



European
University
Institute



MIGRATION
POLICY CENTRE

doi:10.2870/188504
ISBN 978-92-9084-284-2
ISSN 2363-3441

ROBERT
SCHUMAN
CENTRE FOR
ADVANCED
STUDIES

May 2015
2015/09

EU Anti-Trafficking Policies: from Migration and Crime Control to Prevention and Protection

*Lucrecia Rubio Grundell, Social and Political Science
Department, EUI*

Abstract

Trafficking in Human Beings (THB) emerged on the EU's agenda in the mid-1990s. Since then, it has been the subject of increased media attention, intense political cooperation and much legal regulation. Despite three decades of commitment to maximizing co-operation in the fight against THB however, facts regarding prevention, prosecution and especially protection remain extremely discouraging. The upcoming adoption of the European Agenda on Migration therefore, which points to the "fight against criminal human trafficking networks" as one of its four priorities, is promising. It may mark the stepping up the EU's efforts to implement the existing tools and cooperation in dealing with THB. Even more so, when the transitional period for the entry into force of the Lisbon Treaty's provisions regarding Justice and Home Affairs expired in December 2014. This policy brief argues however, that even though the absence of internal borders renders a European approach indispensable, the management of migration flows from third countries is not an adequate framework within which to tackle THB. In fact, the incorporation of THB into the category of migration, especially irregular migration, is arguably one of the main reasons for the lack of success of EU anti-trafficking policies to date. A revision of EU anti-trafficking policies should ensure a more inclusive decision-making process, a focus on exploitation and not on the irregular crossing of borders, a harmonization of penalties and the guarantee that measures regarding protection are made compulsory, non-discriminatory, unconditional and adequate. Moreover, the root causes of THB must be addressed and this must include a review of the impact of EU migration laws themselves.

Key words: European Agenda for Migration, Trafficking in Human Beings, EU-anti-trafficking policy

POLICY
BRIEF



Trafficking in Human Beings (THB) re-emerged as a matter worthy of regional and international concern in the 1970s. Since then, it has become the subject of increased media attention, intense political cooperation and much legal regulation. Though international instruments on the matter existed earlier in the twentieth century, these focused exclusively on combating the “white slave trade”: the procurement of young white women by force or deceit in Europe to be brought to the European colonies for the purpose of prostitution¹. Their narrow focus and traditional ideological substrata rendered these instruments inadequate in dealing with contemporary forms of THB, which had become increasingly complex and multifaceted with globalisation. As a complex phenomenon rooted in global patterns of economic disparity, labour precariousness and gender inequality, as well as in the increasingly stringent immigration policies and de-regulated markets of the global north, THB is analysed today from a variety of different and sometimes competing perspectives. Consequently, there is little consensus among scholars, policy-makers and activists regarding its nature and

possible solutions. In fact, important controversies exist with regards to whether the consent of the trafficked person is to be taken as a constitutive element of THB, and with its traditional focus on sexual exploitation.

Internationally recognised definition

It was not until the year 2000 that an internationally recognised definition was agreed upon in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, which supplemented the United Nations (UN) Convention against Transnational Organised Crime. The Protocol defines THB with three constituent elements: process, means, and purpose. It distinguishes between people aged 18 and over, for which all elements need to be present to constitute a case of THB; and children, for which the use of coercive means is not necessary. In both cases, the illegal crossing of international borders is not a defining element: THB can take place when no borders have been crossed, or when they have been crossed legally.

PROCESS (The...)	MEANS(By...)	PURPOSE OF EXPLOITATION(For...)
<ul style="list-style-type: none"> Recruitment Transportation Harbouring Receipt of persons 	<ul style="list-style-type: none"> Threat Force Coercion Abduction Fraud Deception Abuse of power or vulnerability Giving or receiving of payment 	<ul style="list-style-type: none"> Prostitution or other forms of sexual exploitation Forced labour or services Slavery and similar practices Servitude The removal of organs

¹ Worth mentioning are the international agreement for the Suppression of the White Slave Trade adopted in 1904, the International Convention for the Suppression of the Traffic in Women of Full Age of 1933, and the United Nations (UN) Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others in 1949.



