

Evaluation
of the
**Directive on preventing and combatting trafficking in
human beings and protecting its victims, and replacing
Framework Decision 2002/629/JHA (OJ 2011 no. L
101, p. 1)**
on the basis of the
Manifesto for a European Criminal Policy

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1. On the requirement of a fundamental legal interest worthy of protection

a) What interest does the legal instrument in question aspire to protect?

aa) In order to determine the interest which the Directive aspires to protect, a closer look at the complex structure of the elements of the crime is necessary:

Art. 2 contains the following objective elements:

Art. 2 (1) requires that

- one of several acts (“recruitment, transportation, transfer, harbouring or reception of persons”)
- is committed by using one of several coercives (“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”)

Art. 2 (1) also contains subjective elements and requires that the act be committed and that the coercive be used

- intentionally and
- for the purpose of exploitation.

bb) Therefore, two different protected interests may be distinguished:

- As to the use of coercives, Art. 2 aims to protect the liberty and physical integrity (“use of force”) of any potential victim. Art. 2 only applies if these interests are actually harmed.
- As the element “for the purpose of exploitation” is merely a subjective requirement, Art. 2 does not require that a perpetrator actually exploit a victim. Although it is not necessary that actual harm is done, the various interests protected by this element of the crime are already at risk when the perpetrator carries out one of the acts mentioned above with the said intent. This element aims to protect a variety of interests: the alternative “sexual exploitation” protects the sexual self-determination, forced labour or services, slavery or practices similar to slavery and servitude concern the individual liberty of a victim as well as the victim’s ability to work. If the act is committed in order to remove an organ, the victim’s physical integrity will also be affected.

Therefore, the statutory offences which need to be enacted by the Member States will serve a double purpose: they will protect citizens from the actual commitment of coercive acts on the one hand and from any corresponding danger of harm to further legal interests such as their sexual self-determination, individual liberty, ability to work and physical integrity, on the other hand.

cc) With a view to these protected interests, Art. 2 (4) and (5) of the Directive appear problematic:

(1) No requirement for the coercive to persist (Art. 2 (4))

The liberty of an individual is not infringed where he or she has consented to the respective act. In most cases, the victim will only agree to an infringement of liberty when under the influence of a coercive. This is why Art. 2 (4) is a necessary and welcome provision. It renders any consent irrelevant in case any of the (coercive) means has been used. This provision may, however, be

interpreted in a way that strips the victim's consent of any relevance even if the coercive situation does not persist (e.g. there may be cases in which the victim sees through the perpetrator's deceptive intentions and plays along). Considering the requirement of a legal interest worthy of protection, this is not convincing since the "victim" then acts according to his/her own free will.

(2) No need of coercive in case of a child victim (Art. 2 (5))

According to Art. 2 (5), the conduct referred to in paragraph 1 shall be punishable if it involves a child – irrespective of its age – even if none of the coercives mentioned has been used. This waiver is not necessary. To the extent to which a person under the age of 18 years ("child") is more vulnerable in a specific situation than an adult, the requirements for criminal liability set up in Art. 2 (1) will easily be met. It is hardly conceivable that a child should be willing to surrender itself to the perpetrator's will without the latter taking advantage of the child's inexperience, using other means of coercion or deception. If at all, this may be a realistic scenario for a developed child close to the age of 18 years. In this case, however, it remains unclear what purpose it would serve to define this as human trafficking: if on the one hand the intended conduct meets the requirements of another statutory offence, such as the sexual exploitation and prostitution of minors or coercion, these other offences suffice to protect the interests of the child (especially since they tend to punish conduct well before actual harm is done to the child). If on the other hand the intended conduct is not a criminal offence under other provisions, there does not seem to be a reason why the recruitment, transportation etc. should be punishable as trafficking in human beings.

We would like to add that the elements of the crime as modified by Art. 2 (5) of the Directive do not correspond to the typical idea of trafficking in human beings since they do no longer require a concrete position of vulnerability of the victim. The elements of the crime therefore run the risk to miss the purpose of the Directive in exceptional cases, while at the same time reducing the definiteness of the statutory offence as a whole.

b) Is the protected interest fundamental in terms of its nature?

The interests which the Directive aims to protect (individual liberty – i.e. freedom of will – and other legal interests like sexual self-determination or physical integrity) are of a fundamental nature, represent basic interests of every human being and are prerequisites for any free society. This is i.a. illustrated by the 2000 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons.

c) Is the protected interest anchored in the primary law of the EU?

