimed 'respect for dignity and human rights as inalienable rights', replicated by the current Lisbon Treaty. Furthermore, the ECtHR case law on human trafficking has demonstrated the need for more cooperation between diverse organisations pursuing the same goal such as the Council of Europe, the UN and the ILO. The new Directive refers in many occasions to the ECHR, 2005 Council of Europe Convention on trafficking, the Protocol and other international instruments.

In addition, the Charter of Fundamental Rights, in force since 2007, underlined the priority for the EU to prevent and combat human trafficking. The

directive makes consistent reference to the Charter, specifically to Article 5(3) on human trafficking and Article 24 acknowledging the rights of the Child. Among the new initiatives, the European Council in Stockholm has adopted so-called Stockholm programme in December 2009 making the fight against human trafficking a main concern for the Union.² The action plan agreed in Stockholm for 2010-2014 focuses on strengthening cooperation with the third countries, often where human trafficking originates.

The works on proposal for this Directive go back to 2009, when the Commission came with the new initiative in form of the Framework Decision that was withdrawn after entering into force of the Lisbon Treaty. This was due to the reshuffle of the Treaty and the changing of the legal basis for the Commission's Action. After the disappearance of the pillar structure the new legal basis lies with Article 79, 82 and 83 TFEU related to cooperation in criminal matters that requires the ordinary legislative procedure. The Lisbon Treaty makes it easier to adopt legislation since the majority voting in the Council is needed rather than as previously unanimity.

The new legal basis should considerably strengthen the enforcement mechanisms laid down by the directive. Its significance is two-fold. First, it does not exclude the possibility of the provisions from being directly effective attributing rights defendable in national courts. Secondly, it does not preclude the judicial scrutiny and its interpretation therefore the Court of Justice should have jurisdiction.

The Directive sits alongside the strategic objectives of the Stockholm programme that aims to deliver an "area of freedom, security and justice for Europe's citizens".³ It establishes minimum rules regarding criminal offences, in particular prosecution of the offenders, sanctions for crimes and prevention of human trafficking. The Directive's vision is to adopt holistic and human rights' approach in combating human trafficking. As far as the victims are concerned, it aims to adopt gender specific tactic identifying the victims' needs that differ depending on the purpose they are trafficked for. The new text puts a

² eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:EN:PDF

³ www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/.../114851.pdf

lot of emphasis on assistance and support of the victims in criminal proceedings.

This article will consider the extent to which the directive fulfils its promises. Does it introduce the mechanisms that are powerful enough to make a change? Is it innovative enough and compelling enough? Are there any loopholes and weak points that need to be addressed?

I. EFFECTIVENESS AND COOPERATION

It has been generally recognised that despite of the multiplicity of the legal instruments designed to combat human trafficking at the European and national level, the picture is far from being clear. The new EU directive on preventing and combating trafficking in human beings, and protecting victims intends to replace the Framework Decision 2002/629/JHA, seen as not efficacious enough. Its main objective is to create more effective, more integrated holistic approach to combat human trafficking through measures enhancing prevention, protection and prosecution. The Directive is victim centred and tends to be gender specific, endorsing a human rights approach where the victims' rights are given priority and where specific attention is paid to vulnerable groups such as women and children. It strongly recommends non-prosecution of the victims, as does the 2005 Council of Europe Convention on the same subject. It aims at tackling the problem at its roots, assisting victims and reducing their vulnerability. The new text emphasises the importance of extensive criminalisation of the offenders and introduces stricter lowest maximum penalties.

It establishes a level playing field making frequent reference to the Council of Europe' framework, the 2000 UN Palermo Protocol or the ILO documents.

Article 2 is crucial for the directive defining punishable offences. It heavily relies on the definitions provided by the ILO and the 2000 UN Protocol. Nonetheless, it includes new grounds, brings an extended protection of the children, explains the meaning of position of vulnerability and overall offers some additional clarifications. The Directive does not define a trafficked person, though, the Council of Europe Convention on Human Trafficking applies to "any natural person who is subject to trafficking in

human beings".⁴ This does not mean that the person is recognised as a victim, however 'to be a subject' is enough to fall within the scope of the Convention. The interplay between the Convention and the directive is visible in the majority of Articles of the proposed text. Yet, the Council Framework Decision 2001/220/JHA provides a definition of a victim that could be referred to. Its Article 1 a) states 'victim shall mean a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, directly caused by acts or omissions that are in violation of the criminal law of a Member State'.⁵

2. AMBIGUITY OF THE DEFINITION OF TRAFFICKING: WHAT'S NEW?

What should be considered as human trafficking and a crime punishable under Article 2?

