

Feedback on the revision of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims

21 March 2023

The European Sex Worker's Rights Alliance (ESWA) – previously the International Committee on the Rights of Sex Workers in Europe (ICRSE) - is a sex worker-led network representing 111 organisations and member groups in 35 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. With our actions and approach inspired by our membership community, we work to build a strong, vibrant and sustainable network that mobilises national, regional and international advocacy activity towards long-term, systemic change.

ESWA would like to provide its feedback on “Article 18a Offences concerning the use of services which are the object of exploitation with knowledge that the person is a victim of an offence concerning trafficking in human beings”

ESWA shares the findings and recommendations presented in La Strada International's (LSI) research report, *The Impact of Criminalising the 'Knowing Use' on Human Trafficking*¹. As ESWA supports its member organisations in their grassroots activities to protect the rights of sex workers, ESWA will provide feedback on the draft amendment above covering the concerns of the group of people vulnerable to exploitation in the sex industry and victims of exploitation and trafficking in the sex industry. It is important to mention that 40% of ESWA members are sex worker-led organisations, while the remainder provide various types of services to persons in the sex industry and are in daily contact with this target group. We can therefore safely claim that our feedback provides first-hand experience with the impact of anti-trafficking policies or policies introduced that aim to combat trafficking of the most vulnerable groups.

The proposed amendment introduces the mandatory criminalisation of knowing use, but **does not specify who is to be included as a victim** and does not state that **the protection measures in the Directive should also apply to victims of this crime**. As stated in the LSI research report, it is also unknown whether proving this criminal qualification will require first proving all the elements of the crime of trafficking in human beings, which in itself is very difficult to prosecute.

Currently, about two-thirds of the EU Member States have introduced a (partial) criminalisation of the 'knowing use' of services of trafficked persons into their criminal code while they implement this provision in the area of **trafficking for sexual exploitation in two ways**.

1. The states that follow the definition given in the proposal

States that **penalise the act of knowingly using the services of a victim of trafficking**. In this case, knowledge that the person has been trafficked must be proven. According to the LSI study, this is a very problematic point, which leads to this offence remaining de facto unimplemented. However, it is not clear from the LSI study **who individual states consider to be a victim** when introducing this criminal qualification and, possibly, whether a victim of this crime has the same rights as a victim of trafficking in human beings. However, the study clearly declares that there is little or no experience in this area. In

¹ La Strada International, Policy Paper: [The Impact of Criminalising the 'Knowing Use' on Human Trafficking](#), December 2022.

terms of protecting the rights of victims of crime, it is much more practical to use the **existing criminal qualification of rape**, which is based on absence of consent, where there is no need to prove the crime of trafficking in a very complex way and where it is certain that the victim should have had access to the service system and be entitled to compensation at least in most EU member states (especially those that are party to the Istanbul Convention). This criminal qualification also clearly grants the victim 'victim status'. We are further confident that the criminal qualification – and in particular in the area of trafficking for the purpose of sexual exploitation may have the following negative side effect:

- **Lead to erosion of trafficked persons rights** - as the Directive doesn't include any provision guaranteeing that the rights enshrined by the Directive will be guaranteed to victims of the newly mandatory criminal qualification knowing use of services of trafficked person and instead may lead to derogation of the 'victim status' to 'witness' status of the potential victim of trafficking.
- **Lead to discouraging clients of sex workers to report or to facilitate help of the victim out from the exploitation** - due to fear of the client's own prosecution (as at the certain point the client had the knowledge) who thus can have a twofold position as both a suspect and a witness, and consequently, they are protected from incriminating themselves. This was also confirmed by the German Impact assessment study², as noted by the LSI report. The respondents of the LSI study working directly with victims of trafficking were particularly concerned about this negative side effect. Instead, the 'end demand' campaign should focus on clients to treat sex workers with respect and **to recognise indicators of forced prostitution**, and encourage them to facilitate support and help.
- **Lead to conflation of all sex work with human trafficking and increase stigma of all sex workers** - as they will be seen purely as victims without agency.

