

The Impact of Criminalising the 'Knowing Use' on Human Trafficking

La Strada International
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Executive Summary

The year 2023 marks the negotiations for the revision of the EU Trafficking Directive (2011/36/EU), following the presentation of the evaluation package and revision proposal on the 19th of December 2022. Certain policy makers, international organisations and others pushed for this revision, and advocate for a binding provision on criminalising the 'knowing use' in the revised Directive. Currently, article 18(4) of this Directive only recommends criminalising the 'knowing use of services provided by trafficked persons', with the aim to reduce demand.

As there currently is only very limited research available on the possible impact and side effects of criminalising the 'knowing use', especially regarding the use of this provision for all forms of exploitation, La Strada International has conducted a series of interviews with 19 experts from 10 EU countries, to reveal the practical effects seen by experts in the field.

Through this small-scale assessment, complemented with desk research, La Strada International concludes that there is currently no proven impact of this criminalisation on combatting human trafficking. While two-thirds of the EU Member States have already introduced this provision in national legislation, there is only very limited prosecutorial activity and few convictions across the EU. Member States either limited the legal scope of this provision to users of sexual services of trafficked persons or (almost) exclusively applied their broader criminalisation to this particular group in practice – revealing that this criminalisation could be (mis)used to covertly target prostitution. Reasons for the limited implementation include the influence of political interest and moral values on who to criminalise as well as the practical difficulty to prove the mental element of 'knowledge' for users of other services. Further reasons for the provisions' limited scope could be related to the possible fears that with a broader scope, literary everyone – including governments themselves – could risk criminalisation for the 'knowing use'. Furthermore, interviewees expressed a range of concerns regarding the harmful side effects for victims and precarious (sex) workers. Examples include the increased vulnerability and stigmatisation, as well as risks of secondary victimisation and eroding trafficked persons' rights.

La Strada International believes the revision of the EU Trafficking Directive should not lead to a binding provision, as this not only seems to have very limited impact on combatting human trafficking, but is also very likely to have severe harmful effects.

1. Introduction

On the 19th of December 2022, the EU Anti-Trafficking Coordinator will launch the evaluation package for the EU Trafficking Directive (2011/36/EU), including a proposal for a revision. One of the major reasons to evaluate the Directive and call for a revision, is the strong push amongst certain policy makers and others to change the recommendation in article 18(4) of the Directive into a binding provision.¹ With the aim to curb demand for human trafficking, article 18(4) of the EU Trafficking Directive recommends the criminalisation of the ‘knowing use of services which are the objects of exploitation’.² In other words: criminalising the knowing use of services provided by trafficked persons.

However, to which extent criminalising the ‘knowing use of services provided by trafficked persons’ will actually curb demand for human trafficking, is yet to be seen.

One might view such a criminalisation as a positive development, presuming this would increase the number of prosecutions for human trafficking and better protect trafficked persons. However, further knowledge and research is needed to correctly judge the possible impact of such legislation and assess whether (any) added value outweighs (possible) harmful side effects. The very limited research and impact assessments currently available show only few prosecutions for the ‘knowing use’ and no relevant reduction in demand.³ The lack of thorough research and impact assessments looking into the possibly harmful side effects for victims and (sex) workers, have led La Strada International to the decision to undertake its own small-scale assessment. La Strada International conducted a series of interviews with 19 experts from 10 EU countries and complemented this with the available research to find out more about the application of the offence for all exploitative services, as well as any possible positive impact and any concerns and harmful effects that could arise when Member States criminalise the ‘knowing use’.⁴

2. International obligations to discourage demand for trafficking

Based on international instruments, states are bound to take legislative, educational, social and cultural measures to discourage demand for trafficking.⁵ This binding obligation was first laid down two decades ago in the Palermo Protocol.⁶ The obligation was further strengthened through its codification in article 6 of the Council of Europe Convention on Action against Trafficking (CoE Convention) and article 18(1) of the EU Trafficking Directive.⁷

¹ EC Communication, ‘On the EU Strategy on Combatting Trafficking in Human Beings 2021- 2025’, COM(2021) 171 final, p. 6; EC Communication, ‘Reporting on the follow-up to the EU Strategy towards the Eradication of trafficking in human beings and identifying further concrete actions’, COM(2017) 728 final; See also the resolution by FEMM and LIBE: European Parliament (EP), ‘Resolution of 10 February 2021 on the implementation of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims’ (2020/2029(INI)), no. 22.

² Art. 18(4) EU Trafficking Directive (2011/36/EU); Art. 19 CoE Convention on Actions against Trafficking (CETS 197).

³ EC Report, ‘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, in accordance with Article 23 (2) of the Directive 2011/36/EU’, COM(2016) 719 final; GRETA, ‘9th General Report on GRETA’s Activities’ (2020); KFN, ‘Evaluation of the criminal provisions to combat human trafficking (§§ 232 to 233a StGB)’ [title translated] (Federal Ministry of Justice, Germany 2021); S. Melander and V. Mahmood, ‘Abuse of a victim of sexual trade. Application practice of the provision’ [title translated], (Ministry of Justice, Finland 2022).

⁴ Experts from the following 10 countries have been interviewed: Austria, Belgium, Bulgaria, Cyprus, Finland, Germany, Italy, Ireland, the Netherlands, and Romania. In addition to these interviews, further experts from Belgium, Cyprus, France, Lithuania, and Portugal have been consulted in the process of writing and reviewing this policy paper.

⁵ See: Art. 9(5) of the UN General Assembly Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol), 15 November 2000; Art. 6 CoE Convention on Actions against Trafficking (CETS 197); Art. 18(1) EU Trafficking Directive (2011/36/EU).

⁶ Art. 9(5) Palermo Protocol (2000).