The definition of human trafficking has inspired vibrant academic debate (Allain 2009a, 2009b). The ILO instruments consider human trafficking as a form of forced labour. The ILO Forced Labour Convention 29 defines forced labour as "work or services... exacted under the menace of any penalty for which that said person has not offered himself voluntarily". The ILO instruments imply that it needs to involve a labour factor, a labour relationship, which in effect narrows the scope of what should be understood by human trafficking. Defined as such it seems too restrictive, excluding cases where there is no labour element. However, the ILO Convention 182 extended the scope of 'labour' to cover some other activities such as begging, shoplifting or drug transportation (Bakirci 2009, 2007). In any case, it places the emphasis on the employer-worker relationship rather than the vulnerability of persons involved. Bakirci (2009, 160) argues that the subjects of human trafficking should not been seen as workers or labourers but as victims and witnesses. The new text endorses this view to an extent.

Article 2 of the Directive makes some improvements to the definition provided by the 2000 UN Palermo

⁴ Council of Europe Convention against Trafficking in Human Beings, Article 4e at www.coe.int/.../human.../trafficking

⁵ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001F0220:EN:HTML>

Protocol and the 2005 Council of Europe Convention. It defines trafficking in persons in a broader way than the Framework Decision 2002/629/JHA. Nevertheless, the definition remains quite cumbersome. The new text makes punishable

“the recruitment, transportation, transfer, harbouring or reception of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception of the abuse of power or of the position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.”

The new added value is Article 2 (2) introducing the term of position of vulnerability and explaining its meaning:

“A position of vulnerability means a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved.” The EU Experts Group reviewing the EU Council Decision 2002 also suggested to include a definition of the ‘victim’ in line with the 2005 Council of Europe Convention but mainly for the purpose to ensure that there is one definition and one status of the ‘victim’ across all EU countries (The Authors, 2009). This was translated into Article 2(2) of the proposed directive, arguably in weaker terms.

Article 2(3) builds up on the Palermo Protocol definition and includes the new forms of exploitation such as begging or the exploitation of criminal activities and makes them punishable: “Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude or the exploitation of criminal activities, or the removal of organs.”

The UN Palermo Protocol the definition is not a model of clarity. Scarpa (2008) sees trafficking in human beings as modern slavery or slavery-like practices, a view strongly contested by Allain (2009a, 453; 2009b, 239). He argues that slavery is only one of eight component parts of the Palermo definition, an example of exploitation. It is also one of three parts of the definition of trafficking that says: recruitment and transportation... by means of the threat.. (...) for

the purpose of exploitation. Thus, the definition of human trafficking comprises the means, the method and the purpose.

A further element of precision in the definition of human trafficking is that it does not require movement or crossing the border. Bakirci (2009, 161) explains that contrary to smuggling, trafficking in human beings does not require movement since it does not necessarily involve crossing the border but it does not exclude it, either. People can be trafficked inside one country (Ellerman 2002). Bakirci (2009) also distinguishes between different forms of human trafficking that the Directive endorses such as labour trafficking and trafficking for the purpose of criminal activities that may include sex trafficking, the removal of organs or begging.

Another strong point of the Directive, though not completely new, as it is already to be seen in the 2005 Council of Europe Convention, is Article 2(4), making it clear that the issue of actual or intended consent of the victim to the exploitation is an irrelevant consideration. However, its unequivocal terms strengthen considerably the position of the victim by eliminating all types of situations where the victims were threatened and coerced to consent. Ellerman (2002) argued that “victims of human trafficking are still victims even if they initially given the consent to participation in the labour or sexual exploitation”. Finally, the definition in Article 2(5) offers an unquestionable protection to a child providing that any involvement of a child in human trafficking constitutes a criminal offence and shall be punishable even if none of the means defining human trafficking has not been used. The directive defines child as a person under 18 year old adopting here the highest level of age protection. Protecting the children’s rights is one of the strongest assets of the directive. The only vulnerable group that was offered detailed consideration and the maximum protection.

