

The content and impact of approximation: The case of trafficking in human beings

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1. Introduction

A. *The phenomenon of trafficking in human beings within the European Union*

Trafficking in human beings² is a problem that is prevalent throughout Europe. Several hundred thousand people are trafficked into the EU or within the EU every year³.

As a result, academic and legislative interest in this subject has risen markedly in the last two decades. However, the scale and nature of this criminal phenomenon is

¹ The author would like to sincerely thank Chloé Brière and Anne Weyembergh for their in depth and valuable comments on earlier drafts of this contribution. In addition, she would like to express her appreciation to the *Fonds de la Recherche Scientifique (FNRS)* for its generous financial support over the years of her post-doctoral research at the *Institut d'Etudes Européennes (ULB)*, focusing on 'L'Union européenne et la prévention du terrorisme : impact sur le droit pénal et redéfinition de la relation entre le droit pénal européen et les droits pénaux nationaux'.

² The concept must be distinguished from that of human smuggling. A.A. ARONOWITZ, "Smuggling and Trafficking in Human Beings: The Phenomenon, The Markets that Drive It and the Organisations that Promote It", *European Journal on Criminal Policy and Research*, 9/2, 2001, p. 263 f. ; J. SALT, "Trafficking and human smuggling : a European perspective", *International Migration*, 38/3, 2001, p. 31 f. ; H.M. ALI, "Data Collection on victims of human trafficking : an analysis of various sources", *Journal of Human Security*, 6/1, 2010, p. 55 f.

³ See CENTRE POUR L'ÉGALITÉ DES CHANCES ET LA LUTTE CONTRE LE RACISME, *La traite et le trafic des êtres humains: rapport annuel 2011. L'argent qui compte: Traite des êtres humains et flux financiers criminels*, Bruxelles 2012 ; F. CARCHEDI and I. ORFANO (eds.), *La tratta di persone in Italia. Evoluzione del fenomeno e ambiti di sfruttamento*, Milano, Franco Angeli, 2008; G. WYLIE and P. McREDMOND, *Human trafficking in Europe. Character, causes and consequences*, New York, Palgrave and McMillan, 2010.

not easy to define or to study because trafficking is often investigated or recorded as other forms of crime (such as prostitution, illegal immigration and labour disputes).

In addition, for a long time there were no standardised guidelines for data collection at the EU level⁴. The issue has been partially addressed with the recent publication of an Eurostat Report on human trafficking⁵, based on the data collected and provided by national rapporteurs (or equivalent mechanisms). Many victims are however still not identified nor reported and they constitute the so-called “dark number” which is yet a significant problem.

Europol updates a report every year in which it provides a general overview of trafficking in human beings, with a specific focus on the EU situation⁶. According to this report, social vulnerability is a major root cause of the phenomenon, with people from diverse backgrounds becoming victims of trafficking because they are deceived by promises of employment, good working conditions and a salary. Recruiting individuals has become easier thanks to greater freedom of movement and travel, low cost international transport and global communication links combined with opportunities to work that had not previously been available and self-confidence. Besides, thanks to the perceived anonymity and mass audience of online services, the use of the Internet is growing fast. It is being used both to recruit victims (e.g. via online employment agencies or marriage agencies or via chat forums, spam emails and internet dating) and to advertise the traffickers’ services⁷.

At the international level, the most common form of trafficking is trafficking for sexual exploitation (43%). Most trafficked victims are women (56%, and 98% in the case of sexual exploitation) and children. Some victims are knowingly recruited into prostitution. However, through deception or coercion, they have sometimes ended up in situations where they have been exploited. When it comes to children, parents themselves are sometimes complicit with traffickers⁸. Labour exploitation is also an extremely relevant dimension of the phenomenon. According to the International Labour Organisation (ILO), there are at least 2,45 million people in the world who are in forced labour situations as a result of having been trafficked⁹. Another form of

⁴ A.A. ARONOWITZ, “Overcoming the challenges to accurately measuring the phenomenon of human trafficking”, *Revue Internationale de Droit Pénal*, 3/4, 2010, p. 493 f.; S. STEFANIZZI, “Measuring the unmeasurable: towards the development of indicators for measuring human trafficking”, in E. SAVONA and S. STEFANIZZI (eds.), *Measuring human trafficking. Complexities and pitfalls*, New York, Springer, 2007.

⁵ Eurostat, *Trafficking in human beings*, 2013.

⁶ See e.g. Europol, *Trafficking in human beings in the European Union*, The Hague, 2011. Data on trafficking are also available within a more general Europol Report, *EU serious and organised crime threat assessment (SOCTA)*, last published in 2013.

⁷ A.P. SYKIOTOU, *Trafficking in human beings: Internet recruitment. Misuse of the Internet for the recruitment of victims of trafficking in human beings*, Strasbourg, Council of Europe Publishing, 2007.

⁸ *ILO action against trafficking in human beings*, Geneva, 2008. In the EU 68% of victims are women and 62% are trafficked for sexual exploitation purposes. For key findings concerning the EU specifically please see Eurostat, *Trafficking in human beings*, 2013.

⁹ *ILO action against trafficking in human beings*.

trafficking that is growing fast and is a lucrative area of criminal activity is trafficking in humans to use their organs, in particular kidneys¹⁰.

EU enlargement and the gradual lifting of restrictions on employment in many EU Member States (MS) has led to an increase in the number of instances of human trafficking where people have subsequently been exploited in work situations.

Organised crime groups, often acting in small groups that operate both independently and in cooperation with other criminal groups, are involved in human trafficking. The trafficking generates massive profits (of up to 125,000 euro per month, the third biggest source of illicit profits after drug trafficking and trafficking in weapons). The most frequently reported criminal groups in the EU area are, in descending order, ethnic Roma, Nigerian, Romanian, Albanian speaking, Russian, Chinese, Hungarian, Bulgarian and Turkish organised crime groups¹¹.

Trafficking in the EU used to be a criminal phenomenon that mainly came from outside the EU. However, successive enlargements of the EU and the dismantling of internal borders have led to flows of human trafficking within the EU area¹². Most Member States are destination countries but some are also countries of origin or transit. A number of criminal hubs exists on the continent: the Iberian peninsula is both a region of exploitation (Chinese people working in the textile industry and shops, Eastern Europeans in agriculture, South Americans in the sex industry and Roma children being used as beggars and thieves) and of transit where victims of trafficking are redistributed throughout the EU according to market demand (*e.g.* domestic servants in Portugal). West and North Africans, Eastern Europeans, Balkan people and Chinese people are used as prostitutes and exploited in the agricultural, construction, textile and healthcare sectors and as domestic servants in the southern criminal hub. Victims also move to other countries. The north-east and south-east criminal hub provide wealthier Member States with victims that they can exploit and facilitate the transit and distribution of victims from outside Europe. The north-west criminal hub manages trafficking from other Member States and from outside Europe¹³.

The complexity of the phenomenon described above is mirrored by the plethora of measures adopted at the international and European level to cope with it.

¹⁰ A. CHAPLAN *et al.*, *Trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs*, Strasbourg, Council of Europe Publishing, 2009; S. MEYER, "Trafficking in human organs in Europe", *Eur. J. Crime Crim. L. & Crim. Just.*, 2006, p. 208 f.

¹¹ Europol, *op. cit.*, p. 10-14; UNODC, *Trafficking in persons to Europe for sexual exploitation*, 2010; Eurostat, *Trafficking in human beings*, 2013.

¹² J. VOCKS and J. NIJBOER, "The Promised Land: A Study of Trafficking in Women from Central and Eastern Europe to the Netherlands", *European Journal on Criminal Policy and Research*, 8, 2000, p. 383 f.

¹³ UNODC, *Global report on trafficking in persons 2012*, Vienna, 2012.

B. The plethora of international measures on combating trafficking in human beings

Action has been taken to tackle the phenomenon at the international level ever since the 1940-50s¹⁴. Hence the European Union's instruments to combat trafficking in human beings have not developed in a complete legal vacuum. The existence of the international measures can be traced back to a number of key international and regional initiatives in the years leading up to the adoption of the EU's instruments¹⁵. In fact, in terms of both speed and substance, the development of trafficking-related norms and standards in the past few years has been almost unprecedented in international law. As explained below, this plethora of international measures has had a major impact on both the shape and effectiveness of the 2002 FD.

The most important instrument at the international level is the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (also referred to as the Trafficking Protocol) adopted by the UN in 2000 (supplementing the UN Convention against Transnational Organised Crime (TOC)). The Protocol has been in force since 25 December 2003¹⁶.

The stated purpose of the protocol is threefold: first, to prevent and combat trafficking in persons, with a particular focus on the protection of women and children; second to protect and assist victims of trafficking; third to promote and facilitate cooperation among states parties¹⁷.

This instrument encompassed, for the first time, a clear definition of the phenomenon and established minimum obligations for states. Indeed its Article 3 provides that trafficking comprises three separate elements: an action (recruitment,

¹⁴ See for instance the UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949).

¹⁵ S. FARRIOR, "The international law on trafficking in women and children for prostitution: making it live up to its potential", *Harvard Human Rights Journal*, 1997, p. 213 f.; M.Y. MATTAR, "Incorporating the five basic elements of a model anti-trafficking in persons legislation in domestic laws: from the UN Protocol to the European Convention", *Tulane Journal of International & Comparative Law*, 2006, p. 357 f.; S. SCARPA, *Trafficking in human beings: modern slavery*, Oxford, OUP, 2008; A. GALLAGHER and P. HOLMES, "Developing an Effective Criminal Justice Response to Human Trafficking. Lessons From the Front Line", *International Criminal Justice Review*, 18, 2008, p. 318 f.

