



Should we call for a binding provision on criminalising knowingly use or rather not? Suzanne Hoff – La Strada International

Both Article 19 of the CoE Convention and Article 18(4) of the EU Anti-Trafficking Directive recommend the criminalisation of the knowing use of services which are the objects of exploitation, as one of the ways to curb demand.

The EU THB Directive of 2011 is currently being evaluated and on 13 of December, the EU AT coordinator is expected to present the evaluation package, including most likely a proposal to revise (parts of) the THB Directive. The European Commission is considering to revise among others article 18.4 and make it binding for EU MS to establish as a criminal offence the use of services which are the objects of exploitation with the knowledge that the person is a victim of human trafficking (according definition set in article 2 of the THB directive).

However there is little information about the impact of this offence in countries that have criminalised the 'knowing use'. So far only in 2016 a research has been conducted by the EC, which makes clear that provisions and interpretations of this offence differ; that there are very little prosecutions and convictions and that the impact is generally unknown.

La Strada International decided to conduct desk research and related interviews on the issue to try to find out more about the impact, challenges and possible harm of criminalising the knowing use. Different national stakeholders from different EU countries have been asked among others in which ways this provision can have a positive impact in relation to addressing human trafficking, as well as what the risks/ negative effects of such a binding legislation could be.

While the research has not been finalised yet, La Strada International believes that **broadening the criminal liability and criminalizing all those that knowingly use services which involve exploitation might not only be impractical and hence have limited impact on human trafficking, but can also be dangerous.'**

First findings desk research

From the desk review and the interviews held so far it became clear that:

There is a huge diversity in scope of legal provisions about 'knowing use'

The legal provisions in EU MS differ greatly. Most EU MS that have such an offence only criminalise clients of sexual services but not consumers of other services or products. Also countries that have legalised or regulated prostitution (e.g. Netherlands, Germany) have criminalised the knowingly use of sexual services offered by victims of human trafficking. Some countries (e.g. Romania, Bulgaria) have legislation that also includes criminalisation of knowingly purchase of other services outside sexual services, that have been provided by victims of trafficking, but also here the provisions have not/barely been used outside the sex industry.

Clear lack of knowledge & awareness about the legal provisions among experts

There seem to be generally little knowledge about the existing legal provisions at national level, even THB experts that work long in the field, indicated themselves to have little or limited knowledge of the provision or its implementation and also indicated that there is unclarity about the interpretation in practice at national level. They often informed us, not to have any updated information on whether or not there are investigations or prosecutions related to this offence in the country.

Nearly all interviewees indicated that more awareness is needed, not only among the general public including those that can be criminalised, but also among legal professionals that have to use the offence. None of the persons we interviewed was aware of any awareness raising or information campaign conducted in their countries, related to the criminal provision, also not of any public awareness or information campaign for the general public - or specifically for the target group to be criminalised - when this new criminalisation was added to the national criminal code.

Should human trafficking be proven before the use can be criminalised?

Opinions differed on whether or not trafficking as a crime has to be proven – as a legal condition according the national offence - before those that made use of the services could also be prosecuted. In the NL one interviewee believed that it would be sufficient if a person that was trafficked would self-identify as a trafficked person and that even in cases when traffickers were not or could not be prosecuted, she believed it would still be possible to prosecute those that made knowingly use of the services and thus could be accused of ‘fostering the exploitation/trafficking’. All other respondents so far believed that first human trafficking had to be proven and as one stakeholder stated: “If there is no prosecution for human trafficking, there is no victim”. If there is a prosecution for human trafficking all felt that then also those that profit or foster the exploitation could be prosecuted. This means that the effective use of the offence depends on successful human trafficking prosecutions, which are currently seriously lagging behind.

Evidence to prove knowing use

Respondents indicated that in practice it would be quite difficult to prove the knowing use of those persons buying services provided by trafficked persons. The following signals/indicators were suggested by interviewees related to prove the ‘knowingly’ use, most related in particular to clients of sexual services.

- The regularity/frequency of making use of the services; the amount of visits made to the sex worker – it is believed that from persons that have been more frequent in contact with the victim, it can be expected that they know or should have known that the person was severely exploited.
- The use of an irregular part of the sector – it was suggested that those making use of an irregular part of the (sex or other) sector (s), could be aware of the risks that they purchase services of a exploited persons.