One of the main purposes of the directive is to introduce deterrent sanctions for the offences described in Articles 2 and 3. Article 3 adopts a very broad definition of an offence infringing Article 2. It is designed to catch all types of situations including inciting, aiding, abetting and attempting to commit an offence. This is an incontestable merit of this text. It imposes an obligation on the Member States to ensure that all offences mentioned in Article 2 are punisha-

ble. Concerning the penalties, the Directive seeks to achieve uniformity across the EU. The penalties system draws on the Council conclusions of 24-25 April 2002⁶, integrated also in the 2009 Council Proposal for a Framework Decision (now proposal for a Directive) on combating the sexual abuse, sexual exploitation of children and child pornography.⁷ The penalties system aims at eliminating disparities between the EU countries. The system tends to leave a degree of flexibility to the Member States in order to preserve the coherence of national penal systems but in the same time to achieve approximation of penalties. On one hand, the discretion left to the Member States may weaken in practice the application of the penalties. On the other hand, Articles 3-6 of the directive are quite detailed, which should improve consistency in the Member States' application. After all, Member States are obliged under Article 4.4 to ensure that the penalties they introduce are effective, proportionate and dissuasive. The Member States have also an obligation to ensure that the instrumentalities and proceeds from the offences are seized or confiscated. The gain from the confiscation could contribute to pay for victim compensation.

In the ordinary circumstances the offences of Article 2 are punishable of a maximum of at least five years of imprisonment but up to maximum of at least ten years in the aggravated cases. What are those aggravated cases? Article 4.2a) follows to some extent the recommendation of the EU Experts Group considering as aggravating circumstances the fact of offences being committed against particularly vulnerable victims. This provision liaises here with Article 2.2 on the meaning of 'position of vulnerability'. Though, Article 4.2 a) changed the language and introduces a term of 'particularly vulnerable victim'. This provision is left open ended but gives only one example of a particularly vulnerable victim that is 'a child victim'. In this respect it does not follow the recommendations of the NGOs, the EU Experts Group or the UNHCR that included gender, health conditions, pregnancy and disability. Those grounds are mentioned in Article 11.7. Obviously, the formulation 'at least child victims' does not preclude a referral to those grounds but they seem not to be given enough consideration. Some other severe cases justifying

the maximum penalties refer to organised crime, serious threat to the life of the victim or the use of serious violence or causing serious harm to the victim (Article 4.2 b, c, d). The provision does not specify what should be understood by serious violence or serious harm but the Parliament's report gives some examples.⁸ The lack of clearer guidance in the directive itself could thus lead to some problems of interpretation in future as to the degree of seriousness of the offences. Article 4.3 considers also as aggravated circumstances if the offence is committed by a public body placing responsibility on the Member States to ensure that public officials are adequately trained and informed. This provision will bring considerable improvement in the situation of the victims.

3. NON-PENALISATION CLAUSE. HOW EFFECTIVE WILL IT BE IN PRACTICE?

The crucial point of the directive is Article 8 introducing a non-prosecution and non-penalisation clause in respect of victims. The clause endorses the human rights approach focusing on the vulnerability of the victims and recognising that they may have been forced to commit the crime or involuntarily involved in criminal activities. Article 8 is of fundamental importance, underpinning the position of the victims overall. But, it has some significant weaknesses. First, the Article is silent on non-detention of the victims. Secondly, the provision lacks constraints on the Member States, making non-prosecution and non-penalisation only facultative. Article 8 states: "the competent national authorities are entitled not to prosecute or to impose penalties". The NGOs recommended to introduce a non-penalisation clause as a binding provision for all Member States. This seems a bit unrealistic given that criminal matters are left almost entirely in the Member States' domain. The current provision of the Directive is comparable with the similar one inserted in Article 26 of the 2005 Council of Europe Convention on trafficking in human beings that reads: "Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of non-imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so." Gallagher (2006) argues that the language

⁶ Doc. 9141/02 DROIPEN 33.

⁷ Doc. 8150/09 DROIPEN 16 MIGR 36 CRIMORG 50 +REV 1 (en) + 8150/08 ADD 1 +ADD 1 COR 1 + ADD 2 +ADD 2 COR 1.