¹⁶ Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against transnational organised crime, 2000. M. DITMORE and M. WIJERS, "The negotiations on the UN Protocol on trafficking in persons", *Nemesis*, 2003, p. 79 f.; H. ABRAMSON, "Beyond consent, towards safeguarding human rights: implementing the UN Trafficking protocol", *Harvard International Law Journal*, 2003, p. 473 f.; J. DOEZEMA, "Who gets to choose? Coercion, consent and the UN Trafficking Protocol", *Gender and Development*, 10, 2002, p. 20 f.; A. GALLAGHER, "Human rights and the new UN protocols on trafficking and migrant smuggling", *Human rights quarterly*, 2001, p. 975 f.; D. MC LEAN, *Transnational organized crime: a commentary on the UN Convention and its protocols*, Oxford, OUP, 2007; L.G. POTTS, "Global trafficking in human beings: assessing the success of the United Nations Protocol to prevent trafficking in persons", *Geo. Wash. Int'l L. rev.*, 35, 2003, p. 227 f.

¹⁷ Article 2 2000 Trafficking Protocol.

transportation, transfer, harbouring or receipt of persons); means (threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or abuse of a position of vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having the control over another person); and a purpose (exploitation). Exploitation is defined as including, as a minimum, exploitation via prostitution, other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. Remarkably, the definition includes a provision to the effect that the consent of a victim to the intended exploitation is irrelevant and cannot be used as a defence, when the means described above have been used¹⁸.

Article 5 requires state parties to establish as a criminal offence the conduct set forth in Article 3 of the protocol, when committed intentionally. Article 4, however, specifies that the protocol applies only where those offences are transnational in nature and involve an organized crime group.

In the absence of a specific provision on penalties for trafficking, the relevant provisions of the 2000 TOC convention apply: State parties are required to ensure that sanctions adopted within domestic law take into account the gravity of the offence¹⁹.

Special provisions are included to address the problem of victims' assistance and support²⁰. A number of provisions address the issue of prevention, requesting state parties to: establish policies, programmes and other measures aimed at preventing trafficking and protecting trafficked persons from re-victimisation (*e.g.* cooperation with NGOs, relevant organisations and other elements of civil society); adopt legislation to discourage the demand (*e.g.* for prostitutes or slaves) that fosters all forms of exploitation of persons and that leads to trafficking²¹.

At the European level, the Council of Europe Convention on Action against Trafficking in Human Beings was opened for accession in Warsaw on 16 May 2005²².

The Council of Europe's work on trafficking can be traced back to the late 1980s when the issue was still marginally relevant for international organisations and national governments. The proposal for a convention on trafficking first emerged in 2002 and was limited to the trafficking of women for sexual exploitation²³. The 2005 Convention was clearly intended to bring an added value to the Palermo Protocol, and to address its deficiencies. Trafficking in human beings was recognized as a

¹⁸ Article 3(b) 2000 Trafficking Protocol.

¹⁹ Article 11 2000 TOC Convention.

²⁰ Articles 6-8 2000 Trafficking Protocol. See for a comment A. GALLAGHER, "Using International human rights law to better protect victims of trafficking: the prohibitions on slavery, servitude, forced labour and debt bondage", in L.N. SADAT and M.P. SCHARF (eds.), *Essays in honor of M.C. Bassiouni*, Leiden, Martinus Nijhoff, 2008, p. 397.

²¹ Article 9 2000 Trafficking Protocol.

²² Council of Europe Convention on action against trafficking in human beings and its explanatory report, Warsaw, 16 May 2005, Council of Europe Treaty Series, no. 197.

²³ See Council of Europe Recommendation 1542 (2002) on a campaign against trafficking in women.

human rights' violation, and the guidelines provided insisted on the need to focus on assistance to and protection of victims²⁴.

In the end, the 2005 Convention relates to all forms of trafficking. It applies to both national and transnational trafficking, whether or not related to organized crime²⁵; as a consequence the 2005 Convention is wider in scope than the 2000 Trafficking Protocol.

Its stated purposes are: to prevent and combat trafficking; to protect the human rights of victims; to ensure effective investigation and prosecution; and to promote international cooperation²⁶. The Convention contains several provisions on victims' protection and assistance, going well beyond the Protocol's provisions²⁷. Remarkably, these provisions do not require victims to cooperate with law enforcement authorities in order to obtain support and protection. Finally, the convention provides for the setting up of an effective and independent monitoring mechanism capable of controlling the implementation of the obligations contained in the convention²⁸. This is described as its added value and one of its main strengths²⁹. The Council of Europe thus established a Group of Experts on Action against Trafficking in Human Beings (GRETA) with recognised competences in the field, which monitors the implementation of the convention through country reports evaluating the measures taken by the parties.

C. *The EU response*

Alongside the international instruments described above, the European Union has, over the years, adopted a number of measures that are related to human trafficking in the framework of the third pillar³⁰. As many human trafficking cases have a cross-

²⁴ A. GALLAGHER, "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, 2006, p. 163 f.

²⁵ Article 2 2005 Convention.

²⁶ Article 1 2005 Convention.

²⁷ Articles 10-16 2005 Convention.

²⁸ Article 36 2005 Convention.

²⁹ See the Explanatory Report to the 2005 Convention, points 59 and 354.

³⁰ A. WEYEMBERGH, "La lutte contre la traite des êtres humains dans le cadre du 3^e pilier du traité sur l'Union européenne", *Cahiers de droit européen*, 1-2, 2000, p. 215 f.; H. ASKOLA, *Legal responses to the trafficking in women for sexual exploitation in the EU*, Oxford, Hart, 2007; C. RIJKEN, *Trafficking in persons – prosecution from a European perspective*, The Hague, T.M.C. Asser Press, 2003; E. GUILD, "Immigration and criminal law in the European Union: the legal measures and social consequences of criminal law in Member States on trafficking and smuggling in human beings" and T. OBOKATA, "EU action against trafficking in human beings: past, present and the future", in E. GUILD and P. MINDERHOUD (eds.), *Immigration and criminal law in the European Union*, Leiden, Martinus Nijhoff Publishers, 2006, p. 1 and p. 387; A. MIDDELBURG and C. RIJKEN, "The EU legal framework on combating trafficking in human beings for labour exploitation", in C. RIJKEN (ed.), *Combating trafficking in human beings for labour exploitation*, Nijmegen, Wolf Legal Publisher, 2011, p. 355; T. OBOKATA, "Trafficking of human beings from a human rights perspective: towards holistic approach", *International Studies in Human Rights*, 2006, p. 89 f.; S.H. KRIEG, "Trafficking in human beings: The EU

border dimension, requiring intensive cross-border cooperation for the investigation and prosecution of traffickers, there is a need to harmonise national offences and sanctions. Thus, trafficking in human beings has been mentioned in the treaties since the origins of the cooperation in the field of Justice and Home Affairs field. The Union started taking initiatives in the 1990s, with the first major study conducted by the Commission in 1996³¹.

The EU's Joint Action of 24 February 1997 was the first EU approximating instrument in the EU's fight against human trafficking and smuggling³². Of particular importance is the fact that trafficking in human beings for sexual exploitation has been made a criminal offence within the EU context. Through the Joint Action, EU Member States agreed to review relevant national laws and practices with a view to improving judicial cooperation and ensuring appropriate penalties (including confiscation of the proceeds of trafficking, investigations and technical assistance). Member States were also to ensure protection for witnesses and assistance for victims and their families but, in this regard, no specific obligations were detailed.

This Joint Action was followed by Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings³³.

The Framework Decision 2002/629/JHA was an additional step towards addressing the crime of trafficking in human beings at the EU level³⁴. As set out in detail below, it was based on three key elements: a common definition of Trafficking in Human Beings (Article 1); a uniform threshold for minimum penalties to be imposed (Article 3(2)); and (limited) protection and assistance to victims (Article 7). According to the Commission, as the Framework Decision focuses on criminal law provisions, implementation of a comprehensive anti-trafficking policy in Member States is still unsatisfactory, particularly as regards the effectiveness of law enforcement activities to detect and prosecute trafficking, victim protection and assistance and the monitoring of trends and anti-trafficking policies. In 2004 the EU also enacted the Directive 2004/81/EC on the possibility to introduce a residence permit for victims of human trafficking, who cooperate with law enforcement authorities in their investigations³⁵. However, as explained below, this text did not manage to fully address the lack of

approach between border control, law enforcement and human rights", *European Law Journal*, 15/6, 2009, p. 775 f.

³¹ Commission Communication to the Council and the European Parliament on trafficking in women for the purpose of sexual exploitation, COM (96) 567 final, 20 November 1996.

³² Joint Action 97/154/JHA of 24 February 1997 concerning action to combat trafficking in human beings and sexual exploitation of children, *OJ*, no. L 63, 4 March 1997, p. 2. Its legal basis was Article K.3 TUE.

³³ Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings, *OJ*, no. L 203, 1 August 2002, p. 1.

³⁴ Its legal basis was Article 29 TEU.

