

**ICMPD Contribution to the Public Consultation
on the revision of the EU Anti-Trafficking Directive**

Vienna, 22 March 2022

Introduction

ICMPD welcomes the opportunity offered by the European Commission to contribute to both the impact assessment and evaluation process of the *Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims* (hereinafter referred to as the 'EU Anti-Trafficking Directive').

About ICMPD

ICMPD's Anti-Trafficking Programme is celebrating this year its 20th anniversary. Throughout its 20 years of experience in the anti-trafficking field ICMPD developed an important body of knowledge through empirical studies carried out in different contexts - within as well as outside the European Union – and contributed to policy development linked to both the internal and external dimension of the EU anti-trafficking response.

ICMPD's experience in EU policy development is best demonstrated by:

1. its leading contribution to key research studies commissioned by the EC that are directly or indirectly linked to anti trafficking actions. Among others, from 2010, ICMPD and its partners led the 'Study on Typology and Policy Responses to Child Begging in the EU'¹ as well as the 'Study on reviewing the functioning of Member States' National and Transnational Referral Mechanisms'², both of which played an important role in steering a number of strategic developments in the EU Anti-Trafficking Response.
2. its spearheading role in setting up operational responses to the transnational dimension of trafficking in human beings, notably through the conceptualisation and development of the first initiatives to establish Transnational Referral Mechanisms with³ and outside⁴ European Union Member States.

ICMPD is keen to put its experience and expertise to the service of the European Commission as part of this consultative process. Our submission draws on this experience as well as on the aforementioned initiatives and research reports.

¹ ICMPD and al., European Commission, Report for the Study on Typology and Policy Responses to Child Begging in the EU, European Commission, 2012, available at https://ec.europa.eu/anti-trafficking/document/download/849047a6-3823-4b6e-813b-68468189384a_en

² European Commission, Directorate-General for Migration and Home Affairs, Gregulska, J., Healy, C., Petreska, E., et al., *Study on reviewing the functioning of Member States' National and Transnational Referral Mechanisms*, Publications Office, 2020, <https://data.europa.eu/doi/10.2837/24454>

³ ICMPD, Development of a Transnational Referral Mechanism for victims of Trafficking Between Countries of Origin and Destination (TRM EU), available at: <https://www.icmpd.org/our-work/projects/development-of-a-transnational-referral-mechanism-for-victims-of-trafficking-between-countries-of-origin-and-destination-trm-eu>

⁴ ICMPD, Guidelines for the Development of a Transnational Referral Mechanism for Trafficked Persons: South-Eastern Europe, available at: https://ec.europa.eu/anti-trafficking/icmpd-guidelines-development-transnational-referral-mechanism-trafficked-persons-south-eastern_en

The Revision Process - Preliminary Considerations

ICMPD understands that the Public Consultation has been launched in order to gather inputs from a variety of stakeholders for two distinct yet intertwined processes:

1. the *ongoing* process of evaluation and impact assessment process
2. the *potential* process of revision of the directive.

The online questionnaire that has been published reflects this dichotomy and the answers provided by ICMPD should be interpreted in this light. Indeed, and from the outset, ICMPD would like to emphasise that the four policy options that are being considered as part of the Public Consultation process will have very different consequences on the fight against THB.

Opening up the process of revision of the directive will have far reaching consequences that should be carefully assessed. ICMPD would like to draw the attention of all stakeholders on those consequences, and urge the European Commission to ensure that the important and progressive provisions of the directive, particularly those which have contributed to further advance the rights and entitlements that (potential) victims can respectively claim or exercise, are not negatively affected should the process of revision be taken forward.

It is important to acknowledge the important contribution of the Anti-Trafficking Directive to the improvement of legal, policy and operational responses to trafficking in Human Beings (THB), and reiterate that a number of challenges persist in relation to the implementation of a number of its provisions. The directive is a solid instrument that covers well the wide spectrum of measures that are required to establish comprehensive anti-trafficking institutional and regulatory frameworks that underpin operational responses.