⁸ PE442.887v02-00, 10

of this Article of the Convention is weak, providing only for such a possibility and not imposing any obligation on the Member States, which can ultimately choose to do so or not. Both instruments are carefully drafted and tend not to interfere in the penal systems of the Member States. However, both underline that the centre of gravity is on offenders and the purpose is to punish the traffickers and not to target the victims. Moreover, the purpose of those provisions is also to avoid further victimisation, so-called secondary victimisation of the victims and to boost the victims' confidence to come forward as witnesses in criminal proceedings. They could become inestimable force in combating the organised crimes and in the catch of the oppressors.⁹ Article 8 should also help to allege the immigration laws, mainly illegal entry or stay on the territory of a Member State or in the possession or use of false documents that the victims get hold on often to escape their oppressors. The illustration of the situation for the possible application of Article 8 is an English Crown Court decision in *R v O*.¹⁰ A Nigerian girl, trafficked to the UK for the purpose of prostitution was found in possession of false documents when trying to escape her oppressors and to cross the border to France. She was sentenced to eight months' imprisonment by the Crown Court. The case revealed severe failings in dealing with the victim and a total ignorance of the sensitivity of issues (Elliot 2009).

4. WHO IS THE COMPETENT AUTHORITY?

Finally, Article 8 makes a reference to competent authority of the Member States. The directive once again aligns here with the 2005 Council of Europe Convention on trafficking in human beings that refers to competent authority of the Member States at many occasions, for example in Article 11 or 15. The UK Explanatory Memorandum to the Convention in its paragraph 27¹¹ gives some examples of competent authorities identifying them as public authorities that may have come with contact with trafficking victims, such as the police, the labour ins-

pectorate, customs, the immigration authorities and embassies. Harvey argues that the UK started to use the denomination of Competent Authorities for the Home Office and the UK Border Agency only that is too restrictive and contradicts Article 10 of the Convention. The latter imposes this obligation on any competent authority and not a limited number of authorities (Harvey 2008). The formulation 'any competent authority' means in practice a higher level of protection for the victim that might be recognised as such by one of the public bodies.

5. OBLIGATION TO ASSIST THE VICTIMS OF HUMAN TRAFFICKING. WOULD IT MAKE A DIFFERENCE?

In the centre of the directive is the protection of the victims (Article 11 -15). This is also its remarkable asset. The text distinguishes between overall support for victims and their protection during criminal proceedings (Article 11). Article 11, on general assistance and support, provides some important rules. First, it imposes an obligation on the Member States to provide assistance and support before, during and after criminal proceedings for an appropriate period of time. More questionable is the time after the proceedings. The Directive is less specific than the 2005 Council of Europe Convention on the same subject, using the language of 'appropriate period of time'. The Convention in its Article 13 (1) spells out that a recovery and reflection period should be at least 30 days. Could the directive allow a shorter time? This is very unlikely since both documents need to be read in conjunction and there is no danger that a Member State would compromise Article 13 of the Convention by imposing a shorter reflection period.

Article 11 (2) of the directive mirrors the similar provision of the Convention also in Article 10(2) that imposes an obligation on the Member States to provide assistance and support if the competent authorities have reasonable grounds for believing that the person was a subject of an offence described in Article 2 or 3. As discussed above it is important that competent authorities encompass a full range of public bodies to be able to detect potential victims. Another issue raised by Harvey (2008, 224) is the concept of 'reasonable grounds'. She rightly notices that the wording is quite vague and may vary in time and according to the perception of the competent authority what should be considered as reason-

⁹ Report of the EU Parliament, December 2010, PE442.887v02-00, p.11

¹⁰ R v O [2008] EWCA Crim 2835

¹¹ <http://www.fco.gov.uk/en/publications-and-documents/treaty-command-papers-ems/explanatory-memoranda/explanatory-memoranda-2008/humantrafficking>

nable grounds. Article 11.5 specifies that assistance and support shall cover the victims' subsistence such as appropriate accommodation, material assistance, medical treatment, psychological assistance, counselling, information and translation. The directive also underlines that assistance and support should be offered to all victims regardless of whether they are willing to cooperate in the criminal investigation, prosecution and trial (so-called unconditional support). Member States have an obligation to ensure that the victims have access to compensation for the crimes they have suffered.

The reference to Directive 2004/81/EC confirms the main objective of the EU Action Programme to include the victims who are the third-country nationals emphasising the general goal to strengthen the external dimension of the EU. The directive stresses that the third countries nationals - who are victims of human trafficking should be treated equally with EU nationals. Thus, the protection and support should be unconditional and offered to all victims including those who are unlawfully residing within the EU. But, the Directive does not supplement with any additional rules enhancing the position of third-countries nationals or deals with the migration policies. This link has not been sufficiently explored in the text. The question then is whether the Directive, despite its recognition of the importance of tackling the problem at its roots, does really offer efficient mechanisms to deal with the cases originated outside the EU. Unquestionably, the actions, policies and the ways of cooperation and agreements with the third countries require thorough examination and the concrete steps.

