

Offenses of Human Trafficking in the European Union

Ion Rusu¹, Dorin Matei²

Abstract: Within this paper there were briefly examined the trafficking in persons offenses the two European legislative acts, namely the Framework Decision 2002/629/JHA and the Directive 2011/36/EU, which repealed the first instrument, and some aspects of legal content of offenses of the two acts. The innovation and interest elements are represented by the comparative examination and highlighted by the incriminations development, thus identifying new ways to prevent and combat them. The work can be useful to those practicing in this field and in the academic environment or to the European or Romanian legislator.

Keywords: organized crime; punishment; incitement; complicity

1. Introduction

Trafficking in human beings represents, according to Directive 2011/36/EU, a serious crime, often committed in the context of organized crime, a serious violation of fundamental rights, which is expressly prohibited by the Charter of the Fundamental Rights of the European Union.

Since the last century, the human trafficking offenses have evolved unprecedented, its number being in continuous growth, an aspect which has led to the need to prevent and combat the phenomenon more effectively.

The examination of the causes and conditions that led to this situation has highlighted a number of shortcomings in the system of judicial cooperation in criminal matters between the Member States and the absence of some European legal instruments meant to ensure a strong reaction from the judicial authorities of the Member States.

In this context, particularly complex in order to prevent and combat the phenomenon more effectively, to ensure an area of freedom, security and justice, at

¹ Senior Lecturer, PhD, Danubius University of Galati, Faculty of Law, Romania, Address: 3 Galati Blvd, Galati, Romania, Tel.: +40372 361 102, Fax: +40372 361 290, Corresponding author: ionrusu@univ-danubius.ro.

² Assistant Professor, PhD in progress, Danubius University of Galati, Faculty of Law, Romania, Address: 3 Galati Blvd, Galati, Romania, Tel.: +40372 361 102, Fax: +40372 361 290, e-mail: matei.dorin@univ-danubius.ro.

the level of the European Union, it was adopted the Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in persons¹ and an EU Plan on best practices, standards and procedures for combating and preventing trafficking in persons² and the Stockholm Programme - An open and secure Europe serving and protecting citizens³, granting a clear priority to combating trafficking in persons.

The experience in the recent years, after the adoption of such European legal instruments, has shown that the legislative act framework, which ensures the protection of victims of trafficking in persons and thus criminal sanctioning of the perpetrators of such crimes (the Framework Decision 2002/629/JHA), stopped proving its effectiveness, especially due to the sophisticated methods of breaching the law, identified and applied by the organized criminal groups.

Against this background and in order to improve the increasingly complex activities on prevention, and especially combating human trafficking it was passed another legislative act which repealed the Framework Decision 2002/629/JHA, namely Directive 2011/36/UE of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.⁴

In this paper we proceed with a brief examination of human trafficking offenses provided for in the original European legislative act respectively Framework Decision referred to above, of those provided for in the current European legislation, namely Directive 2011/36/EU, with some critical observations and proposals *de lege ferenda*.

2. Offenses under the Framework Decision 2002/629/JHA

According to the provisions of article 1 paragraph (1) of the mentioned European legislative act called “Offences relating to trafficking in persons for labor or sexual exploitation”, each Member State shall take the measures necessary to act so that the following actions would be punishable: the recruitment, transportation, transfer, accommodation, the subsequent receipt of a person, including exchange or transfer of control over it:

- a) where it is used the coercion, force or threat, including abduction, or
- b) where it is used deceit or fraud, or

¹ Published in OJ L 203, 01.08.2002, p. 1.

² Published in OJ C 311, 09.12.2005, p. 1.

³ Published in OJ C 115, 04.05.2010, p. 1.

⁴ Published in the Official Journal of the European Union L 101/2 of 15.4.2011.

- c) where it is an abuse of power or of vulnerability situation so that the person has no real and acceptable alternative but to submit to the abuse or
- d) when providing or receiving payment or benefits in order to achieve the consent of a person having authority over another,

Under the purpose of labor exploitation or services of that person, including under the form, at least, of work or forced or compulsory services, slavery or practices similar to slavery or exploitation of prostitution of others or other forms of sexual exploitation, including pornography.

In paragraph (2) it is provided the “consent of a victim of trafficking in persons to the intended or actual exploitation, it shall be irrelevant where it was used by any of the means under paragraph (1).

Under the provisions of paragraph (3) “when the actions referred to in paragraph (1) relate to a child it shall be a punishable as human trafficking offense even if it was not used any of the means provided for in paragraph (1).

In paragraph (4) it states that inciting, aiding abetting or attempting to these offenses will be punished.

Regarding the sanctions, the European legislative act provides that each Member State will ensure that the offenses referred to should be punishable by effective criminal sanctions, proportionate and dissuasive penalties, which may entail the extradition.