It is in ICMPD's opinion that the focus at policy and funding level should be placed on accompanying Member States in the implementation of the most challenging provisions of the directive, particularly those linked to protection, assistance and support to victims, including child victims, at both national and transnational levels.

In addition, further work towards an increased engagement and mobilization of EU Member States at political level is also likely to yield positive results in stepping up the fight against THB across the European Union.

However, and should the evaluation and impact assessment processes conclude that a revision of the Directive is likely to bring positive results to the fight against THB within the EU as well as in externally, ICMPD would like to share a number of recommendations that cover 5 priority areas of concern in addition to the response to the Questionnaire.

Priority Area 1: Non Prosecution and Non Punishment of Victims:

Article 8 of the Anti-Trafficking Directive provides that ‘competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence’ of their being trafficked. While the introduction of the non-prosecution and non-punishment principles is welcome in the directive, the discretion left to the ‘competent authorities’ concerned to apply such principle in practice remains a concern. GRETA reports on the application of those principles in practice across the different EU Member States that were put under its scrutiny to point at the scarcity of its application. Moreover, an express mention of the different types of sanctions and/or penalties (e.g. administrative, civil and/or criminal) that are falling under the scope of application of Article 8 (even though partly addressed in Recital 14) is lacking in the body of the directive.

ICMPD strongly recommends that, should the process of revision of the directive be triggered, Article 8 be modified in such a way that competent authorities are required to not to prosecute or impose penalties on victims of THB for their involvement in criminal activities, as well as for the commission of offences that are of an administrative nature, which they have been compelled to commit as a direct consequence of their being trafficked.

Priority Area 2: Demand

The Anti Trafficking Directive currently addresses demand under its Article 18 on “Prevention” and provides that “Member States shall take appropriate measures, such as education and training, to discourage and reduce the demand that fosters all forms of exploitation related to trafficking in human beings” though with limited detail of what such measures could entail. More importantly, it encourages Member States “to establish as a criminal offence the use of services which are the objects of exploitation as referred to in Article 2, with the knowledge that the person is a victim of an offence referred to in Article 2.

Research conducted in the framework of the ICMPD project “Addressing Demand in Anti-Trafficking Efforts and Policies” (DemandAT), a project funded under the 7th Framework Programme for Research, shows that few countries have formulated explicit demand-side policies against trafficking. Importantly, the research shows that there is a lack of clarity amongst relevant stakeholders on how demand, and therefore also demand-side policies, should be understood in the context of THB.

The question of demand has been highly polarizing. In particular, demand for services that are of a sexual nature have crystallized most controversies.

While the importance of criminalising the knowing use of services provided by victims of trafficking does not appear to be the source of the problem, but rather the definition and ability for law enforcement and criminal justice responses to prove that a physical or legal person knowingly uses such services.

ICMPD recommends that any modification to the current article be made only on the basis of solid evidence and data driven research on the topic. Moreover, ICMPD strongly suggests that measures are introduced that would aim at reinforcing the duties of legal persons, particularly corporations, to put in place effective preventative measures in the fields of due diligence and accountability towards all their partners in the supply chain.

An important aspect of policies in this area therefore is to reach a better understanding of the nature and scope of demand-side policies. In developing national-level demand-side policies, MS should be encouraged to specify how particular measures will address demand. Demand for services provided through work which involves trafficking or demand for goods produced through trafficking can be addressed through various measures, including relevant penal and labour law.

The behaviour of individuals can also be influenced through a variety of other policies, including offering positive incentives for individuals and organisations to take certain actions, such as tax breaks, educating the general public with regard to labour exploitation, the use of licensing as a regulatory measure, increasing transparency in markets through the use of certification schemes and related supply chain initiatives, and including criteria related to compliance with decent work standards in procurement rules for both public and private entities.

Priority 3: Legal and Policy coherence between anti-trafficking and migration legislation

Article 11 of the EU Anti-Trafficking Directive clearly makes a case for unconditional access to assistance and support. However, this case is not applied equally if the victim is a third country national or if the victim is an EU national. Indeed, and as provided for in Article 11, such assistance and support measures for the victim applies without prejudice to Directive 2004/81/EC. This reference to the directive on Residence Permit clearly curtails access to assistance, protection and support for victims of trafficking who are not EU nationals and do not cooperate with the authorities.