Another criticism of this provision is the time during which unconditional assistance is offered. The new text imposes this obligation on the Member States only during the reflection and recovery period. The question is: what happens to the victims afterwards? It is clear from the text that the Member States are released from this obligation after the recovery period and their support then becomes discretionary. Article 14 of the 2005 Council of Europe Convention also imposes the obligation to issue a renewable residence permit to the victims but also limited in time. The possible limitations in time of the assistance and support that the Member States provide compromise the human rights vision of the proposed text since there is a danger that the distressed victims

would be left for their own. A little help to solve those situations is offered by Article 11.6. It gives the possibility of granting international protection according to international rules or similar national laws. This should be understood that the stateless persons and asylum seekers are also protected against *refoulement* and their applications considered by the competent authorities¹².

6. IMPORTANCE OF MONITORING

The clear advantage of the Directive is a strong monitoring system. Article 11.4 drafted in parallel to the similar provision in the Council of Europe Convention, concerns setting up appropriate mechanisms that would allow an early identification of the victims in order to provide them with necessary assistance and support. The Commission's Experts Group proposed to establish National Referral Mechanisms (NRM) that could detect victims at the initial stage and to refer them to the competent authorities. The purpose of the NRM is to "allow proper identification of trafficked persons and consistent access to assistance and protection measures, all involved actors - government actors, law enforcement, NGOs, local social welfare organisations, local authorities, labour unions, labour inspections and other labour related agencies- [who] should define and agree upon specific procedures to be implemented.....[...] Member States should ensure within the Anti-trafficking Institutional Framework as defined by the NRM concept, that all involved actors are trained on a systematic basis and, where possible, jointly." (The Authors 2009).

7. PROTECTION IN CRIMINAL PROCEEDINGS

A strong emphasis is put on protecting the victims in criminal investigation and proceedings. This is undoubtedly a step forward from the 2002 Council framework decision. Article 12.2 underlines that victims should have access without delay to legal advice and representation, possibly free of charge if the victim cannot afford it. They should be well-informed to enable them to understand better their legal situation and aware about choices they dispose. They should be advised and given opportunity to claim compen-

¹² 1951 Convention and 1967 Protocol on the Status of Refugees, <http://www.unhcr.org/3b66c2aa10.html>

sation. Furthermore, they should be adequately protected from any risk they incur. The risk assessment shall be done on individual basis.

In line with Article 6.3 of the ECHR, the Directive stresses the victims' right of defence. Article 12.4 is quite extensive on the rules for avoiding secondary victimisation by which national legislation, judicial discretion and practice should abide. They should be protected from any intimidation, retaliation or victimisation that could result from the criminal proceedings. Taking into account the sensitivity of the issues, it includes some examples how to protect the victims' interest. The competent authorities should avoid unnecessary repetition of interviews, visual contact between victims and their oppressors during the interviews and cross-examinations or unnecessary questioning on private life. It draws attention to the need to build the victims' trust and confidence in the system that would encourage them to fully participate in investigation and prosecution of the offenders. Nevertheless, the title of Article 12, referring to 'criminal investigations and proceedings' would suggest that the protection is offered only when the proceedings are ongoing, therefore again limited in time. At least for what concerns the obligation that the Directive imposes, after it would depend on the Member States willingness.

8. RIGHTS OF CHILDREN

Very powerful provisions concern the protection of the rights of the child, making 'the child's best interests a primary consideration' (Article 15.1). The Directive backs here the increasing concern at the European forum to protect the child's rights and supplements the EU commitment in this matter spelt out in Article 24 of the Charter of Fundamental Rights. A new initiative is launched in Article 15.1 to assign a representative for the child victim although it does not define her/his role, competence or qualifications. The provisions on the child protection acknowledge the importance of the needs of the child such as access to education, proper representation as well as assistance and support to child's family or to appoint a guardian for unaccompanied child victim of human trafficking. The NGOs were however disappointed that other vulnerable groups were not given adequate consideration comparable to children. Furthermore, despite the strong trend to

adopt gender-specific approach, the text is not persuasive enough on the specificity of the gender issues. The provisions regarding women and disabled people are not detailed enough and do not do justice to the announced holistic approach.