⁷ These commitments can further be found in: Ch. 4, para. 3.3 of the OSCE, ‘OSCE Action Plan to Combat Trafficking in Human Beings’ (2003), Decision No. 557; Art. 6 of the UN General Assembly Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 18 December 1979; UN CEDAW General Recommendation no. 38, 20 November 2020, CEDAW/C/GC/38.

In addition to these binding provisions, article 19 of the CoE Convention and article 18(4) of the EU Trafficking Directive include a recommendation to criminalise the use of services which are the objects of exploitation, with the knowledge that the person is a victim of human trafficking. In contrast to the aforementioned obligation, this recommendation to criminalise the 'knowing use' is currently not binding,⁸ although there are some groups advocating for a binding provision in the revised EU Trafficking Directive. To date, it is thus left to the discretion of individual states how to fulfil their positive obligation to discourage demand, using the measures they deem most effective – and whether or not to include a measure criminalising the 'knowing use'.

The EU Member States that decided to introduce such a criminalisation, have either limited the legal scope of this provision to users of sexual services of trafficked persons, or have in practice (almost) exclusively applied their broader criminalisation to this particular group. The 2011 Joint UN Commentary on the EU Directive highlights that especially this criminalisation limited to the 'knowing use' of sexual services of trafficked persons can have unintended negative side effects for these victims. At the time, the Joint UN Commentary recommended states to conduct an in-depth impact assessment – especially concerning the impact on human rights – before introducing such a criminalisation into their national legislation.⁹

3. Findings from the interview series with national experts

La Strada International conducted interviews with 19 experts from 10 EU countries.¹⁰ Below we highlight the main findings from this interview series, complemented with information from available research.

3.1 Where is the 'knowing use' criminalised at national level?

As shown in the table below, currently about two-thirds of the EU Member States have introduced a (partial) criminalisation of the 'knowing use' of services of trafficked persons into their criminal codes.¹¹ All Member States that have introduced such legislation limit the personal scope to those persons directly using these services provided by the victim.¹² The mental element (*mens rea*) required by the national provisions is that the user 'knew' the person was a trafficked person – in several countries this required knowledge is also fulfilled when it can be proven that the user 'should have known'.¹³ Ireland is the only EU Member State that has shifted the burden of proof to rests with the defendant, who is to prove that they did not know and had no reasonable grounds for believing the person providing the services to be a trafficked person.¹⁴

⁸The drafting process of the CoE Convention reveals a preferred focus on prevention rather than prosecution, and a stress on the importance to distinguish between the obligation of art. 6 and the lesser recommendation of art. 9. See: S. Mullally, 'Article 19 Criminalisation of the use of services of a victim', in: J. Planitzer and H. Sax (eds.), *A Commentary on the Council of Europe Convention on Action against Trafficking in Human Beings* (EE, 2020), p. 272-273.

⁹UNHCR, 'Prevent. Combat. Protect: Human Trafficking. Joint UN Commentary on the EU Directive – A Human Rights-Based Approach' (2011), p. 99-100.

¹⁰Experts from the following 10 countries have been interviewed: Austria, Belgium, Bulgaria, Cyprus, Finland, Germany, Italy, Ireland, the Netherlands, Romania. In addition to these interviews, further experts from Belgium, Cyprus, France, Lithuania, and Portugal have been consulted in the process of writing and reviewing this policy paper.

¹¹Experts from both Germany and Austria also especially referred to using the regular human trafficking offence in conjunction with the article on commission by contribution to prosecute persons for participation in the trafficking offence. This policy paper focusses on the criminalisation of users for the 'knowing use', a discussion of the use of 'participation' to prosecute others than the (main) trafficker is thus beyond the scope of this paper.

¹²EC Report, COM(2016) 719 final, p. 7.

¹³This lowered bar for the mental element can for example be found in the national provisions in: Germany, the Netherlands, Finland, Lithuania, and Cyprus (regarding art. 17 CC 'the use of services other than sexual services').

¹⁴EC Report, COM(2016) 719 final, p. 7.

Cyprus applies an even stricter regime for the use of sexual services of trafficked persons after introducing this as a strict liability offence in 2019, thereby completely removing the requirement that the user knew or should have known that the services were provided by a trafficked person.¹⁵

Criminalisation of the ‘knowing use’ in national legislation of EU Member States¹⁶	
<u>For all forms of exploitation:</u> <i>‘The knowing use of services provided by a trafficking victim’</i>	Bulgaria, Croatia, Republic of Cyprus, Greece, Lithuania ¹⁷ , Malta, Portugal, Romania, and Slovenia.
<u>Limited to sexual exploitation:</u> <i>‘The knowing use of sexual services provided by a trafficking victim’</i>	Austria, Estonia, Finland ¹⁸ , Germany, Ireland, Latvia, Luxembourg, and the Netherlands.

The national legislation around the criminalisation of the ‘knowing use’ shows a diverse legal landscape. Many EU Member States have deliberately limited the scope of the criminalisation to the use of sexual services. Moreover, it seems that where a broader criminalisation is introduced, this is in practice often (almost) exclusively used to prosecute the ‘knowing use’ of sexual services of trafficked persons. This partial criminalisation and implementation reveal a dominant focus on combatting demand in the context of sexual exploitation.¹⁹ One of the interviewees drew attention to the specific view on and ethical judgement towards prostitution revealed by this partial criminalisation. Consequently, there is a severe lack of attention for those who use other services provided through severe exploitation and there seems to be little interest to address all forms of human trafficking with this provision.

