Position Paper

on the Evaluation and Revision of the EU Anti-Trafficking Directive (2022/36/EU)

Position Paper

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GENERAL RECOMMENDATIONS

1. About ESWA

The European Sex Workers Rights Alliance (ESWA) – previously the International Committee on the Rights of Sex Workers in Europe (ICRSE) – is a sex worker-led network representing 90+ organisations and member groups in 29 countries across Europe and Central Asia. Our aim is to ensure that all sex worker voices are heard, and that their human, health and labour rights are recognised and protected.

Contact: info@eswalliance.org
2. Conceptualising trafficking of human beings

ESWA understands and conceptualises trafficking in human beings as a broader migration, labour and social justice issue and advocates for addressing the root causes of human trafficking as a priority. ESWA opposes a punitive anti-trafficking policy framework that targets sex workers’ workplaces and their clients rather than traffickers. Sex workers are key actors on fighting exploitation and human trafficking in the sex industry, whilst also bearing the burden of harms caused by anti-trafficking and prostitution policies.

While ESWA acknowledges the importance of addressing trafficking in human beings by comprehensive efforts, we also agree with the Commission’s findings that there is still room for improvement regarding the prevention, protection, assistance and support measures to victims. Appropriate implementation of the Directive is needed in order to prevent human trafficking, especially among the most vulnerable and marginalised populations, and to assist victims. However, ESWA believes that a revision of the Directive is not needed, as it already provides Member States with all instruments necessary to tackle all forms of human trafficking.

As far as exploitation in the sex industry is concerned, ESWA calls for sex worker inclusive anti-trafficking policies and for inclusion of a fifth ‘P’: ‘Policies that do not harm and do not exacerbate vulnerabilities’, that will complement prosecution, protection, prevention and partnership.

In this position paper, we highlight the major factors of vulnerability to trafficking in human beings for sex workers; then, we emphasise what we believe are the main practical obstacles to effective implementation of the Directive, and we conclude with key recommendations for tackling human trafficking in sex work.

3. Factors of vulnerability to human trafficking in sex work

Gender

Sex work is deeply connected to female poverty and the position of women within the labour market. For instance, it has been shown that in times of economic crisis and austerity, an increasing number of women engage in sex work in many European countries. Many of them previously worked in professions that are traditionally viewed as feminine and precarious and underpaid. Austerity measures impact women disproportionately, especially mothers and single mothers, women of colour, disabled women, trans women, or any other sub-group of women traditionally marginalised in society. Sex work therefore intersects with many other social issues that impact women, such as the gender pay gap, social benefits for women, childcare support, education exclusion and segregation, minority rights, the situation of asylum-seekers, refugees and migrants, and discrimination against

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LGBTQI+ people. These intersecting factors create precarious conditions where female sex workers are particularly vulnerable to exploitation including human trafficking.

Also, LGBTQI+ sex workers in Europe often live and work in precarious and dangerous contexts. The reasons for this are the criminalisation of sex work; sexual orientation and gender identity; structural, institutional and direct violence; and pathologisation and medical mistreatment. Sex work is a multigendered phenomenon: sex workers of all gender identities, sexual orientations and sex characteristics face serious human rights violations and violence. For instance ILGA-Europe and Transgender Europe note that 88% of murdered trans people in Europe are sex workers, the majority of them migrants, and that racism, sexism, homophobia, transphobia and xenophobia exacerbate LGBTQI+ sex workers’ vulnerability to violence that may include exploitation and trafficking. Trans people engage in sex work for a variety of reasons, most commonly because they live in a transphobic environment and face structural barriers to education and employment, and thus have limited economic and employment opportunities.

Migration

Estimates indicate that in some Western European countries, migrants, often in irregular situations without resident and work permits, constitute a significant portion, if not the majority, of sex workers. From the late 1970s, migration within the sex industry in Europe has involved mostly women from South Asian, Latin American and African countries. In the 1990s, after the dissolution of the Soviet Union, the most significant shift was the increased number of sex workers from Central and Eastern Europe migrating to Western European countries, and after the 2004 and 2007 EU enlargements, the same movement continued within the European Union.

A large number of migrant sex workers in Western European countries are non-EU citizens, primarily from Eastern Europe, the Balkans, Central Asia, Africa, Latin America, and Asia. Research in recent years found that sex work has increasingly become common among asylum seekers and refugees fleeing to Europe from Africa, Latin America, Western and South Asia, the Caucasus, and the Middle East.