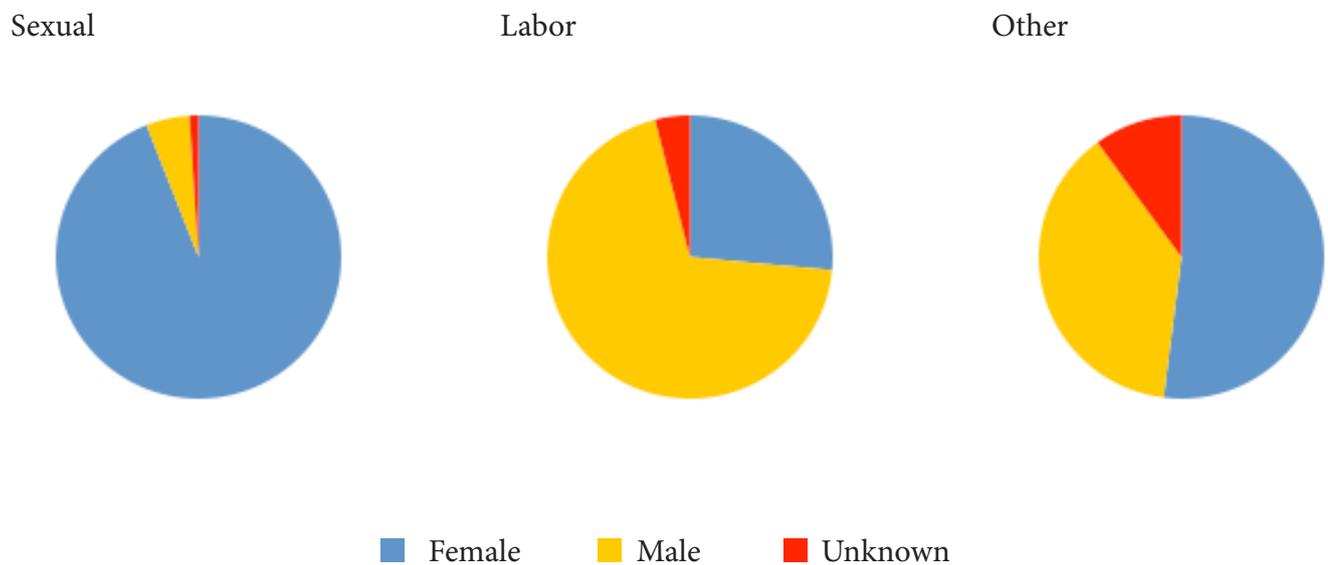
Current state of affairs in the European Union

The early phases of European integration were characterised by the relative absence of policy action addressing THB. It was only after the mid-1990s that EU authorities realised that a common EU approach to THB was indispensable. The increasing competences of EU institutions, the growing presence of concerned actors and the rising preoccupation with internal security, external border control and transnational organised crime therefore, gave way to the sudden and unprecedented adoption, extension and consolidation of anti-trafficking policies. Despite three decades of commitment to maximizing co-operation in the fight against THB however, facts regarding prevention, prosecution and especially protection remain extremely discouraging.

The 2015 Eurostat report estimated that over 30,000 trafficked persons were identified in the EU in the years between 2010 and 2012. Of that total, 65% were EU citizens. 69% were trafficked for the purpose of sexual exploitation, of whom 95% were female, while 19% were trafficked for labour exploitation, 71% of whom were male. Fewer than 27% received at least some form of assistance, while of the 7,704 people that were prosecuted for THB, only 2,700 were convicted. 73% of those prosecuted were EU citizens.

However, data concerning the magnitude of the phenomenon, as well as temporal and geographical comparison in this regard must be interpreted with caution. After all, apparently increasing numbers might be the result of better identification or measurement practices. This notwithstanding, available data on identified trafficked persons does allow us to conclude that THB into and within the

Figure 1: Registered victims by type of exploitation and by gender (2010-2012). (granted and renewed)



Source: Eurostat 2015 (Based on data from 22 Member States which provided data for all three years)



EU exists. We also see that it is clearly a gendered phenomenon and that anti-trafficking endeavours seem to be inefficient.