Several EU Member States have expanded the criminalisation around prostitution in their national legislation. Sweden, Finland and Ireland have comprehensive third-party regulations criminalising all facilitation of the selling of sexual services, also in all non-exploitative situations.²⁰ While these governments state that this does not lead to criminalising the ones providing the sexual services, practice shows that these third-party regulations – as well as immigration law and fiscal policies – often do result in the criminalisation of sex workers.²¹

¹⁵ See art. 17A of the Law 60(I)/2014 as amended by the Law 117(I)/2019 in Cyprus, which is exclusively applicable to the use of sexual services. Further, art. 19 states that no defence may be raised against the strict liability offence of art. 17A. Additionally, art. 17 of this same law criminalises the use of all other services (excluding sexual services), this article does require the user ‘should have known’ that the services were provided by a trafficking victim (this is thus not a strict liability offence). See: GRETA, ‘3rd Evaluation Report on Cyprus’, GRETA(2020)04, para. 155.

¹⁶ Based on data from the following sources, checked and updated through consulting national experts and recent GRETA reports: EC Report, COM(2016) 719 final, p. 3-5; GRETA, ‘9th General Report on GRETA’s Activities’ (2020), p. 47-49; OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, ‘Discouraging the demand that fosters trafficking for the purpose of sexual exploitation’ (Vienna, 2021), p. 34.

¹⁷ In Lithuania, in addition to the criminalisation of the ‘knowing use’, the general purchase of sexual services is an administrative offence.

¹⁸ In Finland the criminalisation is broader than only the ‘knowing use of sexual services of a trafficked person’, as it also covers victims of pimping and pandering. See: Ch. 20, Sec. 8 (384/2015) Finnish criminal code (abuse of a victim of sexual trade).

¹⁹ S. Mullally, in: J. Planitzer and H. Sax (eds.), *A Commentary on the Council of Europe Convention on Action against Trafficking in Human Beings* (2020), p. 276-276.

²⁰ N. Vuolajärvi, ‘Criminalising the Sex Buyer: Experiences from the Nordic Region’ (LSE, 2022), <https://www.lse.ac.uk/women-peace-security/assets/documents/2022/W922-0152-WPS-Policy-Paper-6-singles.pdf>, p. 7-10, 13-14; Amnesty International, ‘“We live within a violent system.” Structural violence against sex workers in Ireland’ (2022), <https://www.amnesty.org/en/wp-content/uploads/2022/02/EUR2951562022ENGLISH.pdf>, p. 5-8.

²¹ *Ibid.* For example, when working together out of one apartment, persons providing sexual services can be criminalised as pimps or brothel holders, and third country nationals without legal residence risk deportation. This can be seen in Sweden, Finland and Ireland. We were informed that this is in practice also the case in Cyprus. In Finland the practice of deporting TCNs without legal residence is currently under examination.

Sweden, Ireland and France have even criminalised all purchase of sexual services, while this expansion of the reach of criminal law is not required nor recommended by the CoE Convention and the EU Directive.²² This expansion of criminalisation in the realm of prostitution can contribute to the further conflation of human trafficking and prostitution.²³ Moreover, it seems that in certain countries, the criminalisation of the 'knowing use' or even the complete criminalisation of all purchase of sexual services is used as a means to criminalise prostitution under the pretext of anti-trafficking legislation.

3.2 Lack of awareness and knowledge among both experts and the general public

While two-thirds of the EU Member States have introduced a (partial) criminalisation of the 'knowing use', there seems to be relatively little awareness of the existing legal provisions at national level, even among trafficking experts. Nearly all interviewees stressed that more awareness is needed about this criminalisation among the general public. It is striking that – as far as we were informed – only Bulgaria launched a public awareness campaign to inform the public when they introduced this new criminalisation. It is peculiar that this campaign was only directed at users of sexual services, because Bulgaria criminalised the 'knowing use' of *all* services of trafficked persons.²⁴ Cyprus had not organized a (real) public awareness campaign, but instead the government launched a video spot following the introduction of the strict liability statute on use of sexual services of trafficked persons. One of the interviewees stated that this video spot contributed to the conflation of sexual exploitation and sex work, giving the impression that all those providing sexual services are being exploited and seemingly trying to prepare the political landscape for a complete ban on the purchase of sex.

The lack of awareness and knowledge of the existing provisions on the 'knowing use' problematically also extends to legal professionals. Even anti-trafficking experts in the field indicated that they themselves have little or limited knowledge of the provision or its implementation. Moreover, the majority of the interviewees indicated that there is a lack of knowledge among legal practitioners, as well as unclarity about the practical interpretation at national level.

²² S. Mullally, in: J. Planitzer and H. Sax (eds.), *A Commentary on the Council of Europe Convention on Action against Trafficking in Human Beings* (2020), p.277.

²³ Effects of this expansion of criminalisation include further marginalisation and stigmatisation, moreover, their access to the justice system is compromised due to the threat of being criminalised. The severe repercussions on persons providing sexual services include the deterioration of working conditions: their autonomy is severely affected, forcing them to operate in more risky situations, facing increased violence. See: N. Vuolajärvi, 'Criminalising the Sex Buyer: Experiences from the Nordic Region' (LSE, 2022), p. 7-10, 13-14; Amnesty International, "'We live within a violent system.'" Structural violence against sex workers in Ireland' (2022), p. 5-8; European Sex Workers Rights Alliance (ESWA), 'Myth-busting the Swedish model. The evidence debunking 10 key claims on client criminalisation' (2022), <https://assets.nationbuilder.com/eswa/pages/221/attachments/original/1646300871/Factsheet.pdf?1646300871>; H. Le Bail, C. Giametta and N. Rassouw, 'What do sex workers think about the French Prostitution Act? A Study on the Impact of the Law from 13 April 2016 Against the 'Prostitution System' in France.' (Médécins du Monde, 2019), <https://hal-sciencespo.archives-ouvertes.fr/hal-02115877/document>, p. 6-7. The French study even found that in France sex workers are more often criminalised than their clients; See also: A. Oliveira, 'Less equal than others: The laws affecting sex work, and advocacy in the European Union' (GUE/NGL Goup of the EP, 2020), <https://repositorio-aberto.up.pt/bitstream/10216/133560/2/461540.pdf>.