³⁵ Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, *OJ*, no. L 261, 6 August 2004, p. 19.

protection granted to trafficking victims. The situation called for a substantive improvement in the EU's rules³⁶.

In March 2009, increased awareness of the limited repressive approach of the 2002 Framework Decision on trafficking in human beings led the Commission to issue a proposal to repeal and replace it. When the Lisbon Treaty came into force on 1 December 2009, the proposal was put to one side as the new legal basis provided by this Treaty offered considerable advantages for new legislation to be adopted in the field of justice and home affairs from then on³⁷. As a consequence, an EU directive on preventing and combating trafficking in human beings was proposed by the Commission, negotiated rapidly and adopted in April 2011³⁸. Member States had to implement it by April 2013. But to date, only six out of the twenty-seven Member States have fully transposed it, and three countries have reported only partial transposition³⁹.

The 2011 Directive has been supplemented by the adoption by the EU Commission of an EU Strategy towards the Eradication of Trafficking in Human Beings (2012-2016) on 19 June 2012⁴⁰. The strategy lists a number of measures to be implemented over the next five years and is based on five key priorities: identifying, protecting and assisting victims of trafficking; stepping up the prevention of trafficking in human beings; more prosecution of traffickers; boosting coordination and cooperation among key actors and policy coherence; increasing knowledge of and effectively responding to emerging concerns relating to all forms of trafficking in human beings. The Council has welcomed the strategy and invited Member States and the relevant EU agencies to further develop and strengthen existing action on the basis of the Commission's guidelines⁴¹.

³⁶ See Proposal for a Directive on preventing and combating trafficking in human beings and protecting victims, repealing Framework Decision 2002/629/JHA, COM (2010) 95 final, 29 March 2010.

³⁷ Legislation will no longer need to be approved unanimously by the EU Council of Ministers (*i.e.* national governments). Instead, it will be adopted by a majority of Member States at the Council together with the European Parliament. A single country will not be able to block a proposal. Implementation at national level will also be improved. The Commission will be able to monitor how Member States apply EU legislation. If it finds that EU countries violate the rules, it will be in a position to refer the case to the European Court of Justice.

³⁸ Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, *OJ*, no. L 101, 15 April 2011, p. 1.

³⁹ Commission, Press Release, Trafficking in human beings: more victims but Member States are slow to respond, 15 April 2013, IP/13/322, available at http://europa.eu/rapid/press-release_IP-13-322_en.htm.

⁴⁰ Communication from the Commission, The new EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016, COM (2012) 286 final, 19 June 2012.

⁴¹ Council conclusions on the new EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016, 3195th Justice and Home Affairs Council meeting Luxembourg, 25 October 2012.

D. Research purpose and scope of the contribution

This contribution will assess the content and impact of the approximation of the EU's instruments on preventing and combating trafficking in human beings on Member States' national legislation.

Considering the insufficient transposition of the 2011 Directive, and the short time elapsed since the expiration of the transposition period, it is not yet possible to wholly evaluate the impact of this directive. As a consequence, this contribution will first focus on the approximation resulting from the 2002 Framework Decision⁴². It will analyse to what extent the 2002 Framework Decision has managed to achieve its objective of enhancing the approximation of the legislation of Member States, thereby strengthening mutual trust. In particular, an assessment will be made of the shortcomings of such approximation. For the purpose of this analysis, both the EU instruments and national legislation are being taken into account.

The contribution will then discuss to what extent the evaluation of the 2002 Framework Decision has been taken into account in the drafting of the 2011 directive. It will first describe what exactly is required of Member States under the new directive in terms of specific actions and responses. It will then assess how these obligations compare to those contained in the 2002 Framework Decision and how they relate to other agreements developed at the international level. Finally it will evaluate to what extent the new EU directive has remedied weaknesses in the previous legal regime, especially those related to protection of victims of trafficking and prevention measures.

In conclusion, some hypotheses will be elaborated on the potential impact of the new instrument on the basis of its more effective nature as well as the scope and content of the new provisions. The author will identify the main challenges ahead and evaluate whether the directive and its various implementing mechanisms can meet these challenges and thereby contribute to a more effective European law on the issue of trafficking in human beings.

2. The content and impact of approximation: the Framework Decision 2002/629/JHA

The aim of this Framework Decision is to “reduce disparities among different judicial approaches of Member States and contribute to the development of police and judicial cooperation against trafficking in human beings”⁴³. In fact, the approximation of criminal law boosts the protection of legal interests via criminal law because it makes it harder for perpetrators of human trafficking crimes to take advantage of legal diversity by choosing the most convenient legal system⁴⁴. It facilitates cooperation in criminal matters by ensuring that cooperation is based on parallel (or at least similar)

⁴² See also T. OBOKATA, “EU Council Framework Decision on combating trafficking in human beings: a critical appraisal”, *Common Market Law Review*, 40, 2003, p. 917 f.

⁴³ Report from the Commission based on Article 10 of the Council Framework Decision of 19 July 2002 on combating trafficking in human beings, COM (2006) 187 final, 2 May 2006.

⁴⁴ K. AMBOS, “Is the development of a common substantive criminal law for Europe possible? Some preliminary reflection”, *Maastricht Journal of European and Comparative Law*, 12, 2005, p. 173 f.

criminal law provisions. This is attempted via the adoption of minimum standards with regard to criminal offences and penalties⁴⁵.

The 2002 Framework Decision aimed at promoting a harmonised EU response to human trafficking. Although it marked a significant improvement in the EU provisions for combating the phenomenon (A), the instrument has a number of limitations (B).

A. *A significant improvement in the EU provisions for combating trafficking in human beings*

As things stand, there is no reliable data from which safe conclusions can be drawn regarding the degree of cooperation between law enforcement or prosecuting authorities subsequent to the adoption of the 2002 Framework Decision but this instrument does constitute a major change both in practical and symbolic terms⁴⁶.

1. The symbolic value of the 2002 Framework Decision: raising awareness about the phenomenon

Some national legislation already contained provisions that could be used for combating trafficking even before the 2002 Framework Decision and can still be used⁴⁷.

The real problem faced by those seeking to combat trafficking was not the presumed dearth of criminal law provisions. Instead, what was lacking was a complete awareness of the contours of the problem. The changes introduced by the Framework Decision contributed to drawing attention to the issue of trafficking at a symbolic level, leading to increased awareness of the phenomenon and stimulating the political will needed to combat it. Although not completely successful, the 2002 Framework Decision constitutes a timid attempt to shift the attention and interest of the criminal justice system from controlling flows of migrants – which used to be understood as the legal interest at stake⁴⁸ – to considering also the need to protect and assist victims⁴⁹.

⁴⁵ See Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law, COM (2011) 573 final, 20 September 2011.

⁴⁶ A. WEYEMBERGH and V. SANTAMARIA, *The evaluation of European Criminal Law. The example of the Framework Decision on combating trafficking in human beings*, Bruxelles, Editions de l'Université de Bruxelles, 2009.

⁴⁷ For instance, in Belgium detailed provisions already existed in relation to the extraterritoriality and liability of legal persons.

⁴⁸ J. SALT and J. STEIN, "Migration as a business: the case of trafficking", *International Migration*, 35/4, 1997, p. 467 f.; M.V. MCCREIGHT, "Smuggling of migrants, trafficking in human beings and irregular migration on a comparative perspective", *European Law Journal*, 12/1, 2006, p. 106 f.

⁴⁹ C. RIJKEN and E. DE VOLDER, "The European Union's struggle to realize a human rights' based approach to trafficking in human beings", *Connecticut Journal of International Law*, 25, 2009, p. 49 f.

2. *Approximation of offences and penalties*

The Treaty of Amsterdam introduced a new legal basis (Article 31 TUE) allowing for the progressive adoption of measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the field of organised crime.

In this context, the 2002 Framework Decision has certainly been a step forward with regard to the approximation of EU criminal law in the field and the creation of a common EU approach to trafficking in human beings as it provides a common definition as well as an approximation of the level of punishment for perpetrators of trafficking. The provision on the protection of victims included in the Framework Decision, although limited in scope, contributes to this aim as the ways in which victims are protected used to vary considerably from one Member State to another.

The definition of trafficking included in the 1997 Joint Action was rather narrow⁵⁰: it placed considerable emphasis on the migration aspects and envisaged the sexual exploitation of women and children outside their country of origin as the only possible result of trafficking⁵¹.

By comparison, it is worth noting that the changes in content of the 2002 Framework Decision have to be seen in the context of other international instruments and especially of the 2000 Trafficking Protocol, which has influenced its scope.

The EU 2002 Framework Decision, in its Article 1, makes human trafficking an explicit and specific criminal offence,⁵² thus encouraging effective investigations and the prosecution of suspects. In addition, it provides for additional clarity as it avoids the previous situation in which numerous offences overlapped. It also brings

⁵⁰ Article I.A. – In the context of this Joint Action: (i) ‘trafficking’ [is understood] as any behaviour which facilitates the entry into, transit through, residence in or exit from the territory of a Member State, for the purposes set out in point B (b) and (d); (ii) ‘sexual exploitation’ in relation to a child, as the following behaviour: (a) the inducement or coercion of a child to engage in any unlawful sexual activity; (b) the exploitative use of a child in prostitution or other unlawful sexual practices; (c) the exploitative use of children in pornographic performances and materials, including the production, sale and distribution or other forms of trafficking in such materials, and the possession of such materials; (iii) ‘sexual exploitation’ in relation to an adult, as at least the exploitative use of the adult in prostitution.

