Subsidiarity and Trafficking in Human Beings

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MARCO BORRACCETTI, MAR 14 2021

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The European action against trafficking in human beings must be seen from a dual perspective. On the one hand, it is part of the action countering irregular migration as analysed throughout section three of this book; on the other hand, it is a serious form of crime included in EU cooperation concerning criminal matters in the area of freedom, security and justice (Title V of the Treaty on the Functioning of the European Union, TFEU) as explored in chapter seven. This dual perspective is also reflected in two different legal bases set out in Articles 79 and 83 TFEU. Both provisions are included in Title V, although they do not bind all EU member states as the UK, Ireland and Denmark have opted out of this set of regulations. However, the member states of EFTA are bound. In the area of freedom, security and justice the EU does not hold exclusive competence and, therefore, has to respect the principle of subsidiarity as mentioned in the treaties. More specifically Protocol no. 2 refers to the application of the principle of subsidiarity as well as that of proportionality. The aim of this chapter is to understand the role of the principle of subsidiarity in European actions as part of the fight against human trafficking. After an analysis of the principle in the EU legal framework and in the context of human trafficking, the focus will be on its contribution to adopting solutions against users of services that are provided by victims of trafficking.

The principle of subsidiarity in the area of freedom, security and justice

The principle of subsidiarity represents a filter between Union competences and their exercise. The EU may use its power to legislate in a given field, as conferred to it by the member states, only in a manner compatible with the subsidiarity principle. The Treaty of Lisbon retained this approach, even if the concrete guidelines for applying the subsidiarity test were not taken over in the new protocol annexed to the treaties (Lenaerts and Van Nuffel 2011).

The Treaty on European Union (TEU) specifies in Article 5 (1) that the use of EU competences ‘is governed by the principles of subsidiarity and proportionality’. More specifically, under the principle of subsidiarity, the EU can act if the objectives of the proposed action ‘cannot be sufficiently achieved by the Member States, … but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level’. Given its nature, it applies only in areas where the Union shares legislative competence with that of the member states (Article 5 (3) TFEU).

In practice, the subsidiarity principle tests Union action against a de-centralisation criterion as well as an efficiency criterion: the EU acts only if the proposed objectives cannot be sufficiently achieved by the member states, and if they can be better achieved by the Union (Lenaerts and Van Nuffel 2011). In other words, there is an assumption that EU action must have a better effect than the sum of single national actions in the specific policy area of concern.

Since the Treaty of Lisbon, the Treaty formulation of the principle of subsidiarity explicitly refers to member state action ‘either at central level or at regional and local level’. The philosophy is that decisions are taken ‘as closely as possible to the citizen’ (TEU preamble, last paragraph). The EU ‘shall act only within the limits of the competences conferred upon it by the Member States in the Treaties’ (Article 5 (1) TEU), and subsidiarity is one of the principles that governs the exercise of competences conferred to the EU. For this reason, EU action will conflict with the principle of subsidiarity only if the desired objective can be achieved just as much in all member states either by

acting alone or by cooperation between the member states concerned (Article 5 (1) TEU).

The application of the principle of subsidiarity has to follow Protocol no. 2, adopted jointly with the Treaty of Lisbon. It implies that the actions of EU institutions are under the scrutiny of national parliaments in accordance with the specific procedures set out. This has the aim of contributing to the good functioning of the Union (Article 12 (b) TEU). In the case of the area of freedom, security and justice, Article 69 TFEU reaffirms the role of domestic representative bodies as controllers of EU institutional compliance with the subsidiarity principle. In particular, as suggested by Article 3 of Protocol no. 1, national parliaments can send to the presidents of the three political EU institutions a reasoned opinion whether a draft legislative act is in line with the principle. However, it is clear that subsidiarity concerns cannot be used to create new forms of crimes other than those already included in the part of the treaty dealing with cooperation in criminal matters. In other words, subsidiarity cannot be exploited for creating different and new EU competences. Rather its specific use in the area of freedom security and justice serves to confirm the need for EU action. As it is not meant to restrain the use of centralised European measures, it stands in clear contrast to an interpretation that sees subsidiarity as a way of preserving the political function of national borders in EU-wide criminal law proceedings (Herlin-Karnell 2009, 352).