2. States that implement the provision without the need to prove the knowledge and criminalise all acts of sex purchase.

The so-called Swedish model law that is presented as implementation of 'use of victims' (without the knowledge element) was recognised as **counterproductive and harmful for both sex workers and victims of human trafficking**. From the criminal justice perspective, it must be noted that the crime does not consider people selling sex as victims, but as witnesses. The effectiveness of the law was recently questioned by the [Norwegian Criminal Law Council](#) that proposed a law reform to decriminalise purchase of sex in December 2022. Norway has been implementing the Swedish model since 2009 and the Council questioned this aspect - that a person who sells sexual services is not to be **regarded as a victim in the legal sense**. This challenges the principle that punishment should be reserved for cases where the perpetrator can be blamed. Further, the fact that **acts which are not in themselves exploitative and are victimless are criminalised** calls into **question the principle of proportionality**. The Council also concluded that the **protection of the individual's right to sexual self-determination is a key principle for the criminal law** regulation of sexuality today. This claim is then supported by the decision of the ECtHRs: *Pretty v. United Kingdom*³. Composed of 60 eminent judges and lawyers from all regions of the world, the **International Commission of Jurists** published *The 8 March Principles for a Human Rights-Based Approach to Criminal Law Proscribing Conduct Associated with Sex, Reproduction, Drug Use, HIV, Homelessness and Poverty*⁴ in March 2023, stating that criminal law is among the harshest of tools at the disposal of the State to exert control over individuals. As such, it ought to be a measure of last resort, where other less restrictive means of achieving legitimate interests are insufficient. However, globally, States have exhibited a **growing trend towards overcriminalisation**. The report further regrets that in recent years there has been a backlash against human rights, especially against sexual and reproductive health and rights and the human rights of sex workers (and other groups). In particular, the report outlines that there has been continued use and, in some cases, a new proliferation of arbitrary criminal laws proscribing conduct associated with sex and

² KFN, 'Evaluation of the criminal provisions to combat human trafficking (§§ 232 to 233a StGB)' [title translated] (Federal Ministry of Justice, Germany 2021), p. 105.

³ *Pretty v. United Kingdom, (Case 2346/02)* paragraphs 61 and 62 where it is recognised that sexual life is protected, as part of personal autonomy, and that individuals have the right to pursue activities that are physically and morally harmful or dangerous to them.

⁴ The 8 March [Principles for a Human Rights-Based Approach to Criminal Law Proscribing Conduct Associated with Sex, Reproduction, Drug Use, HIV, Homelessness](#) and Poverty March 2023

that these laws have led to egregious human rights violations, including by engendering and perpetuating stigma, harmful gender stereotypes and discrimination. The report also re-confirms the concerns of the Norwegian Criminal Law Council that unless criminal laws proscribing the above-mentioned conduct are directed at coercion or force or otherwise at the absence of consent, their mere existence - **let alone their threatened or actual enforcement - violates human rights.**

Principle 17 Sex Work

The **exchange of sexual services between consenting adults for money, goods or services** and communication with another about, advertising an offer for, or sharing premises with another for the purpose of exchanging sexual services between consenting adults for money, goods or services, whether in a public or private place, **may not be criminalised**, absent coercion, force, abuse of authority or fraud.

Criminal law may not proscribe the conduct of third parties who, directly or indirectly, for receipt of a financial or material benefit, under fair conditions - without coercion, force, abuse of authority or fraud - facilitate, manage, organise, communicate with another, advertise, provide information about, provide or rent premises for the purpose of the exchange of sexual services between consenting adults for money, goods or services.

Similarly, just in March 2023 the International Labour Organisation announced on Twitter⁵ that *'Decriminalisation of sex work will protect sex workers rights and open the door to social protection, safety and health and efforts to combat trafficking and forced labour says ILO's Anna Olsen at event to discuss proposed new law for sex workers in Thailand.'*