The protected interests are embodied in various provisions of primary Union law. However, at least the general prohibition of trafficking in human beings pursuant to Art. 5 (3) of the Charter of Fundamental Rights is not a sufficient reference since it does not define which acts shall actually be covered by the notion of "trafficking in human beings". But without this clarification it is impossible to assess the legitimacy of the concrete offence as construed by Directive 2011/36/EU.

Apart from that, primary Union law contains many references which help to justify the protection of the legal interests mentioned above depending on the means of coercion and the form of

exploitation. These references may help to identify the fundamental nature of the interests mentioned above. Among these are Art. 3 (1) (right to integrity of a person), Art. 5 (prohibition of slavery etc.), Art. 6 (right to liberty), Art. 15 (1) (right to choose an occupation), Art. 24 (rights of the child), Art. 31 (right to fair and just working conditions), Art. 32 (prohibition of child labour) of the Charter of Fundamental Rights.

Furthermore, Art. 79 (2) (d) TFEU proves the importance of fighting trafficking in human beings as a crime.

d) Is the protected interest recognized in the constitutional traditions of the Member States?

The interests mentioned above are protected as basic rights by virtually all of the Member States' constitutions. This serves as another argument for their protection.

e) In what way is the impact of the proscribed conduct on the protected interest especially harmful to the society?

Apart from the fact that individual liberty, physical integrity and sexual self-determination are as such fundamental values in modern societies, the typical offence of trafficking in human beings is characterised by the socially detrimental combination of two factors: the perpetrator seeks an economic profit from exploiting the vulnerability of its victim.

f) Does the EU legislator deal with the question of a legal interest worthy of protection, and is there any explicit and detailed justification as to whether a legitimate interest of this kind actually exists?

The EU legislator refers to the Charter of Fundamental Rights in Recitals No. 1 and 33 (partly to the provisions mentioned supra 1.c) and mentions the main aspects which found the need to protect these legal interests and why trafficking in human beings is detrimental to societies.

2. On the *ultima ratio* principle

a) Are alternative mechanisms for the protection of the legitimate interest (according to 1) available to the EU which do not entail criminal sanctions?

If and to what extent alternative, non-criminal-law measures may suffice, depends on how seriously the punishable acts affect the legal interests. In particular, due consideration must be given to the question of whether there are alternatives to the tendency of the Directive to require punishment well in advance of a violation of the interests that shall be protected (cf. the analysis of the elements of the crime supra 1.a.bb), thereby establishing the actor's criminal liability far before actual harm is done.

aa) This tendency is due to the fact that the Directive simply requires the perpetrator to act for the

purpose of exploitation and not to actually exploit the victim. The elements of the crime therefore apply to conduct which is directed at making such exploitation possible. What is more: since the attempt of an offence pursuant to art. 2 (1) shall also be punishable, the perpetrator runs the risk of criminal liability at an even earlier stage. It needs to be analysed whether there are sufficient alternative means for the protection of the interests at stake at this early stage.

One may consider to turn the (subjective) element of the crime “for the purpose of exploitation” into an objective element and therefore require the actual exploitation of the victim. That, however, would be going too far since the objective element of using a means of coercion already infringes upon interests before the (intended) exploitation takes place. However, it should be distinguished between the various alternative acts of the crime:

As to the acts of transportation, transfer, harbouring or reception of persons, the victim will usually be within a sphere of influence of the perpetrator, who is then in the position to virtually exert power and to progress to exploiting the victim. This is especially abundantly clear for certain means of coercion like the exchanging or transferring of control over persons. To this extent, alternative measures for protecting the victim’s interests are not apparent.

As to the act of recruitment, this is different. This alternative applies to cases in which the victim engages with the perpetrator due to a (deceiving) offer the latter makes (maybe even enforced with a threat). At this early stage, the perpetrator normally won’t have a position of power comparable to the one implied by the other alternatives. As a consequence, criminal liability is extended even further and alternatives to criminal punishment must duly be regarded.

bb) Such alternative measures (in the case of recruitment) may for example be initiating broad campaigns to raise awareness for the actual living conditions in typical target countries among the population of the countries of origin. These campaigns must warn of the risk to be forced into prostitution as well as of other aspects of sexual exploitation. In the target countries, such campaigns must aim to inform potential recipients of forced labour in order to dry up the corresponding markets. Target countries must take appropriate measures in order to raise the rate of crime detection in this regard, e.g. by reinforcing border patrols in areas that seem to attract these perpetrators.