For sex work this included whether the services were purchased in a hidden isolated place or in a regulated brothel. It was though stated that in countries where prostitution is not legalised, consumers do not have the choice to opt for the legal part of the sector and thus could have limited options for own ‘due diligence and risk reduction’. Moreover it could be questioned as large parts of the sex work sector moved from the streets to private flats - and is accessible online via internet – whether this would also be framed as ‘hidden and isolated’ places?

- Testimonies of clients or persons offering the services or when buyers were ‘caught red handed’.
- Also it would matter for the evidence according the interviewees, if consumers were in direct contact with the victim to agree on the services, or whether they had been in contact with mediators that mediated for the services, which would have given them information that the person could possibly not have consented for providing the services and conditions of the services. The presence of mediators, including pimps at the time of purchasing sexual services, was also seen as a sign that the person might not work voluntary in prostitution. This is though contrary to what is proclaimed by sex workers as a key safety; laws criminalising third parties are so broad in many countries that it can prevent sex workers hiring anyone to help or assist them in their work, most crucially to help them with security¹.
- An important criteria for the evidence would also be if due diligence was conducted by the buyer of the services, did the consumer undertake any action to ensure him/herself that the person that delivered the person was not exploited? According sex workers, due diligence of third parties is more relevant in this context, but can be only subject of debate if third parties are not excessively criminalized.
- For sex workers ‘consent’ is central concept which is determinant in defining sexual violence. For sex workers, consent means agreed upon terms and conditions, under which sexual services are provided. If these consented terms and conditions are violated, the incident should be classified as sexual offence. Where consent is absent for reasons including threat or use of force, deception, fraud, and abuse of power or involvement of a child, such activity would constitute a human rights abuse which must be treated as a criminal offence.

Who is to be criminalised?

Interviewees believed that the following persons could be criminalised:

- Those who profit from the services, even though not responsible for the exploitation (in many countries limited to sexual services) although opinions differed on this.
- There was strong doubt about whether people buying clothes or agricultural products that were made under exploitative circumstance should and could be criminalised. The argument used against this: ‘then you should criminalise half of the population, as ‘exploitation occurs structurally in many different labour sectors’. It was stated that in case of long supply chains, consumer are not really able to control, neither can ensure that they buy services made without exploitative labour. “As a consumer you are limited in what you can verify and what you can choose; responsibility for fair produce and fair demand should lie with the government and also with the private sector, but not with the buyer”.
- Some felt that only consumer of sexual services should be criminalised and not consumers of other services or products as the ‘distance from the client’ was much bigger. However those people seem not to see difficulties with criminalising those that made use of online sexual services, even though also then there is a clear distance.
- Those that directly employ a person, e.g. a domestic worker or a construction worker that would renovate their house; although opinions also differed here.

¹<https://www.nswp.org/sites/default/files/Policy%20Brief%20The%20Decriminalisation%20of%20Third%20Parties%2C%20NSWP%20-%202016.pdf>

- Those who make use of minor prostitution (although there is other legislation in place in EU countries to criminalise this)
- Those who outsource the person or the services of the person, knowing that the person is a victim of human trafficking
- Some interviewees opted for strict liability for the private sector, in addition to criminalise clients of exploited sex workers

Added value of the offence

Most interviewees referred to the 'normative aim' of the offence; to prevent people to make use of (sexual) services that involve risks of exploitation' and believed that the offence as such, would support more awareness raising and reduce generally the demand for exploitative services. However all interviewees had mild or strong doubts about the 'enforceability' of the offence. According to respondents no impact assessment or evaluation on the crime has been conducted in their countries – except for Finland - neither an assessment before the legislation was introduced.

Even the strong advocates for criminalisation of knowing use were clearly not expecting big results or much change from a binding criminal offence. Most of the interviewees therefore spoke of a 'symbolic value' only. Some expected that it could ensure that more actors would become accountable and that next to traffickers the legislation would give the option to also criminalise those that profit/make use from the services, even though they were not directly responsible for the exploitation. They saw the added value of a binding offence in 'it being an addition to existing legal instruments'.

Another respondent made a call for linking this legal instrument with certification of vulnerable sectors/services/products, which would provide consumers with a choice; e.g. the buyer that buys non-certified products or services, knows that this involves risks, including the risks to be criminalised.

Some believed that the legal provision might lead to more reporting by clients of sex workers about malpractices, also possibly as a way to avoid criminal responsibility afterwards. Others actually thought that exploited and trafficked persons would actually no longer be reported and reporting would severely diminish as those that can report risk to be criminalised. Some stated that persons that make knowingly use of exploitive services/labour would most likely not be the ones that report a crime. Several interviewees mentioned the general low reporting of malpractices by clients of sex workers, even though generally being aware of signals of human trafficking/labour exploitation.