The recent increase in migration flux and a punitive approach to migration, including the exclusion of undocumented migrants from the labour market, has led and will continue to lead to an increase of undocumented migrants, asylum seekers, refugees (and people falling in and out of documentation) selling sexual services in order to generate income and to survive.

However, migrant sex work in itself is not exploitation or human trafficking, but the conflation of migrant sex work and human trafficking leads to ineffective and dangerous policies. Evidence shows

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that criminalisation of migration and sex work often result in migrant sex workers having to work clandestinely, rendering them particularly vulnerable to exploitation and abuse. Migrant sex workers in Europe and Central Asia often live and work in precarious and dangerous contexts. They are not only affected by the criminalisation of sex work, but also the harsh migration policies and repressive anti-trafficking measures. Furthermore, they often do not speak the language of the host country, cannot rely on support networks, and are unable to access state benefits. As a result of strict migration policies, criminalisation of migration and clampdowns on irregular migration and undeclared work, reporting crimes to the police or accessing health services might also involve detection by the police. Therefore a lot of undocumented migrants face high levels of exploitation and violence as they are easy targets for criminals and abusive landlords and employers.

Moreover, the economic impact of the COVID-19 pandemic is likely to increase the number of people that will turn to sex work to make a livelihood in the months and years following the end of confinement periods, which will result in lower rates, increased vulnerability, and potentially increased exploitation.

Lack of safe reporting mechanism and policing

Sex workers face violence because of the stigma associated with sex work, widespread criminalisation of their work, poverty, and/or due to discrimination based on gender, race, HIV status, drug use, or other factors. Data is, however, very scarce on the specific patterns of this intersectional violence targeting sex working communities in Europe, and is even more sporadic on migrant sex workers’ experiences of seeking justice and support.

As our report ‘Undeserving victims’ illustrates, a crucial factor in accessing justice is the relationship with police. For (undocumented) migrant sex workers, this relation is often conflicting as they are seen as criminals violating immigration and sex work laws instead of being perceived as victims when suffering incidents of violence and abuse. Even though individual police officers can leverage some support for those who suffered crimes, as exemplified by several sex worker testimonies in the above mentioned report, they cannot compensate for the failures of criminal justice systems that are generally biased against women, trans and gender-nonconforming people, migrants, people living with disabilities, poor and working class people, and Black people and people of colour.

In the study conducted for ‘Undeserving victims’, sex worker interviewees gave very diverse answers in relation to their experiences with police and how policing affects their life, depending on various factors, particularly legal frameworks pertaining to sex work and migration in their respective countries. Responses indicate a common agreement that police need to be more responsive to sex workers’ reporting and more accountable to protect sex workers from violence and crime.

For instance, many sex workers reflect that they purposely avoid contact with police due to potentially being punished under prostitution policies and municipal by-laws. They fear the consequences of reporting as a sex worker: fines and prosecution for sex work-related offences (soliciting; brothel-

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keeping), being outed, losing custody of one’s child. For migrant sex workers, policing constitutes a high risk of being detained and deported. Absence of a firewall between immigration enforcement and access to justice compromise the non-discrimination principle in access to justice for undocumented migrant crime victims. Furthermore, the experience highlighted by the respondents concludes that policies that lead sex workers to hide from police exacerbate their vulnerabilities to violence, as they push them out of sight of the public, prevent them from screening clients, lead them to hurried negotiations, and do not allow them to work together for their safety.

4. Main obstacles to effective implementation of the Directive

Misuse of ‘ending demand’ policies

‘End demand’ and ‘demand reduction’ have become catchphrases in anti-trafficking discussions. Although the concept of ‘demand’ traditionally comes from economic areas and can be understood as a willingness or ability to buy goods or services. The OHCHR 2010 Commentary\(^7\) lists examples of how states are able to shape demand for goods and services produced by trafficking. These include laws and policies on a range of matters, including immigration, employment, welfare and economic development. For example, stigma, discrimination and/or lack of legal status of domestic workers, ‘entertainers’ or migrant workers, among others, create an environment in which the exploitation of these persons becomes both “possible and worthwhile”\(^8\). Thus, end demand interventions should include measures against discrimination, or the adoption and enforcement of legislation to protect workers or migrants from exploitation.

End demand interventions should be understood as interventions to address the demand for goods and services produced or provided in the context of exploitative situations. Therefore, the core measures aiming to reduce demand should focus on reducing exploitation within a sector and not criminalising a sector in its entirety, such as the sex work sector.