ICMPD strongly recommends, should the process of revision of the directive be triggered, that the right to access to assistance and support measures is accessible to all victims, regardless of their origin and without discrimination of any sort.

Moreover, and in light of the nexus between smuggling of migrants and trafficking in human beings, particularly as a result of the collusion of human traffickers and migrant smugglers Organised Crime Groups, many refugees and other persons in need of international protection are at heightened risk of THB, with many victims of THB being identified among refugees and other people on the move. The current Ukrainian crisis testifies sadly demonstrates how topical the situation is.

Yet, the lack of coherence between Directive 2004/81/EC, the qualification directive and the Anti-Trafficking Directive is apparent. **It is therefore recommended that the EU Anti Trafficking Directive introduces provisions ensuring its coherence with the Common European Asylum System package of directives and regulations, including through the introduction of a saving clause along the lines of Article 14 of the Palermo Protocol.**

Priority Area 4: National Referral Mechanisms and Transnational Referral Mechanisms

ICMPD's experience in assessing the functioning of national referral mechanisms (NRM)⁵ and transnational referral mechanisms (TRM)⁶ within the EU and in the third countries, suggests that the

⁵ Study on reviewing the functioning of Member States' National and Transnational Referral Mechanisms HOME/2018/ISFP/PR/THB/0000ICMPD (2010) https://ec.europa.eu/anti-trafficking/system/files/2020-10/study_on_reviewing_the_functioning_of_member_states_national_and_transnational_referral_mechanisms.pdf;

⁶ Guidelines for the Development of a Transnational Referral Mechanism for Trafficked Persons in Europe: TRM-EU. Available at: shorturl.at/pvDUY

protection cycle for victims of trafficking has gaps requiring urgent solutions across the following issues: early and equal access to assistance, effective coordination of services for victims, and implementation of case monitoring.

The revision should also expressly stress the need for frontline responders and all anti-trafficking stakeholders' participating in the NRM/TRM to be **continuously trained** on the procedures in place in their countries, as well as on every adopted updates.

An important need for Member States is to seek the cooperation with the NRMs or equivalent mechanisms of the third countries that are of particular relevance for the Members States in responding to human trafficking and specifically in ensuring human rights-based protection measures for the trafficked persons, including in their return. Member States should be expressly encouraged to explore the possibilities for developing TR-based models with third countries and advised against returning trafficked persons outside such existing TRMs and specifically the NRMs of the country of return.

Member States must make additional efforts to better coordinate the actions on victims' return with the source countries as the process of return is a current challenge in the bilateral cooperation on trafficking cases. Due to lack of coordination, it is often impossible for the receiving organisation to prepare properly. Such actions could jeopardise the safety of the victim, and reflect negatively in the increased risk of re-trafficking. **Therefore, we stress upon the need of coordinated approach for transnational referral of cases, based on the principles for safe return of trafficked persons and built upon the existing national response mechanisms in the countries of exploitation and origin. A revised directive should recognise the importance of setting up or strengthening further bilateral and multilateral mechanisms for identification, protection, investigation and prosecution particularly between transit and destination countries along the migration routes to Europe**

Priority Area 5: Gender Sensitive Approaches:

The most identified form of trafficking is sexual exploitation of women and children. This had an impact on the design of the anti-trafficking responses of EU MS that created a "paradox of vulnerable group"- girls and women are "particularly vulnerable", but often men and boys are not considered "vulnerable groups" and might be denied access to protection and essential services, rendering them more vulnerable to trafficking and other abuses.

While acknowledging the gender-specific phenomenon of trafficking in its Recital 3, **ICMPD recommends that a revised EU Directive should include in its Articles that MSs should ensure a gender-sensitive approach that provides equal focus of the anti-trafficking policies and measures on all victims and on all forms of exploitation. This includes ensuring identification of and appropriate and tailored assistance and support for girls, boys, women and men victims of trafficking, as well as LGBTQ+.**