²⁴ GRETA, '2nd Evaluation Report on Bulgaria', GRETA(2015)32, para. 112; Furthermore, in France, where the purchase of all sexual services is criminalised, a poster campaign to inform the public about this new law was launched in 2016. See: OSCE, 'Discouraging the demand that fosters trafficking for the purpose of sexual exploitation' (2021), p. 52-53.

3.3 Is the criminalisation of the 'knowing use' applied in practice?

The limited data available on the application of national provisions criminalising the 'knowing use', show the scarce application of these national provisions. In the 2020 Commentary on the CoE Convention, Mullally – currently the UN Special Rapporteur on trafficking in persons – concluded that in those countries where a criminalisation of the 'knowing use' is introduced, "there is very limited prosecutorial activity as well as limited knowledge of the scope or import of the offence".²⁵ Most interviewees informed us of the very limited number of prosecutions in their country or stated they had no updated information on any prosecutions related to this offence.²⁶

A similar picture can be gathered from the available EU data. The 2016 report by the European Commission on the impact of national legislation criminalising the use of services of trafficked persons (2016 EC Report) stipulates that the statistical data provided by Member States is scarce: only a limited number of prosecutions and convictions had been communicated.²⁷ This report reveals that in 2015-2016 there had only been 18 convictions for the use of services of trafficked persons in the EU, of which 15 in Romania alone – strikingly, all of these concerned the use of sexual services.²⁸ Based on the aggregated data from the 2016 EC Report and GRETA's 2019 General Report, merely 4 EU Member States reported any convictions at all for the criminalisation of the 'knowing use'.²⁹ From the 2020 EC data collection publication on trafficking in the EU, it appears that the conviction rates are higher, as the table on 'knowing use' shows a total of 133 convictions in the period 2017-2018 of which 85 in Lithuania and 21 in Hungary.³⁰ Unfortunately, however, this data was found not to be reliable. GRETA's Second Evaluation Report on Hungary from 2019 plainly states that the 'knowing use' is not criminalised in Hungarian legislation.³¹ For Lithuania, based on a consulted human trafficking expert and GRETA's Second Evaluation Report on Lithuania we have to conclude that there have been no convictions yet for the 'knowing use' in Lithuania.³²

This scarce application of the provision, or even total lack of application in some EU Member States, was brought up in all the interviews with experts from countries where a criminalisation of the 'knowing use' has been introduced. For Bulgaria and Finland, as well as several other countries where there have been a few investigations, the interviewees highlighted that it is very unpredictable when – if at all – this provision will be used.

²⁵ S. Mullally, in: J. Planitzer and H. Sax (eds.), *A Commentary on the Council of Europe Convention on Action against Trafficking in Human Beings* (2020), p. 276-276.

²⁶ Only for two countries the interviewees could provide us with recent data on the application of the offence. Germany: convictions for the 'knowing use' (Section 232a StGB) in low single digits in both 2019 and 2020 (as an offence that was sentenced along with at least one more serious offence). Austria: 21 convictions for the provision on the violation of sexual self-determination (Section 205a CC) in both 2019 and 2020. As the Austrian provision is broad, it is not clear what number of these convictions pertained to the 'knowing use'. See: "Sicherheitsbericht 2020". P. 79-80 at: <https://www.justiz.gv.at/home/justiz/daten-und-fakten/berichte/sicherheitsberichte.2c94848525f84a630132fdbd2cc85c91.de.html>.

²⁷ EC Report, COM(2016) 719 final, p. 6; This assessment report was required by art. 23 of the EU Trafficking Directive.

²⁸ EC Report, COM(2016) 719 final, p. 7; See also: OSCE, 'Discouraging the demand that fosters trafficking for the purpose of sexual exploitation' (2021), p. 36-37.

²⁹ Bulgaria, Romania, Greece and Lithuania. Further non-EU CoE State Parties which reported case law on the criminalisation of the 'knowing use': North Macedonia and Serbia. See: EC Report, COM(2016) 719 final, p. 6; GRETA, '9th General Report on GRETA's Activities' (2020), p. 48-49.

³⁰ EC, Directorate-General for Migration and Home Affairs, 'Data collection on trafficking in human beings in the EU' (2020), <https://data.europa.eu/doi/10.2837/45442>, p. 243.

³¹ GRETA, '2nd Evaluation Report on Hungary', GRETA(2019)13, para. 165-167.

³² The Lithuanian expert on Human trafficking explained that over the past years there have been a few convictions for the 'knowing use' by lower courts, but these have all been quashed by the higher courts; See further: GRETA, '2nd Evaluation Report on Lithuania', GRETA(2019)08, para. 159-160.

One of the main reasons for the scarce application mentioned in the interviews, is the difficulty to establish the required *mens rea* of knowledge that the person providing the services was a victim of trafficking.³³ This difficulty also persists in countries where the required mental element is lowered to 'should have known' – like Finland, Germany, the Netherlands and Lithuania. This is even the case in Ireland, where in 2017 the burden of proof was shifted towards the buyer (defendant), and where to date there has not yet been a single conviction.³⁴ We were informed that also in Cyprus, where since 2019 the use of sexual services of trafficking victims is criminalised as a strict liability offense, there have been no convictions yet.³⁵ Due to the limited – or even complete lack of – jurisprudence, there is but little clarity on how to prove the mental element. A few interviewees mentioned circumstances that could be used to prove the mental element, such as the frequency of using the (sexual) services and the presence of a pimp at the time of purchase. Moreover, one interviewee stated that when the user is 'caught red-handed' it might be easier to establish the necessary proof. Another interviewee underlined the unlikelihood that victims, coerced by their trafficker to conceal the actual situation, will reveal the fact that they are trafficked to the user of their services.³⁶

Another main obstacle is posed by the limited available resources and capacity of police and other law enforcement actors to investigate and prosecute human trafficking, while the 'knowing use' is a difficult crime to investigate and prosecute. Investigating this specific statute requires a lot of resources, capacity and knowledge of the police and the prosecutor's office. These resources, if available in the first place, will have to be channelled away from other investigations, thus leading to less resources to investigate the main crime of trafficking itself. Moreover, some interviewees mentioned that investigative authorities do not see this statute as a serious crime and thus not as a priority – which may well be another cause for the limited number of investigations.