Sex purchase ban as immigration enforcement tool

The policy brief: *Criminalising the Sex Buyer: Experiences from the Nordic Region (2022)*⁶ examines the effects of criminalisation of sex buying on sex workers and people in the sex trade, especially on their vulnerability to violence and exploitation. In the Nordic region - as in many other countries - the majority of the people in the sex trade are migrants (upwards of 70 per cent). This brief therefore places particular emphasis on **how the policing of commercial sex under the 'Swedish model' intersects with immigration policies and their enforcement**. Even if Nordic model policies claim to decriminalise the selling of sex, **the countries regulate it through immigration policies**. In Sweden and Finland, the selling of sex is grounds for deportation and denial of entry for migrants without permanent resident permits coming from outside the EU/EEA. Sweden has also deported EU citizens for selling sex. In Norway, provisions in its immigration laws give police authority to question, deport and control migrant sex workers. During client investigations and other policing of commercial sex, the police deport people who sell sex. Because of the threat of deportation, foreigners feared contact with the police even if they were legally in the country, and as one of the respondents said, they wouldn't call a police unless it were 'a question of life or death'. According to the Policy brief, Swedish officials see deporting migrants who engage in commercial sex - regardless of whether they are victims of trafficking - as a 'concrete crime prevention measure.' **This approach may also answer the question of why the number of officially registered victims of trafficking may be lower in the Swedish model countries than in countries with legalised models as many of them are deported before their actual identification.**

The normative effect-does the argument work?

According to the La Strada International Study⁷ based on the interviews with experts the symbolic normative effect of this criminalisation - identified by proponents as the (only) possible added value - is highly doubtful due to lack of public awareness and near absence of government awareness campaigns on criminalisation. According to GRETA's⁸ observation, the criminalisation of the 'knowing use' could

⁵ <https://twitter.com/ILOAsiaPacific/status/1636283468685668352?s=20>

⁶ Niina Vuolajärvi Centre for Women, Peace and Security (London School of Economics): [Criminalising of the sex buyers: Experiences from the Nordic Region](#) (2022)

⁷ La Strada International, Policy Paper: [The Impact of Criminalising the 'Knowing Use' on Human Trafficking](#), December 2022.

⁸ Council of Europe Group of Experts on Action against trafficking monitoring implementation of the CoE Anti-trafficking Convention

potentially have a normative effect and awareness raising function. This normative import, however, which attracts questioning and diverging practice when the criminal law is expanded to target a wider group – purchasers of sexual services⁹. In its monitoring of State Parties to the CoE Convention against Trafficking, GRETA has repeatedly commented that criminalising the purchase of sexual services is not required by Article 19 as such, or other provisions of the Convention targeting demand.¹⁰ The crime policy approach adopted by the Convention is limited to the criminal offence of trafficking in persons, and related positive obligations of prevention and criminalisation. The normative distinctions made, however, specifically in the context of prostitution and trafficking for the purpose of sexual exploitation, is contested, as is the scope of State Parties' obligations to combat demand¹¹.

There is great interest in Sweden and other European countries in how the law criminalising purchase of sex has been understood and accepted by the Swedes. There is strong consensus in Sweden that commercial sex constitutes exploitation and a hindrance to gender equality, and that discouraging men's demand should be at the centre of prostitution policies. This normative transformation is present in the national opinion surveys done before and after the Sex Purchase Act was adopted¹². In 1996, 32 per cent of Swedes supported criminalising the act of buying, in 2012 this percentage was 65 per cent. Men held more positive attitudes towards prostitution than women. A large proportion of participants (49.8% of men and 80.1% of women) wanted to keep the law on buying sex, but few thought that the number of sex sellers or buyers had decreased as a result of the law. A similar rise in negative attitudes can be seen in relation to the sale of sex. In 1996, **30 per cent of Swedes believed that selling sexual services should be criminalised**, whereas in 2012, **52 per cent believed it should be prohibited by law** (37% of men and 65% of women). Moreover, Sweden's normative campaigns against commercial sex have increased the view of sex workers as victims and mentally damaged. In other words, even if the law and discourses related to commercial sex as violence **created a new stigmatised group – sex buyers – it did not shift stigma away from people in the sex trade but rather increased it and more than half of the Sweden population would like to see people selling sex criminalised**.

While stigma is one of the main catalysts of violence and exclusion for sex workers and people in the sex trade, the wide adaptation of the understanding of commercial sex as a form of violence in Swedish society contributes to heightened experiences of stigma, marginalisation, and discrimination¹³. In Sweden and Norway, where the full criminalisation of sex buying is enforced, sex workers and people in the sex trade report more exclusion and victimisation than in Finland, the stigma being most extreme in Sweden¹⁴.

