

## **OPINION ON ACTS OF GERMANY ON PROSTITUTION AND TRAFFICKING IN HUMAN BEINGS**

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### **GERMANY**

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This Opinion has benefited from contributions made by Dr. Marta Achler, International Law Expert.

Based on an English translation of the legislation provided by the Ministry of Justice of Germany (Criminal Code) and commissioned by the OSCE Office for Democratic Institutions and Human Rights (Prostitution Act and Prostitute Protection Act).

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## EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS

The Opinion analyses the German Prostitution Act 2002, the Act for the Regulation of Prostitution Sector and Protection of Persons Engaged in Prostitution (the “Prostitute Protection Act”), in force since 1 July 2017, and certain provisions of the German Federal Criminal Code, to assess their compliance with the commitments and obligations under the international law on the prevention and fight against trafficking in human beings. In particular, as requested, the present Opinion reviews such legislation against the requirements of Article 9 of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (the Palermo Protocol), supplementing the United Nations Convention against Transnational Organized Crime, which makes it mandatory for States Parties to the Treaty to address demand “*that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.*”

Prostitution is regulated in Germany by the above acts and is legal within the limits set by these instruments.

Guided by norms of international law and recognizing the lack of consensus in international fora and among participating States, the current Opinion does not purport to suggest a particular position on the issue of legalized prostitution. At the same time, participating States must ensure an effective mechanism for the prevention and fight against trafficking in human beings, as well as ensure protection of persons engaged in prostitution and other vulnerable individuals from exploitation.

The apparent aim of the Prostitute Protection Act 2017 and norms of the Criminal Code is to strike a balance between prostitution and any form of sexual exploitation that leads to trafficking, the latter being in violation of international law, regional treaties, European Union Law and OSCE commitments. However, the legislation does not seem to include sufficient safeguards for vulnerable persons engaged in prostitution, as well as those who are outside the system of registration, thus potentially undermining the efforts to prevent trafficking. Furthermore, it is crucial that authorities ensure strict application of all the available safeguards against abuse of the most vulnerable groups, and consider enhancing oversight mechanisms that became especially relevant following the mass influx of refugees following the military attack of the Russian Federation on Ukraine.

Therefore, in accordance with international law, and in particular Article 9 of the Palermo Protocol, and with a view to further improve the legislation ODIHR makes the following recommendations:

A. With respect to the Prostitute Protection Act:

1. Incorporate legislative and non-legislative tools to discourage the demand that fosters exploitation which leads to trafficking within state-funded programs and/or organized public health, education and awareness campaigns; [para. 63]

2. Consider legislation to reduce demand, in line with Article 9(5) of the Palermo Protocol by addressing the root cause of prostitution that fosters exploitation that leads to trafficking; [paras. 61-62]
  3. Ensure that websites which facilitate the sale of sexual acts implement measures to prevent the exploitation of the prostitution of others, including age verification of the persons depicted in advertisements and limiting advertisements to only persons who are registered as employed in prostitution; and more generally, develop legal provisions to prevent trafficking for the purpose of sexual exploitation including pornography production, sexual exploitation and forced prostitution online; [para. 62]
  4. Clarify and provide better guidance and criteria for the identification of persons “being induced”, under coercion or exploitation by a third party, to engage in or continue to engage in prostitution; [para. 56]
  5. Clarify specific examples and concrete factual indications of force or coercion or exploitation of vulnerability or abuse of power or inequality in existing prostitution law and regulations; [paras. 53-56]
  6. Assess and review the systems of registration and regulations for persons engaged in prostitution with a view to introducing more effective measures or alternative measures to identify and support those who are exploited, coerced or trafficked into prostitution for lack of ability to adhere to all of the registration rules set out in the law; [paras. 57-59]
  7. Ensure that any act falling within the definition of trafficking or sexual exploitation should be immediately notified under Article 232a of the Criminal Code and investigated, when there is a clear indication that a person engaged in prostitution is induced by a third party to engage in prostitution; [para. 56]
- B. With respect to the Criminal Code:
1. Evaluate the effectiveness of recent amendment to Article 232a, para. 6 (2) of the Criminal Code relating to the “careless” conduct (“Leichtfertigkeit”) on the part of the purchaser of sexual acts, and all relevant legislation, to assess whether it is an effective tool to discourage demand that fosters exploitation that in turn leads to trafficking; [para. 68]
  2. Review, with the possibility of revising, laws on burdens of proof so that an accused trafficker or exploitive procurer (pimp) must disprove conditions of exploitation and abuse proffered by a claimed victim under existing criminal laws; [para. 68]
  3. Provide regular training to enforcement authorities, including robust training and operational prioritization. [para. 69]
- C. To ensure that the review of the Prostitute Protection Act 2017 investigates the reasons why the administrative regulations, including the employee benefits guaranteed, are minimally used while ensuring that such a review is part of a comprehensive and inclusive consultation process with the main stakeholders, including persons engaged in prostitution, survivors of trafficking in human

beings who were exploited within prostitution in Germany, survivor-led networks, organizations assisting trafficked persons, labour inspectorates and local authorities, as well as to engage actively with civil society in monitoring the situation of persons engaged in prostitution, developing policies and continuing to build partnerships to reduce vulnerability and risk of trafficking of persons engaged in prostitution. [paras. 71-73]

***These and additional Recommendations, are included throughout the text of this Opinion, highlighted in bold.***

***As part of its mandate to assist OSCE participating States in implementing OSCE human dimension commitments, ODIHR reviews, upon request, draft and existing legislation to assess their compliance with international human rights standards and OSCE commitments and provides concrete recommendations for improvement.***

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(1) The German Federal Criminal Code (*Strafgesetzbuch*) [Criminal Code in the version published on 13 November 1998 (Federal Law Gazette I, p. 3322), as last amended by Article 1 of the Act of 11 July 2022 (Federal Law Gazette I, p. 1082)]

(2) The Prostitution Act (*Prostitutionsgesetz*) (2002)

(3) The Act for the Regulation of Prostitution Sector and Protection of Persons Engaged in Prostitution (Prostitute Protection Act) (*Gesetz zur Regulierung des Prostitutionsgewerbes sowie zum Schutz von in der Prostitution tätigen Personen. (Prostituiertenschutzgesetz)*) (in force since 2017), as last amended by Article 5 para. 1 of the Act of 9 March 2021