⁵¹ See 1997 Joint Action but also the Hague Ministerial declaration on European guidelines for effective measures to prevent and combat trafficking in women for the purpose of sexual exploitation (1997).

⁵² Article 1 – Offences concerning trafficking in human beings for the purposes of labour exploitation or sexual exploitation – “1. Each Member State shall take the necessary measures to ensure that the following acts are punishable: the recruitment, transportation, transfer, harbouring, subsequent reception of a person, including exchange or transfer of control over that person, where: (a) use is made of coercion, force or threat, including abduction, or (b) use is made of deceit or fraud, or (c) there is an abuse of authority or of a position of vulnerability, which is such that the person has no real and acceptable alternative but to submit to the abuse involved, or (d) payments or benefits are given or received to achieve the consent of a person having control over another person for the purpose of exploitation of that person’s labour or services, including at least forced or compulsory labour or services, slavery or practices similar to slavery or servitude, or for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation, including in pornography. ”

together the treatment of trafficking-related activities into one EU legal act. Under the 2002 FD, the scope of the offence has been extended to cover not only sex-related trafficking but also forced labour. Thus, the EU seems to have acknowledged that trafficking is not only related to prostitution and sexual exploitation. Hence, the definition enshrined in the 2002 FD is broader than the definition within the 1997 Joint Action with regards to the means of exploitation. However, whereas the 1997 Joint Action made no difference between trafficking in human beings and smuggling, the 2002 FD follows the approach of the 2000 Trafficking Protocol and concerns only trafficking in human beings. As a consequence, its scope of application is narrower and more specific than the scope of the preceding EU instrument.

Although the initial idea was to improve the implementation of the protocol and go beyond its provisions, differences in the definition of trafficking were smoothed out over time and the final version reflected the definition set out in the protocol in relation to all but a few minor elements⁵³. For instance, the definition left out the removal of organs, which was included in the 2000 Trafficking Protocol definition. The three elements of the definition have been in any case retained: material acts, means and aims.

The inclusion of a rule with regard to penalties (Article 3), as well as their broad application to legal persons (Article 5), constituted a general strengthening of the relevant provisions of the 2000 Trafficking Protocol. For example, in addition to establishing a standard of “effective, proportionate and dissuasive” criminal penalties (Article 3(1)), the 2002 Framework Decision introduced the concept of aggravated offences in relation to which the stated minimum penalties are to apply (Article 3(2)). The aim of approximating the level of penalties is to prevent situations in which some traffickers receive lower punishment than others depending on the Member State in which they are convicted.

As all Framework Decisions on the approximation of national legislation, the 2002 Framework Decision on trafficking encompasses also provisions on the liability of legal persons (Article 4) and sanctions on legal persons (Article 5) as well as on Member States’ jurisdiction.

The jurisdiction clause is broader than that of the protocol⁵⁴: for instance, establishing jurisdiction when the offender is a Member State’s national becomes an obligation, whereas it remains in the discretion of the State Party in the case of the

⁵³ See with the 2000 Trafficking Protocol’s definition: Article 3 – “For the purposes of this Protocol: (a) ‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt 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 a 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. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”.

⁵⁴ In the absence of a specific provision, Article 15 TOC Convention applies to the Trafficking Protocol as well.

Trafficking Protocol. However, Member States partially retain the right to opt out of these innovative aspects⁵⁵.

3. *First steps towards providing effective assistance for and protection of victims*

Most national legislation used to have shortcomings in terms of assistance to victims and victim protection⁵⁶. Asymmetries in national legislation created situations where some of those trafficked were protected more than others depending on where they were trafficked to. For instance, only a few Member States provided, in 2002, for the issuance of temporary residence permits as a basis for long-term protection. Moreover, a difficulty in providing protection is the fact that many of those trafficked into or through Member States are illegal immigrants who are likely to be arrested, detained or deported in accordance with national immigration laws and regulations.

The 2002 Framework Decision provisions and the corresponding implementing legislation constitute an improvement (although timid) in this respect.

The victim's consent is rendered irrelevant if elements of force, coercion or abuse of authority are present⁵⁷. There is also an acknowledgement that differences between trafficking in adults and children should be reflected in the definition itself. In fact child exploitation does not require the use of violent means to be identified as trafficking⁵⁸.

Moreover, Member States are required to ensure that, at least for offences committed on their territory, investigations and prosecutions do not rely on victims' complaints (all Member States' implementing legislation are compliant with these requirements)⁵⁹. The stipulation that investigations and prosecutions can proceed *ex officio* is clearly intended to address the problem of intimidation of victims, which compromises efforts to come up with an effective criminal justice response to trafficking⁶⁰.

B. *Areas of concern hindering the added value of the 2002 Framework Decision*

The potential of the 2002 Framework Decision has been recognised as it has proven influential in promoting approximation. However, it is difficult to say whether any perceived degree of the approximation process can be attributed solely to the implementation of the 2002 Framework Decision or should also be attributed to

⁵⁵ Article 6(2) 2002 FD "A Member State may decide that it will not apply or that it will apply only in specific cases or circumstances, the jurisdiction rules set out in paragraphs 1(b) and 1(c) as far as the offence is committed outside its territory."

⁵⁶ V. Roth, *Defining Human Trafficking and Identifying Its Victims: A Study on the Impact and Future Challenges of International, European and Finnish Legal Responses to Prostitution-Related Trafficking in Human Beings*, Leiden, Martinus Nijhoff, 2012.

⁵⁷ Article 1(2) 2002 FD. The issue of consent was not mention in the 1997 Joint Action whereas the provision already existed in the 2000 Protocol (Article 3(b)).

⁵⁸ Article 1(3) 2002 FD.

⁵⁹ Article 7(1) 2002 FD.

⁶⁰ A. CONFALONIERI, "The role of the victim in administrative and judicial proceedings", *Revue Internationale de droit pénal*, 81/3-4, 2010, p. 529 f.

the impact of the aforementioned international instruments⁶¹. All these instruments contribute to a certain extent to the approximation of national legislation in this field. The impact of the 2002 Framework Decision cannot be analysed in isolation from that of other international instruments. Besides, there are areas of concern, which may limit its contribution because of what has been left out of its scope.

1. Implementation à géométrie variable and over-criminalisation of the phenomenon

Firstly, the “harmonising effect” is limited because the 2002 Framework Decision only sets out minimum standards of criminal protection. As a consequence, the implementation at the national level has been “à géométrie variable” and has led to a general over-criminalisation of the phenomenon, *i.e.* implementation at the national level has been accurate but more severe than the FD itself.

National legislation has, in many cases, exceeded the 2002 Framework Decision requirements on a number of issues, such as the definition of the offence (wider when implemented into national law), the penalties prescribed (which go beyond those envisaged by the Framework Decision and can even go as far as life imprisonment if aggravating circumstances apply) as well as the jurisdiction over trafficking⁶².

As regards the definition of the offence, the 2002 Framework Decision establishes only minimum standards. Many Member States have decided to go beyond the requirements of the 2002 Framework Decision defining the criminal offences more broadly.

Some states have reduced the number of constituent elements of the criminal offence.

In Belgium there are only two main constituent elements of the offence, namely the action of exploitation and its purpose. The means of exploitation are aggravating circumstances. As a consequence the scope of the offence is much broader. Hungary⁶³ and Spain⁶⁴ incriminate all forms of trafficking without there being any need an underlying purpose of concrete exploitation (exploitation is considered as an aggravating circumstance).

Some states have expanded the aims of exploitation. For example, in France, human trafficking is very broadly defined as the exploitation of a person for the purpose of committing any serious offence (*crime* or *délit*). Such a broad definition is meant to cover any possible practice that could develop in the future but also has serious implications for the principle of legality and could create major difficulties

⁶¹ A. WEYEMBERGH and V. SANTAMARIA, *op. cit.*

⁶² For details on the national legislation of Belgium, France, Germany, Greece, Italy, Spain, Lithuania, Poland, The Netherlands, Slovenia and the United Kingdom see A. WEYEMBERGH and V. SANTAMARIA, *op. cit.*

⁶³ Article 175B Criminal Code. See K. LIGETI, “Trafficking in human beings in Hungary”, *ibid.*, p. 197 f., at p. 205-207.

⁶⁴ Article 318*bis*, para. 1 Criminal Code. See F.J. DE LEON, M. MAROTO and M.A. RODRIGUEZ, “Spanish legislation on combating trafficking in human beings”, *ibid.*, p. 315 f., at p. 320-321.

when it comes to interpreting it in practice.⁶⁵ Italian legislation refers to any kind of activity implying victim exploitation – the list is left open in order to cover forms of exploitation that may appear in the future⁶⁶.

In addition to the introduction of a common definition of the phenomenon, the 2002 Framework Decision provides for a minimum threshold for maximum penalties applicable to trafficking in human beings. The threshold only applies to offences involving aggravated circumstances. In relation to ordinary offences, Article 3(1) 2002 FD only refers to effective, appropriate and dissuasive penalties. The 2002 Framework Decision did not require Member States to prescribe the same penalty for each type of circumstance of trafficking, leaving this matter to their discretion. These choices run the risk of promoting divergence rather than approximation of national laws. In fact, penalties in the Member States vary significantly. Moreover, it has favoured the development of a particularly repressive approach⁶⁷.