Comparing how various states have transposed and implemented these international obligations into national laws is illuminating. While states that follow the example of Sweden criminalise the purchase of sex – regardless of whether trafficking is involved or not – New Zealand, where sex work is fully decriminalised, has implemented demand-side measures in a way that: (i) explicitly prohibit pressuring a sex worker to provide services; (ii) forbid illicit behaviour of intermediaries, and; (iii) seek to influence clients and intermediaries by ‘codes of conduct’ for operators within the sector.\(^9\) New Zealand has also developed policies that aim to improve the working conditions of sex workers and increase their safety and negotiating powers.

One of the proposed options by the European Commission is to undertake legislative action and to amend the 2011 Anti-Trafficking Directive to introduce mandatory criminal sanctions against the users of the services provided by victims of trafficking. The current provision in the 2011 EU Anti-Trafficking Directive is not mandatory and states may decide whether or not to criminalise those who knowingly use the services of victims and to what extent. The criminalisation of use of services provided by sex

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\(^7\) OHCHR Commentary, 2010
\(^8\) OHCHR Commentary, 2010, p.101
\(^9\) See: [https://www.demandat.eu/sites/default/files/WP3_Policy-Brief_Measures_FINAL.pdf](https://www.demandat.eu/sites/default/files/WP3_Policy-Brief_Measures_FINAL.pdf)
workers is how several EU member states interpreted the non-binding provisions of the EU Anti-Trafficking Directive to criminalise clients of sex workers - regardless of whether or not the sex worker was a victim.

We are confident that such laws that extend the scope of the above provision to criminalise clients of all sex workers violate Art. 2, Art. 3 and Art. 8 of the European Charter of Human Rights. In April 2021, the European Court of Human Rights registered the complaint of 261 migrant sex workers against France in the case *M.A. and others vs. France* (Request n. 63664/19) to assess the French law ‘against the prostitution system’. The case establishes serious doubts about compliance of such a law with the European Charter of Human Rights\(^\text{10}\).

We are also confident that in the context of trafficking for the purpose of sexual exploitation, knowingly using the services of a victim constitutes an already existing crime - rape.

Further broadening criminal liability to criminalise all those that knowingly use services which involve exploitation is dangerous and impractical, especially if, as is recommended by the Resolution of the European Parliament on the implementation of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims (2020/2029(INI)) paragraph 68, ‘the user should demonstrate that all reasonable steps were taken to avoid the use of services provided by a victim’. This obliges all citizens to examine working conditions under which goods are produced or services 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)\(^\text{11}\).

Finally, there is no evidence that criminalisation of sex work reduces trafficking in human beings. On the contrary, evidence suggests that traffickers use the existence of criminal law and police enforcement against sex work to control trafficked persons and discourage them from approaching police for help\(^\text{12}\). The evidence instead bolsters the argument that decriminalisation of adult consensual sex work will lead to better and more effective anti-trafficking policies.

While consumer awareness is important, further criminalisation is not the way to go. *Structural labour and economic reforms, and measures to better regulate business and empower workers are needed to address exploitative labour practices across European economies and global supply chains.*

### Access to assistance and residence permits

Although persons presumed to be trafficked are entitled to assistance and support even before they are officially identified, it is not always the case. The 2016 Report on the implementation of the EU

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\(^{10}\) See: [https://hudoc.echr.coe.int/fre?i=001-209407#%7B%22itemid%22:[%22001-209407%22]%7D](https://hudoc.echr.coe.int/fre?i=001-209407#%7B%22itemid%22:[%22001-209407%22]%7D)


anti-trafficking directive\textsuperscript{13} points out that only half of the EU Member States clearly require that assistance and support should be provided as soon as the competent authorities have an indication or reasonable grounds to believe that the person is a victim of trafficking in human beings. Furthermore, GRETA, the body responsible for monitoring the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings, was concerned by indications that the provision of assistance to victims of trafficking hinges on their cooperation with law enforcement authorities, even though the link does not exist formally. In 20 country evaluation reports, GRETA has urged the authorities to ensure that in practice, access to assistance for victims of trafficking is not made conditional on their co-operation in the investigation and criminal proceedings\textsuperscript{14}. According to the 7th General report of GRETA\textsuperscript{15}, in many countries there is no recorded information on any compensation received by victims of trafficking and several countries still lack state compensation schemes accessible to victims of trafficking\textsuperscript{16}.