## I. INTRODUCTION

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1. On 22 June 2021, the Chairwoman of the Committee for Family, Seniors, Women and Youth in the German Bundestag sent to the OSCE Office for Democratic Institutions and Human Rights (hereinafter, “ODIHR”) a request for a legal review of German legislation on prostitution and trafficking in human beings to assess its compatibility with international law and OSCE Commitments. The request concerned the Prostitution Act (2002) (hereinafter, “Prostitution Act 2002”) and the Act for the Regulation of Prostitution Sector and Protection of Persons Engaged in Prostitution (hereinafter, “Prostitute Protection Act 2017”), together with relevant provisions of the Criminal Code (hereinafter, “CC 2021”), especially Section 232 on human trafficking, Section 232a on forced prostitution, Section 180a on exploitation of prostitutes, and Section 184f on exercise of prohibited prostitution, or Section 181a on procuring (“pimping”).
2. The requesting party asked, in particular, to examine the compatibility of the said legislation with Article 9 of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (hereinafter, “Palermo Protocol”).<sup>1</sup>
3. On 28 June 2021, ODIHR responded to this request, confirming the Office’s readiness to prepare a legal opinion on the compliance of these provisions with international human rights standards, in particular, Article 9 of the Palermo Protocol, and the OSCE commitments. Resources from the Office of the OSCE Special Representative and Co-ordinator for Combating Trafficking in Human Beings were consulted during the process of preparing this legal analysis.
4. This Opinion was prepared in response to the above request. ODIHR conducted this assessment within its mandate to assist the OSCE participating States in the implementation of their OSCE human dimension commitments.<sup>2</sup>

## II. SCOPE OF THE OPINION

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5. The scope of this Opinion covers only the legislation and provisions submitted for review. Thus limited, the Opinion does not constitute a complete and comprehensive review of the entire legal and institutional framework regulating prostitution and measures to prevent and combat trafficking in Germany. It also seeks to respond to the direct request of assessing German legislation against international law, in particular, Article 9 of the Palermo Protocol.<sup>3</sup>
6. The Opinion raises critical issues and provides indications of areas of concern. In the interest of conciseness, it focuses on the provisions that require amendments or

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1 *UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children* (Palermo Protocol), supplementing the *United Nations Convention against Transnational Organized Crime*, 15 November 15 2000, T.I.A.S. No. 13127, 2237 U.N.T.S. 319 (the Palermo Protocol was ratified by Germany on [14 June 2006](#)); *United Nations Convention Against Transnational Organized Crime*, opened for signature on 12 December 2000, T.I.A.S. 13127, 2225 U.N.T.S. 209 ([ratified by Germany on 14 June 2006](#)).

2 ODIHR conducted this assessment within its mandate as established by the OSCE Action Plan to Combat Trafficking in Human Beings (2003): see paras. 9.1 and 15.1 of the [Annex to OSCE Ministerial Council Decision 2/03 on Combatting Trafficking in Human Beings](#) (2003).

3 Palermo Protocol, Section III. “Prevention, cooperation and other measures”: Article 9 “Prevention of trafficking in persons”.

improvements in order to be in line with Article 9 of the Palermo Protocol, rather than on the positive aspects of the legislation. The ensuing legal analysis is based on international and regional human rights and rule of law standards, norms and recommendations as well as relevant OSCE human dimension commitments, such as the OSCE Action Plan to Combat Trafficking in Human Beings.<sup>4</sup> In cases where information about applicable international standards is illustrated through how they are implemented in practice in certain national laws, such country examples should always be approached with caution since they cannot necessarily be replicated in another country. Indeed any country example provided should always be considered in light of the broader national institutional and legal framework, as well as the country context and political culture.

7. Moreover, in accordance with the *Convention on the Elimination of All Forms of Discrimination against Women* (hereinafter “CEDAW”)<sup>5</sup> and the 2004 OSCE Action Plan for the Promotion of Gender Equality<sup>6</sup> and commitments to mainstream gender into OSCE activities, programmes and projects, the Opinion integrates, as appropriate, a gender and diversity perspective.
8. The present Opinion undertakes to assess the impact of the Prostitution Act 2002, the Prostitute Protection Act 2017 and relevant provisions of the CC 2021 against the commitments and obligations under international law on the prevention of trafficking in human beings. Guided by norms of international law, the current Opinion does not purport to suggest a particular position on the issue of legalized prostitution.
9. This Opinion is based on the legislation submitted for review, with subsequent updates. The relevant provisions of the Criminal Code have been translated by the German Ministry of Justice and are available online,<sup>7</sup> and an unofficial English translation of the other pieces of legislation was commissioned by ODIHR, which is attached to this document as an Annex. Errors from translation may result. The Opinion is also available in German. However, the English version remains the only official version of the Opinion.
10. The relevant German legislation employs the term prostitute (“Prostituierte”) and prostitution (“Prostitution”). In this Opinion the term “person(s) engaged in prostitution” is employed to refer to persons offering sexual acts. ODIHR does not seek to advocate for using a specific term for persons engaged in prostitution.
11. As a result of the situation in Ukraine following the Russian military invasion of Ukraine and the ensuing large number of refugees, more people become vulnerable to Trafficking in Human beings. *“Criminals profit from the chaos and desperation of war. Crisis increases vulnerabilities as well as opportunities to exploit people in need, especially internally displaced people and refugees”*.<sup>8</sup> Consequently, authorities may need to take effective steps in order to further enhance protection of people against trafficking. This Opinion does not prevent ODIHR from formulating additional written or oral recommendations or comments on respective subject matters in Germany in the future.

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4 [Annex to OSCE Ministerial Council Decision 2/03 on Combatting Trafficking in Human Beings](#) (2003), [MC.DEC/2/03](#), Maastricht, 2 December 2003.

5 *UN Convention on the Elimination of All Forms of Discrimination against Women* (hereinafter “CEDAW”), adopted by General Assembly Resolution 34/180 on 18 December 1979. [CEDAW was ratified by Germany on 10 July 1985](#).

6 See [OSCE Action Plan for the Promotion of Gender Equality](#), adopted by Decision No. 14/04, MC.DEC/14/04 (2004), para. 32.

7 [German Criminal Code](#) in English.

8 [Statement of UNODC Executive Director Ghada Waly](#).