Such measures may be costly. In order to combat trafficking in human beings effectively, however, Member States must not limit themselves to introducing or to aggravating criminal measures which seem not to involve any additional costs. Criminal sanctions do not take the bull by the horns. Criminal punishment can only resolve a matter after the offence has already been committed. The introduction of criminal sanctions may therefore only accompany and complement the measures mentioned above.

b) Can the European legislator demonstrate the inadequate effectiveness of alternative, non-penal/criminal measures in practice?

The EU legislator presupposes that there is a necessity for criminal sanctions to counter trafficking in human beings. In this regard there also seems to be a consensus among the Member States which is illustrated by the fact that the Directive (or the previous Framework Decision respectively) is based on the requirements set up by other international legal instruments. This, however, cannot discharge

the EU legislator of its duty to scrutinise as to whether every act covered by the definition of human trafficking must really be punishable (especially considering the advancing of criminal liability) or whether alternative means other than criminal sanctions would be sufficient.

c) Does the EU legislator deal with the question of alternative protective measures, and is there an explicit and detailed explanation as to whether resort to criminal law (of Member States, where appropriate) is necessary?

It must be mentioned as a positive aspect of this Directive that the EU legislator acknowledges the need for a comprehensive approach towards combatting trafficking in human beings which does not exclusively resort to criminal law but also incorporates preventive measures. The intended measures match those described above in principle:

Art. 18 of the Directive obliges the Member States to take measures for the education and training of police officers and other officials as well as to initiate campaigns targeted at informing the potential victims and raising awareness among them.

Art. 3 of the Directive 2009/52/EC prohibits the employment of third-country nationals illegally staying in the European Union; Art. 4 of this Directive requires that a third-country national, before taking up the employment, holds and presents to the employer a valid residence permit or other authorisation for his or her stay. These rules for the labour market of third-country nationals help to indirectly prevent the illegal employment of victims of human trafficking.

Recital No. 2 of the Directive and the “Action-oriented Paper on strengthening the EU external dimension on action against trafficking in human beings; Towards global EU action against trafficking in human beings” (Council Document No. 6865/10) call for funding of organisations which aim to combat trafficking in human beings and for developing partnerships with third countries involving i.a. mutual exchange programmes and Swift Action Teams. The cooperation shall also lead to better statistics for analysing the typical travel roots of victims. The measures shall include training for diplomats, border patrol and law enforcement officers as well as the personnel of transport companies. The Paper acknowledges the need to take steps in order to reduce the demand for human trafficking.

Recital No. 6 of the Directive explicitly mentions close cooperation with civil society organisations, including NGOs, i.a. to raise the necessary awareness.

The EU plan on best practices, standards and procedures for combating and preventing trafficking in human beings (OJ 2005 No. C 311, pp. 1 et seqq.) introduces information campaigns in potential countries of origin. According to the Plan, a seminar for the air-carrier industry was held calling for several steps which should sensitise officials for this problem. As to the aim to reduce the demand, the Paper does not go beyond listing best practices from the Member States.

Unfortunately, the afore-mentioned measures are not elaborate and appear rather vague. The preventive measures called for in Art. 18 of the Directive are not precise either which means that it will be difficult to assess whether the steps taken by the Member States meet the requirements set for them. Even the “Action-Based Paper” is nothing more than a non-binding political memorandum of understanding and does not ensure that concrete steps will be taken. A detailed contemplation of

how the prescription of certain acts in the Directive could be replaced by non-criminal-law measures is nowhere to be found in the preparatory works.

Finally, the Directive lacks reasoning for one elementary question: as the preparatory works (SEC (2009) 358 final, p. 7) acknowledge, there is no reliable empirical data as to the extent of human trafficking within the Union. Without these data, it is impossible to assess whether legislative steps are truly necessary. The number of criminal proceedings dealing with offences of human trafficking is not telling enough and the mere fact that the number of convictions is low does not prove anything: it would be necessary to know whether a criminal proceeding could not be conducted due to shortcomings of the Member States' criminal laws. The EU legislator should have done a more thorough analysis in this regard.

d) Do the proscribed types of conduct indeed call for criminal sanctions as a last resort?

The elements of the crime as stipulated in Art. 2 of the Directive cover a number of alternatives. As to the reasoning for their penalization, the Directive does not distinguish between them. This may be due to the fact that the repealed Framework Decision had already contained mostly identical requirements as to the criminal liability.