An additional obstacle is the uncertainty whether a conviction for human trafficking is prerequisite to prosecute the buyer for the 'knowing use'.³⁷ Almost all interviewees were unsure whether a conviction for the 'knowing use' would be possible in their country without a prior conviction of the trafficker. If theoretically possible, most argued that this would be very difficult in practice. Only one interviewee from the Netherlands was confident that, if the victim would self-identify, a prosecution for the 'knowing use' could be possible without the prior conviction of the trafficker. However, this is rather theoretical as there has not yet been any conviction in the Netherlands since the enactment of the provision in January 2022. Throughout the entire interview series, we were not informed of any cases where the 'knowing use' was prosecuted without a prior prosecution for human trafficking. In Finland, for example, there have only been prosecutions for the 'knowing use' within larger cases against the traffickers. An additional problem then arises: the users cannot be used as witnesses in the case against the trafficker, as they have the right to stay silent. These users who risk being prosecuted for the 'knowing use' thus have a twofold position as both a suspect and a witness, and consequently, they are protected from incriminating themselves. This can complicate establishing sufficient proof in the case against the trafficker.

³³ See further: EC Report, COM(2016) 719 Final, p. 6; S. Mullally, in: J. Planitzer and H. Sax (eds.), *A Commentary on the Council of Europe Convention on Action against Trafficking in Human Beings* (2020), p.276-276; OSCE, 'Discouraging the demand that fosters trafficking for the purpose of sexual exploitation' (2021), p. 11.

³⁴ Generally, prosecutions for trafficking are very low in Ireland, with no convictions for trafficking under the Criminal Law (Human Trafficking) Act 2013 up until June 2021, and only 2 convictions in the period since. See: GRETA, '3rd Evaluation Report on Ireland', GRETA(2022)12, para. 102-103, 113.

³⁵ We were informed that there are currently three cases pending at the court in Cyprus for the use of sexual services of victims of trafficking based on art. 17A of Law 60(I)/2014 as amended by Law 117(I)/2019.

³⁶ See further: The UN SR stated that even the best-intentioned sex purchasers are probably unable to distinguish between trafficked and non-trafficked persons. UNCHR, 'Report of the Special Rapporteur on the Human Rights Aspects of the Victims of Trafficking in Persons, Especially Women and Children, Sigma Huda', E/CN.4/2006/62, para. 63.

³⁷ No further information on this specific issue has been found in available reports.

The uncertainty as to whether a prior conviction for human trafficking is required is striking, because one of the claims in favour of introducing the criminalisation of the 'knowing use' was that this would allow for the possibility of 'going after' the user (client) when prosecuting the trafficker is not possible, with the idea that this would enhance the prosecution of human trafficking.³⁸ Taken together, this means that the effective use of the provision criminalising the 'knowing use' will most likely depend on successful human trafficking prosecutions, which are currently seriously lagging behind.

3.4 Impact on combatting human trafficking

Before La Strada International conducted the interview series, the limited research available already acknowledged that both article 18(4) of the EU Trafficking Directive and article 19 of the CoE Convention have limited impact on state practice.³⁹ The 2016 EC Report concludes that its analysis "demonstrates a rather diverse legal landscape which fails to effectively contribute to discouraging demand of such services".⁴⁰

The interviewees all had doubts about the enforceability of the criminalisation of the 'knowing use' in practice. Both proponents and opponents of the criminalisation shared the view that this provision would lead to only few prosecutions, which might be both a cause and a consequence of the low number of investigations. Almost all interviewees doubted whether the criminalisation would contribute to combatting human trafficking in practice, and several strongly stated that the criminalisation does not have any added value and only causes negative side effects. The proponents, however, highlighted the preventative and normative function the provision could fulfil – as the introduction of the offence signals that the very use of services of trafficked persons is an offence, and that users play part in enabling that this exploitation persists.

One interviewee explained that convictions are necessary to raise awareness about the criminalisation and to realise this preventative and normative effect in practice. This is in line with GRETA's observation that the criminalisation of the 'knowing use' could *potentially* have a normative effect and awareness raising function, if state parties introducing such a criminalisation also disseminate information about it and promote its practical application.⁴¹ As noted previously, we only encountered one country which launched a real awareness raising campaign, specifically aimed at alerting the public about this new criminalisation.⁴²

Furthermore, we noted that the expected impact of the criminalisation on the demand for and prevention of human trafficking is mainly based on an assumption, and that there is currently no data proving this. Finland and Germany are the only two countries to have conducted an evaluation of the provision, of which only the latter included an impact assessment including the human rights impact.⁴³ This German evaluation report concluded that the new criminalisation did not bring

³⁸ See: OSCE, 'Discouraging the demand that fosters trafficking for the purpose of sexual exploitation' (2021), p. 33-49.

³⁹ S. Mullally, in: J. Planitzer and H. Sax (eds.), *A Commentary on the Council of Europe Convention on Action against Trafficking in Human Beings* (2020), p. 274-276.

⁴⁰ EC Report, COM(2016) 719 final, p. 10.

⁴¹ GRETA, '9th General Report on GRETA's Activities' (2020), p. 49.

⁴² See: GRETA, '2nd Evaluation Report on Bulgaria', GRETA(2015)32, para. 112.