### III. LEGAL ANALYSIS AND RECOMMENDATIONS

#### 1. RELEVANT INTERNATIONAL HUMAN RIGHTS STANDARDS AND OSCE HUMAN DIMENSION COMMITMENTS

12. The commitment to combat trafficking in human beings has been undertaken by States at the international, regional and national level.
13. The leading international treaty in the field of human trafficking is the already mentioned Palermo Protocol.<sup>9</sup> It was adopted as an addition to the United Nations Convention against Transnational Organized Crime<sup>10</sup> (“UNTOC”).
14. Article 3 (a) of the Palermo Protocol defines “trafficking in persons” as:

*“[T]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”*
15. Following the adoption of the Palermo Protocol, the Council of Europe adopted the Convention on Action against Trafficking in Human Beings, 2005 (“the Anti-Trafficking Convention”).<sup>11</sup> In its Article 4, the Anti-Trafficking Convention adopts the same definition of trafficking as the Palermo Protocol. However, it is more ambitious in its provisions by seeking to provide more far-reaching protection and assistance mechanisms to victims of trafficking.
16. All the elements of the definition of trafficking under Article 3 of the Palermo Protocol and Article 4 of the Anti-Trafficking Convention must be met in order for a perpetrator to be found guilty and convicted of the crime of trafficking of an adult victim.<sup>12</sup> These three elements are often termed “action” (recruitment, transport, transfer, harbouring or receipt), “means” (force, fraud, coercion, abduction or abuse of power or of position of vulnerability), and “purpose” (e.g., to exploit prostitution of others or other sexual exploitation). Means need not be shown in cases where the victim is a child.
17. Article 3(b) of the Palermo Protocol and 4(b) of the Anti-Trafficking Convention provide that the consent of a victim of trafficking to the intended exploitation is irrelevant where any of the means in Article 3(a) or 4(a), respectively, have been used. On this point, the Explanatory Report accompanying the Anti-Trafficking Convention states:

*“The question of consent is not simple and it is not easy to determine where free will ends and constraint begins. In trafficking, some people do not know what is in store for them while others are perfectly aware that, for example, they will be engaging in prostitution. However, while someone may wish employment, and possibly be willing to engage in prostitution, that does not mean that they consent*

<sup>9</sup> *Op. cit.* footnote 1 (Palermo Protocol).

<sup>10</sup> *Op. cit.* footnote 1 (United Nations Convention against Transnational Organized Crime).

<sup>11</sup> [Council of Europe Convention on Action against Trafficking in Human Beings](#) (CETS No. 197) 16 May 2015 ([entered into force in Germany on 1 April 2013](#)).

<sup>12</sup> European Court of Human Rights, [V.C.L. and A.N. v. The United Kingdom](#), Application nos. 77587/12 and 74603/12, para. 149 (16 February 2021).



*to be subjected to abuse of all kinds. For that reason Article 4(b) provides that there is trafficking in human beings whether or not the victim consents to be exploited.”<sup>13</sup>*

18. In Recommendation 1325 (1997) on traffic in women and forced prostitution in Council of Europe member States, the Parliamentary Assembly of the Council of Europe defined use of force in this context as follows:

*“2. ... [A]ny legal or illegal transporting of women and/or trade in them, with or without their initial consent, for economic gain, with the purpose of subsequent forced prostitution, forced marriage, or other forms of forced sexual exploitation. The use of force may be physical, sexual and/or psychological, and includes intimidation, rape, abuse of authority or a situation of dependence.”*

19. The internationally agreed definition of trafficking in human beings is broad and requires States Parties to criminalize the relevant conduct alongside taking measures to prevent trafficking and protect and assist victims. This definition covers a range of exploitative purposes, including sexual exploitation, labour exploitation, and organ removal.<sup>14</sup> Sexual exploitation is not specifically defined by the Palermo Protocol, but Article 3 (a) states that “exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation”.<sup>15</sup> The UNODC *Legislative Guide for the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children* (2020) explains that the exploitation of the prostitution of others is generally understood as “*profiting from the prostitution of another person*”,<sup>16</sup> equating the exploitation of prostitution of others to what is commonly known as “pimping”.
20. The United Nations Glossary on Sexual Exploitation and Abuse defines “*sexual exploitation*” as “*any actual or attempted abuse of position of vulnerability, differential power or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another.*”<sup>17</sup>
21. In addition to establishing the definition of trafficking in human beings, and of particular relevance to this Opinion, the Palermo Protocol also establishes the legal obligation for States to prevent trafficking in persons. Article 9 of the Palermo Protocol on “Prevention of trafficking in persons” states:

*“1. States Parties shall establish comprehensive policies, programmes and other measures:*

- a. To prevent and combat trafficking in persons; and*
- b. To protect victims of trafficking in persons, especially women and children, from revictimization.*

*2. States Parties shall endeavour to undertake measures such as research information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons.*

<sup>13</sup> [Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings](#), para. 97 (16 May 2005).

<sup>14</sup> Article 3 (a) of the Palermo Protocol which defines exploitation as: ‘*the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.*’

<sup>15</sup> *Ibid.*

<sup>16</sup> UNODC, [Legislative Guide for the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children supplementing the United Nations Convention against Transnational Organized Crime](#) (2020), para. 119.

<sup>17</sup> United Nations, [Glossary on Sexual Exploitation and Abuse](#), p. 7.

3. *Policies, programmes and other measures establishes in accordance with this article shall, as appropriate, include cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.*

4. *States Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make such persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity*

5. *States Parties shall adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children that leads to trafficking.*<sup>18</sup>

22. The OSCE Action Plan to Combat Trafficking in Human Beings, also brought to the fore the necessity to prevent, protect and assist victims as well as effectively prosecute traffickers.<sup>19</sup> Furthermore, the Action Plan encourages OSCE participating States to conduct more far-reaching analysis of the root causes of Trafficking in Human Beings, its demand and supply factors, its networks and its economic consequences, and its link with illegal migration.<sup>20</sup> It further calls upon them to adopt or strengthen legislative, educational, social, cultural or other measures, and, where applicable, penal legislation, including through bilateral and multilateral co-operation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, and that leads to trafficking.<sup>21</sup>

23. On a regional level, the Council of Europe Convention on Action Against Trafficking in Human Beings also includes under its Article 6 an obligation to adopt measures to discourage demand. Article 6 states:

*“To discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking, each Party shall adopt or strengthen legislative, administrative, educational, social, cultural or other measures including:*

*a. research on best practices, methods and strategies;*

*b. raising awareness of the responsibility and important role of media and civil society in identifying the demand as one of the root causes of trafficking in human beings;*

*c. target information campaigns involving, as appropriate, inter alia, public authorities and policy makers;*

*d. preventive measures, including educational programmes for boys and girls during their schooling, which stress the unacceptable nature of discrimination*

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18 *Op. cit.* footnote 1, Article 9 (Palermo Protocol).