9. PREVENTION AND TRAINING

An unquestionable innovation of the Directive is a strong obligation imposed on the Member States to set up effective rules to prevent offenses and to deter the demand for activities resulting from human trafficking. Effective prevention appears to be a key feature in the fight against human trafficking. Article 18 highlights the importance of regular training of officials dealing with potential victims. The Member States shall take the necessary measures to raise awareness among the potential victims and to diminish the risk of becoming the victim through research and education programmes, information, defused also via internet. Article 18.2 refers to the specific training that should be offered to the officials who are in contact with potential victims such as police forces, immigration authorities, public prosecutors and lawyers to enable them to identify the victims at the preliminary stage. The NGOs also recommended the insertion of a clause imposing on Member States not only a promotion of training but also providing adequate funding possibilities to finance the training that was not retained in the end. The Member States were entrusted to establish a monitoring system (National Rapporteurs) in order to identify tasks, gather statistics or carry out assessments.¹³ Article 19 confines them a role of the guardians on the implementation of the directive. The coordination and consolidation of the EU strategy on human trafficking is handed over to an Anti-Trafficking Coordinator. The Member States should facilitate her/his tasks through actions that could improve coherence of collected data, avoiding duplication of effort, reporting to the EU institutions and contributing to development of new EU policies on human trafficking.¹⁴

The Stockholm Programme inspiring the spirit of the Directive highlights the importance of development

¹³ Report of the EU Parliament, December 2010: PE442.887v02-00

¹⁴ Report of the EU Parliament, December 2010, PE442.887v02-00, p.17

of common indicators through the exchange of the best practices in identifying the victims. The third countries involvement vigorously advocated by this programme, has not been addressed in the Directive to its full potential. However, the text often refers to documents covering matters concerning third countries, in particular Directive 2004/81/EC on residence permits for third country nationals who are victims of human trafficking and Directive 2009/52/EC on minimum standards on sanctions or measures against illegally residing third country nationals. Unfortunately, the UK opted out from the Directive 2004/81/EC judging its provisions to be inadmissible and potentially a source of abuse. Initially, the UK and Denmark had also withdrawn its commitment from the present Directive deciding eventually to 'opt in' in March 2011.¹⁵

10. JURISDICTION AND EXTERNAL DIMENSION

The rules related to the jurisdiction of Article 10 are supplemented by the Council Framework Decision 2009/948/JHA on prevention and settlement of conflict of jurisdiction in criminal proceedings that should provide further guidance in case of the clash.¹⁶ Article 10 states that "Member States shall take all necessary measures to establish their jurisdiction over an offence referred to in Articles 2 and 3 where a) the offence is committed in whole or in part within their territory; or b) the offender is one of their national". Conversely, Article 10.2 provides that "Member States shall inform the Commission where they decide to establish further jurisdiction [...] over an offence committed outside their territory." This means in practice that Member States can choose not to apply jurisdiction's provision if the offence is committed outside of their territory. Essentially, this notably weakens the enforcement of the directive. The text often refers to international protection and international instruments that cover third countries but the language of the directive in relation to the external dimension is not convincing. Have the Stockholm programme recommendations been sufficiently endorsed in this text?

¹⁵ OJ L 328, 15.12.2009, p. 42

¹⁶ OJ L328, 15.12;2009,42

11. COOPERATION AND COORDINATION OF EFFORTS

The EU in its Action Plan and other recent documents has declared its commitment to an integrated and human rights-based approach. There is a clear attempt to incorporate human rights in the vision of the directive, which makes numerous references to human rights documents. Nevertheless, many provisions relating to assistance or support deeply infused with human rights objectives are limited in time or territory at least so far as mandatory rules are concerned. The directive refers widely to other EU instruments mainly directives and framework decisions, for example on approximation of penalties, organised crimes, criminal investigation, prosecution and trial or resident permit. In less stronger terms, often implicitly, it relies upon the UN definitions or the ILO framework. One of the criticisms addressed to the international community in the ECtHR landmark decision in *Siliadin v France* was insufficient and ineffective cooperation between national and international legal framework and lack of link between the Council of Europe ECHR and the ILO instruments as well as inadequate national enforcement of the Articles of the Convention.¹⁷ The European Court of Human Rights held in this case that Article 4 of the Convention (prohibition on slavery, servitude and forced or compulsory labour) imposes positive obligations on the Member States to effectively implement Article 4 in such a way that it makes offences of Article 4 of the ECHR punishable offences in criminal law (Mantouvalou, 2006). This obligation has been strengthened by the recent ECtHR judgment in *Rantsev v. Cyprus and Russia*, where it was held that Article 4 of the ECHR gives rise to specific obligations namely to protect victims and to draft administrative and legislative frameworks to dissuade trafficking in human beings and to examine the circumstances in which it has occurred.¹⁸