⁴³ After the Finnish evaluation (2013) and the German evaluation (2021), both countries decided to lower the required mental element to also include 'should have known'. See: KFN, 'Evaluation of the criminal provisions to combat human trafficking (§§ 232 to 233a StGB)' [title translated] (Federal Ministry of Justice, Germany 2021), https://www.bmj.de/DE/Ministerium/ForschungUndWissenschaft/Evaluierung_Strafvorschriften_Bekaempfung_Menschenhandel/Evaluierung_Strafvorschriften_Bekaempfung_Menschenhandel_node.html; S. Melander and V. Mahmood, 'Abuse of a victim of sexual trade. Application practice of the provision' [title translated], (Ministry of Justice, Finland 2022), https://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/164033/OM_2022_4_SO.pdf?sequence=1&isAllowed=y.

forward a relevant reduction in demand. It was stated that the new provision had little practical relevance – as it is very difficult to prove the mental element of 'knowledge'. Moreover, concerns were raised regarding the fact that clients would no longer report exploitative situations as they would risk criminalisation, and on top of that they could invoke their right to remain silent when questioned in the case against the trafficker.⁴⁴ These concerns will be further discussed in paragraph 3.5.

Both proponents and opponents highlighted the restricted impact of criminal law and explained that the criminalisation can only have effect when it is part of a comprehensive set of tools tackling demand. Several interviewees argued that the answer should be sought outside the criminal code. To reduce demand, they said we should not focus on criminalisation but instead on awareness raising and education. It is noteworthy that this necessary shift in focus was brought up by multiple interviewees without being specifically asked about this. These are exactly the types of measures which are laid down as binding obligations in both the EU Trafficking Directive and the CoE Convention,⁴⁵ while the criminalisation of the 'knowing use' is merely a non-binding recommendation.⁴⁶ One of the interviewees also specifically cited the binding obligation in article 18(1-3) of the Directive to explain the focus should be on awareness raising, education and information provision, not on creating grounds of criminalisation around the victims.

3.5 Harmful side effects on victims and vulnerable workers

The 2011 Joint UN Commentary on the EU Directive already drew attention to the fact that especially when the criminalisation of the 'knowing use' is limited to the 'sexual services of victims of trafficking', this can have unintended negative effects. To mention a few: the criminalisation might deter users from reporting trafficking situations, the proceedings may be an additional burden for the victim, and the criminalisation may add to the existing stigmatisation of these victims.⁴⁷ In line with this, it could be questioned whether there would be similar harmful side effect for vulnerable workers exploited for labour. At the time, the Joint UN Commentary recommended states to conduct an in-depth impact assessment looking into the human rights impacts before introducing any such a criminalisation in national legislation.⁴⁸ A decade has passed, and while about two-thirds of the EU Member States have introduced such a (partial) criminalisation, to our knowledge only one of these has conducted a national impact assessment into the human rights impact on victims and (sex)workers.⁴⁹

These concerns about the harmful side effects are also widely shared among the experts who participated in the interview series. Only 2 out of 19 interviewees expressed not to have concerns about the unintended negative effects on victims. The main concern amongst the majority of the interviewed experts is that the criminalisation promotes risks for (potential) victims rather than protecting their rights. They explained that the criminalisation pushes sex work (even further) from the public realm and underground, rendering persons who provide sexual services all the more vulnerable to exploitation. This can cause more stigmatisation of sex workers and make it

⁴⁴ KFN, 'Evaluation of the criminal provisions to combat human trafficking (§§ 232 to 233a StGB)' [title translated] (Federal Ministry of Justice, Germany 2021), p. 105.

⁴⁵ Art. 18(1-3) EU Trafficking Directive (2011/36/EU); Art.6 CoE Convention on Actions against Trafficking (CETS 197).

⁴⁶ Art. 18(4) EU Trafficking Directive (2011/36/EU); Art.19 CoE Convention on Actions against Trafficking (CETS 197).

⁴⁷ UNHCR, 'Prevent. Combat. Protect: Human Trafficking. Joint UN Commentary on the EU Directive – A Human Rights-Based Approach' (2011), p. 99-100.

⁴⁸ *Ibid.*

⁴⁹ See para 3.4 (Germany).

harder for social workers to access potential trafficking victims among this group. These concerns are also backed by reports like the Joint UN Commentary on the Trafficking Directive and research by the European Sex Workers' Rights Alliance.⁵⁰

Another major concern relates to the side effects of the criminal proceedings against the 'user'. These proceedings can be harmful, humiliating and traumatising for the victim, even where countries allow for special measures to better protect victims during the proceedings. The victim can be called as a witness to testify and be questioned by the defence lawyer, which is a heavy burden and can cause secondary victimisation. Moreover, qualifying the victim as a witness may lead to an erosion of the trafficked persons' rights, as not all rights specifically intended for trafficking victims may be granted when they are labelled as witnesses. On top of this, the heavy burden of these proceedings might pose an even higher threshold for victims to report exploitative situations.

A further negative effect which could hamper the prosecution of trafficking is that the criminalisation of the 'knowing use' could lead to a reduction in reporting by clients.⁵¹ It is striking that mainly the experts who have worked directly with victims stressed that they have frequently seen clients supporting victims through reporting. For this reason, these experts fear this reduction in reporting. On the flip side, coincidentally or not, the interviewees who did not share this particular concern – stating that those who make use of exploitative services are not likely to be the ones who would report – were mainly experts who have not worked with victims directly.

Almost all interviewed experts came to the conclusion that victims would not be better off with the criminalisation of the 'knowing use'. For most countries it was unclear what rights the victims have when a user is prosecuted for the 'knowing use' of their services. Specifically, the experts often did not know whether a victim is entitled to the same rights when the 'user' is prosecuted, as when the trafficker is prosecuted. For example, if the prosecution of the 'user' would mean they are entitled to a victim status with related rights. It was especially unclear whether this would include the right to a temporary residence permit. Given the heavy and double burden of the proceedings on a victim-witness, this is particularly harmful and adds to the abovementioned concerns. It is therefore doubtful whether the criminalisation of the 'knowing use' can be said to fall under the human rights-based approach.