19 *Op. cit.* footnote 2, (OSCE Action Plan to Combat Trafficking in Human Beings). See also Ministerial Council Decision on Strengthening Efforts to Prevent Trafficking in Human Beings (MC.DEC/6/17), which reiterated the OSCE’s “support for the effective implementation” of the Palermo Protocol “as the international legal framework for combating trafficking in persons”; see also Ministerial Council Decision 14/4 and Ministerial Council Decision 6/17, which recall that the 2003 OSCE Action Plan “stress[es] the importance of comprehensive prevention measures, including measures to address demand.” Ministerial Council Decision 7/17 on Strengthening Efforts to Combat All Forms of Child Trafficking, Including for Sexual Exploitation, as well as Other Forms of Sexual Exploitation of Children (MC.DEC/7/17), calls on participating States “to help eliminate demand that fuels child trafficking and sexual exploitation of children”. And a year later, 2018 Ministerial Council Decision 6/18 on Strengthening Efforts to Prevent and Combat Child Trafficking, Including of Unaccompanied Minors (MC.DEC/6/18), whereby OSCE participating States committed to promote efforts to prevent child trafficking, countering the culture of impunity, and reducing and addressing the demand which fosters all forms of exploitation.

20 *Op. cit.* footnote 2, (OSCE Action Plan to Combat Trafficking in Human Beings), Section IV, para. 1.3.

21 *Ibid.*, (OSCE Action Plan to Combat Trafficking in Human Beings), Section IV, para. 3.3.

*based on sex, and its disastrous consequences, the importance of gender equality and the dignity and integrity of every human being.”*

24. The European Union also introduced a Directive<sup>22</sup> in 2011, which is binding legislation for European Union Member States, including Germany, and addresses trafficking in human beings by aiming to prosecute criminals effectively and better protect the victims. It also obliges European Union Member States to “*to take appropriate measures, such as education and training, to discourage and reduce the demand that fosters all forms of exploitation*”.<sup>23</sup> Utilizing the term “reduce”, ensures that there is a clear understanding and commitment for States to pursue the reduction of demand as part of preventing trafficking in human beings, including for the purpose of sexual exploitation. The EU Strategy on Combatting Trafficking in Human Beings (2021-2025) reaffirmed this approach by prioritizing reducing demand for trafficking and all forms of exploitation, breaking the criminal model to halt victims’ exploitation, protecting, supporting and empowering victims, especially women and children and to deepen co-operation across the international dimension.<sup>24</sup>

## **2. BACKGROUND ON THE INTERNATIONAL FRAMEWORK AND THE OBLIGATION TO DISCOURAGE THE DEMAND THAT FOSTERS EXPLOITATION THAT LEADS TO TRAFFICKING**

25. In commenting on the international legal framework governing State responsibilities to prevent trafficking in human beings, it is important to note that the approach of OSCE participating States to the regulation of prostitution varies greatly. Countries remain divided on the matter in both legislation and practice, with a wide range of legal regimes, where prostitution is either legal, largely unregulated or fully or partially criminalized. In some participating States, both service as well as purchase of prostitution is legal and regulated (such as, Austria, Germany, Greece, Hungary, Latvia, Netherlands and Turkey), or largely unregulated, where prostituting and buying sex are legal but soliciting or organizing prostituting is prohibited (such as, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, Italy, Luxembourg, Malta, Poland, Portugal, Slovakia, Slovenia, and Spain). There are also states, which criminalize purchase of prostitution, but decriminalize persons in prostitution (such as, France, Ireland, Iceland, Canada, Northern Ireland Norway, and Sweden) — the so-called “Equality Model” — or punish both the person(s) engaged in prostitution and the client (e.g., Lithuania).<sup>25</sup>
26. However, regardless of the model chosen, it is important that regulation of prostitution at the domestic level is in line with international obligations and, in particular, with the obligations to curb the type of demand expressed in Article 9(5) of the Palermo Protocol (cited in para. 27 below). Participating States are obliged to introduce “*all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.*”<sup>26</sup> Although the Palermo Protocol does not provide guidance nor take a position on the regulation of prostitution in combating trafficking in human beings, and the Council of Europe Anti-Trafficking Convention also leaves discretion to State Parties on the issue, States agreed that the demand that fosters exploitation,

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22 [Directive 2011/36/EU 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.](#)

23 *Ibid.*, (EU Directive 2011/36) Preamble (25).

24 [Communication on EU Strategy on Combatting Trafficking in Human Beings.](#)

25 [Study on EU Member States’ regulations on prostitution and their cross-border implications on women’s rights \(commissioned by the European Parliament’s Policy Department for Citizens’ Rights and Constitutional Affairs at the request of the FEMM Committee\),](#) September 2021, p. 22 (legislation) and 35 (“Swedish model”).

26 *Op. cit.* footnote 1 (Palermo Protocol), and *op. cit.* footnote 5 (CEDAW, Article 6).

including the exploitation of the prostitution of others, must be discouraged. The EU Directive further elaborates on discouragement by reduction of demand.<sup>27</sup>

27. As noted above in para. 21 above, Article 9(5) of the Palermo Protocol refers to legislative or other measures States Parties must endeavour to take in preventing trafficking in persons, including “*educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.*”
28. As noted by the OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, Article 9(5) of the Palermo Protocol requires States to discourage not “*the ‘demand for trafficking’ or the ‘demand for sexual exploitation’, but rather demand that encourages exploitation that in turn leads to trafficking.*”<sup>28</sup> In other words, demand needs only be causally connected to exploitation — in that it “fosters” the exploitation — but does not have to be designed or intended to increase exploitation or trafficking. In the context of trafficking for the purpose of exploitation of the prostitution of others, for example, this approach extends the concept of demand to buyers or users whose conduct unintentionally or unknowingly motivates third parties to exploit prostitution.<sup>29</sup>
29. Under CEDAW, Article 6, links between demand for prostitution, sexual exploitation, and sex trafficking have long been recognized by the Committee on the Elimination of Discrimination against Women (“CEDAW Committee”) in its concluding observations for specific countries, for example, requesting to intensify efforts to minimize the demand for prostitution as a measure to prevent trafficking and exploitation in women. For instance, in its concluding observations for Denmark, the CEDAW Committee, “[r]equest[ed] the State party to intensify its efforts to combat trafficking in women, including measures to prevent trafficking, minimize the demand for prostitution [...]”<sup>30</sup>
30. The Preamble of the UN General Assembly resolution 63/156 notes “*that some of the demand for prostitution . . . is met by trafficking in persons in some parts of the world*” and “[c]alls upon Governments to discourage, with a view to eliminate, the demand that fosters the trafficking of women and girls for all forms of exploitation, and in this regard to enhance preventive measures, including legislative measures, to deter exploiters of trafficked persons, as well as ensure their accountability.”<sup>31</sup>
31. This understanding of demand as contained within the Palermo Protocol has also been outlined by the UN Special Rapporteur on the human rights aspects of the victims of trafficking in persons, especially women and children. Her 2006 report to the UN Commission on Human Rights highlighted three issues of particular emphasis in regards to Article 9(5) of the Palermo Protocol:

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27 *Op. cit.* footnote 22 (Directive 2011/36/EU, Preamble (25)).