Implementing legislation has led to a rigorously punitive framework. For countries where trafficking was already criminalised, the implementing legislation has increased the lengths of prison sentences compared to the situation beforehand. Trafficking in human beings is, at the national level, one of the most severely punishable offences in criminal codes. As a general rule, the punishment is exclusively imprisonment⁶⁸. Maximum sentences provided by national legislation are much higher than what is required by the 2002 Framework Decision, in some cases even when aggravated circumstances are not present⁶⁹. A maximum penalty of no less than eight years – as required by the 2002 FD – is often simply a medium range of the sanctions envisaged for trafficking at the national level.

Because of the Member States' perceived need to strengthen their arsenal of repressive measures in order to stop crimes from being committed, the severity of

⁶⁵ Article 225(4)(1) *Code Pénal*. See M. POELEMANS, “La transposition en France de la Décision-cadre 2002/629/JAI du 19 juillet 2002 sur la traite des êtres humains”, *ibid.*, p. 85 f., at p. 90-93.

⁶⁶ Articles 600 *Codice Penale*. G. GRASSO and A. LUCIFORA, “Evaluation of the impact in Italy of the 19th July 2002 Framework Decision against trafficking in human beings”, *ibid.* p. 219 f., at p. 221-227.

⁶⁷ Remarkably, in the 2002 Framework Decision the minimum required as maximum penalty for aggravated offences is eight years whereas it was ten years in the original proposal. The original proposal contained also a minimum for non-aggravated offences, which is not included in the final 2002 Framework Decision. Was there maybe a concern during the negotiations that the approach retained could be too repressive?

⁶⁸ Specific sanctions are however provided for legal persons (see Article 5 2002 FD).

⁶⁹ The maximum sentence in Belgium is of 10 years (15 years in the case of aggravated circumstances); in France the maximum sentence is 10 years, in the case of organized crime involvement it is brought to 20 years, torture or inhuman treatments lead to the applicability of life imprisonment and other complementary penalties; in Germany the maximum sentence is 10 years without any aggravating circumstance; in Greece the maximum sentence is 5 to 10 years, brought to 10-20 in the case of aggravated offence, if the victim dies life imprisonment becomes applicable. Certain aggravated circumstances included in Greek law were not even in the text of the 2002 Framework Decision. A. WEYEMBERGH and V. SANTAMARIA, *op. cit.*

penalties has dramatically increased the use of deterrence as the main instrument to combat the problem.

Compared to national scales of criminal penalties, as provided for other serious offences, the penalties for trafficking in human beings are certainly effective and dissuasive. However, implementation raises doubts about whether the proportionality requirement of the new provisions is being met. In fact, the prescribed penalties do not always reflect the harm inflicted by the proscribed conduct, especially in view of the fact that mere intent of exploitation is enough for a charge under the relevant provisions⁷⁰.

In certain cases, the criminal sanctions provided at the national level are patently disproportionate and legal scholars are highly critical of their disproportionately punitive nature⁷¹.

2. *Weak and narrow provision on the protection of victims*

Secondly, approximation is limited due to the limited content of the 2002 Framework Decision in certain respects.

The provision concerning respect to victims is both weak and narrow in scope. Regrettably, the measures identified in the victim protection provision are limited to children, who are considered to be particularly vulnerable victims when it comes to EU standards on the standing of victims in criminal proceedings. By contrast, the 2002 FD says nothing about the protection of adult victims (except that investigations should not be dependent on their report or accusation)⁷². Member States are required to take measures to ensure that child victims and their families receive appropriate assistance⁷³. Besides, there are no provisions on victims' repatriation or remedies (such as compensation). This limited approach to victims' rights and interests appears to be a backward step by comparison with both the 1997 Joint Action's provisions (Article II.F) and the 2000 Trafficking Protocol's provisions (Articles 6-8).

The EU argued that some of the more obvious weaknesses would be addressed at a later stage. For example, the EU made use of the competences granted by the EC Treaty with regard to irregular migration to further address the question of victims' assistance and support in the EU Directive 2004/81/EC on short term residence permits, which is meant to enable victims of trafficking to cooperate with law enforcement authorities by providing assistance⁷⁴. Trafficked victims are given a reflection period during which they cannot be subject to any expulsion order and Member States are required to give them access to subsistence and medication, translation services, etc. First, this directive has been criticised as a minimum standards' version of existing national regimes⁷⁵.

⁷⁰ The act of trafficking must have occurred but the exploitation in itself must not necessarily have taken place.

⁷¹ See A. WEYEMBERGH and V. SANTAMARIA, "Conclusions", *op. cit.*, p. 379.

⁷² This avoids the need for victims to testify at trial and thus protects them for a re-victimisation process.

⁷³ Article 7(3) 2002 FD.

⁷⁴ Legal basis: Article 63(3) TEC (measures on immigration).

⁷⁵ R. PIOTROWICZ, "European Initiatives in the Protection of Victims of Trafficking who Give Evidence Against Their Traffickers", *Int. J. Refugee Law*, 14/2-3, 2002, p. 263 f.

Member States are only requested to “consider” granting a residence permit. Secondly, victims’ assistance and protection is disappointingly only provided if they cooperate with the judicial authorities. This is not a desirable approach. Victims who are outside criminal proceedings are unable to benefit from the process. This may be a reasonable and justified response from the point of view of a Member State. Moreover, problems arise when criminal proceedings are terminated, for example due to lack of sufficient evidence, or come to an end when traffickers are convicted or acquitted. In these circumstances, Member States can withdraw their support to victims, as they have no further value from a criminal justice point of view. Another issue is that those who do not cooperate may face enforcement action such as deportation. Finally, residence permits may not be invoked by victims who are nationals of another Member State, which may result in a problem given that some of the new states after the last round of enlargement may still be considered as countries of origin. In the end, the main aim of the 2004 Directive was to combat illegal immigration, including trafficking. It was not designed to create a victim protection scheme.

Connecting the protection of victims to the prosecution of specific defendants demonstrates the problem engendered by viewing trafficking as nothing but a problem of criminal law. The trade-off between protection and cooperation proves that the EU’s main concern is not (yet) the protection of fundamental rights.

Instead, the provisions on protection and assistance should be considered from a human rights perspective. Victims should benefit from an unconditional right to protection. Protection should be given to all victims equally, even when they are not willing to participate in criminal proceedings for example because of fear of reprisals from the traffickers. A victim of trafficking who cannot or will not assist authorities in the prosecution of traffickers deserves no less protection than any other victim! The protection of the victim needs to be dissociated from the prosecution of the offender.

In the end, and in spite of the adoption of the 2003 Directive, we can say that the protection of victims is not sufficiently covered by the 2002 Framework Decision. The EU has not sought to implement comprehensive policies aiming at protecting victims along with its simple rationalisation of existing criminal law provisions (the 2005 Council of Europe Convention is much more advanced in this respect)⁷⁶. During the drafting stages, the UN High Commissioners for human rights and refugees jointly expressed concern that the provision on victims’ protection was minimal⁷⁷.

Many Member States have no specific provisions relating to the protection of victims of human trafficking and they simply rely on the general provisions in their criminal codes. In most states there is no systematic catalogue of the rights and duties of the victims and assistance to the children’s families is not provided⁷⁸.

⁷⁶ Article 12(6) of the 2005 Convention states that “Each Party shall adopt such legislative or other measures as may be necessary to ensure that assistance to a victim is not made conditional on his or her willingness to act as a witness”.

⁷⁷ UN HIGH COMMISSIONER FOR REFUGEES, *Observations by the United Nations High Commissioner for Human Rights and the United Nations High Commissioner for Refugees on the Proposal for an EU Council Framework Decision on Combating Trafficking in Human Beings*, 27 June 2001.

⁷⁸ A. WEYEMBERGH and V. SANTAMARIA, *op. cit.*

Besides, regrettably, many Member States have no specific provisions on victim's consent as a reason for excusing the offender of his/her responsibility. The general appreciation of victims' consent differs broadly according to each Member State's general criminal law. In some Member States, victim's consent excuses the offender from liability except for serious crimes whereas in others it does not do so unless the offence involves the recourse to mental or physical violence⁷⁹.

3. *Specific measures on prevention missing*

The 2002 Framework Decision may have had an indirect impact on the development of prevention measures in some Member States. However, although they had already been introduced in the 2000 Trafficking Protocol, there are no specific provisions on the prevention of trafficking by addressing its root causes and the demand feeding the phenomenon.

The 2002 Framework Decision is merely a criminal law response to the trafficking of human beings in that its aim is to prohibit trafficking and to punish traffickers. This could hinder the effectiveness of the instrument. The balance between prevention and repression needs to be improved. For action to be successful, it needs to go beyond criminalisation of the act and punishment of traffickers and address a range of issues⁸⁰.

The causes of trafficking must be taken into account as the demand for cheap labour forces or for sexual services is an important factor in the development of the phenomenon.

On the one hand, national legislators must strengthen law to punish forced labour as a deterrent to potential employers but also establish a good working relationship with states of origin to control the supply side. On the other hand, they should open channels for legal migration for employment purposes. Immigration law is sometimes so strict that it encourages trafficking to move into illegal labour markets.

3. To what extent has the evaluation of the 2002 Framework Decision been taken into account in the elaboration of the directive?