A thorough and detailed reasoning should however have been provided for the newly incorporated aspects of the "intent of exploitation" (removal of organs and exploitation of criminal activities; the mention of begging is only declaratory since begging is just one form of forced services). The preparatory works simply refer to other international legal instruments which also impose criminal sanctions. Irrespective of obligations arising from international law, these instruments do not give the EU legislator carte blanche and do not justify it to simply copy and paste the relevant provisions into the Directive in order to make them legally binding without pursuing a consistent European criminal policy. This may still be acceptable for the removal of organs. But as to the exploitation of criminal offences, a closer look at the legal justification would have been necessary (s. infra 4.b.aa and 6.a).

3. On the principle of guilt

a) Does the punishment provided for in the instrument require the actual responsibility of the individual?

Yes. The Directive only applies to acts which have been committed intentionally and includes another subject element of the crime ("for the purpose of exploitation"). The elements for increasing the minimum maximum penalty in Art. 4 (2) of the Directive do also presuppose the individual responsibility of the perpetrator.

b) Do these sanctions correspond to the individual guilt in terms of their type and gravity?

It must be (positively) noted that the Directive distinguishes as regards the level of sanctions by calling for higher minimum maximum penalties in more severe cases.

However, the Directive does not fully respect the principle of guilt since it treats acts of a very different severity the same way:

As opposed to the repealed Framework Decision, the Directive does distinguish between perpetrators (Art. 4 (1) – (3)) and participants (Art. 4 (4)) with regard to the minimum maximum penalty. However, in general, the Directive does not sufficiently distinguish between main perpetrators and subordinates. This is due to the fact that Art. 2 (1) establishes that several acts, which would usually be considered as forms of aiding and abetting, need to be criminal offences of their own. What is more, the Directive only requires the respective acts to be committed “for the purpose of exploitation” and does not require that the perpetrator intends to exploit the victim personally. For example: someone who transports a victim to another place is treated in the exact same way as someone else who takes control of and exploits the person for his or her own personal benefit. A subordinate driver, who does not seek a substantial material gain from the act and does not exert force upon the victim, would consequently be confronted with the same minimum maximum penalty as the main offender.

This also applies to the act of recruitment. As pointed out *supra* 2.a, this alternative shall establish criminal liability well before the act of exploitation and even well before the victim finds itself in an inferior position to the perpetrator. For example: if the victim’s consent to his or her transport to another country, where he/she shall be exploited for prostitution, is obtained by deceptive means (without the transport already having taken place), this may justify criminal punishment. This constellation does not, however, deserve the same treatment as a case in which the victim is actually abducted from home by force. This is exemplified by the following: if the victim decides to go “voluntarily” due to deception but misses the arranged time of departure, the Directive would classify this as a case of human trafficking with the same minimum maximum penalty as if the victim had been forced to go to a foreign country.

In a similar way, the list of coercives includes the giving or receiving of payments or benefits to achieve the consent of a person having control over another person. Under this alternative, even followers such as couriers become perpetrators and are treated in the same way as those who actually use force.

Although the distinction of several degrees of severity made in Art. 4 (1) and (2) is welcome, the cases enumerated in Art. 4 (2) do not fully respect the requirement to punish in accordance with the individual’s amount of guilt. In particular, Art. 4 (2) (a) of the Directive does not demand “more” than Art. 2 (1) because already the regular definition of human trafficking lists the abuse of a position of vulnerability as one of several coercives. This alternative will therefore always amount to a particularly severe case punishable with the double minimum maximum penalty. This problem is exacerbated by the lack of definiteness as to the element of “vulnerability” (see *infra* 4.b)aa)).

Furthermore, the mere fact that an offence of human trafficking is committed within the framework of a criminal organisation (lit. b) is not necessarily as severe as endangering the life of the victim (lit. c) and thus should not entail the same minimum maximum penalty.

c) Does the legislator explicitly deal with the question of whether these sanctions are appropriate having regard to the guilt of the individual?

The EU legislator distinguishes between common and especially severe forms of human trafficking as defined in Art. 4 (1) – (3) of the Directive. Unfortunately, the shortcomings mentioned above, especially the equal treatment of all alternative acts, are not discussed or explained. Furthermore, the EU legislator reveals a problematic attitude towards criminal policy in Recital No. 12 according to which the levels of penalties reflect the “growing concern” among Member States: mere concerns should never be regarded as a sufficient justification for a certain level of criminal sanctions (nor for the introduction of criminal punishment at all).