The upcoming adoption of the European Agenda on Migration is a good moment to step up the EU's efforts in the implementation of existing anti-trafficking measures. Indeed, the European Commission has pointed to the fight against criminal human trafficking networks" as one of its four priorities in this area. However, as this policy brief will argue that, even though the absence of internal borders renders a European approach indispensable, the management of migration flows from third countries is not an adequate framework within which to tackle THB. In fact, the incorporation of THB into "migration", especially irregular migration, is one of the main reasons for the lack of success of EU anti-trafficking policies.

The European Union's legal and policy framework

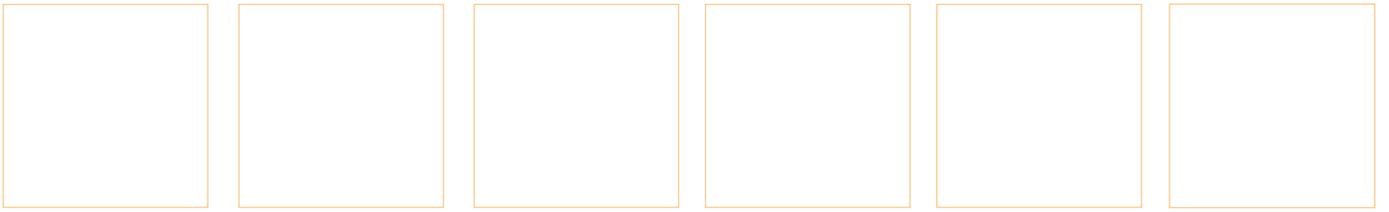
Legal Base

THB is related to a wide number of issues over which the EU has jurisdiction. But most EU anti-trafficking measures have been based on EU competences in the field of **police and judicial cooperation in criminal matters**. EU institutions were granted such competences by the 1993 Maastricht Treaty. This treaty created the third pillar and allowed for a discrete form of supranational cooperation in matters of border control, asylum, migration and police and judicial cooperation. Since then, such competences have been successively extended, first by the 1997 Amsterdam Treaty, which created the

Area of Freedom, Security and Justice (AFSJ), and later by the 2007 Lisbon Treaty, which subjected all matters of police and criminal cooperation to the ordinary co-decision legislative procedure by formally abolishing the pillar structure. Up until the expiration of the transitional period of the Lisbon Treaty in December 2014 therefore, EU anti-trafficking measures were subjected to the predicaments of the third pillar itself, which has been characterised by the overwhelming influence of Member State interests to the detriment of both EU institutions and civil society organisations, as well as by an exceptionally complex decision-making process.

Legal and Policy Framework

The first legal response to THB on behalf of EU institutions was the **1997 Joint Action to Combat Trafficking in Human Beings and the Sexual Exploitation of Children**, in which Member States agreed to review their legislation in order to make THB for sexual exploitation a crime and to ensure appropriate penalties through enhanced police and judicial cooperation. The Joint Action had the primary stated aim of contributing to the fight against certain forms of unauthorised immigration and to improving judicial cooperation in criminal matters. It focused exclusively on THB for the purpose of sexual exploitation, and it did not include a clear definition of the offence. It, thus, conflated the different offences of THB, smuggling and sexual exploitation. In addition, it did not include any specific obligations with regards to assistance or protection.



In contrast, the first policy instruments developed at the EU level – like the **STOP Program** adopted in 1996, or the multi-annual **Daphne programs** initiated in 1997 – had a strong human rights perspective. This was the case as a result of the active involvement of feminist anti-trafficking MEPs and civil society organisations in their design and implementation.

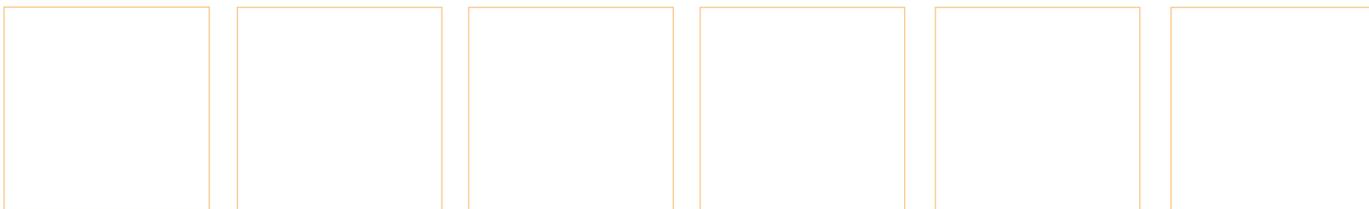
Given that all provisions were optional for Member States, insofar as Joint Actions were mere recommendations with no legally binding effects, the Joint Action was replaced by the **2002 Framework Decision on Combating Trafficking In Human Beings**. The Framework Decision provided for the first time a clear definition of THB and specified the role of consent in line with the UN's Protocol. In addition, it obliged Member States to take the necessary measures to ensure that THB was punishable by effective, proportionate and dissuasive criminal penalties. These had to include imprisonment for no less than eight years in the case of aggravated circumstances. Some of the shortcomings of the preceding instrument persisted, however, as the focus was still on migration control and criminal law provisions. Moreover, the Framework Decision only covered the cases of THB for sexual or labour exploitation, thus falling short of regulations at the international level; and established only minimum standards for offences involving aggravated circumstances, resulting in the adoption of different penalties in different Member States. Lastly, no mention was made of prevention, and only a brief provision referred to the need for appropriate assistance, which was