3.6 Should the criminalisation of the 'knowing use' be extended to all types of exploitation?

With the aim to curb demand, article 18(4) of the EU Trafficking Directive and article 19 of the CoE Convention recommend criminalising the 'knowing use of services provided by a trafficked person'. These provisions apply to all types of exploitation, and GRETA has repeatedly urged CoE State Parties to expand the criminalisation to include users of services provided by trafficking victims of all types of exploitation.⁵² However, in practice many Member States have deliberately implemented a provision in national legislation which is limited to sexual services.⁵³

⁵⁰ UNHCR, 'Prevent. Combat. Protect: Human Trafficking. Joint UN Commentary on the EU Directive – A Human Rights-Based Approach' (2011), p. 99-100; ESWA, 'Myth-busting the Swedish model. The evidence debunking 10 key claims on client criminalisation' (2022); ICRSE, 'A brief guide on collateral damage of Anti-Trafficking laws and measures on sex workers (2019), https://www.eswalliance.org/collateral_damages_of_anti_trafficking_laws_and_measures_on_sex_workers.

⁵¹ These concerns are also backed by the Joint UN Commentary on the EU Directive and the German impact assessment.

⁵² S. Mullally, in: J. Planitzer and H. Sax (eds.), *A Commentary on the Council of Europe Convention on Action against Trafficking in Human Beings* (2020), p. 276.

⁵³ This can be witnessed in countries such as Romania and Bulgaria, where the broad provision has almost exclusively been used in the realm of sexual services. Only for Bulgaria we have been informed about a few prosecutions for the 'knowing use' in cases where there was a combination of both sexual exploitation and labour exploitation.

Countries which did follow the international recommendations and implemented a provision on 'all types' have in practice (almost) exclusively limited the application to sexual services. A broadened criminalisation would in practice thus risk still only targeting users of sexual services. Reasons for this include the influence of political interest and moral values on who to criminalise as well as the practical difficulty (if not impossibility) to prove the mental element of 'knowledge' for users of other services. Further reasons could be related to the possible fears that with a broader scope, literary everyone – including governments themselves – could risk criminalisation for the 'knowing use'. If the current article 18(4) of the EU Directive would be revised and changed into a binding obligation, all EU Member States would be obliged to introduce such a broader provision criminalising the 'knowing use' of any services provided by a trafficked person – regardless of whether this person was trafficked for labour, sexual services, organ removal or other forms of exploitation.

Several experts from countries where the scope of the criminalisation is limited to sexual services, pointed out that the effectiveness and consequences of an extension of the criminalisation should be assessed first, before considering such a revision. This assessment should include the current challenges, including the difficulty to prove the mental element. Almost all interviewees stressed the difficulty or even impossibility to prove that the user *knowingly* made use of services provided by a trafficked person when this criminalisation is to be applied to 'users' outside the realm of sexual services. Also, this would put a high burden on consumers to know where products come from, while the supply chain is too long to realistically require this from consumers. This could thus create a situation of legal uncertainty, as anyone could then be held criminally liable for buying goods produced within the global supply chain, as these could possibly be connected to services from trafficking victims. One interviewee put this very clearly: this would lead to holding those responsible who have less to spend; those who have no choice but to buy the cheapest food available.

Several experts pointed out that criminalising consumers is not the way forward. Instead, the focus should be on criminalising employers who exploit their employees,⁵⁴ on the liability of companies for their supply chain (due diligence) as well as on raising awareness amongst consumers and educating them. To bring about a positive effect, several experts also suggested a system of certifications. Such a system would provide consumers with a choice to buy certified services and products – which they can trust are free from exploitation. The experts argued that such a system could impact and improve work circumstances a lot – more than a criminalisation of consumers. In addition, it might increase the demand for 'fairly produced' services and could thus push back the demand for exploitative labour.

3.7 Article 18(4) of the EU Trafficking Directive as a binding obligation?

From the 19 experts interviewed by La Strada International, only 3 did not see a change of article 18(4) of the EU Trafficking Directive into a binding obligation as problematic. These few proponents of a binding provision did point out that such a provision would have to be more specific than the current one to be useful in practice. One proponent identified a dishonesty regarding the current provision: while the provision in the Directive theoretically applies to all forms of exploitation, in practice it is only applied to sexual exploitation – and everyone knows this. In this context, several opponents feared that the reasons to push for a binding provision mainly relate to moral and ethical pushes for a complete ban on prostitution.

⁵⁴ For example, in Italy there is no provision directed at consumers but there is a specific provision directed at employers: Art. 603 bis of the Italian Criminal Code on 'illicit intermediation and work exploitation' punishes the employer and/or mediator if they use an exploited worker.

The large majority opposing a binding provision stressed that it is too easy to think one can curb demand with a criminalisation – even though it might sound good at first. Experts emphasised that this criminalisation is not the answer. Instead, the answer should be sought in broader actions outside the realm of criminal law. What is needed is a focus on awareness raising and education for the general public, a focus on the social context and on the human rights of affected persons. Interviewees stressed that we must acknowledge that there is no simple or single answer to curbing demand for trafficking. Moreover, an expansion of the current EU legal framework on human trafficking with a binding obligation to criminalise the ‘knowing use’ potentially raises the very risks we try to combat. Creating more criminalisation can cause potential victims to become more and more vulnerable to exploitation. Therefore, reliable data is necessary before one should consider any such changes in legislation. One expert stated that he was saddened by the fact that over twenty years after the adoption of the Palermo Protocol, some think that criminalising consumers is the next step.