4. On the principle of legality

a) Does the proposed legislative act aim at the introduction of a supranational criminal offense:

No.

b) If the legislative act aims at harmonising national criminal law provisions:

aa) To the extent that the obligation to adjust national criminal law does not give any leeway for the implementation (and thus exhaustively defines the criminal offence): are the objective and subjective prerequisites for criminal liability as well as the sanctions which could be imposed foreseeable (as supra a)?

The Directive imposes on the Member States an extensive obligation to punish. The alternative acts as stipulated in Art. 2 (1) overlap and aim to describe the whole process of transporting a person and incriminate all actions in this regard completely. The enumeration of possible means of coercion is even more comprehensive: it is virtually impossible to imagine a conduct directed at influencing the will of a person which is not covered. The Member States are not left with any margin of discretion in this regard. To this extent, the Directive must therefore meet a high standard of definiteness to which it does not live up.

Two elements of the crime do not allow the citizen to sufficiently foresee to what they refer: “abuse of power” and “abuse of a position of vulnerability”. These two elements are two faces of the same coin. They convey a notion of a power divide: one of the persons concerned must be superior to the other. This is why both terms face the same criticism as to their definiteness: it is unclear how to identify a sufficient degree of superiority at which the superior must give due regard to the interests of the inferior. But what is, for instance, a sufficient economic divide between two people in order to result in an “abuse of power”? The definition of vulnerability in Art. 2 (2) of the Directive does not contribute to the exactness of these terms. To the contrary, it adds to the lack of definiteness since it makes the vulnerability dependent on whether the victim has no real or acceptable alternative. If one additionally takes into consideration the German wording (“keine für sie annehmbare andere Möglichkeit”, i.e. no alternative acceptable for *the victim*), the Directive can be interpreted to oblige national legislators to determine vulnerability from the victim’s perspective. As an element of the crime, such a criterion would be far too indefinite since one would have to resort to individual factors

which could not be determined by applying an abstract standard. As a consequence, this element may even extend to cases in which a person could be expected to withstand a situation of pressure from an objective point of view. In order to ensure a certain standard of definiteness, the two elements mentioned above would have had to be phrased more clearly.

Due regard has to be given to Recital No. 11 according to which illegal abortions shall be covered in so far as they fulfil the constitutive elements of trafficking in human beings. It remains unclear to what aspect of the exploitative intent this refers. This gives rise to the suspicion that the EU legislator intended a broad notion of the term “practices similar to slavery” which would not conform to the requirements of the principle of legality.

bb) Do the national legislators have the possibility to implement each single prescription imposed by the European legislative act in such a concrete manner that this results in a strict and unambiguous provision of national criminal law (please give reasons for the answer using possible examples on how to formulate the implementing law)?

Since most of the elements of the crime are definite enough, the Member States can avoid conflicts with the principle of legality by simply transposing them literally. However, some conflicts with this principle exist and they can hardly be corrected by national legislators.

Art. 4 (2) (d) in particular is a problematic provision as it prescribes completely open and vague criteria for augmenting the minimum maximum penalties: “serious violence” and “particularly serious harm”. The Directive does not define these terms. National legislators may of course attempt to clarify the meaning of these terms, e.g. by deciding whether the term “particularly serious harm” should also extend to psychological or financial damages. By such a clarification, however, the national legislators would risk failing to implement the Directive correctly – especially if the European Court of Justice should opt for a broader interpretation.

As to the sanctions, Member States are left with a broader margin of discretion for promoting their own criminal policies since the Directive only obliges them to adjust their maximum penalties. Art. 4 (3), which requires the Member States to regard the fact that the offence was committed by an official as an aggravating circumstance, leaves it up to the national legislators to decide whether this aspect should be considered when determining the sanction in each particular case or whether they prefer to enact a statute providing for higher penalties, while ensuring the conformity to the principle of definiteness themselves.

c) Does the proposed Directive introduce retroactive rules, or does it compel member States to introduce such rules?

No.

d) Is any potential retroactivity justified with reference to the principle of *lex mitior*?

e) Have national Parliaments, organizations, and citizens been informed of the proposed Directive in a timely and comprehensive manner, and have they been given a reasonable possibility to voice their own opinion?

COM (2010) 95 final, pp. 4 et seq. states: “Following the Council's request to evaluate the implementation of the EU Plan¹, the Commission sent a questionnaire to the Member States (MS) in December 2007. 23 MS, plus Norway, replied. The results fed into the Commission Working Document adopted on 17 October 2008².”