The preamble to Protocol no. 2 states clearly the aim of the principle of subsidiarity: to establish the 'condition for the application' and to establish a 'monitoring mechanism'. In fact, the main EU institutions have to guarantee its 'constant respect' (Article 1), justifying each version of a new piece of legislation through a detailed statement on compliance (Article 5). Indeed, any national parliament may – within eight weeks from the date of transmission of a draft legislative act – submit a reasoned opinion to the leadership of EU institutions stating that compliance was not ensured (Article 6). The lack of an explicit reference to such concerns may represent a violation of EU law as set out in the treaties.

The fight against human trafficking and its weakness

Trafficking in human beings is a serious form of crime and a grave violation of human dignity. Indeed, it is prohibited by Article 5 (3) of the Charter of Fundamental Rights of the European Union. It therefore has no legal or moral acceptance, and the exploitation of a person in coercive circumstances by another person must be seen as a reprehensible act in any system of criminal law and justice. As stated above, the European legal framework approaches the fight against human trafficking from a dual perspective: first, in connection with the fight against irregular migration and, second, as a crime with a European dimension that is subject to cooperation among the member states in criminal matters. As required by Article 79 TFEU, the EU:

shall develop a common immigration policy aimed at ensuring, at all stages, … the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.

For this purpose, EU institutions are requested to adopt specific combative measures in the area of trafficking in persons, in particular when the criminal practice concerns women and children. Yet, in this legal context the fight against trafficking in human beings is only one of the instruments meant to achieve the goal of counteracting irregular migration and thus forms part of EU immigration policy. This follows from an emphasis on the external 'cross-border' dimension of trafficking as also reflected in the spirit of the UN Convention on Organised Crime (the Palermo Convention and its Protocol on Trafficking in Human Beings; United Nations, 2000) and the Convention of the Council of Europe against Trafficking in Human Beings (Council of Europe, 2005a).

Clearly, taking up the fight against trafficking in human beings exclusively in the context of migration policy would have severely limited EU action. All other constellations of trafficking, within or across member states, would not be followed up and could avoid further prosecution. For this reason, the explicit mentioning of trafficking in human beings in the list of crimes with a European dimension constitutes an added value. It covers all situations where EU citizens have become victims of traffickers without the need to establish a particular connection with migration issues. Therefore, Article 83 TFEU states that the

European Parliament and the Council may, by means of directives adopted in accordance with the ordinary

legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with an internal 'cross-border' dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

Indeed, trafficking in human beings is one of these serious forms of crime with a cross-border dimension, albeit without a necessary linkage to a migration issue.

At the same time, the cross-country dimension set out in Article 83 refers to potential internal European constellations even though the area of freedom, security and justice is without internal borders. Nevertheless, such borders still exist for the prosecution of crimes in so far as the competence of law enforcement authorities is located within national jurisdictions and the legal measures in the hands of the member states are considered insufficient.

The EU's legal framework on trafficking in human beings includes the Anti-Trafficking Directive and the Residence Permit Directive (EU 2004; 2011). The former is the main source of the current framework and had a legal predecessor in the form of Framework Decision 2002/629 (see EU 2002; Krieg 2009). The latter was the first EU act that addressed trafficking in human beings from a criminal law perspective, and for this reason was adopted in the third pillar of the original treaty structure dealing with cooperation in the fields of justice and home affairs.

In the adoption process of the two directives, subsidiarity concerns came into play due to the added value deriving from EU actions in addition to the sum of national pieces of legislation. Arguably, the investigation and prosecution of respective crimes depends heavily on the cooperation of the member states concerned and is enhanced by harmonised criminal statutes. Yet, a satisfactory level of the required harmonisation 'cannot be achieved by national legislators on their own, even if they should choose to cooperate closely' (Satzger et al. 2013, 115–8).