As mentioned, it has been documented that the sex purchase ban law has harmful effects in countries that implemented it. Further, there are false claims that introduction of the Swedish model law leads to demand reduction and consequently to decrease trafficking in human beings for the purpose of sexual exploitation. The examples below are illuminating:

Northern Ireland (UK)

The research by Queen's University Belfast¹⁵ stands out **for having compared data from before and after the implementation of the Sex Purchase Act**. Among the main findings of the comparative study

⁹ Mullally, S. (2020). "ARTICLE 19: CRIMINALISATION OF THE USE OF SERVICES OF A VICTIM". In *A Commentary on the Council of Europe Convention on Action against Trafficking in Human Beings*. Cheltenham, UK: Edward Elgar Publishing.

¹⁰ GRETA, 7th General Report on GRETA's activities, March 2018, para 167

¹¹ Mullally, S. (2020). "ARTICLE 19: CRIMINALISATION OF THE USE OF SERVICES OF A VICTIM". In *A Commentary on the Council of Europe Convention on Action against Trafficking in Human Beings*. Cheltenham, UK: Edward Elgar Publishing.

¹² Criminalising the Sex Buyer: Experiences from the Nordic Region; Jari Kuosmanen, "Attitudes and Perceptions about Legislation Prohibiting the Purchase of Sexual Services in Sweden," *European Journal of Social Work* 14, no. 2 (June 2011): 247– 63, <https://doi.org/10.1080/13691451003744341>; Carl Göran Svedin et al., *Prostitution i Sverige. kartläggning och utvärdering av prostitutionsgruppernas insatser samt erfarenheter och attityder i befolkningen* (Linköping: Linköping University Electronic Press, 2012), <http://urn.kb.se/resolve?urn=urn:nbn:se:liu:diva-75383> Fulltext från Linköping University Electronic Press.

¹³ Niina Vuolajärvi Centre for Women, Peace and Security (London School of Economics): [Criminalising of the sex buyers: Experiences from the Nordic Region](#) (2022)

¹⁴ Ibid.

¹⁵ NI Department of Justice: [Assessment of impact criminalisation of the purchase of sexual service in Northern Ireland](#) (2019)

are: a trend analysis of 173,460 advertisements indicates that **the legislation has had little effect on the supply of or demand for sexual services**. Serious crimes against sex workers in Northern Ireland are fortunately rare. However, between 2015 and 2018 there has been an **increase in the number of reports on the Uglymugs.ie website in relation to, for example, assaults, sexual assaults and threatening behavior**. Sex workers are also exposed to higher rates of anti-social and nuisance behavior and they reported higher levels of anxiety and unease, and **increased stigmatisation**. Northern Ireland implemented the Nordic Model in 2015, with tackling human trafficking stated as an explicit aim.¹⁶ As shown in Figure 1, the number of people referred as victims of sexual exploitation has not decreased after its introduction, but on average has increased.

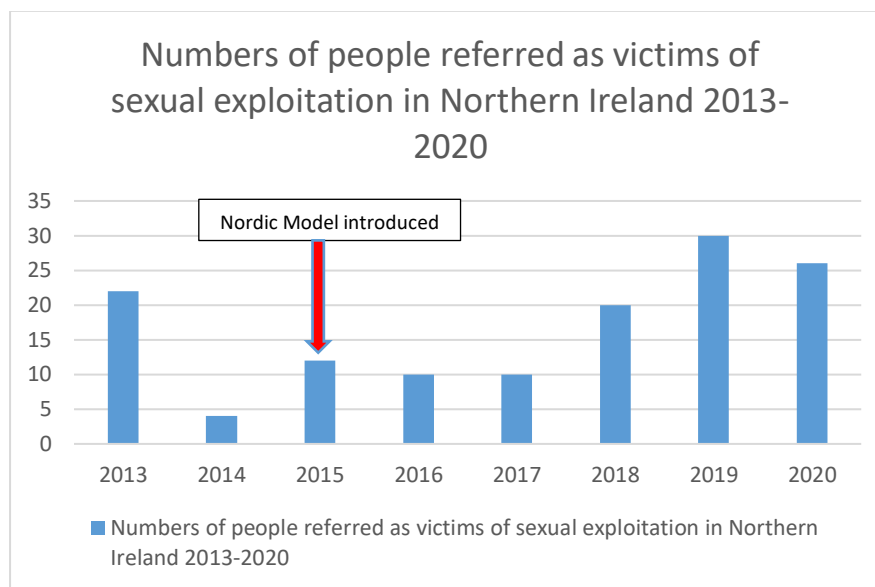


Figure 1: Data from end of year statistical summaries of NRM referrals, National Crime Agency 2013-2018 and UK Home Office 2019 and 2020