28 OSCE, “[Discouraging the demand that fosters trafficking for the purpose of sexual exploitation](#)”, June 2021, p. 26.

29 *Ibid.* (Discouraging the demand that fosters trafficking for the purpose of sexual exploitation), pp. 26-27. See also: *op. cit.* footnote 5 (CEDAW, Article 6, which provides: “*States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women*”). The CEDAW Committee’s General Recommendation no. 38 of 2020 reaffirmed that “*States are . . . obligated to discourage the demand that fosters exploitation and leads to trafficking*”; Committee on the Elimination of Discrimination Against Women, [General Recommendation no. 38 \(2020\) on trafficking in women and girls in the context of global migration](#), para. 6. Palermo Protocol, Article 9(5), is specifically embraced as an instrument converging with CEDAW’s anti-discrimination imperatives. A similar causal connection between demand for prostitution and trafficking underlies the European Union Brussels Declaration (2002), para. 7: “*It should be an essential and common goal for the fight against trafficking to address the reduction of the demand for sexual acts . . .*”; see European Union, [Brussels Declaration on Prevention and Combating Trafficking in Human Beings](#), para. 7 (20 September 2002).

30 U.N. Doc. [CEDAW/C/DEN/CO/6](#), 25, 2006, para. 23.

31 [G.A. Res. 63/156](#), Preamble, para. 2 (18 December 2008).

“a. Demand must be understood in relation to exploitation, irrespective of whether that exploitation also constitutes trafficking;

b. Demand must be understood as that which fosters exploitation, not necessarily as a demand directly for that exploitation;

c. It is not necessary for demand itself to lead to trafficking; rather it is sufficient that the exploitation fostered by demand leads to trafficking.”<sup>32</sup>

32. While States have an obligation to discourage demand that fosters exploitation which leads to trafficking, the Palermo Protocol leaves States Parties with a great degree of flexibility as to how they implement this obligation. The latest edition of the *UNODC Legislative Guide for the Palermo Protocol*<sup>33</sup> provides some commentary on the measures that can be taken in implementing Article 9(5). It notes that some of the measures called for may require legislation to ensure that the basic powers and resources are allocated to the appropriate entities. Reducing the vulnerability of potential victims, including by addressing “poverty, underdevelopment, and lack of equal opportunity”<sup>34</sup> may also require legislative measures.
33. It further notes that efforts such as research into the nature and extent of the problem, the conducting of media or other public information campaigns, enhancing cross-border mobility, access to labour markets, and the alleviation of harsh social or economic conditions may not require legislation. On the other hand, it notes that well-crafted legislation, particularly migration and labour legislation, can play an important role in preventing trafficking in persons.<sup>35</sup>
34. Guidance on implementation of Article 9(5) of the Palermo Protocol is also provided in the *UNODC Model Legislative Provisions against trafficking in persons (2020)* relating to the use of goods or services provided by a trafficking victim.<sup>36</sup> It states, that there are variety of ways to comply with Article 9(5), and proposes an approach that targets those who are the beneficiaries of exploitative labour or services providing a number of options. Furthermore, the Inter-Agency Coordination Group against Trafficking in Persons (ICAT)<sup>37</sup> has drafted a series of working papers to assist States in the development of policy and legislation on trafficking and to elaborate on the meaning of different terms in the Palermo Protocol. One of its papers specifically considered the question of addressing demand in the context of trafficking.<sup>38</sup>
35. CEDAW requires States Parties to take all appropriate measures, including legislation to suppress all forms of traffic in women and exploitation of prostitution of women. Similarly, the Convention on the Rights of the Child<sup>39</sup> requires state parties to take all

32 ECOSOC [E/CN.4/2006/62](#), 20 February 2006, para. 51.

33 *Op. cit.*, footnote 16 (2020 UNODC Legislative Guide for the Palermo Protocol).

34 *Ibid.*, paras. 286, 302, 308, 309, 316.

35 *Ibid.*, in particular Chapter VII.

36 See *UNODC Model Legislative provisions against trafficking in Persons*, Vienna 2020.

37 <<https://icat.un.org/>>.

38 Inter-Agency Coordination Group against Trafficking in Persons (ICAT), [Preventing trafficking in persons by addressing demand](#), September 2014. The paper notes that during the first decade following the adoption of the Palermo Protocol, most efforts to prevent trafficking in persons focused on what was often referred to as the supply side, concentrating on those who were seen as vulnerable to becoming victims of trafficking in persons. The paper however then goes on to argue that it concentrates exclusively on the question of demand that contributes to trafficking for labour exploitation in the context of the production of goods and/or services but deliberately does not address demand that contributes to trafficking for the purpose of sexual exploitation, as to do it, states ‘would require it to address the ongoing debate on whether demand for all forms of prostitution contribute to trafficking’. For a summary of this debate, the paper refers to the UN Special Rapporteur on the sale of children, child prostitution and child pornography, Juan Miguel Petit, *Report on the demand for sexual acts deriving from exploitation*, to the 62nd session of the UN Commission on Human Rights, UN document [E/CN.4/2006/67](#), 12 January 2006, paras. 29 to 31.

39 Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, [ratified by Germany in 1992](#).

appropriate measures to “*combat the illicit transfer and non-return of children abroad*” and to recognize the right of the child to be protected from economic exploitation.