Thus, the Anti-Trafficking Directive is aiming for a comprehensive approach in the fight against trafficking in human beings, also by including measures sanctioning traffickers regardless of the fact of whether they are natural or legal persons. Unfortunately, the piece of EU legislation does not contain similar provisions for the exploiters of victims who are not considered traffickers but are users of their services. In fact, according to the wording of Article 18 (4) of the Anti-Trafficking Directive, the member states should only 'consider taking measures' to punish 'the use of services which are the objects of exploitation'. Clearly, this must be considered the weakest part in the existing legal framework. Indeed, a system including sanctions for the users of services from victims of trafficking would be much completer and more effective by significantly reducing the possibilities for exploitation.

Although in line with the principle of subsidiarity, it might be worth noting that the choice of the European Parliament and the Council gives preference to the existing national approaches, leaving the consideration of criminal sanctions in the domain of domestic authorities. Therefore, a genuine European approach with potentially global reach is undermined as national governments maintain the last word in decisions on criminal law and policy. Not surprisingly, the envisaged solution has not worked so far, as it emerged from a recent Report on Criminalisation of the Use of Services issued by the Commission (EU 2016).

The report on the criminalisation of the use of services

In a nutshell, the report confirmed that national actions did not achieve the desired goals. For that reason, the Commission was requested to consider the possibility of issuing a specific proposal on the criminalisation of the users of services from victims of trafficking, while at the same time giving full respect to the principle of subsidiarity.

To develop its own position, the Commission made use of information received from the member states, although the latter did not elaborate in detail how 'they fulfilled the legal obligation to consider the criminalisation of users of victims stemming from Article 18 (4)' of Directive 2011/36/EU (EU 2016, 3). This formulation is telling and refers in substance to both parliamentary and governmental initiatives. Potentially, the obligation 'to consider the criminalisation of users of victims' could be satisfied by a simple discussion about the possibility of instituting different sanctions within the existing legal framework.

Due to limited cooperation by the member states, only a patchwork of data and information became available. Apparently, only ten EU countries (Bulgaria, Croatia, Cyprus, Greece, Lithuania, Malta, Portugal, Romania, Slovenia, and the United Kingdom) address all forms of exploitation and recognise the use of services in the context of trafficking of human beings as a criminal offence. Other EU countries have opted for a more limited and selective criminalisation of respective practices. More specifically, a second group of 14 member states (Austria, Belgium, Czech Republic, Estonia, France, Germany, Hungary, Italy, Latvia, Luxemburg, The Netherlands, Poland, Slovakia, and Spain) reported to have no explicit national legal provisions in place for establishing 'the use of services' as a criminal offence. Instead, in a smaller sub-group of member states, recourse could be made to provisions relating to sexual offences and child sexual exploitation (Belgium Italy, the Netherlands, Spain), or to the unlawful brokering and exploitation of labour more generally (Italy). Finally, in a third group, member states such as Finland, Ireland, and Sweden have introduced legislation targeting the use of victims of trafficking, but only as regards particular forms of exploitation: sexual exploitation in the case of Finland and Ireland, and the purchase of sexual services in the case of Sweden. In the meantime, the demand for services from victims fuels exploitative behaviour across Europe, while a comprehensive and coherent EU policy response is missing. As individual states appear to limit the required action against traffickers, the final result is increasingly fragmented EU action sporadically targeted at 'last consumers'.

As it stands, most legislative measures focus on sexual exploitation, bearing in mind that the biggest number of victims are women and girls (Eurostat 2015, 11). Yet, according to European and international definitions of trafficking, the exploitation for sexual reasons is just one category among many others. The latter, for example, also include 'forced labour or services, including begging, slavery, … servitude, or the exploitation of criminal activities, or the removal of organs' (EU 2011, Article 2). Only the first country grouping has legislation in place covering diverse forms of exploitation. The second and third grouping may provide protection through rules not necessarily directed towards trafficking offences. By contrast, the EU legal framework applies, if the victims of trafficking are third country nationals who stay illegally in the territory of the Union. Then the member states have a legal instrument at their disposition in the form of the Employers' Sanctions Directive (EU 2009). Under certain circumstances, this directive may justify the sanctioning of users of services, despite its prime intention to fight irregular migration.