limited to children. Moreover, the absence of any instrument for monitoring, and the lack of any form of accountability with regards to non-compliance meant that, though legally binding, the Framework Decision had relatively few repercussions for the regulation of THB in Member States.

The absence of prevention and protection measures was mirrored in the policy framework developed since the early 2000s, which became more closely linked to the development of the AFSJ. The **Hague program** adopted by the Council in November 2004 and the Stockholm program that replaced it in 2009 both situated THB next to irregular migration, smuggling, terrorism and other forms of transnational organised crime as newly urgent security threats.

In the years that followed, two crucial instruments were adopted as a response to the deficiencies of previous instruments. These constitute the current legal framework of the EU with regards to THB.

The first is **Directive 2004/81/EC on residence permits issued to third-country nationals who are victims of THB or the subjects of smuggling**. Its fundamental objective is to encourage trafficked and smuggled persons to denounce their traffickers and smugglers by providing them with protection and assistance during criminal proceedings. As such, the Directive obliges Member States to give trafficked persons a “reflection period” in which to decide whether or not they wish to cooperate with authorities. During this period, trafficked persons cannot be expelled, and Member States are required



to provide them with an appropriate standard of living, which includes access to accommodation, emergency medical and psychological treatment, social welfare and translation services. In addition, the Directive requests Member States to consider granting trafficked persons that do collaborate, a temporary residence permit for a minimum of six months or the duration of the criminal proceeding, as well as access to the labour market, to vocational training and to education during that time.

These are unprecedented measures in the protection of trafficked persons, and mark a clear departure with regards to previous instruments. However, it is important to note that the Directive is not legally based in Art. 83 TFEU regarding cooperation and the approximation of rules on criminal matters. Rather, it is based on Art.36(3) which grants the EU competences in the field of irregular migration. Consequently, the Directive is not a human rights document, or a victim protection scheme, but an instrument designed to combat irregular migration.

First, therefore, the granting of a reflection period is made conditional upon the trafficked person having ceased all contact with the alleged trafficker. In addition, no minimum duration for the reflection period is stipulated, and “appropriate measures” with regards to assistance and protection are not defined, leaving both to the discretion of Member States. Moreover, competent authorities may decide to put an end to the reflection period if the trafficked persons actively and voluntarily renew contact with the alleged trafficker; or for reasons related to public policy or national security. Similarly, the granting of a residence permit for a minimum period of six months is made conditional upon trafficked persons showing clear indications of their

intention to cooperate in criminal proceedings. And, as in the case of the residence permit, the conditions and procedures under which access to education or the labour market can be achieved are left entirely to the discretion of Member States. Moreover, competent authorities may put an end to the residence permit in advance. They can do so not only if the trafficked person renews contact with the alleged trafficker or for reasons of public policy or national security; but also if the authorities believe that the trafficked person’s cooperation has ceased or become fraudulent. They can do so, too if the criminal proceedings are interrupted, and in every case, when criminal proceedings have finished. In both cases, termination entails that the ordinary aliens’ law of the relevant Member State applies, which means that trafficked persons are likely to face enforcement actions derived from crimes they may have incurred as a result of their trafficked status, or more commonly, expulsion or deportation as a result of the infringement of immigration laws.