Also, according to EU Directive 2004/81/EU, the ability to stay in a country and receive assistance beyond the reflection period is linked not only to victims’ willingness to cooperate with authorities, but also to the usefulness of the information they share. Furthermore, the outcome of whether the victim will be granted a residence permit also depends on investigations and police capacities, especially where cross-border investigations are concerned. Access to this highly desirable form of protection, a residence permit, is thus unequally distributed and depends on victims’ roles in and value to criminal proceedings, not their individual needs. Such a system particularly disadvantages victims who were particularly isolated, had little to no control over their situation, or very limited access to information about their traffickers. It also disadvantages victims that have ample reasons not to report their traffickers and not to cooperate with authorities. Trafficking networks may threaten to harm their children, other family members, or suspected informants themselves, or victims may face retaliation in their home countries, from traffickers, for cooperating with the authorities, or be trafficked again. There is significant criticism of criminal justice systems that exploit trafficking victims as witnesses in criminal proceedings, before eventually deporting them.

It has also been pointed out that “offering residency conditions upon testifying” can backfire in court and provide an opportunity for the defence to draw into doubt the veracity of the testimony, or indeed, even induce exaggeration of information in order to obtain a residence permit. Having something to gain from testifying easily weakens the credibility of the victim and threatens corresponding rights. It must be acknowledged that it is not in the interest of all victims to cooperate with the authorities and that such cooperation can have serious consequences for their safety and wellbeing. A human rights-based approach should be the guiding principle for all anti-trafficking


\textsuperscript{14} 4th General Report on GRETA activities, covering the period of 2014. Available at: https://rm.coe.int/16805aa45f

\textsuperscript{15} 7th General report of GRETA activities, covering the period of 2017. Available at: https://rm.coe.int/greta-2018-1-7gr-en/16807af20e

policies, not only in theory, but in practice. Such an approach would ensure that victims of trafficking are offered residence permits on the basis of their individual needs and risk assessments. The provision of residence permits must not be tied to victims’ willingness to cooperate with investigations or the usefulness of the information they can provide.

The directive should not be revised, but rather properly implemented. However, the scope of the Directive 2004/81/EU on residence permit should be revised and extended, to ensure unconditional access to residence for all victims.

5. Key recommendations

Involve Sex Workers’ organisations

UNAIDS, the World Health Organisation (WHO), the United Nations Population Fund (UNFPA), and the United National Development Programme (UNDP) have recognised that violence against sex workers must be prevented and addressed in partnership with sex workers and their organisations, and that sex workers and their organisations should be meaningfully included in policy making. They have also recognised that sex worker organisations are best positioned to refer women and children who are victims of trafficking to appropriate services.

Additional funding would be necessary to fund community-based organisations and workers’ unions, including migrants and sex workers. Only by including, recognising and supporting the work of these organisations, can we prepare more nuanced interventions addressing trafficking in human beings.

In the EU Strategy on Combating Trafficking in Human Beings (2021-2025), the European Commission invites states to enable funding for community-led and peer-mentoring empowerment programmes. Supporting, recognising and funding sex workers and their organisations can be a way to implement this priority of the EU Strategy.

In addition, we recommend the Commission to enable EU funding to community-led interventions and programmes and their inclusion into the anti-trafficking policies and national referral mechanism.

The most effective way to address exploitation is to improve the labour and social protections available to the workers involved and their ability to organise.

Increase labour safety measures

We call for the prioritisation of a human rights-based approach and measures to address demand for cheap, underpaid or even unpaid work and services, demand to easily control (sex) workers or keep workers in isolation and abusive situations, and demand for unregulated/undeclared and unprotected

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17 For more information about how sex workers’ organization address exploitation in the sex industry, see: ESWA, From vulnerability to resilience: sex workers organizing to end exploitation. 2021. Available at: https://www.eswalliance.org/report_on_sex_work_migration_exploitation_and_trafficking
labour or services, often performed in the context of (irregular) migration\(^{18}\) instead of intensifying the criminal justice response.

Particularly, the working conditions of sex workers are undermined by the widespread criminalisation and stigmatisation of sex work. Consequently, many sex workers, and especially the most vulnerable ones such as undocumented migrants, are pushed to operate in the informal economy and in more isolated and dangerous environments. **According to sex workers, one of the key reasons for their victimisation is the lack of safe working places**, which is often the result of national sex work laws and municipal by-laws that criminalise or penalise sex work or certain aspects of it.

To address online sexual exploitation effectively, include sex workers

The call for an examination of the role of technology as a contributing force to human trafficking and exploitation has been heard for more than the past decade. Attention has focused on a range of issues from adult services websites and the use of social media to recruit victims and facilitate trafficking, to the utilisation of data analytics software in order to understand trafficking and identify victims.

For many anti-trafficking stakeholders, technology is both the risk and the opportunity; technology can serve as a force multiplier and be used in positive ways to combat trafficking in human beings, especially in the prevention and protection contexts.