Furthermore, a Communication by the European Commission clarifies that the member states have criminalised illegal employment in all the circumstances described in Article 9 of the Employers' Sanctions Directive, including those where the employer knows that the worker is a victim of human trafficking (EU 2014, 5). Yet again, the Commission points out that the member states are not necessarily sanctioning illegal employment when 'the employer was aware that the worker was a victim of human trafficking' (EU 2014, 5). Instead, the Employers' Sanctions Directive is applicable only in the rather specific case of victims residing illegally as third country nationals in a member state. It does not apply if potential victims are EU citizens or regular EU residents. Then none of the European acts is useful to counter the exploitative behaviour of users of services, and any other applicable legal instruments would have to be rooted in national legal orders.

Obviously, the current situation in the fight against human trafficking is influenced by different approaches and practices developed within the EU member states. Where national measures establishing a criminal offence exist, their individual scope is limited, for example, excluding recruiters. Moreover, all domestic legislation requires that the user had prior knowledge of the service provider being a victim of trafficking (EU 2016, 7). The need to find evidence for the intention or, indeed, knowledge of a wrongdoing by the users of services (*mens rea)* highlights the complexity of the issue. In most member states, the burden of proof rests with the prosecutor, while the suspect or defendant 'benefits from the presumption of innocence and has no obligation to prove his innocence' (EU 2016, 7). Similarly, an Explanatory Report of the Council of Europe pointed to this major obstacle, but still considered the evidence argument as inconclusive in terms of the criminal nature of a certain type of conduct (Council of Europe 2005b, 37).

What is more, the development of criminal law must go beyond a mere deterrent effect and protect people that are part of a larger community. This is particularly true for those most exposed to violence and who experience the use of force to exploit their individual vulnerabilities. Therefore, the focus must be on actors, legal persons, or groups of people engaged in exploiting victims of trafficking in the form of abuse or for the sake of profit. Investigations must also include promoters or facilitators of such behaviour who actively create an enabling environment for human exploitation. The potential linkage between exploitation and profit is not restricted to criminal organisations as it may

involve a chain of legitimate businesses. These can include profit-takers such as relatives of victims, formal and informal recruitment agencies, labour market intermediaries, sub-contractors of global suppliers, travel agencies or transport enterprises as well as information technology companies (EU 2016, 9). The suggested criminalisation of the users of services from victims of trafficking would be a first step to protect vulnerable people and to incentivise law enforcement authorities to increase the reach of their activities.

The accountability of perpetrators as an anti-trafficking measure is a foundational aspect of EU action. However, the strength of this key element is undermined, if the users of services are not sanctioned in a complete and comprehensive way. In fact, this further impacts on the effective prevention of the crime of trafficking itself as it is 'less discouraged and even fostered … through a culture of impunity'; and raising awareness of the demand side for different forms of trafficking may help to ensure that 'those who profit from the crime and exploit the victims are brought to justice' (EU 2016, 10). Again, in the words of the Commission (EU 2016, 10):

The lack of criminalisation of the use of services of a trafficked person, especially with the knowledge that she or he is a victim of human trafficking, renders the overall fight against trafficking in human beings less effective.

While only a short time has passed since the Anti-Trafficking Directive came into force and the publication of a first evaluative report, its findings should ring an alarm bell. Successful implementation will not occur unless there is a more coherent and uniform EU approach towards the criminalisation of the users of exploitative services.

Application of the principle of subsidiarity

As mentioned above, the principle of subsidiarity supports European legislative action adding value to individual national efforts. In the described scenario, subsidiarity concerns must be examined from at least two perspectives: how, if at all, could a new EU act on the criminalisation of users of services of trafficked persons be considered a necessity; and does this follow from an inability of the member states to achieve the desired goal set out in the original directive?