The second instrument is **Directive 2011/36/EU on preventing and combating THB and protecting victims**, which replaces the 2002 Framework Decision. It was the first instrument to be adopted in the AFSJ under the new rules established by the Lisbon Treaty. It was also the first to clearly and explicitly adopt an integrated, holistic, human rights, victim-centred and gender-sensitive approach to THB. As such, the directive includes a definition of THB in the exact terms contained in the UN’s Protocol, though adding the exploitation of begging or other forms of criminal activity to the Protocol’s open ended list. In addition, it introduces a minimum common threshold of five years for the maximum penalty for all trafficking-related offences, and elevates the minimum threshold for aggravated



offences form eight years to ten. More importantly however, the Directive introduces provisions regarding prevention, which oblige Member States to set up effective measures to prevent offences and to deter the demand for activities resulting from THB. It, also, contains an unprecedented focus on the protection and assistance of trafficked persons.

In this regard, Member States are required to establish appropriate measures aimed at the early identification of trafficked persons. They must provide, too, assistance and support to “presumed victims”, that is, when the competent authorities have reasonable grounds to believe that a person was subjected to THB. Moreover, a minimum period of 30 days is established for the reflection period, and Member States are obliged to provide assistance before, during and after criminal proceedings, without such assistance being conditional upon collaboration. When trafficked persons do collaborate in criminal proceedings, however, assistance is upgraded to include access to legal advice and representation, possibly free from charge if the trafficked person cannot afford it, and with the opportunity to claim compensation. Lastly, the Directive introduces a radical innovation in the form of a non-prosecution and non-penalisation clause with regards to those criminal activities which they have been compelled to commit as a direct consequence of THB.

It is important to note, however, that several factors may hinder the radical potential of these provisions. First, there is the lack of precision of many expressions, like that of “reasonable grounds” or “vulnerable position”, together with the fact that provisions regarding penalties only established minimum common thresholds for maximum penalties. This

entails that many aspects of the transposition of the Directive into national law is left to the discretion of Member States. Second, the unconditional nature of the protection offered to trafficked persons is limited to the Reflection Period, after which protection is left to the discretion of Member States. The same is true of the non-penalisation clause, which only requires Member States to provide for the possibility of non-punishment. In addition, the Directive states that such provisions shall not prejudice the 2004 Directive, which means that Residence Permits are still conditional upon cooperation in criminal proceedings.

It is worth mentioning that with regards to the transposition and effective implementation of both Directives, the European Commission has repeatedly expressed its discontent. In **2013 thirteen Member States were subject to infringement procedures** because they had failed to notify the Commission of transposing legislation regarding Directive 2011/36/EU². In accordance with Article 23 of the Directive, the Commission has to report on the state of transposition in April of this year (2015).

2 These countries were Austria, Cyprus, France, Germany, Greece, Ireland, Italy, Luxemburg, Malta, Netherlands, Portugal, Slovakia and Spain.



Need for reform: the persistence of a migration and crime control focus

From the above we may conclude that the legal framework currently in force marks a significant shift in EU anti-trafficking measures: they have moved from a criminal and migration control approach to one that also includes human rights concerns. However, THB in the EU is still predominantly treated as a case of **illegal border crossing** like irregular migration or smuggling; and as a **serious form of transnational organised crime** which, like terrorism, drugs and arms trafficking and cyber-crime, poses unprecedented threats to the stability, security and welfare of the EU and its Member States. As such, the EU's anti-trafficking strategy still prioritises a **repressive law enforcement approach centred on prosecution**. It still focuses predominantly on the **cross border dimension of THB**, placing undue emphasis on the element of transportation rather than exploitation, of which states, and not exploited individuals, are the primary victims. The deleterious consequences that this has for the protection of trafficked persons, the prosecution of traffickers and the prevention of THB as a whole, cannot be overstated.