Three consultative meetings were held with a view to drafting the impact assessment. The Group of Experts on Trafficking in Human Beings met on 2 and 3 October 2008, and after extensive discussion issued a written opinion. A consultative meeting with experts from different backgrounds including governments, law enforcement agencies, NGOs, international organisations and universities was held on 7 October 2008. The participants were subsequently invited to transmit written comments, and several experts did so. A meeting with Member States' representatives was held on 17 October 2008.“

However, it gives rise to concern that the Commission apparently saw no need for external expertise (COM [2010] 95 final, p. 5).

5. On the principle of subsidiarity

a) Why is it not enough with criminal law measures at Member State level?

Since trafficking in human beings in general appears as a cross-border phenomenon, the investigation and prosecution of these crimes depends heavily on the cooperation of the concerned Member States, which is enhanced by harmonised criminal statutes. A full harmonisation cannot be achieved by national legislators on their own – even if they should choose to cooperate closely.

This assessment does not mean that the crime of trafficking in human beings always involves several Member States. Each of the punishable acts pursuant to Art. 2 (1) can be carried out within the jurisdiction of a single Member State as well, although cross-border implications are a typical element of this crime. The act of recruitment, for instance, might take place in one Member State but the perpetrator will usually intend to transfer his victim to another Member State subsequently.

Neither Art. 83 (1) TFEU nor the principle of subsidiarity limit the harmonising competence of the Union to exclude cases without cross-border implications. The principle of subsidiarity may call for such a limit in certain areas of crime and would at least have required the EU legislator to explain why restricting the Union's legislation to cross-border cases would not have sufficed.

The fact that the Member States cooperate in other international organisations to fight trafficking in

¹ EU Plan on best practices, standards and procedures for combating and preventing trafficking in human beings of the Council (OJ C 311, 9.12.2005, p. 1).

² 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.

human beings more effectively (cf. UN Protocol of 2000³) may serve as a hint for the need to find a common solution at the European level. It is striking, though, that these instruments limit their scopes of application to cross-border cases. Such a limitation would have been conceivable in the Directive as well. Yet, from a practical perspective, it seems difficult to assess whether a case has cross-border implications or not, even if someone should be recruited by a perpetrator of the same nationality in their country. The aspect of “trading” makes the crime of trafficking in human beings a typically international crime. This should suffice to justify the assumption that the Directive is in line with the principle of subsidiarity as a whole.

b) Why is the objective of each measure – whether in terms of its scope or its impact – better served on a European level?

In order to effectively investigate and prosecute across borders on the basis of harmonised criminal laws, the work of national legislators needs to be coordinated. This is made possible by the minimum requirements in this Directive.

c) Does the EU legislator deal with the question of subsidiarity and is there an explicit and detailed evaluation of the fulfilment of this requirement in Union acts – taking into account all the alternatives and weighing all circumstances?

The EU legislator bases its reasoning on the principle of subsidiarity almost exclusively on the typical cross-border implications of this crime phenomenon, without distinguishing between the different alternatives of the definition in Art. 2 (1). The international character of this crime should have been based on intensive recourse to statistical evidence which – regrettably – has not been collected. The EU legislator also includes a general remark on the advantages of the legal framework of Union law (no requirement of ratification).

d) Have national Parliaments expressed their views as to the preservation of the subsidiarity principle and, if so, what was their opinion? Has the EU legislator explicitly considered these arguments?

The preparatory works do not reveal any involvement of the national parliaments.

³ Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, United Nations Treaties Service, Vol. 2237, p. 319; Doc.A/55/383.

6. On the coherence of domestic criminal justice systems

a) Do the criminal law provisions of the Directive undermine the coherence of the criminal justice system of one or more member States?

The alternative of recruitment, which has been criticised supra 1.a) and 5.a) in a different context, may cause severe conflicts with the basic concepts of criminal law of the national criminal justice system – especially those dealing with the participation in crimes. For example: whosoever recruits someone to commit a crime by means of deception would be liable as an indirect perpetrator of the crime in Germany. What is more, the Directive does not require that the situation of coercion persists at the time of the (intended) commitment of the crime by the victim. This means that the perpetrator would be punishable for trafficking in human beings even in cases in which the victim chooses to take sides with the perpetrator. Finally, the conflict with the general laws on participation in crimes becomes most obvious in cases where a child shall be recruited for the purpose of exploiting criminal offences that he or she shall commit. For these cases, the Member States may not make the use of coercive means a prerequisite for criminal liability. If, for example, a 20-year old manages to persuade a 17-year old friend to commit a theft or burglary for him, the mere act of persuasion would make him criminally liability for trafficking in human beings: he would have recruited a child for the purpose of exploiting it for criminal activities. Since the Directive does not require that the situation of coercion persists, similar problems may arise in case of adults.