36. Important guidance on addressing demand is also contained in the *UN Recommended Principles and Guidelines on Human Rights and Human Trafficking*.<sup>40</sup> Principle 4 states that “*Strategies aimed at preventing trafficking shall address demand as a root cause of trafficking*”, while Guideline 7 recommends that States, in partnership with intergovernmental and non-governmental organizations, should consider “*analysing the factors that generate demand for exploitative commercial sexual acts and exploitative labour and taking strong legislative, policy and other measures to address these issues*”. Guidance has also been provided by the OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings in its Occasional Paper “*Discouraging the demand that fosters trafficking for the purpose of sexual exploitation*”, which outlines legislative and non-legislative tools to discourage demand.<sup>41</sup>
37. In its recently adopted General Recommendation on trafficking in women and girls in the context of migration, the CEDAW Committee has written specifically on addressing demand in the context of sexual exploitation.<sup>42</sup> It writes that sexual exploitation persists due to States Parties’ failure “*to effectively discourage the demand that fosters exploitation and leads to trafficking. Persistent norms and stereotypes regarding male domination and the need to assert male control or power, enforce patriarchal gender roles, male sexual entitlement, coercion and control which drive the demand for sexual exploitation of women and girls. Massive financial gains with few risks due to the impunity are still widespread.*” It then concludes that “[t]he need to address the demand that fosters sexual exploitation is especially important in the context of digital technology which exposes potential victims to increased risk of trafficking” and recommends that States:
- “(i) Discourage the demand that fosters exploitation of prostitution and leads to human trafficking.
- (ii) Implement educational, social or cultural measures aimed at targeting potential users.”<sup>43</sup>
38. Furthermore, the CEDAW Committee has been yet more direct recently in advising states to consider criminalizing demand, along the lines of the “Swedish (Nordic or Equality) Model”, which criminalizes demand by making the purchase of a person’s services for sexual use a crime and enforcing it.<sup>44</sup> For instance, in its Concluding Observations on the

40 [UN Recommended Principles and Guidelines on Human Rights and Human Trafficking](#).

41 Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, [Discouraging the demand that fosters trafficking for the purpose of sexual exploitation](#)”, June 2021.

42 *Op. cit.* footnote 29. [CEDAW Committee, General Recommendation no. 38 \(2020\)](#), see in particular para. 30 and Recommendations in paras. 61 and 62.

43 *Ibid.* paras. 30 and 61-62.

44 The Equality Model was first passed in Sweden, *BROTTSBALKEN [BRB]* [CRIMINAL CODE] 6:11 (Swed.). From January 1999 to July 2011, the maximum penalty was imprisonment for six months. Its increase to a maximum of one year was amended in by LAG OM ÄNDRING I *BROTTSBALKEN (Svensk författningssamling [SFS] 2011:517)*; see also Proposition [Prop.] 2010/11:77 *Skärpt straff för köp av sexuell tjänst* [government bill] (Swed.). The law’s diffusion began in 2009 in Norway, *Lov om straff (straffeloven)* [Criminal Code] Ch. 26, § 316 (Nor.), <<https://lovdata.no/lov/2005-05-20-28/§316>>, continued with Iceland in 2010, *Lög um breytingu á almennum hegningarlögum*, nr. 19/1940, með síðari breytingum, Nr. 54/2009 § 2 (27 April 2009) (Iceland), <<https://www.stjornartidindi.is/Advert.aspx?RecordID=d706be4d-cd00-4e69-9ef3-f60c79d95045>>; see also *Lög um breyting á almennum hegningarlögum*, nr. 19 12. febrúar 1940 (*kynferðisbrot*), Nr. 61/2007 §13 (28 March 2007) (Iceland), <<https://www.stjornartidindi.is/Advert.aspx?RecordID=70370aa7-7543-4e4b-938a-b36dcf155939>> (removing in 2007 the prohibition on prostitution itself, providing imprisonment of “[a]nyone who has a job or livelihood from the prostitution of others”, plus penalties for related activities); Canada, Bill C-36, Protection of Communities and Exploited Persons Act, 2nd Sess., 41st Parl., 2014 (Royal Assent, Nov. 6, 2014) (Can.), Bill C-36, cl. 15; and Northern Ireland in 2014, Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 c. 2, § 15, <<https://www.legislation.gov.uk/nia/2015/2>>; in France in 2016, Loi n° 2016-444 du 13 avril 2016 *visant à renforcer la lutte contre le système prostitutionnel et à accompagner les personnes prostituées*, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE n° 0088 [J.O.] [OFFICIAL GAZETTE OF FRANCE], 14 April 2016, Text 1 of 133; Republic of Ireland in 2017, Criminal Law (Sexual Offences) Act, 2017 §§ 25–27 (Act No.2/2017) (Ireland) [<https://perma.cc/87MU-YWUT>]; and Israel:

seventh periodic report of Finland, the CEDAW Committee recommended that Finland “[p]ursue steps to criminalize the demand for prostitution and take measures to discourage such”.<sup>45</sup> The Committee further noted “the lack of information and data on the extent of prostitution and the lack of measures taken by the State party to reduce the demand for prostitution and provide alternative income-generating opportunities to women who wish to leave prostitution”.<sup>46</sup> In its Concluding Observations on the seventh periodic report of Belgium, the Committee recommended to “[t]ake measures to discourage the demand for prostitution, including by considering the criminalization of the purchase of sexual acts”.<sup>47</sup> The Report of the UN Special Rapporteur on trafficking in persons, especially women and children, also mentions that criminalization “of the use of prostituted persons” could be a way to effectively meet the obligation to discourage demand.<sup>48</sup>

39. The European Court of Human Rights, however, recognizes that “since there is no duty to criminalize prostitution, either under the Palermo Protocol, or under Convention No. 29, and consequently prostitution and related matters falling outside the scope of trafficking in persons should be dealt with by individual countries in accordance with their national laws and policies. Nonetheless, it seems clear that coercive sexual exploitation and forced prostitution do come within the scope of the definition of forced or compulsory labour in Article 2, paragraph 1, of the Convention.”<sup>49</sup> In the 2020 case [S.M. v. Croatia](#), the European Court of Human Rights noted that thirty nine Council of Europe Member States recognize that human trafficking involving sexual exploitation is a serious crime. In all these countries trafficking in human beings is criminalized, as well as forced prostitution.<sup>50</sup> The Court further, stated that:

“211. The majority of member States surveyed criminalise the involvement in the provision by another person of sexual services even where there is no coercion on the person providing the services. The exceptions are Germany, the Netherlands, Slovenia, Spain and Switzerland.