Sex workers are impacted by the rapid changes towards a more digitalised structure of daily life. Accelerated by COVID-19, technological developments have caused sex workers to alter their ways of working. They can now advertise, find and screen clients, communicate and exchange information with their colleagues, access helpful information and organise politically online. Despite the many benefits of digitalisation in sex workers’ lives, it has also created new threats that their communities need to encounter and develop coping strategies for. And yet, sex workers have never been invited to share their views and expertise regarding online working environments, nor have they been included into reporting and referral mechanisms.

Sex workers further benefit from numerous applications that have mainly been developed by sex workers for the sake of their safety. Such apps can be presented as examples of how communities at risk of trafficking and exploitation can remain resilient. This resilience, however, is rarely acknowledged by anti-trafficking actors and rarely promoted as an approach that can effectively prevent trafficking.

Concerns about commercial sexual exploitation of children or exploitation and trafficking of adults online are shared by sex workers and their organisations. Yet, measures to end these crimes must consider the impact on the living and working conditions of those working in the sex industry. Abolition or prohibition of online adult content leads to further marginalisation and exploitation of content creators and workers, greater exposure to and reliance on exploitative third parties, higher risk of exposure to less secure platforms, using crypto-currency and the inability to self-organise and defend their rights. Sex workers and other relevant stakeholders should be considered central actors to be consulted in developing policies, including policies on how to effectively address online child sexual exploitation, human trafficking facilitated online, revenge porn or distribution of sexually explicit

\(^{18}\) See ESWA’s submission to the evaluation of the EU AT directive: [https://www.eswalliance.org/eswa_submissions](https://www.eswalliance.org/eswa_submissions)
images or videos of individuals without their consent. Well-facilitated and well-moderated social media may have significant positive effects on the online safety of sex workers and other content creators and prevent crime, including child sexual exploitation and human trafficking. **We are convinced that there is no need to amend the EU Anti-Trafficking directive. We do, however, urge the Commission to take an evidence- and rights-based approach to the issues of exploitation and human trafficking in the online context by meaningful inclusion of all stakeholders, including adult content creators and sex workers.**

**GENERAL RECOMMENDATIONS**

We suggest the following non-legislative measures at the EU level:

- We urge the Commission and Member States that when assessing “end-demand” prostitution and anti-trafficking policies, policy-makers need to conduct a thorough inventory of all sex work-related regulations, assessing their de facto impact on the safety and rights of those selling sex. In this process, sex workers must be consulted.
- We urge the Commission to include sex workers and sex worker-led organisations into anti-trafficking policy development at the European policy level. Anti-trafficking policies would benefit from sex workers’ in-depth knowledge of the dynamics of the sex industry and encourage them to directly report on the intended and unintended effects of anti-trafficking (and related) policies on sex workers’ safety and rights.
- We urge the commission to promote involvement of sex worker collectives and other precarious workers’ unions and collectives into national referral mechanisms. As recognised by UNAIDS in their Guidance Note on HIV and Sex Work, sex worker organisations are best positioned to refer women and children who are victims of trafficking to appropriate services.
- We call on the Commission to earmark funding to grassroots civil society organisations that are led by and for people from marginalised communities facing intersectional discrimination and higher risks of THB, such as sex workers, and to design grants dedicated for projects with the aim of including the at-risk populations in the crime prevention policies and national referral mechanisms.
- We call on the Commission to promote inclusion of sex worker-led organisations into designing, implementing and evaluating social inclusion and rehabilitation programmes for victims of trafficking and for sex workers who want to exit the sex industry.
- We call the Commission to take action to reduce the stigma associated with involvement in the sex work sector. Measures to reduce stigma include improving public attitudes towards sex workers, providing agencies, authorities, NGOs and the general public with nuanced and non-stereotypical information about sex work.
- We call on the Commission to initiate nuanced dialogue about the online dimension of trafficking and child sexual exploitation - and its intersection with intersecting issues such as online safety, online censorship, discrimination, exclusion and freedom of expression, utilisation of AI, due diligence and platform governance - by bringing together a variety of experts from the intersecting fields such as children’s rights, victims’ rights, sex workers’ rights and digital rights (including data protection, privacy, freedom of speech, cybercrime and copyright).
• We urge the Commission to recognise that immigration policies impede migrant (sex) workers’ access to justice and exacerbate their vulnerabilities to exploitation and human trafficking. Therefore firewalls between immigration enforcement and service provision in the area of health care, social services and the justice system should be implemented.

• Revise the scope of the Directive 2004/81/EU on residence permit to ensure unconditional access to residence for all victims.