Although these situations would be regarded as cases of incitement, they will have to be classified as trafficking in human beings pursuant to the Directive. This will also result in extending criminal liability since the intended criminal activities do not actually have to be carried out. Finally, the minimum maximum penalty of ten years in the case of recruiting a child seems too high, since the statutory penalties for the intended crimes that the latter shall commit may be much lower.

b) In terms of systematicity and substantive content, is the Directive in line with other EU legislative acts related to criminal law?

The efforts to harmonise the Member States' criminal law provisions against trafficking in human beings conform – generally speaking – to the other measures taken by the Union. However, this Directive is not in line with at least one other EU instrument. According to its Art. 2 (1) and (3), the Member States shall take the necessary measures to ensure that the intentional recruitment of a child for the purpose of *any form of sexual exploitation* is punishable (and pursuant to Art. 2 (5) no means of coercion must be used in this case). The Directive on combating the sexual abuse and sexual exploitation of children and child pornography (2011/93/EU), however, only calls for the penalization of the recruitment of a child for the *participation in child prostitution*, i.e. for one particularly severe form of sexual exploitation. But the inconsistencies do not end at this point: although the two Directives partly cover the same behaviour they provide for different minimum maximum penalties. While the narrower Directive on combating child pornography establishes a minimum maximum penalty of 8 or 5 years respectively, Art. 4 (2) (a) of the broader Directive on combating trafficking in human beings requires a minimum maximum penalty of 10 years as children are regarded as particularly vulnerable victims. It appears contradictory that the rather general provision embodied in the Directive on combating trafficking in human beings should provide for a higher minimum maximum penalty than the Directive which was specifically designed to harmonise

the national provisions on the sexual exploitation of children.

c) Does the EU legislator deal with the question of horizontal and vertical coherence, and is there an explicit and detailed explanation as to whether the proposed Directive does not undermine the coherence of domestic criminal justice systems or at least whether any such undermining is inevitable – particularly in view of the obligation to respect the national identity of each member State?

The EU legislator does not deal with the question of vertical coherence. The contradiction to the Directive combating child pornography is not discussed, the horizontal coherence to other provisions of EU law is merely stated.

OVERALL EVALUATION

- ☐ The legislative act **fully complies with** the requirements of the Manifesto on European Criminal Policy.
- ☒ The legislative act **satisfies essentially** the requirements of the Manifesto on European Criminal Policy. Alterations or improvements are required only on certain points (see recommendations).
- ☐ The legislative act meets **only partially** the requirements of the Manifesto on European Criminal Policy. Significant alterations or improvements are required (see recommendations).
- ☐ The legislative act **does not substantially meet** the requirements of the Manifesto on European Criminal Policy. Extensive and structural alterations are required (see recommendations).
- ☐ The legislative act **does not meet at all** the requirements of the Manifesto on European Criminal Policy. The proposal/enactment of such a legal instrument must be wholly reexamined (see recommendations).

The aim of the Directive to fight trafficking in human beings is welcome and legitimate and requires – generally speaking – the recourse to criminal law sanctions at the European level.

It would be desirable if the EU legislator were not to opt for harmonising the particularly sensitive area of criminal law without firstly assessing the scope of the problem on the basis of a statistically significant, empirical analysis of how many people are subject to exploitative practices each year in the Union and without secondly showing how the national criminal justice systems fail to address these problems.

The EU legislator also needs to improve its statement of the reasons for its legal instruments. In many aspects, its motifs, which are necessary to test the instrument against the principles of proportionality, subsidiarity and coherence, are not mentioned at all or not in their entirety.

The legitimacy of the Directive is in many aspects justified by the mere statement that trafficking in human beings is a particularly serious crime without distinguishing between the various forms of behaviour that fall under the definition of the crime. This is the core of many problems to which this legal instrument gives rise with regard to the Manifesto on European Criminal Policy.

RECOMMENDATIONS FOR THE AMENDMENT OF SPECIFIC PROVISIONS OF THE PROPOSED DIRECTIVE:

1. A more precise wording of Art. 2 (2) of the Directive

The definition of a *position of vulnerability* in Art. 2 (2) (“no real or acceptable alternative”) should be modified to clarify that the Directive applies an objective standard for determining whether or not the person concerned did have acceptable alternatives. While the English text does not necessarily create a need for such an amendment, the German version (“für sie annehmbar”) seems to differ from the English text in this regard. Cf. *supra* V.1.