IRELAND

The Amnesty International Study titled: *“We live within a violent system.” Structural violence against sex workers in Ireland*¹⁷ reveals how the criminalisation of aspects of sex work is forcing sex workers to take **more risks as they avoid the police, putting their lives and safety in jeopardy. The research also shows how the lack of trust in the police and social stigma reinforced by the criminal law are key concerns for sex workers**. For many of those interviewed, the criminalisation of paying for sex adds to the already high levels of societal stigma and discrimination they experience on other grounds, such as race, ethnicity, gender, gender identity, disability, drug use, homelessness or migrant status. The research highlights the lack of data on sex workers’ experiences and the government’s reliance on outdated and flawed research that conflates human trafficking for sexual exploitation with sex work.

Ireland introduced the Nordic Model in 2017 with an explicit aim **to reduce trafficking victimisation in the sex industry**. While Ireland’s national data suggests this has been effective – with the number of *identified* victims falling from 103 in 2017 to 44 in 2021, **this case is a good example of how trafficking data can mislead**. Contrary to this alleged decrease presented as a success of the Swedish model, the US government’s Trafficking in Persons Report 2020¹⁸ – an annual report that ranks countries according to how effectively they are tackling trafficking – downgraded Ireland, **placing it on a TIER 2 ‘watch list’ of countries which need to improve their anti-trafficking approaches**. It was the worst ranking in the Western European Region. Likewise, a 2022 Council of Europe report¹⁹ has

¹⁶ Ellison et al. 2019. A review of the criminalisation of paying for sexual services in Northern Ireland. Commissioned by the Department of Justice.

¹⁷ Amnesty International 2022: [“We live within a violent system.” Structural violence against sex workers in Ireland](#)

¹⁸ [Trafficking in Persons Report 2020](#)

¹⁹ 2022 [GRETA publishes its third report on Ireland - Action against Trafficking in Human Beings \(coe.int\)](#)

stated that, **despite the alleged drop in victims, “these figures do not reflect the real scale of the phenomenon in Ireland, partly due to the persisting limitations of the existing procedures for identifying victims.”**

FRANCE

The study on the Impact of the law against the ‘Prostitution system’ in France²⁰ reveal that the law has had a detrimental effect on sex workers’ safety, health and overall living conditions and that **cases of violence, of all kinds, have increased:** insults in the street, physical violence, sexual violence, theft, and armed robbery in the work place. **Sex workers experienced greater impoverishment, increased health risks and increased exposure to violence that formed a vicious circle.**

Furthermore, in April 2021 the **European Court of Human Rights registered the complaint of 261 sex workers - most of them migrants - against France** in a case M.A. and others vs. France (Request n. 63664/19)²¹ to assess the French law ‘against the prostitution system’. The case establishes serious doubts about compliance of ‘Swedish model’ law with the European Convention of Human Rights.

France adopted the Nordic Model in 2016. As with the countries already reviewed and as shown in Figure 2, the introduction of the law does not correlate with a reduction in identified victims of sexual exploitation when compared to pre-law levels.

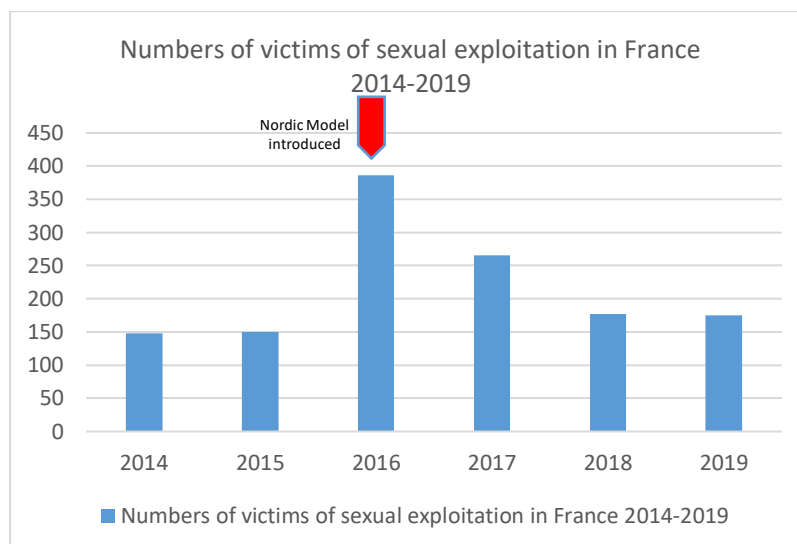


Figure 2 Data from Group of Experts on Action against Trafficking in Human Beings, Council of Europe