Overall, the directive sends quite a strong message to the Member States to encourage them to cooperate with each other in order to achieve the common goal. It promotes the dialogue between competent authorities of the Member States in exchange of information and best practice. It emphasises the importance of the dialogue between law enforcement agencies,

¹⁷ ECtHR, *Siliadin v France* [2005], No 73316/01

¹⁸ ECtHR, *Rantsev v. Cyprus and Russia* [2010], No 25965/04

police, judicial and financial authorities. In investigations and prosecutions Member States should closely cooperate and make use of the European Arrest Warrant procedure and coordinate efforts with Europol and Eurojust.¹⁹

CONCLUSION

The directive certainly marks a step forward at the EU level in fighting against trafficking in human beings as compared to the Council Framework Decision of 2002. The question is: Is it going to be enough to put in place an effective system to combat human trafficking? The new text improves rules on prosecution of traffickers, offers a higher level of protection to the victims and introduces measures for the prevention of trafficking. It sets up the system of coordinated efforts between the EU Member States. The text often refers to the Council of Europe framework and International Instruments available in this field. The Human Rights' perspective is infused in the text. The Directive also reiterates many provisions of the 2005 Council of Europe Convention on the same subject and also refers to the UN Instruments in particular the UN Protocol 2000 (Palermo Protocol).

The clear asset of the new text is a wider and consolidated definition of human trafficking adding the new grounds such as, begging or removal of organs. The Directive also defines the position of vulnerability although only rights of children have been considered in detail (Article 13-15), devoting insufficient space to other vulnerable groups.

The Directive improves coordination of rules of national criminal laws and harmonises the definition of offences in Articles 2 and 3 as well as the upper limit of penalties. The new text identifies the situations invoking the aggravating circumstances defining them. In this way, it provides a uniform definition of aggravating circumstances across the EU. An important achievement of the proposed directive is the insertion of non-penalisation clause for the victims involuntarily involved in illegal activities. There are two backdrops in this provision. There is nothing on non-detention of victims during the proceedings or af-

terwards and the MS are only entitled to not penalise the victims but they are not obliged to do so.

There are some innovative provisions related to the prosecution of offenders. In particular, the option to prosecute EU nationals for offences committed in the third countries. This provision fulfils the objective of the Stockholm Programme to strengthen the EU external dimension however its optional nature diminishes its force.

The protection of victims in criminal proceedings is substantial and has potential to bring the positive results. It covers some additional steps to avoid unnecessary distress of persons in position of vulnerability in particular children. It aims at preventing secondary victimisation that could arise from the repetitive interviews of witnesses or frequent contact with offenders.

The human rights' vision is particularly visible in the provisions on the victims support and assistance. The Directive specifically addresses the need for material support and accommodation, medical and psychological assistance for the time before, during and after the proceeding. The assistance needs to encompass legal counselling and interpreters. Nonetheless, there is no much guaranty for the continuous assistance after the proceedings and such assistance remains at the discretion of the Member States. Article 12 indicates that the unconditional assistance is offered only within the criminal justice system.

The strength of the Directive lies also with the monitoring mechanisms on the implementation of the directive, the role of National Rapporteurs in synchronising efforts, exchange information and the good practices.

The Directive takes specific measures to protect rights of a child. For example, particular assistance is offered to unaccompanied children. However, in terms of criticism, it is important to point out that in the same time it does not address enough the rights of other groups of persons in positions of vulnerability, for example, on the grounds of disability, pregnancy or other. Despite of the announcement to be gender specific, the adopted text does not reflect enough specific needs of women and girls although they are a predominant part of the victims trafficked into prostitution and pornography.

¹⁹ *Ibid.*, Rapport of the EU Parliament, 8.