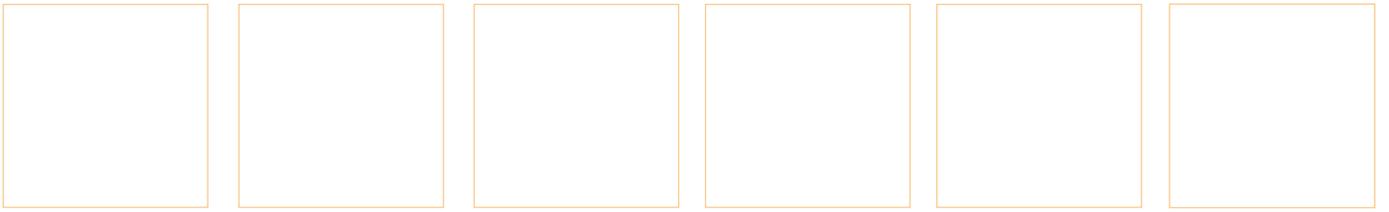
a. Protection:

A focus on migration and crime control has the fundamental consequences of **subordinating the protection of trafficked persons to the prosecution of criminals**, whether traffickers or irregular migrants. However, it also conditions the extent and nature of protection itself. That THB is treated predominantly as an issue of illegal border crossing together with irregular migration and smuggling **generates the need to adequately and indubitably distinguish «real» trafficked persons from “bogus” ones**, insofar as smuggled persons

and irregular migrants are considered criminals for having consented to the irregular crossing of borders and therefore knowingly infringed migrations laws. The result is a reduced conception of trafficked persons that relies heavily on a normative narrative of victimhood, which, in turn, is centred on the absence of consent. Ultimately, this conception collapses the complexities of the trafficking process into a simple dichotomous representation of forced victims and voluntary criminals. This, in turn, **creates hierarchies** of protection that legitimise the protection of some against the criminalisation of others. As a result, much of what is adopted in the name of anti-trafficking struggles has troubling consequences for many people, especially irregular migrants and migrant sex workers. The **protection of trafficked persons is also compromised** however, as determining the presence or absence of consent in real trafficking cases is not easy, and suspicions of criminality still hover over narratives of exploitation and abuse. As a result, only the most extreme cases of victimhood, determined according to accepted scripts of violence and coercion qualify for protection, provided, of course, that protection does not undermine the protection of the EU from unwanted migration and crime.

b. Prosecution:

As THB is conceptualised as one of the most serious forms of transnational organised crime, and addressed fundamentally through police and judicial cooperation, there has been the tendency to over-criminalise the phenomenon; a tendency which became even more prominent with the 2011 Directive, in which minimum penalties were toughened. This has given way to serious doubts about the proportionality of the new provisions. In addition, however, EU anti-trafficking regulations establish only minimum common thresholds for



maximum penalties and in the case of aggravated offenses, thus **allowing for the adoption of very different penalties in each Member State**. This absence of harmonisation in relation to penalties means that traffickers can still take advantage of the legal disparities in the regulation of THB in the EU, rendering a specific EU approach ineffective.

c. *Prevention:*

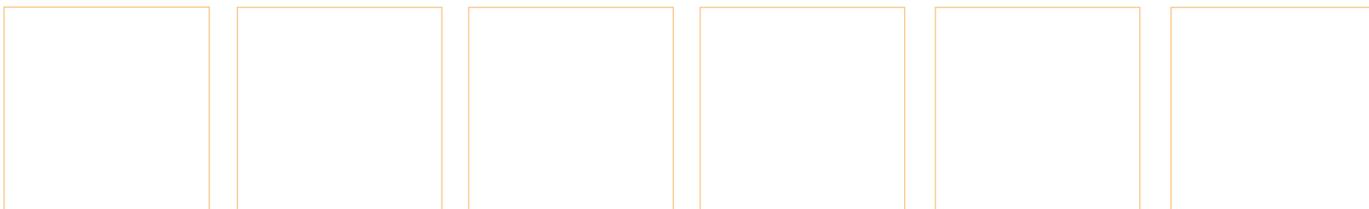
A criminal justice focus renders THB **an individual crime, the root causes of which are to be found in the profit-seeking practices of traffickers and of those who generate demand** for the exploitation of trafficked persons. This explains why the EU's prevention schemes are centred on the stricter enforcement of border controls and on the targeting of demand. Though measures to address the demand of trafficked persons are important, the individualisation of THB is often accompanied by a racialisation of the culprits, identified primarily as foreign, non-EU criminal gangs. This runs counter to the data that shows most identified traffickers to be EU citizens, but also contributes to the empowerment of anti-immigrant and xenophobic sentiments. Moreover, **such an approach depoliticises and conceals the broader structural causes of the phenomenon** such as the global patterns of economic disparity, labour precariousness and gender inequality; and forecloses the possibility of assessing the space of economic and social vulnerability opened up by EU policies. Concretely, the EU's increasingly stringent immigration policies, and the unprecedented levels of economic de-regulation that characterise the EU's internal market, which has not been paralleled with social protection in the form of harmonised labour rights.