As noted earlier, subsidiarity in EU legislation is not meant as an instrument to create new forms of criminalisation. In addition, trafficking in human beings has also been included in the list of serious 'euro-crimes'. What matters more here is the fact that the Union can exercise exclusive competences due to the 'nature' of the existing codification. In this context, it is worth noting the substance of Article 18 (4) of Directive 2011/36/EU:

In order to make the preventing and combating of trafficking in human beings more effective by discouraging demand, Member States shall consider taking measures to establish as a criminal offence the use of services which are the objects of exploitation as referred to in Article 2, with the knowledge that the person is a victim of an offence referred to in Article 2.

According to the Report by the Commission, member states in their majority have not yet adopted comprehensive legislation sanctioning the use of services of victims of trafficking; and most legislation sanctions the use of services of trafficked persons for sexual reasons. On the one hand, this is justified due to the strong gender dimension of crime; on the other hand, it excludes all other forms of exploitation. It has also become clear that not all national measures target directly the users of services. Instead, domestic authorities are applying legal instruments already in place in their national legal framework to address this form of exploitative behaviour.

As a first result, therefore, taking into consideration the purpose of the Anti-Trafficking Directive, the demands of Article 18 (4) are respected and the actions of the member states are in congruence with the goal 'to consider taking measures' that establish a criminal offence. Arguably, though, the described provisions are only in partial fulfilment of the obligation on part of the member states. Again, the Commission Report is essential evidence as it demonstrates that only a minority of states has a comprehensive legal system in place, including rules on the criminalisation of the users of services. Moreover, the relevant national authorities are not able to prosecute all groups of users of exploitative services. Thus, national actions remain insufficient and inadequate, especially as the number of reported crimes is increasing at regional as well as global level. There can be little doubt that the demand side for the use of

services of trafficked persons drives the criminal behaviour of traffickers further.

In sum, given the actual situation in the policy area under discussion further European legislative intervention can be justified, while simultaneously respecting fully the principle of subsidiarity. This is possible, as the member states so far have not been able to realise all the aims of Article 18 (4). Regardless of the complete implementation of Article 18 (4), its partial or entire lack of fulfilment, an argument in favour of a new legislative act on the criminalisation of users of exploitative services can be made in congruence with the principle of subsidiarity.

In this way, European objectives in the fight against the trafficking of human beings could be better achieved. Ideally, then, there would be no further discrimination or distinction among the users of services safeguarding potential victims from exploitation in various stages of the supply chain. Such genuine European action may also have a positive impact in the general fight against organised crime as a major source of specific types of exploitation.

Conclusion

The fight against trafficking in human beings demands a complete legal framework to target all its manifestations. This directs attention to the use of services of trafficked persons as a major aspect of the observed phenomenon. The Anti-Trafficking Directive created an obligation for EU member states to prosecute natural and legal persons as traffickers or as companies exploiting vulnerable people; it also enabled them to further consider the criminalisation of user behaviour. However, the Commission's own report showed the limits of the European system in addressing the identified problem. In short, national measures against the user population appear fragmented and piecemeal, while empirical data on the precise consequences of the implementation process of the directive is hard to come by. As reported crime rates of trafficking are not falling, the importance of an effective European legislative instrument in the hands of national prosecutors is reinforced. In this scenario, the principle of subsidiarity does justify EU action in the form of a new Commission proposal on the criminalisation of exploitative behaviour, thus adding value to the use of this policy instrument.

Nevertheless, the suggested legal interpretation of the principle of subsidiarity respects the limits set by the treaties as it does not serve to create a new form of crime. Instead, it attempts to develop the existing legal framework for a problem constellation with an already recognised European dimension. The latter has been repeatedly confirmed in official documents engaged with the subject matter, also stressing the social costs of human trafficking (see EU 2015). This chapter has argued that a revised Anti-Trafficking Directive must come to terms with the demand and supply side of a criminal transaction by 'changing the wider environment' that facilitates trafficking in human beings (EU 2011, Article 2; EU 2016, 9). Closing this existing legislative gap in the European legal order would give much needed support to national authorities in their mission to protect vulnerable persons from exploitation.

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About the author:

Marco Borraccetti is Associate Professor in European Union Law at the University of Bologna. His research focuses on EU migration, human trafficking as well as refugee and asylum policy.