The external dimension is addressed often by reference to other EU instruments and it seems not to be robust enough to tackle the problem at roots in the country of origin. It does not link with other migration policies. Overall, it does not provide a coherent framework, a level playing field between the EU and third countries, capable of producing successful results.

The Lisbon Treaty offered to Member States a possibility to opt from legislation in the area of Justice and Home Affairs. The UK and Denmark decided initially to 'opt out'. The UK eventually decided to 'opt in', sending a positive message to the outside world but also improving coherence in action against Human Trafficking. The UK has also taken some initiatives to help victims such as operation Pentameter, Poppy project or establishing of the Reflex agency (Ashworth 2012; Cowen 2011; Mitsilegas 2011; O'Neill 2011).²⁰ The UK is a leading country for economic migration and also an important platform for human trafficking. Many of the provisions of the proposed text will benefit victims, introduce a fairer process and diminish the cost of sometimes unnecessary trials. The UK's attitude to 'opt in' demonstrates the willingness to give up its obsession with border control and hunting criminals favouring the victim-centred approach.

REFERENCES

- Allain, Jean. 2009a. "Trafficking in human beings: Modern slavery." *European Journal of International Law* 20(2): 453-57.
- Allain, Jean. 2009b. "The definition of slavery in International Law." *Howard Law Journal* 52(Winter): 239-75.
- Ashworth, Andrew. 2012. "Trafficking people for exploitation: arranging individual's entry into United Kingdom with intention to exploit." *Criminal Law Review* 1: 63-66.
- Bakirci, Kadriye. 2009. "Human trafficking and forced labour: A criticism of the International Labour Organisation." *Journal of Financial Crime* 16(12): 160-65.
- Bakirci, Kadriye. 2007. "Child pornography and prostitution: Is this crime or work that should be regulated?" *Journal of Financial Crime* 14(1): 5-11.
- Cowen, Louise. 2011. "Victims of human trafficking: protection from punishment." *Archbold Review* 7: 4-5.
- Ellerman, Derek. 2002. "Trafficking of Women and Children in the United States". Retrieved from <http://www.polarisproject.org/polarisproject/Branches.htm>
- Elliott, Jessica. 2009. "(Mis)Identification of Victims of Human Trafficking: The Case of R v. O." *International Journal of Refugee Law* 21(4): 727-41.
- Gallagher, Anne. 2006. "Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments." *European Journal of Migration and Law* 8: 163-189.
- Harvey, Alison. 2008. "Human Trafficking - The road to ratification of the Council of Europe Convention Against Trafficking in Human Beings in the UK." *Journal of Immigration Asylum and Nationality Law* 22(3): 218-235.
- Mantouvalou, Virginia. 2006. "Servitude and forced labour in the 21st century: the human rights of domestic workers." *Industrial Law Journal* 35(4): 395-414.
- Mitsilegas, Valsamis. 2011. "Trafficking: guidance - trafficking people committing criminal offences - correct approach to prosecutions." *The Criminal Law Review* 5: 425-429
- O'Neill, Maria. 2011. "A Europe that protects: moving to the next stage of cross-border law enforcement cooperation." *The Police Journal* 84(2): 125-150.
- Scarpa, Silvia. 2008. *Trafficking in human beings: Modern slavery*. Oxford: Oxford University Press.
- The Authors. 2009. "Opinion of the Experts Group on Trafficking in Human Beings of the European Commission. On the revision of the Council Framework Decision of 19 July 2002 on combating trafficking in human beings." *International Journal of Refugee Law* 21(3): 508-15.

²⁰ Human Trafficking: UK responses, SN/HA/4324 <http://www.parliament.uk/briefingpapers/commons/lib/research/briefings/snha-03753.pdf>

PARA CITAR EL PRESENTE ARTÍCULO:

Estilo Chicago autor-fecha:

Gromek-Broc, Katarzyna. 2011. "EU directive on preventing and combating trafficking in human beings and protecting victims: Will it be effective?". *Nova et Vetera* 20(64): 227-238.

Estilo APA:

Gromek-Broc, K. (2011). EU directive on preventing and combating trafficking in human beings and protecting victims: Will it be effective? *Nova et Vetera* 20(64), 227-238.

Estilo MLA:

Gromek-Broc, K. "EU directive on preventing and combating trafficking in human beings and protecting victims: Will it be effective?". *Nova et Vetera* 20.64 (2011): 227-238.