Likewise, the Directive should define the term “abuse of power” more closely. This term equally expresses a certain divide in power, but does not take recourse to the (individual) vulnerability of the

victim but to the (individual) strength of the perpetrator. This might be expressed by the following definition: *“Abuse of power means that due to his or her sex, physical or mental condition, economic situation, availability of weapons, dangerous objects or other means of technical equipment, superiority in numbers or other circumstances, the perpetrator has gained a significant position of superiority over the victim which the perpetrator uses for the purpose of preventing or breaking resistance and to facilitate the achievement of the perpetrator’s objectives against the victim.”* Cf. *supra* V.1.

In order to phrase Art. 2 (2) even more precisely and to clarify that children will under usual circumstances find themselves in a position of vulnerability, the following should be added to the provision: *“Such a situation might arise from the age of the victim, the victim’s physical or mental development, the victim’s health condition, an apparent and severe financial distress or a pregnancy.”* Cf. *supra* V.1.

2. A more precise wording of Art. 2 (3) of the Directive

Art. 2 (3) of the Directive should be formulated more restrictively. This provision should only apply to “the exploitation of *coerced* criminal activities”. This would reflect a typical aspect of trafficking in human being and reduce the danger of incompatibilities with existing national criminal law provisions on participation in crimes. Cf. *supra* VII.1.

3. A more precise wording of Art. 2 (4) of the Directive

Art. 2 (4) of the Directive should be amended as follows: *“... shall be irrelevant where any of the means set forth in paragraph 1 has been used and continues to influence the decision of the victim.”* Cf. *supra* II.2.

4. Deleting Art. 2 (5) of the Directive

Art. 2 (5) of the Directive should be deleted. There are only very few cases conceivable in which a child would not be in a position of vulnerability due to its age (cf. the proposed amendment to Art. 2 (2)). In these cases, the use of a means of coercion must not be omitted. Otherwise, the elements of the crime would no longer reflect the particularly typical conduct of trafficking in human beings. Conflicts with the laws of participation in crimes as embodied in the national criminal justice systems may also be avoided or mitigated. Cf. *supra* II.2.

5. Amending the minimum maximum penalties

Apart from general objections against the use of minimum maximum penalties⁴, the minimum maximum penalty for cases of recruitment in the Directive should be reduced. This would reflect that

⁴ Satzger, *International and European Criminal Law*, Munich 2012, § 7 para. 45; ECPI, ZIS 2009, 707, 709 and EuCLR 2011, 86, 91.

the act of recruitment takes place before the victim's rights are actually infringed; thus the perpetrator does not appear to be as culpable as in other cases and does not deserve such a harsh punishment. The contradiction to Art. 4 (5) of the Directive combating child pornography could also be resolved by lowering the minimum maximum penalty for cases of recruitment. Cf. *supra* III.1., IV. and VII.2.

In order to ensure a punishment in accordance with the principle of guilt, the Directive should distinguish between the profiteers of a crime and the helpers at the level of criminal sanctions. The EU legislator should amend Art. 4 (1) of the Directive in order to allow Member States to lower the minimum maximum penalties for less serious cases. This could include the alternatives of exchanging or transferring the control over persons if a means of coercion is not used directly against the victim. Cf. *supra* IV.

6. Amending the minimum maximum penalties for severe cases

Art. 4 (2) (a) should only apply to cases in which the victim *"was particularly vulnerable and the perpetrator used a means of coercion pursuant to paragraph 1."* This would prevent every ordinary case of vulnerability from amounting to a particularly severe case at the same time. The clarification according to which human trafficking of children must be considered a severe case would be redundant taking into account the amendment to Art. 2 (2) proposed above. Such an amendment would also avoid contradictions to the Directive combating child pornography: in cases where an additional means of coercion is used, it seems legitimate to raise the level of punishment. Cf. *supra* IV. and VII.2.

Art. 4 (2) (d) should apply only to harm done to the victim's health. The EU legislator should also explain when such bodily harm is particularly serious. This may for example be the case *where the damage to the victim's health is long-lasting or has grave consequences for the physical integrity, requires a long treatment, results in a lasting disability or annihilates or reduces the victim's ability to work.* A definition of this kind would resolve the conflict with the principle of definiteness. Cf. *supra* IV. and V.2.