In the political field in Brussels, certain strong proponents of a binding provision even argued that the word ‘knowingly’ should be removed from the provision.⁵⁵ This would lead to a strict liability provision criminalising everyone who uses the services of trafficked persons, irrespective of whether they know. Almost all interviewees opposed such a strict liability provision. According to most experts, such a provision would be dangerous, entirely arbitrary, and in conflict with both constitutional law and the rights of the defendant. Furthermore, three experts pointed out that a strict liability offence would risk leading to a *de facto* ban on prostitution – as this is the (only) area where one can assume it will be applied in practice. This could bring forth the very circumstances the provision aims to combat, and hamper the prosecution of traffickers and the protection of victims’ rights. Lastly, one of the interviewees made the following important remark: a revision should always consider the question ‘is it a good law in practice?’ If the answer is no, a revision might at best lead to repealing the provision.

4. Conclusion and recommendations

In 2023, the negotiations for the revision of the EU Trafficking Directive will commence. The evaluation package and revision proposal are expected to be presented by the EU Anti-Trafficking Coordinator on the 19th of December 2022. As only little research and few impact assessments have been undertaken regarding the proposed criminalisation of the ‘knowing use of services provided by trafficked persons’, La Strada International conducted a series of interviews to reveal the possible impact and the harmful side effects as seen in practice by experts in the field.

4.1 No proven impact on combatting trafficking

The few impact assessments on the criminalisation of the ‘knowing use’ did not show any impact of this criminalisation on combatting human trafficking. These findings are endorsed by this assessment; most of the interviewed experts doubted the practical impact of the criminalisation of the ‘knowing use’.

⁵⁵ OSCE, ‘Feedback from: OSCE’ (2021), F2671000, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13106-Fighting-human-trafficking-review-of-EU-rules/F2671000_en; European Women’s Lobby, ‘Feedback from: Europeans Women’s Lobby (2021), F2670828, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13106-Fighting-human-trafficking-review-of-EU-rules/F2670828_en; This view was also put forward by Juan Fernando López Aguilar (Libe Chair) at the Porticus Partners Meeting (Brussels) in June 2022.

- Firstly, there are only few investigations into the offence criminalising the 'knowing use' and this scarce application of the national provisions is unpredictable and has led to only few convictions across Europe. Reasons for this include the difficulty to establish the required mental element, the limited knowledge among experts and the high burden of these investigations on the limited available resources.
- Secondly, the symbolic normative effect of this criminalisation – identified by proponents as the (only) possible added value – is to be doubted as there is a lack of awareness among the public, due to the near absence of governments' awareness campaigns on the mentioned criminalisation.

4.2 Harmful side effects

Concerns about the unintended negative effects on victims and vulnerable (sex) workers are widely shared and the majority of the interviewed experts concluded that victims would not be better off with the introduction of this criminalisation.

- Firstly, this criminalisation promotes risks for those providing sexual services – including potential trafficked persons – through increased stigmatisation, vulnerability and pushing prostitution further into the social periphery. This exacerbates the vulnerability of sex workers as well as the violence and human rights violations they are facing. It should raise serious concern that certain countries have even criminalised all purchase of sexual services as well as third-party involvement, all rendering affected persons more vulnerable to exploitation.
- Secondly, proceedings can be harmful and cause secondary victimisation on the victim-witness who will be called to testify and be questioned by the defence lawyer. The qualification of the victim as a witness can also lead to an erosion of the trafficked persons' rights, since as a witness the person might not be entitled to the same support.
- Lastly, we have seen that the implementation and application of the national provisions criminalising the 'knowing use' have been limited (almost exclusively) to sexual exploitation. In practice, this means that the provision is (mis)used to criminalise users of sexual services only, and thus functions as a prostitution regulation disguised as an anti-trafficking action. Therefore, we can conclude that the call for a binding provision on the 'knowing use', does not seem to aim at targeting users of *all types* of exploitation.

4.3 Recommendations

Based on the findings from the interview series with national experts and complementary desk research, **La Strada International concludes that the revision of the EU Trafficking Directive should not lead to a binding provision on the 'knowing use' of services provided by trafficked persons.** A binding provision criminalising all those who knowingly use services of trafficked persons might not only have limited added value to combatting human trafficking, but is also likely to have severe harmful effects.

The lack of impact of the criminalisation of the 'knowing use' on combating trafficking and curbing demand, as well as the apparent presence of negative side effects, should thus be taken into account in the revision of the EU Trafficking Directive. An extension of the criminalisation to all forms of exploitation seems practically not feasible, is not supported by Member States, and is therefore not the way forward. Limiting this provision to users of sexual services would reveal that the measure is merely aimed at addressing prostitution, and as such should under no circumstances be included in EU legislation aiming to address human trafficking.

Moreover, the restricted impact of criminal law should be kept in mind. To reduce demand in the realm of human trafficking – if one aims to make an impact for affected persons of all types of exploitation – the focus should not be on criminal law but on awareness raising and education. These are exactly the binding obligations enshrined in article 18(1-3) of the EU Trafficking Directive and article 6 of the CoE Convention: raising awareness, designing preventive measures and conducting thorough research. To discourage and reduce demand, these prevention efforts should be focussed on and addressed to persons at risk of all types of exploitation, as well as at persons at risk of becoming offenders.

La Strada International recommends the European Commission to enhance the focus on the following topics in order to reduce demand for all types of exploitation across the EU:

- Awareness raising, preventative measures (including education) and research – as enshrined in article 18(1-3) of the EU Trafficking Directive and article 6 of the CoE Convention;
- Strengthening the support for (potential) victims of trafficking and their access to the justice system;
- The liability of companies for the exploitation of their employees as well as binding due diligence measures;
- 'Fairly produced' services through the certification of sectors to give consumers a choice; and
- Monitoring and assessing the impact of (legislative) measures which aim to reduce demand for trafficking, especially looking into the impact on the most vulnerable population such as migrants and other precarious workers.