Within the article 3, paragraph (2) there are listed several aggravated options that will be punishable by a sentence of at least 8 years, respectively:

- the offense endangering the victim's life deliberately or through serious negligence;
- the offense was committed against a victim who was particularly vulnerable;

In this regard, in accordance with stipulations of the European legislative act, the victim is considered to be particularly vulnerable, at least when it was not accomplished the age of sexual majority under the national law and the offense was committed for the purpose of exploitation of the prostitution of others or other forms of sexual exploitation, including pornography;

- the offense was committed by the use of serious violence that has caused particularly serious harm to the victim;
- the offense was committed within a criminal organization as defined in the Joint Action 98/733/JHA, apart from the penalty level referred to therein.

From the examination of the provisions of the European legislative act, some observations can be drawn, namely:

- In terms of the objective side, the offenses are provided in several versions type, i.e. the recruitment, transportation, transfer, accommodation, subsequent reception, passage or transfer of control over the person; for the existence of the offense it is required stating only a single action of those listed by the legislator;
- All specified actions are part of the structure of the objective side of such offense; it should be achieved by one of the methods expressly provided for in article 1 paragraph (1), letter a) - d) of the European legislative act (Framework Decision 2002/629/JHA);
- in the event of obtaining the consent of the exploited person, it has no relevancy on the existence of the offense if it was used one of the means used in the text;
- in terms of the subjective side, the offense will exist only if the actions which are in the objective side structure are achieved in labor or sexual exploitation of the passive subject;
- the participants will be punished, respectively the instigators and accomplices, and also the attempt;
- under the punitive aspect, we find that the legislator under the typical forms of crime did not impose a minimum or maximum punishment, while in the aggravated one it has mentioned the compulsoriness of sanctioning with imprisonment of at least eight years;
- the children, who in the acceptance of the legislator are people who have not turned 18, enjoy a preferential legal treatment, meaning that when there are victims of trafficking in persons, the crime will exist even if it was not used any of the means set forth expressly in the text of the incrimination.

The criticism that is required is that in the event of the performance of some of the actions specifically provided in the text, entering in the content of the objective side, if the goal is not that of labor or sexual exploitation, the offense cannot be attributed to its authors. We find therefore a limitation of incrimination, only to the two main forms of exploitation of a person, namely labor or sexual one, which represents a certain restriction, with serious consequences in the practice of the judicial authorities of the Member States.

Although in the mentioned legislative act it presents many flaws, it has its importance, as it meant the beginning of the fight against human trafficking in the European Union.

3. Offences under Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on Preventing and Combating Trafficking in Persons and Protecting its Victims, and Replacing the Council Framework Decision 2002/629/JHA

The experience accumulated in this field has highlighted the proliferation of the phenomenon in the European Union and the emergence of new manifestations of the organized crime.

Based on these considerations, and the seriousness of these crimes, at the level of the EU it was adopted a new law that is more complete and it includes a variety of ways of preventing and combating the crime in this area.

The main novelties brought by this new legislative act replacing the Framework Decision 2002/629/JHA of the Council are:

- the concrete formulation of the content of the trafficking in persons offense;
- establishing concrete penalties, higher compared to the old legislative act, in the case of type variants as well as in the cases of the serious ones;
- establishing clear rules on criminal liability of the legal entity which refer to: conditions, penalties, the seizure and confiscation, etc.
- rules concerning the investigation and prosecution competences;
- assistance and support to victims;
- protection of trafficking in persons victims in criminal investigations and proceedings;
- assistance, support and protection of child victims of trafficking;
- prevention of offenses and victimization.

Under the provisions of article 2 of the mentioned European legislative act (Directive 2011/36/EU), Member States shall take measures in order to incriminate the following acts: recruitment, transportation, transfer, accommodation or receipt of persons, including exchange or transfer of control over people in question of threat or use of force or other forms of coercion, of abduction, fraud, deception, abuse of power or taking advantage of the vulnerability or of giving or receiving payments or benefits to achieve the consent of a person having control over another person, in order to operate them.

The operating period is interpreted by the European legislator in the paragraph (3), it includes at least the exploitation of the prostitution of other people or other forms of sexual exploitation, forced labor or services, including begging, slavery or practices similar to slavery, servitude, exploitation of criminal activities, or the removal of organs.

Regarding the consent of a victim, whether intended or actual, it is irrelevant when any of the above mentioned means were used.

In the case where the mentioned facts are against a child, they constitute the crime of human trafficking, even if it was not used any of the means provided in article 2, paragraph (1) of the legislative act under examination (Directive 2011/36/EU).

Such European legislative act adopted in 2002, inciting, abetting and attempt will be punished.

As regards the criminal penalties, it is provided that for the mentioned facts all Member States shall take measures to punish them with a sentence whose maximum limit is at of least 5 years.

In addition to these standard versions, in the article 4 there are provided also some aggravated variants punishable by a sentence whose maximum must be at least 10 years, respectively, when the offense:

- a) was committed against a victim who was particularly vulnerable, which in the context of this Directive, there are included at least child victims;
- b) has been committed in a criminal organization within the meaning of Framework Decision 2008/841/JHA of 24 October 2008 of the Council on the fight against organized crime¹;
- c) endangered the life of the victim intentionally or through serious negligence;
- d) has been committed serious violence or has caused particularly serious harm to the victim.