2 Ideas for Policy Action:

The present moment is critical for the revision of EU anti-trafficking policies as the transitional period for the entry into force of the Lisbon Treaty's provisions regarding JHA expired in December 2014. In what follows therefore, suggestions with regards to the possible direction that revisions could take are presented, with a focus on five fundamental objectives.

An Inclusive Policy-making Process: The predominance of Member States' interests in the EU's anti-trafficking policies needs to be counterbalanced with a truly pluralistic consultation process. Given the contested nature of THB, it is important to involve a broad spectrum of individuals from different backgrounds. Therefore, anti-trafficking civil society organisations and NGOs, who have extensive knowledge of the reality of THB, must be included in all stages of the policy-making process, from agenda-setting to implementation. It is crucial, however, that measures are taken to ensure that the EU's civil society interface does not systematically favour certain voices from the anti-trafficking scene, while excluding others.

A Focus on Exploitation: the defining element of THB is not the irregular crossing of borders, but transportation for the purpose of exploitation. As such, anti-trafficking policies in the EU should emphasise exploitation as the defining element of THB, without distinguishing between types of exploitation, and focusing equally on curtailing instances of the latter from a rights-based approach. Not only would this guarantee a more effective protection of trafficked persons who would face a smaller risk of being re-victimised by the state. It would also reduce the focus on THB as posing



a threat to the security of Member States, and consequently, reduce the risk of anti-trafficking measures surreptitiously pursuing anti-immigration or anti-prostitution goals. **A fundamental step in this regard, therefore, would be to treat THB outside of the European Agenda for Migration.**

A harmonisation of penalties must be achieved in order to guarantee that traffickers cannot use legal disparities to their advantage. Such penalties, however, must respect the legal principle of proportionality, in particular taking into consideration the harm imposed to trafficked persons, together with the benefits derived from trafficking.

Measures regarding protection must be made compulsory, non-discriminatory, unconditional and adequate:

All trafficked persons should be equally entitled to access assistance, protection and justice measures regardless of their gender, age, nationality or field of work. In addition, the provision of such mechanisms must be considered a right of trafficked persons and as such should not require any form of compensation on their behalf, whether monetary or in the form of collaboration. Moreover, their provision ought to be guaranteed by national welfare and judicial systems, and not by the altruistic work of civil society organisations. To be adequate, such measures should take into consideration the specific needs of trafficked

persons, with a special focus on the possible gender, race, sexuality and ability-based discriminations that can hinder the non-discriminatory access to aid and justice. Lastly, such provisions must seek to foster the empowerment of trafficked persons themselves. Provisions must recognise the agency of trafficked persons while helping them to act on their own behalf. In this regard, it is fundamental that, within a human rights approach, the notion of the rights-bearing subject is problematized, questioning the western prejudices that underpin it. Contextual specificities must be taken into account in order to promote universal rights rather than the imposition of liberal western values.

Root causes of THB must be addressed beyond border control and reduction of demand to focus on the gendered and racialised nature of labour migration and working conditions in multiple sites and sectors. The conditions of vulnerability that favour THB must also be addressed, actively ensuring, first, that neither the EU's migration regulations nor regulations adopted to develop the AFSJ compromise human rights; and, second, that labour rights are not undermined by the protection gap that is generated when negative economic integration resulting in market de-regulation within the EU is not met with a parallel political integration strengthening EU-wide social protection.

Migration Policy Centre

The Migration Policy Centre at the European University Institute, Florence, conducts advanced research on global migration to serve migration governance needs at European level, from developing, implementing and monitoring migration-related policies to assessing their impact on the wider economy and society. The Migration Policy Centre is co-financed by the European Union.

Migration Policy Centre Robert Schuman Centre for Advanced Studies - European University Institute - Via Boccaccio 151 I-50133 Florence Italy.

Tel: (+39) 055 4685 817

Fax: (+39) 055 4685 770

mpc@eui.eu



Complete information on our activities can be found online at: www.migrationpolicycentre.eu/