Research and consultations pinpointed a number of shortcomings of the existing legal framework. First, there has not been a net increase in investigations and in the prosecution of trafficking in Member States following the implementation of the 2002 Framework Decision compared to the estimated scale and the gravity of the offence. Secondly, the 2002 Framework Decision focused on criminal law provisions as the implementation of a comprehensive anti-trafficking policy in Member States was still unsatisfactory. Victims are not receiving adequate assistance; protection or compensation and prevention measures are insufficient. Thirdly, the situation has been poorly monitored, leading to a lack of knowledge and coordination⁸¹.

⁷⁹ *Ibid.*, p. 384.

⁸⁰ *Opinion no. 7/2010 of the Group of Experts on Trafficking in Human Beings of the European Commission Proposal for a European Strategy and Priority Actions on combating and preventing trafficking in human beings (THB) and protecting the rights of trafficked and exploited persons*, 2010.

⁸¹ See Report from the Commission based on Article 10 of the Council Framework Decision of 19 July 2002 on combating trafficking in human beings, COM (2006) 187 final, 2

The impact assessment identified a number of options, eventually coming out in favour of the most expansive one: new legislation on prosecution, victim support, prevention and monitoring, accompanied by a series of non-legislative options (such as training, preventative measures in countries of origin and destination and victim support schemes) that would support the effective implementation of the Framework Decision⁸².

Thus, in March 2009, the Commission submitted a proposal for a Framework Decision on preventing and combating trafficking in human beings⁸³, aiming at strengthening the provisions of the previous instrument. The proposed Framework Decision was not adopted before the entry into force of the Treaty on the Functioning of the European Union. Under the new decision-making process, the draft was scrapped.

However the parts that are relevant to the discussion have received general support and the substance of them has been resubmitted for further negotiation. A new proposal for a directive on preventing and combating human trafficking was tabled in March 2010⁸⁴. Its content is essentially the same as the previous 2009 proposal for a Framework Decision.

A new instrument was considered necessary because, according to the Commission, the existing framework suffered from insufficient or erratic implementation in Member States⁸⁵. Moreover, there was a willingness to introduce a more effective instrument after the Lisbon Treaty had come into force. The reforms introduced by the new treaty allow the European Parliament to be more involved and therefore to deal with previous doubts about the democratic legitimacy of the instrument and would include the possibility of launching infringement proceedings at the European Court of Justice⁸⁶.

The Directive on preventing and combating trafficking in human beings and protecting victims was formally adopted in April 2011. Member States had to implement it by 6 April 2013. It is one of the first instruments adopted in the Area of Freedom, Security and Justice under the Treaty on the Functioning of the EU (TFEU), it replaces the 2002 Framework Decision and its legal bases are articles 82(2) and 83(1) TFEU.

May 2006; Commission working document – Evaluation and monitoring of the implementation of the EU Plan on best practices, standards and procedures for combating and preventing trafficking in human beings, COM (2008) 657 final, 17 October 2008; 2009 Proposal for a Framework Decision on preventing and combating human trafficking.

⁸² Commission Staff Working Document – Accompanying document to the Proposal for a Council Framework Decision on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA – Impact Assessment, SEC (2009) 358, 25 March 2009.

⁸³ Proposal for a Framework Decision on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA, COM (2009) 136 final, 25 March 2009.

⁸⁴ Proposal for a Directive on preventing and combating trafficking in human beings, 2010.

⁸⁵ *Ibid.*

⁸⁶ See Anne WEYEMBERGH'S contribution in this same publication.

The Council of Europe Convention signed in 2005 had a profound impact on the partial shift in the EU policy against trafficking from the adoption of purely law enforcement measures to a more careful consideration of victim protection and assistance. The renewed EU attention on implementation and monitoring mechanisms has also been influenced by the relevant Council of Europe convention provisions as well as the work done in the framework of GRETA.

The evaluation of the 2002 Framework Decision has been partially taken into account and in many respects the 2011 Directive is considerably better than its predecessor, although ameliorations have some limits (A). However, concerns have still been raised and the new instrument has been sharply criticised (B)⁸⁷.

A. Major improvements by comparison with the 2002 Framework Decision

In the Preamble trafficking in human being is identified as a gross violation of fundamental rights⁸⁸. In addition, the Preamble highlights that the Directive “adopts an integrated, holistic, and human rights approach to the fight against trafficking in human beings”.

These constitute very significant elements witnessing the shift from a criminal justice approach to a human rights-based approach in the EU approach to trafficking in human beings, finally combined within an integrated and multidisciplinary approach to the phenomenon⁸⁹. This approach is meant to address the phenomenon of human trafficking in all its dimensions (protection, prevention, prosecution). In addition, it aims at the coordination of actions conducted and measures adopted within different fields that have an impact on trafficking in human beings, such as criminal law, migration law, labour law or external relations.

Such development has been deeply influenced by the drafting of the 2005 Council of Europe Convention as well as the case-law of the Strasbourg Court on the matter⁹⁰.

⁸⁷ For a detailed commentary of the 2011 Directive see T. OBOKATA and B. PAYNE, “Implementing action against trafficking of human beings under the TFUE: a preliminary analysis”, *New Journal of European Criminal Law*, 3/3-4, 2012, p. 298 f. See also *Joint UN Commentary on the EU Directive – A Human rights-based approach*, 2011.

⁸⁸ “Trafficking in human beings is a serious crime, often committed within the framework of organised crime, a gross violation of fundamental rights and explicitly prohibited by the Charter of Fundamental Rights of the European Union” (recital 1).

⁸⁹ On this shift see T. OBOKATA, “A human rights framework to address trafficking of human beings”, *Netherlands Quarterly of Human Rights*, 24/3, 2006, p. 379 f.

⁹⁰ In the *Siliadin* case the Strasbourg Court mentioned trafficking in human beings, and explicitly recognised that Article 4 ECHR (prohibition of servitude) entails positive obligations for states to penalise and prosecute effectively any act aimed at maintaining a person in a situation of slavery, servitude and forced or compulsory labour. In the *Rantsev* case, the ECtHR better specified the constituent elements and means of such a positive obligation highlighting that trafficking in human beings falls within the scope of Article 4 ECHR. As a consequence, states must establish a legal framework to prevent and prosecute the phenomenon, take protective measures, investigate situations of trafficking (cooperating with foreign authorities in the context of transnational cases). See Eur. Court HR, 26 July 2005, *Siliadin v France*, Application no. 73316/01 and Eur. Court HR, 7 January 2010, *Rantsev v. Cyprus and Russia*, 7 January 2010, Application no. 25965/04. For academic comments see H. CULLEN, “Siliadin v

1. *Extended definition of trafficking in human beings*

Article 1 introduces a comprehensive statement of purpose by which the directive clearly defines its objectives: establishing minimum rules concerning the definition of criminal offences and sanctions and strengthening prevention aspects and the protection of victims.

In order to enhance the approximation of legislation, the directive provided a definition of trafficking identical to the one set out in the 2000 Trafficking Protocol⁹¹ except that it extended the open-ended list of practices that are to be included as “exploitation” to “exploitation of activities associated with begging or of criminal activities”. This choice promotes consistency and legal certainty and facilitates the tasks of both national legislators and judicial authorities that will have to interpret the law. Broadening the understanding of the concept of exploitation is also of great importance. In fact, this allows to encompass different situations and to adapt EU instruments to the evolving threat with the consequent emergence of new forms of trafficking (diversification of activities of exploitation). In addition, exploitation now includes begging and removal of organs and an open formulation of the forms of force is used⁹². Following the position of the Experts Group on its predecessor⁹³, the definition of human trafficking is more comprehensive than both the 2002 FD and the 2000 Trafficking Protocol.

2. *Deeper approximation of sanctions and broader jurisdiction*

With regard to sanctions and reflecting the European Commission’s view that penalties had to be strengthened, the 2011 directive introduces a minimum common threshold of five years for the maximum penalty for all trafficking related offences, regardless of aggravated circumstances⁹⁴. The minimum common threshold for the

France: Positive Obligations under Article 4 of the European Convention on Human Rights”, *Human Rights Law Review*, 23, 2006, p. 592 f.; V. STOYANOVA, “Dancing on the borders of Article 4: Human trafficking and the European Court of Human Rights in the Rantsev case”, *Netherlands Quarterly of Human Rights*, 30/2, 2012, p. 164 f.

⁹¹ Article 2(1) – “Member States shall take the necessary measures to ensure that the following intentional acts are punishable: The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those 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 a 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”.

⁹² Article 2(1) – “... 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 a 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”.

⁹³ Opinion no. 1/2008 of the Expert 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.

⁹⁴ Article 4(1). Remarkably, the 2009 Framework Decision proposal suggested 6 years.

maximum penalty in the case of aggravated circumstances has been raised from the eight years of the 2002 Framework Decision to ten years⁹⁵.

The introduction of a common threshold for all trafficking related offences is a significant novelty because the 2002 FD only provided such threshold for aggravated offences. This choice certainly has a beneficial impact in deepening the approximation process at the EU level. The impact on the approximation of legislation is however limited because the 2011 directive (as the 2002 FD) only defines minimum common thresholds for the maximum penalty (and not also a minimum for the minimum penalty), leaving a wide discretion in the hands of the national legislator to go beyond the minimum provided for. In addition, as further explained in the upcoming pages, the increased level of sanctions is a negative element.