It will also be considered an aggravating circumstance also committing a criminal offense by a public servant in the performance of duties.

In order to prevent a return to the same category of committed offense, the European legislator has foreseen also seizure and confiscation of means and proceeds obtained from committing these crimes.

At the same time, in order to facilitate the discovery of these organized crime groups, it was foreseen the possibility of criminal non-criminal charges and the non-application of sanctions of criminal law to the victims who were forced to commit these crimes.

Although it is not the subject of the paper, it is worth mentioning, due to their importance and novelty in the matter, some aspects on the way the European legislator provided protection, assistance and support to child victims of trafficking in persons.

¹ Published in OJ L 300 of 11.11.2008, p. 42.

Thus, unlike the major people, the children victims have a special status in sense that, their assistance, support and protection during investigations and proceedings have certain specific features. (Balan-Rusu & Coman, 2013, p. 332)

Thus, in the case of child victims of trafficking, the Member States shall ensure that the undertaken specific actions, in the short or long term, in their physical and psychological recovery is achieved based on an assessment of the specific situation of each case, considering their views, needs and concerns. (Balan-Rusu & Coman, 2013, p. 332)

This feature has particular aspects, in that it differs from case to case different, from one victim to another, the procedures as such being different.

Another feature is that it will appoint a guardian or representative for the child victim, from the moment of its identification by the authorities in case that, under the national law, a conflict of interest between the holders of parental responsibility and the child victim prevents them to defend the interest of the child and /or to represent the child. (Balan-Rusu & Coman, 2013, p. 332)

Also, it will take some measures to provide assistance and support to the family of the child victim of trafficking in persons if the family is in the territory of another Member State (Balan-Rusu & Coman, 2013, p. 332)

Mentioning expressly the provisions that ensure the protection of child victims of human trafficking in persons offenses is an objective necessity stemming practically from the overall evolution of the crime in the field, and at the same time, it highlights the concern of the European Union for ensuring the safety of its citizens.

Proceeding into the examination of the offenses provided for in the European legislative act, several observations can be drawn, namely:

- the new modified legislative act represents a progress in the domain legislating these types of particularly serious offenses, with serious consequences, sometimes unimaginable;
- in terms of the objective side, there were set several actions, alternatives, namely, recruitment, transportation, transfer, accommodate or receipt of persons, including exchange or transfer of control over the persons concerned; we mention that these are alternative actions, so that for the existence of the crime, it is necessary to find the evidence, that it was conducted by only one of them, if it is found that the active subject of the offense committed the act through multiple actions; this aspect has no relevance, only in the case of individualizing the punishment;
- in terms of ways to achieve those mentioned actions, there are: threat, use of force and other forms of coercion, abduction, fraud, deception, abuse of power,

taking advantage of someone's vulnerability, giving or receiving money or other benefits to achieve the consent of a victim to get the consent of a person, having control over another person; we should remember that the offense can exist only when the offender has used only one of these ways;

- in terms of the subjective side, the European legislator has provided the essential requirement: the actions under the content of the objective side and the modalities to be achieved under the purpose of exploitation of the person; in order to avoid other interpretations than those intended by the legislator, the legislator conducted an authentic (legal) interpretation, indicating that the operation includes at least exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, including begging, slavery or practices similar to slavery, servitude, the exploitation of criminal activities or taking organs; given this interpretation, we consider that these activities considered as minimal by the European legislator may be supplemented by other forms of exploitation;
- the inciting, abetting and attempt are punishable in all circumstances;
- the penalties are differentiated by means of committing the crime, namely in the type variant or the aggravated one, in the first case the maximum limit of the penalty is of at least five years, and the second one of at least 10 years.

Without a doubt the adoption of this legislative framework is intended to provide an approximation of the laws of the Member States in preventing and combating more effectively this kind of crime, representing a legal instrument particularly useful in the current European circumstances.

4. Conclusions

Incriminating certain categories of acts that seriously infringe the freedom and dignity of the person is an important step made by the European Union in the complex task of providing a space of freedom, security and justice.

The European legislative act in its entirety is actually another moment in approximating the laws of the Member States in this domain.

Preventing and combating more effectively the organized crime, in particular trafficking in minors at the level of the European Union, is a very complex activity, which should contribute to all concerned agencies of the Member States.

On the background of fighting against the crime in this domain, the most important aspect, in addition to laws approximation of the Member States, it is the increase of specific activities of judicial cooperation in criminal matters between judicial authorities of the Member States, with the support and direct involvement of the European institutions such as Europol and Eurojust.

Examining the offenses established in the European legislative act leads to the conclusion that these indictments were absolutely necessary in the context of the proliferation of such crime.

However, note the need to incriminate as offenses of trafficking in minors also other acts involving the minor trafficking even in the cases where the purpose is not the one of operating, as it currently provides.

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