212. The member States have different approaches to identifying the existence of coercion; the constitutive elements of compulsion in national legislation are not uniform. The threat of physical violence is the most commonly identified indicator of coercion. Some other indicators are, for instance, blackmail, deceit, fraud, false promises, taking advantage of the victim’s vulnerability, restriction of movement, abduction, and abusing a position of power.”<sup>51</sup>

40. To similar effect, the OSCE Action Plan recommends “Adopting or strengthening legislative, educational, social, cultural or other measures, and, where applicable, penal legislation...to discourage the demand that fosters all forms of exploitation of persons, especially women and children, and that leads to trafficking.”<sup>52</sup>

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Prohibition of Consumption of Prostitution Services Act (Temporary Provision and Amendment), 5779-2019, SH 2779 p. 235 (Isr.), <[https://fs.knesset.gov.il/20/law/20\\_lsr\\_528389.pdf](https://fs.knesset.gov.il/20/law/20_lsr_528389.pdf)> (entered into force 20 July 2020).

45 CEDAW Committee, [Concluding observations on the seventh periodic report of Finland](#), 10 - 28 February 2014, para. 21 (d) on recommendations.

46 *Ibid.*, para. 20.

47 U.N. Doc. CEDAW/C/BEL/CO/7 (14 November 2014), para. 27(b).

48 [Report of the Special Rapporteur on the human rights aspects of the victims of trafficking in persons, especially women and children](#), UN Doc E/CN.4/2006/62, 20 February 2006, para. 88.

49 European Court of Human Rights, Grand Chamber Judgement, [S.M. v. Croatia](#), 2020, para. 145, quoting ILO, *Report of the ILO Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part IB), p. 41, See also Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings: [Discouraging the demand that fosters trafficking for the purpose of sexual exploitation](#), June 2021, Chapter 3.

50 *Ibid.* (S.M. v. Croatia), para. 210.

51 *Ibid.* (S.M. v. Croatia), paras. 211-212.

52 [Decision No. 557. OSCE Action Plan to Combat Trafficking in Human Beings](#), at IV, para. 3.3, PC.DEC/557 (24 July 2003).

41. Furthermore, the EU Directive 2011/36/EU, also addresses, in particular in Article 18, preventive measures that states should take to discourage and reduce the demand that fosters all forms of trafficking related to trafficking in human beings (see para. 44 below).

## 2.1 Measures to Discourage Demand

42. The obligation to discourage demand can be implemented through different means. However, the Protocol makes it clear that the obligation to take action is mandatory and Article 9 of the Palermo Protocol specifically directs States to take steps to discourage the demand that fosters exploitation that leads to trafficking. This could be achieved through the combination of legislative, social, cultural or educational measures, addressing the cause of the problem and its manifestation.
43. In seeking to meet this obligation as it pertains to trafficking for the purpose of sexual exploitation, it can be argued that two general pathways implemented complementarily are open to States. The first is to adopt criminal justice measures. The second is through the adoption and implementation of prevention initiatives which seek to use non-criminal means of discouraging the demand that fosters exploitation.
44. With regards to criminal justice tools to discourage demand, the most commonly adopted response within the OSCE region is the criminalization of the knowing use of services from victims of trafficking in human beings. Article 18(4) of the EU Directive 2011/36/EU, suggests that “[i]n 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,<sup>53</sup> with the knowledge that the person is a victim of an offence referred to in Article 2.” This recommendation is repeated in Article 19 of the Council of Europe Anti-Trafficking Convention.
45. In seeking to criminalize demand in a manner consistent with the framing of Article 9 of the Palermo Protocol, other forms of criminalization of the use of sexual acts from victims of trafficking in human beings have also been deployed within the OSCE region. One such method has been to criminalize the purchase of sex from victims of trafficking in human beings, without the need to demonstrate the knowledge on the part of the user (*mens rea*), an approach commonly referred to as “strict liability”. Another method has been to criminalize the use of sexual acts, irrespective of the status of the person in prostitution as a victim of trafficking in human beings or otherwise. When partnered with the decriminalization of the selling of sexual acts, this criminal justice framework is commonly referred to as the “Nordic” or Equality model.
46. These forms of criminal justice responses are all currently present within the OSCE region, though they offer different benefits and limitations. While criminalizing the knowing use of services from victims of trafficking in human beings is the legislative tool employed by about 40 per cent of OSCE participating States<sup>54</sup> and a statute recommended by the EU Directive and Council of Europe Convention, analysis conducted by the OSCE Special Representative may indicate that it is not a useful or effective statute. First, “it criminalizes only the demand for trafficking — i.e., those who know that the person in prostitution is a trafficking victim and still proceed with the transaction. Therefore, it criminalizes only a subset of the broader concept of demand articulated in Article 9(5) [of the Palermo Protocol], which obliges States to discourage the demand that fosters exploitation that leads to trafficking”.<sup>55</sup> It has thus been argued

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53 Article 2: Offences concerning trafficking in human beings, EU Directive 2011/36/EU, OJ, L 101/6.

54 *Op. cit.* footnote 28 (OSCE, [Discouraging the demand that fosters trafficking for the purpose of sexual exploitation](#)), p. 34.

55 *Ibid.*, p. 36.



that criminalizing the knowing use of services from victims of trafficking in human beings, without taking any additional steps to discourage the demand that fosters exploitation which leads to trafficking, may be insufficient to meet the standard set out by Article 9 of the Palermo Protocol.

47. It is further argued that the “knowing use” statute is also particularly difficult to implement, as it may not reflect the realities of the purchase of sex, where both buyer and the persons engaged in prostitution are incentivized to not recognize, or indicate instances of trafficking. As such, proving that the sex buyer had prior knowledge that the person engaged in prostitution was a victim of human trafficking is a particularly difficult task. In removing the requirement to prove prior knowledge of the status of the person in prostitution as a victim of trafficking in human beings, the “strict liability” method expands the demand that is being discouraged from that which is for trafficking, to the demand that is directly connected to trafficking.<sup>56</sup> By focusing on the status of the victim, “strict liability” statutes target the harmful behaviour of the sex buyer in a manner which prioritizes addressing the harm inflicted on victims, forcing the buyer to exercise greater due diligence and serving as a form of risk management. A positive step is that Germany has introduced a provision on “careless” conduct (“*Leichtfertigkeit*”) in CC Article 232a para. 6 (see para. 61 below).
48. Furthermore, criminalizing all purchases of sexual acts seeks to encompass the demand that fosters exploitation that leads to trafficking, by reducing the overall market for paid sexual acts. In doing so, it covers the broad scope of demand articulated within the Palermo Protocol. As stated by the UN Special Rapporteur on the Human Rights Aspects of the Victims of Trafficking in Persons, Especially Women and Children, the obligation to discourage demand under Article 9(5) can be “effectively met” through the criminalization of all sex purchasers.<sup>57</sup> Such a blanket approach could have a normative effect against the promulgation of exploitative behaviour, and lowers the barrier to implementation as neither the knowledge of the user or status of the person in prostitution need to be proven by law enforcement. As with any criminal justice measures, all of these options must be exercised ethically, responsibly and with due consideration for the vulnerabilities of those selling sex, whether trafficking victims or otherwise.
49. Criminal justice measures are however only one tool to discourage demand as outlined in the Palermo Protocol, with social, educational and cultural measures all within the scope of action for States. The OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings has identified several non-legislative tools for States to discourage the demand that fosters trafficking for the purpose of sexual exploitation. It notes that awareness campaigns are a widespread and available tool to discourage demand. Either targeting the general public, or specific subgroups such as the users of services from victims of trafficking in human beings, such campaigns can help raising awareness of the links between demand and trafficking for the purpose of sexual exploitation. Awareness-raising activities can also involve certain business sectors, such as transportation or hospitality, where users of services are more likely to come into contact with the campaign materials. Targeted forms of education, for men who have purchased sex or for young men and boys who may do so in the future, is another measure that can be deployed to discourage demand. In doing so, such interventions discourage the future purchase of sexual acts, thereby reducing the demand that fosters exploitation that can lead to trafficking.
50. Deterrence initiatives are also available as a means of discouraging the demand that fosters exploitation. For example, in the online domain, deterrence and disruption tools