Impact on Prosecution

It was generally believed that the offence would lead to only very few or no prosecutions. It was stated that because of the little awareness, too little resources and difficulties to proof that the person knew about the exploitation/trafficking practices, the offence would be hardly used. One respondent clearly stated (RO) that it would not be a priority to prosecute clients of services that might foster human trafficking, as there is already too little time and too little resources for combating THB in general, mentioning that in particular also the large joint investigations related to cross border cases require a lot of time and investment from law enforcement.

It was also questioned by another respondent: If more investigative capacity would be needed for this new criminalization: where the resources would be taken from, as resources are scarce and choices have to be made and there is fear that this would lead to even less human trafficking investigations and prosecutions.

In most countries there are indeed currently hardly no cases prosecuted under this article, so jurisprudence is lacking. It was stated that criminalisation of those that knowingly make use of the

services of exploited persons, is even more difficult than proving human trafficking. The claim that criminalisation of knowingly use contributes to prosecution of human trafficking was therefore debated and doubted by nearly all interviewees.

It was also reported that laws criminalizing clients of sex workers are often disproportionately enforced and funded on the costs of investigation of severe exploitation and human trafficking in the sex industry. As a result sex workers, not clients, incur the majority of profiling, surveillance and policing under these measures, not only while working but also in their day-to-day lives, whilst perpetrators of the crime of human trafficking have not been prosecuted.

Impact on those that provide the services – trafficked and exploited persons – can we call it a human rights based approach?

Also the impact on the rights for trafficked persons was felt unclear. Nearly all experts believed that ‘the victim won’t be better off with this criminalisation’ (also the proponents of the criminalisation confirmed this). Some respondents stated not to believe that the offence would give victims more rights. It was questioned: what rights victims could claim after someone is being convicted of ‘knowing use’, especially in case trafficking was not proven. In the latter it was doubted if ‘victims’ could then claim any rights.

Some felt that it could be harmful for victims, who now might have to testify in court as witness to prove the knowing use, e.g. related with cases against the buyers of their services and that this could lead to secondary victimization. References were also made to the fact that criminalisation measures have moved the prostitution sector further underground, due to which sex workers have even less access to information and support measures and making their work more dangerous. This could also happen with other sectors/services. Furthermore one key principle of keeping sex workers safe is that they do not have to work alone – however - working together (two or three sex workers, while one speaks the language of the country, the other may not - and thus is seen as pimp) leads often to prosecutions of sex workers themselves for brothel keeping.

Also it was stated that due diligence by clients could lead to risks for sex workers. In practical terms the clients of sex workers should be then able to access the sex workers’ personal information, including name, nationality, residence permit, date of birth- which can counter data privacy of sex workers and put them at risk of extortion from clients (taking into account the stigma that surrounds the industry). It was questioned whether this is in practical terms proportionate and safe for people working in the sex industry. Sex workers call instead that ‘due diligence’ of third parties should be established².

Should the scope of the offence be extended and binding?

Respondents feared that reasons to push for a binding provision, mainly related to moral pushes to end prostitution. In countries where the scope of the article is limited to clients of sex workers only, it was felt not realistic to extend the offence to all buyers of services or products made with exploitative labour (Austria, NL, Romania respondents) – these and many other countries do currently not comply with a possible binding future provision.

² <https://www.consumer.vic.gov.au/licensing-and-registration/sex-work-service-providers/running-your-business/safety-of-sex-workers-clients-and-brothel-employees>

One respondent (BG) felt that a binding instrument would be good, as only then countries would establish and implement such provisions. This respondent was in favour to broaden the scope of the criminal article and include all forms of THB. ““If it becomes a binding criminal offense, then we must also tackle more victims of economic exploitation”.

Respondents also saw risks, that even a provision with an extended scope, would lead to only some ‘knowing use’ to be punished; e.g. only clients of sex workers – as this is the case currently in the few countries which already have a broad criminalisation - and that decisions on who to criminalise would be influenced by ‘political and moral interests’. This risk is also expected with the proposal for a ban on forced labour products, the fact that only some products and services are banned and others – also made with exploitative labour – would not.

What about a provision without the condition ‘knowingly’?