For offences of incitement, aiding and abetting and attempt (as defined in Article 3), the 2011 directive simply reaffirms the need for penalties to be “effective, dissuasive and proportionate to the gravity of the crime” and to contribute to a more effective investigation and prosecution and international cooperation⁹⁶.

Besides, a new provision on penalties completes the existing framework, requiring Member States to ensure that competent authorities are entitled to seize and confiscate the instruments and proceeds of trafficking⁹⁷.

The provisions on jurisdiction have been partially amended.

Firstly, whereas the 2002 FD provided that a Member State may have decided not to establish its jurisdiction over an offence where the offender was one of its nationals (derogating from its Article 6(1)), the exercise of the active nationality principle has been made mandatory by the 2011 Directive.

Secondly, in relation to offences committed outside their territory, Member States is required to ensure that the principle of double criminality is not used to hamper the establishment of jurisdiction⁹⁸. The establishment of jurisdiction does not depend on the complaint of the victim in the state where the offence occurred or on a positive action of that state with regard to the offence⁹⁹. The 2002 FD did not encompass such a two-fold provision on offences committed outside the state’s territory. The need not to rely on the victim’s complaint was then mentioned not in a provision on “jurisdiction” but in a provision on “protection of and assistance to victims” and the requirement was limited to cases where the offence had been committed at least partially on the territory of the MS.

With regard to prosecution, a problem may be that, in certain states, periods of limitations are placed on trafficking and related offences so that prosecution may not be instituted after a certain amount of time has elapsed. This can lead to legal loopholes and the impunity of traffickers¹⁰⁰. In this context, Member States are also

⁹⁵ Article 4(2).

⁹⁶ Article 4.

⁹⁷ Article 7.

⁹⁸ Article 10(3)(a).

⁹⁹ Article 10(3)(b).

¹⁰⁰ T. OBOKATA and B. PAYNE, *op. cit.*, p. 316.

required to allow the prosecution of the offence for a sufficient period of time even after child victims have reached the age of majority¹⁰¹.

3. *Increased protection and assistance of victims*

The most radical departure from the 2002 Framework Decision concerns victims' protection and assistance¹⁰².

First, a number of measures provide the protection of victims in the context of investigations and prosecutions.

The 2002 Framework Decision's requirement that investigations and prosecutions should not be dependent on victims' complaints has been retained. In addition, the 2011 directive provides that criminal proceedings might continue even if the victim withdraws their complaint¹⁰³.

Investigators and prosecutors must be trained and a full range of effective investigative tools made available to them¹⁰⁴. According to the impact assessment, this provision was prompted by a concern that trafficking investigations were carried out at an inappropriately low level and Member States required encouragement to ensure that investigations were tackled in the same way as serious and organised crimes, by especially trained law enforcement officials who have appropriate investigative means at their disposal¹⁰⁵. The appropriate training of officials ensures a better identification of trafficking victims and consideration of their specific needs at an early stage.

Member States are required to establish appropriate measures aimed at the early identification of and providing support for victims¹⁰⁶.

Another major improvement of the 2011 directive is a general de-criminalisation provision requiring Member States to provide for the possibility of not prosecuting and not imposing penalties on victims for their involvement in unlawful activities that they have been compelled to commit as a direct consequence of their having been trafficked¹⁰⁷. This claim is a reaction to a problem in relation to victims of human trafficking, which is that they are often detained, prosecuted or punished for minor offences typically associated with the victimisation process, such as violation of immigration laws and involvement in unlawful activities such as prostitution (status-related offences)¹⁰⁸.

This clause clarifies the position of the victim in criminal proceedings, recognising that the victim was not free to choose between committing or participating in unlawful activities that are a direct consequence of being trafficked. However, it attracted criticism during scrutiny of the draft proposal in the Council, with some delegations expressing the view that introduction of non-punishment clauses entails certain risks.

¹⁰¹ Article 9(2).

¹⁰² Articles 11, 12 and 13. See the EU Commission publication, *The EU rights of victims of trafficking in human beings*, 2013.

¹⁰³ Article 9(1).

¹⁰⁴ Preamble, considerant 15.

¹⁰⁵ Impact Assessment, SEC (2009) 358.

¹⁰⁶ Article 11(4).

¹⁰⁷ Article 8.

¹⁰⁸ See *Joint UN Commentary on the EU Directive*.

As a consequence, the provision only requires Member States to provide for the possibility of non-punishment. The ultimate decision rests with national authorities! The provision is rather weak in the end and has merely symbolic value. However, it has the merit to draw attention to the problem.

A very significant novelty in respect of both the 2002 Framework Decision and the 2009 Framework Decision proposal is that Member States are required to ensure that victim support and assistance is not made conditional on their willingness to cooperate in the criminal investigation, prosecution or trial of traffickers. However, the 2011 directive highlights that this provision should not prejudice the 2004 Directive, which makes a link between victim protection and their cooperation with authorities¹⁰⁹. Thus the granting of a residence permit is still made conditional on victim's cooperation with law enforcement.

Secondly, detailed measures provide for a "hard-core" protection to victims beyond the context of investigations and prosecutions, granting them substantial rights.

A victim will be treated as such as soon as there is an indication that she/he has been trafficked and will be provided with assistance before, during and after criminal proceedings¹¹⁰.

Minimum assistance and support measures are listed and special attention is required for victims with special needs¹¹¹. A major improvement is certainly that all victims of trafficking, and not only vulnerable victims as in the 2009 Framework Decision proposal, must have access to legal counselling and legal representation, including for the purpose of claiming compensation. This should be free of charge when the victim does not have sufficient financial resources¹¹².

Member States are also required to ensure that victims receive appropriate protection on the basis of an individual risk assessment¹¹³. During criminal proceedings, identity protection measures and alternatives to direct testimony must be provided in order to avoid secondary victimisation.

Children are entitled to extensive protection. The directive's provisions are extremely detailed, both in relation to measures for their physical and psycho-social recovery and their participation in criminal investigations and proceedings¹¹⁴. For example, video recordings of interviews of a child victim may be used as evidence at trial.

Of particular relevance is also the fact that the directive requires states to ensure that victims of trafficking have access to existing compensation schemes¹¹⁵.

¹⁰⁹ Article 11(3).

¹¹⁰ Articles 11(1) and 11(2).

¹¹¹ Article 11(7).

¹¹² Article 12(2).

¹¹³ Article 12(3)

¹¹⁴ Articles. 13, 14, 15 and 16.

¹¹⁵ Article 17.

4. *Introduction of prevention provisions*

The 2011 directive also contains several detailed prevention provisions¹¹⁶.

In an effort to promote rapid and accurate victim identification as well as the provision of immediate support to the most vulnerable, Member States are required to promote regular training for officials that are likely to come into contact with victims and potential victims of trafficking¹¹⁷.

Member States are also required to take appropriate measures, such as education and training, to discourage the demand that fosters “all forms of exploitation related to trafficking”¹¹⁸.

The 2011 directive includes a further provision requiring Member States to take appropriate action, including “information and awareness raising campaigns, research and education programmes, where appropriate in cooperation with civil society organisations and other stakeholders” in order to raise awareness and reduce the risk of people, especially children, becoming victims of trafficking¹¹⁹.

Finally, and most controversially, Member States are required to “consider taking measures” to establish, as a criminal offence, the use of the services of a victim of trafficking with the knowledge that the individual is a victim of a trafficking-related offence¹²⁰. It was not possible to find EU-wide consensus on this issue because legislation and policies on prostitution vary considerably from one Member State to another. The provision is the result of a compromise and has been seen by some authors as a missed opportunity to reduce the demand for human trafficking for the purposes of sexual exploitation¹²¹.

5. *New monitoring mechanisms*

A major concern in relation to the 2002 Framework Decision was also that the implementation and monitoring arrangements for that instrument were rather quick and led to the drafting of a thin and rather inconclusive report¹²².

As a substantial added value to the existing regime, the 2011 directive requires Member States to establish national rapporteurs or equivalent mechanisms to carry out assessments of trends in trafficking, measure the results of anti-trafficking actions, including the gathering of statistics in close cooperation with relevant civil society organisations and the related report¹²³.

¹¹⁶ Article 18.

¹¹⁷ Article 18(3).

¹¹⁸ Article 18(1).

¹¹⁹ Article 18(2).

¹²⁰ Article 18(4).

¹²¹ T. OBOKATA and B. PAYNE, *op. cit.*, p. 312-313.

¹²² Report of the Experts Group on Trafficking in Human Beings, Brussels, 22 December 2004.

¹²³ Article 19. In 2009 the Council had already invited all Member States to participate in an informal and flexible EU network of National Rapporteurs or equivalent mechanisms in order to improve the understanding of the phenomenon of trafficking in human beings and to provide the Union and its Member States with objective, reliable, comparable and up-to-date strategic information in the field of trafficking in human beings. The Council, however, did

The impact assessment (attached to the 2009 Framework Decision proposal) noted that this measure is crucial as “better knowledge of the situation of trafficking is the necessary starting point for the establishment of effective anti-trafficking policy”¹²⁴. For the purpose of effective scrutiny, the national rapporteur should be established as an independent structure.

However, up to January 2013, only two Member States out of twenty-seven have appointed independent national rapporteurs (Finland and the Netherlands), whereas others only have non-independent specialised anti-trafficking bodies or coordinators who are attached to the relevant government departments¹²⁵.