NORWAY

The 2016 report by Amnesty International Norway: The human cost of ‘crushing’ the market: Criminalisation of sex work in Norway²² demonstrates that Norway is not implementing its international obligations to respect, protect and fulfill the rights of people who sell sex. Amnesty International spoke with sex workers who had experienced violations of the right to housing, the right to personal security, the right to equal protection of the law, the right to health, the right to non-discrimination and the right to privacy. With this report, Amnesty International issued a call for the Norwegian authorities to change their approach and instead place the protection of the human rights of all people who sell sex at the centre of its responses to commercial sex. Together with studies from other countries, the research from Norway also led Amnesty International to introduce their official policy on sex work in 2016²³.

²⁰ Hélène Le Bail et al., « [What do sex workers think about the French Prostitution Act?: A Study on the Impact of the Law from 13 April 2016 Against the ‘Prostitution System’](#) in France, 2018

²¹ [M. A. ET AUTRES c. FRANCE et 4 autres affaires \(coe.int\)](#)

²² 2016 Amnesty International Norway: [The human cost of ‘crushing’ the market: Criminalisation of sex work in Norway](#)

²³ [Amnesty International policy on state obligations to respect, protect and fulfil the human rights of sex workers](#), May 26, 2016

Norway introduced the Nordic Model in 2009. As seen in Figure 3, statistics provided by the Norwegian Coordination Unit for Human Trafficking in its 2017 report demonstrate that victim rates have not decreased since its introduction.



Figure 3 Data on number of presumed victims of trafficking for sexual exploitation 2007-2016, Norway

3. Not demand, but other factors drive trafficking

The premise of the Nordic Model is that by ending ‘demand’ for commercial sexual services, i.e. by criminalising purchase of those services, the sex sector overall will reduce in size and, by proxy, the number of people trafficked into the sector will reduce too. As the evidence outlined above demonstrates, this is not what occurs when the model is applied. The **International Organisation of Migration** analysed whether trafficking is ‘demand’ driven and found that it is not – rather, it highlights three factors that drive trafficking:

1. Lack of effective labour market regulation – this may be because the sector is criminalised and thus workers within it do not have access to labour protections, because workers are undocumented and excluded from those protections, or because regulations are poorly designed or poorly implemented;
2. A high supply of ‘exploitable’ labour – immigration pathways and lack of different livelihood options creates a pool of people who need to say yes to poor work offers;
3. Power and social norms – racism, xenophobia and prejudice create a climate in which people justify their exploitation of others.

Rather than making the sex sector even less protected from traffickers by prohibiting the buying or selling of sexual services, a ‘decriminalisation plus’²⁴ approach would support sex workers’ security and safety *whilst enabling anti-trafficking measures to be taken*.

4. Conclusions and recommendations

Based on the above, **ESWA recommends rejecting the Article 18 a. that would make the criminalisation of knowing use of victims mandatory**. The binding provision doesn’t have any added value and, what’s even more important, can have unintended negative effects on the victims of human trafficking as well as groups at risk of trafficking in human beings. In line with the conclusion of the International Commission of Jurists, **it would only lead to overcriminalisation of different aspects**

²⁴ For more information about the methods by which decriminalisation can support anti-trafficking measures, please see our briefing [Tackling Trafficking under a Decriminalisation Model](#).

of human life that can be better addressed by other tools than criminal justice. ESWA echoes the findings of LSI study that **this approach is not based in human rights and is in fact likely to lead to human rights violations**. We further denounce the Swedish model law - within which the proposed provision is implemented beyond the definition in Art. 18a. where the knowledge element doesn't need to be proven specifically in the sex sector. Data from countries with the Swedish Model, as seen in this briefing, shows that this approach has no evidence that it reduces trafficking rates, either in individual countries with the model in place or when countries are compared. On top of that, there is ample and growing evidence that violence against women within the sex industry increases when this legislative model is applied.

We further 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)