There is currently a call from strong opponents for a binding provision to leave the word ‘knowingly’ out and criminalise also the use of trafficked persons, when there was no intention by the buyer to exploit; meaning ‘strict liability’. All interviewees we spoke with so far believed that a binding provision on EU level without the word knowingly is impossible, stating that this would be ‘entirely arbitrary’ or ‘not possible with the concept of criminal law’ and or ‘very unfair for the defence’. One respondent stated: “No, not realistic to criminalise a person if they do not realise that they commit a crime, this is also dangerous. We need to prove facts (actus reus) and the subjective element (mens rea). We thus cannot prosecute someone for something he or she did not know”

First Conclusions & recommendations

Those advocating for a revision of the directive and article 18.4 to make it mandatory to criminalise the knowing use, have been suggesting that the added value of such legislation is to ensure that those that cannot be criminalised under current human trafficking legislation, can still be punished under this legislation for facilitating or fostering human trafficking, by ‘knowingly making use of the services of trafficked persons’. These advocates claim that this would increase the amount of THB prosecutions and curb demand

However, there is not much evidence available that existing legislation on criminalising knowingly use had much impact in practice. Many suggest that the provision mainly has – and will have – a symbolic normative effect and can increase public awareness of human trafficking and behavioural change. However it seems that no information or awareness campaigns have been launched to promote this ‘normative effect’, also the ‘normative effect’ has so far not been assessed and generally hardly any impact assessments have been conducted.

If the criminal article is just to be symbolic or to be (mis) used to criminalise clients of sex workers only as a way to diminish the demand for prostitution, then a binding provision in EU law that EU MS should comply with, seems not much of an added value. Whilst many sectors currently rely on exploitative labour practices, much of the ‘demand actions’ currently taken by EU Member States have only targeted the sex work sector, and criminalized the use of sexual services as these might be exacted from victims of trafficking. Not only has this approach been inefficient at reducing trafficking, it has been found to dramatically increase violence and other human rights violations of sex workers.

If indeed as the EU THB Directive prescribes we will look at all forms of human trafficking and it is proposed to **broadening the criminal liability and criminalizing all those that knowingly use services which involve exploitation** this might prove impractical and at times impossible to enforce but can

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also be dangerous and create harm, especially if – as was suggested by EU MEPs - that ‘the user should demonstrate that all reasonable steps were taken to avoid the use of services provided by a victim’.

This creates a positive obligation on all citizens to examine working conditions under which goods were produced or service offered. Such a provision may create a situation of legal uncertainty, where anyone can be held criminally liable for buying goods, products or services for everyday use, that are produced within the global supply chain, by workers in extremely precarious and exploitative conditions (and may include trafficked persons). La Strada International therefore believes that there is no need to revise the directive on this provision. A revision of the directive which would strengthen right provisions for victims of trafficking would be supported instead by us. Instead of a binding EU provision on criminalising the knowingly use, it is needed that:

- More assessment is conducted before calling for a binding offence - EU countries, except Finland, seem never to have done any impact assessment or evaluation on the crime, neither an assessment before the legislation was introduced. Such impact assessments should also look at possible ‘collateral damage’ and harm caused for victims and (sex) workers.
- More focus should be put on how states are able to shape demand for goods and services produced by exploitative practices and trafficking. These include impact assessment of laws and policies on a range of matters, particularly on immigration policies, employment, welfare and economic development.
- More focus should also be put on fair production and delivery of goods and services; via certification of sectors, products or services, so clients have a choice what to buy and know if they buy/purchase services that are not controlled/not certified there is a risk.
- The new EU due diligence legislation, the ban on products and also the ‘criminalisation of knowingly use’ should not be used just as a political tool, to ban or criminalise certain services or products but not others. Such new legislation should include measures to secure rights and remedies for affected workers, which is currently lacking
- To ensure the normative impact, there is a need for much more awareness – those to be criminalised under current provisions, should know that they can be criminalised and under which circumstances? An offence without such awareness would have less impact.
- Clearer legal guidance is needed on how to use and interpret the offence at national level, what falls under the law and what not, also is there a need for a THB verdict first?

If the EC nevertheless still pushes for a binding provision;

- They should provide further legal guidance for legal practitioners on how to interpret and proof the offence and how it can address all forms of human trafficking. The provision should not be used or be conflated with the wish to criminalise prostitution.
- The legal guidance should make clear, whether a criminal conviction of the trafficker is a prerequisite for a ‘knowingly use’ conviction and what rights are to be granted to the victim according this offence.
- From the start the EU should carefully monitor the impact of the provision, with sufficient attention for the possible harm and negative impact, especially on the most vulnerable population such as migrant and precarious workers, racialized and marginalized communities.
- ‘Knowingly’ should remain part of the description of the provision, also to prevent that just anyone can become liable