The 2011 Directive also requires Member States to transmit to the EU anti-trafficking coordinator¹²⁶ information such as assessments of trends in trafficking or the results of anti-trafficking actions (e.g. gathering of statistics). On this basis the coordinator will contribute to the regular reporting carried out by the Commission¹²⁷. The Commission has to prepare a consolidated report not only in the first four years but also every two years thereafter.

B. Major limitations of the improved instrument

As explained above, the 2002 Framework Decision had been strongly criticised for favouring a ‘variable geometry’ situation in EU Member States in the implementation of offences and sanctions. This has led to a lack of compliance with the principle of legality and the development of a repressive approach. The European legislator has not fully addressed this issue and the 2011 directive still adopts minimum standards for both the definition of offences and sanctions.

Firstly, the list of acts to be considered as purposes of exploitation is not exhaustive. They are to be seen as minimum standards. Member States are free to broaden the scope of the EU definition in the implementing legislation and go beyond the directive requirement, with the resulting negative impact on the level of approximation¹²⁸.

not request at the time to establish a national rapporteur in Member States where it did not exist nor mentioned the criteria of independence. See Council conclusions on establishing an informal EU network of national Rapporteurs or Equivalent Mechanisms on Trafficking in Human Beings. 2946th Justice and Home Affairs Council meeting, Luxembourg, 4 June 2009.

¹²⁴ Impact Assessment, SEC (2009) 358, p. 29.

¹²⁵ For more details on the situation in each MS see the regularly updated Commission page: <http://ec.europa.eu/antitrafficking/section.action?sectionPath=National+Rapporteurs§ionType=MAP&page=1&resetBreadcrumb=false>.

¹²⁶ The EU Anti-Trafficking Coordinator, is responsible for improving coordination and coherence among EU institutions, EU agencies, Member States and international actors and developing existing and new EU policies to address trafficking in human beings. The EU Anti-Trafficking Coordinator also monitors the implementation of the new and integrated “EU Strategy towards the Eradication of Trafficking in Human Beings (2012-2016)” and provides overall strategic policy orientation for the EU’s external policy in this field. Its establishment was first foreseen by the Stockholm Programme and the first coordinator, Myria Vassiliadou (who still holds the role), has been appointed in December 2010.

¹²⁷ Article 20.

¹²⁸ For example, in Belgium the Bill which is under discussion in relation to the transposition of the 2011 Directive includes within the list of purposes of exploitation also illegal adoption

Secondly, as underlined above, the 2011 directive introduces a minimum common threshold of five years for the maximum penalty for all trafficking related offences, regardless of aggravated circumstances¹²⁹. The minimum common threshold for the maximum penalty in the case of aggravated circumstances has been raised from the eight years of the 2002 Framework Decision to ten years¹³⁰. The introduction of a minimum common threshold for all trafficking related offences and not only for aggravated offences (and the more severe minimum sanctions provided for aggravated offences) risks to favour even further the repressive approach described in relation to the implementation of the 2002 FD. In addition, penalty provisions may be severely criticised because of the severity of the penalties and the lack of differentiation in the level of penalties according to the types and gravity of the offences (as the principle of proportionality would require).

Disappointingly, “serious violence” or “serious harm” to the victim, listed as aggravated circumstances, are not defined. In addition, in the context of aggravating circumstances, only children are mentioned as “vulnerable victims” and not also adults, who may be considered vulnerable on the grounds of pregnancy, their health conditions and disability¹³¹.

4. Concluding remarks: the potential impact on approximation of the 2011 directive

The limitations of the 2002 Framework Decision and its implementation in the assistance and protection of victims and in the over-criminalisation/over-sanctioning of the phenomenon witnessed a public order approach to tackling the phenomenon for a long time whereas the prevention of the phenomenon and the assistance and support of victims was treated as being outside the scope of states’ interest.

The 2011 directive has been more ambitious and certainly constitutes a positive contribution to a more balanced and comprehensive anti-trafficking legal regime which, in several elements, goes beyond other international standards. The most innovative elements of the proposal attracted criticism, particularly from Member States. Some even queried whether the new instrument was necessary given the existing plethora of instruments and argued that the full implementation of the 2000 Trafficking Protocol, the 2002 EU Framework Decision and the 2005 Council of Europe Convention might be a more effective way to counter trafficking in human beings and help victims than creating new legislative requirements.

Member States were required to implement the directive’s provisions by 6 April 2013, with the Commission’s first report due in April 2015. A significant evaluation of the impact on approximation of the 2011 directive cannot yet be established because of the short period of time since it has entered into force. The new instrument still

and forced marriages. See *Projet de loi visant à modifier l’article 433quinquies du Code pénal en vue de clarifier et d’étendre la définition de la traite des êtres humains*, 5-711/1.

¹²⁹ Article 4(1). Remarkably, the 2009 Framework Decision proposal suggested 6 years.

¹³⁰ Article 4(2).

¹³¹ See Commission Proposal, p. 10.

has to prove its worth¹³². In May 2013, only six out of twenty-seven countries have fully transposed the 2011 directive and three countries have reported only partial transposition! Despite the fact that the deadline has expired, much still depends on the way in which individual states interpret and apply their legal obligations.

Possible future results of the implementation of the 2011 directive would be of interest for further research. However, the difference in content and in nature of the 2011 directive with respect to the 2002 Framework Decision does not make it possible to come up with many hypotheses on future impacts.

First, it has now become accepted at the EU level that trafficking is a gross violation of human rights. By comparison with the 2002 Framework Decision, the 2011 directive constitutes a significant improvement in terms of recognition of the rights of victims and of the connection between the protection of those rights and improved criminal justice responses to trafficking. Except for the granting of residence permits, support and assistance are provided irrespective of the victims' willingness to cooperate with the criminal justice authority.

However, some fear the extensive provisions on assistance to victims could be subject to fraudulent claims by economic migrants. During the negotiations, Member States have thus been cautious and drafted provisions in a manner that could not lead victims to claim specific rights¹³³. De facto, victims who participate in criminal proceedings are probably more likely to receive substantial assistance and support and to be provided with a long-term residence permit¹³⁴. Moreover, despite the inclusion of a non-punishment clause, there is still nothing to stop states from treating victims of trafficking as criminals and from arresting and prosecuting them for violations of labour and migration laws.

The 2011 directive has also attempted to create a consistent and complete system of prevention and control of trafficking in human beings to influence the demand side. The willingness to find a balance between prevention and repression is clear from the title of the instrument, which is now "on preventing and combating trafficking". The 2011 directive adopts the so-called "3Ps obligations", focusing on prosecution, protection and prevention¹³⁵. In this context, it thus aims at facilitating a more joined up approach through cooperation among Member States as well as other stakeholders such as civil society organisations.

With regard to implementation and monitoring, the establishment of national rapporteurs and their contribution to the work of the EU anti-trafficking coordinator, which we have mentioned above, could partly offset the weak implementation

¹³² K. GROMEK-BROC, "EU Directive on preventing and combating trafficking in human beings and protecting victims: will it be effective?", *Nova et Vetera*, 20, 2011, p. 227 f.

¹³³ T. OBOKATA and B. PAYNE, *op. cit.*

¹³⁴ Member States are strongly reluctant to issue residence permits on humanitarian grounds and, despite many being eligible, only few have been issued. See Report from the Commission to the European Parliament and the Council on the application of Directive 2004/81 on the residence permit issued to third country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, MIGR 103, 15197/10, 19 October 2010.

¹³⁵ T. OBOKATA and B. PAYNE, *op. cit.*

structure around the 2002 FD. Moreover since the entry into force of the Lisbon Treaty, the European Court of Justice is fully competent for measures adopted in the areas of police cooperation and judicial cooperation for criminal matters and it is thus possible for the European Commission to launch infringement proceedings in cases of non-compliance and non-implementation of a directive. These are both welcome developments in strengthening the enforcement of the anti-human trafficking legal framework.

Regrettably, the choice of the EU legislator to keep the minimum standards' approach stands in the way of an in-depth harmonisation of criminal offences and sanctions as Member States are free to go beyond the required limits and, as underlined, this leads to a more repressive approach. The wide margin of appreciation left to Member States may make an effective response to human trafficking under the TFUE more difficult.

Implementing legislation is still likely to broadly define the offences disregarding the principle of legality. The EU has failed to develop comprehensive frameworks to correlate the proscribed conduct to the proscribed penalties in a proportionate fashion and Member States will continue to sanction all trafficking-related offences (aggravated or simple) heavily. The much criticised severity of the legislation implementing the 2002 Framework Decision will not be subject to revision and will instead be legitimated and encouraged by the introduction of a minimum threshold for maximum penalties in all trafficking offences and an increase in the penalty for aggravated offences.

The tendency towards more repressive action encouraged by the minimum standards' provisions encompassed in the EU instruments analysed contrasts with the idea that the introduction of criminal sanctions should be conceived as a last resort when all other alternatives have proven inadequate to address a given problem. In this view, criminal sanctions ought to be confined to the minimum extent possible and coexist with other welfare policy tools.

An important step would be to create, within the systems of legislative evaluations, a control mechanism not only of transposition gaps but also of its excesses. Otherwise we run the risk of turning EU criminal law into a scapegoat for the mistakes of national criminal policies.