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<sup>56</sup> *Ibid.*, (Discouraging the demand that fosters trafficking for the purpose of sexual exploitation), p. 40.

<sup>57</sup> See 2006 Report, Economic and Social Council [E/CN.4/2006/62](#), para. 88.

can be used to communicate directly with a potential purchaser of services from a victim of human trafficking, through advertisements or other means of communications, or deny access to websites or platforms where services from trafficking victims are advertised and sold. As the majority of victims who are trafficked for the purpose of sexual exploitation within the OSCE region are now advertised online, such online methods of deterrence and disruption are particularly important tools within the context of prevention.<sup>58</sup>

51. The *UNODC Legislative Guide for the Palermo Protocol* also outlines measures, outside of the legislative response, which may be used to curb the demand for trafficked exploitative labour, including sexual exploitation. In the Legislative Guide, para. 316, the following measures are listed as relevant to discouraging demand:

*“316. Measures targeted at discouraging demand may include:*

- (a) Measures addressing the root causes of and factors contributing to trafficking, including poverty, lack of education, and social norms that enable exploitative practices, such as norms permitting discrimination against women and other traditionally disadvantaged groups, with a view to reducing vulnerability to trafficking;*
- (b) Measures increasing opportunities for legal, gainful and non-exploitative labour migration and other legal and safe pathways for movement and promoting access to information about such opportunities;*
- (c) Measures sanctioning those who use the goods or services exacted from victims of trafficking;*
- (d) Measures and mechanisms to improve labour conditions in sectors vulnerable to labour exploitation through strengthening and enforcing labour standards and regulations through labour inspections and other means;*
- (e) Measures against exploitation associated with the migration process, including through improved regulation of private recruitment agencies, strengthening protections and rights of migrant and refugee workers, and support for the organization of workers;*
- (f) Measures increasing access to protection and asylum systems;*
- (g) Measures increasing access to education and employment for refugees, internally displaced persons, and stateless persons;*
- (h) Measures raising awareness and attention about the risks associated with trafficking and research into all forms of exploitation and the factors that foster demand;*
- (i) Private sector and State initiatives to address exploitative labour practices;*
- (j) Measures addressed at disrupting supply chains that involved exploitative labour practices; [...].”*

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58 [New policies needed to combat trafficking in the internet era, according to OSCE study](#), 15 February 2022. See also for instance [UN News](#) (accessed on 9 December 2014) and [Recommendations on enhancing efforts to identify and mitigate risks of trafficking in human beings online as a result of the humanitarian crisis in Ukraine](#), 22 April 2022.

### 3. THE LEGAL CONTEXT IN GERMANY

#### 3.1 Background and the 2017 Prostitute Protection Act

52. The Prostitution Act 2002 was introduced in Germany in 2001<sup>59</sup> and entered into force in 2002. Other provisions were previously in place prior to the enactment of this 2002 law. The Prostitution Act of 2002 aimed at regulating and improving the legal and social situation of persons engaged in prostitution and effectively “legalized” prostitution in Germany.<sup>60</sup>
53. The Prostitute Protection Act 2017, entered into force on 1 July 2017. Core elements of the Act include a requirement to register the operation of a prostitution business and the obligation for all persons providing sexual acts to register their work with the authorities. Additionally, persons engaged in prostitution must carry proof of registration that includes a photo<sup>61</sup> identity certification with them when engaging in prostitution related activities. They may also use an “alias registration certificate.”<sup>62</sup> Section 5 of the Prostitute Protection Act states that a person will not be issued registration if there are “*factual indications that the person is being or will be induced to engage in prostitution by a third party by taking advantage of a coercive situation, his or her helplessness associated with his or her stay in a foreign country, or his or her personal or economic dependence, or that the person is being or will be exploited by a third party*”.
54. The granting of a license to operate a prostitution business is linked to fulfilling certain minimum requirements. The license to operate a prostitution business may be denied if “[...] *there are indications, based on the business plan, the design of the services provided, the intended agreements with the persons engaging in prostitution or other factual circumstances, that the type of operation is incompatible with the free exercise of the right to sexual self-determination or ‘promotes the exploitation of prostitutes’*”.<sup>63</sup> According to Section 25 of the Prostitute Protection Act 2017, the operator of a prostitution business shall not allow a person to work, if it is apparent that the person is underage (18 years), or is under 21 years of age and “*is being or will be induced*” by a third party to engage in or continue to engage in prostitution, or that person “*is being or will be induced by a third party to engage in prostitution by taking advantage of a coercive situation, his or her helplessness associated with his or her stay in a foreign country, or his or her personal or economic dependence, or that person is being or will be exploited by a third party*”.
55. Sections 14 and 25 of the Prostitution Protection Act seek to introduce some form of safeguard whereby an “indication” of promotion of exploitation or knowledge that a person is being “induced” into prostitution — in particular as a result of their foreign status in Germany — would result in denial of permit or, in the case of Section 25, prohibit that person to work. The expectations placed on the sector to identify what may be subjective feelings of coercion by a person may be too high, while it is also crucial that *factual* or other *indications* of promotion of exploitation are clearly defined and leave no room for a situation of exploitation either in law or in practice. While Sections 14 and 25 appear to be reactive forms of victims identification, as they seek to provide protection in the event that a case of human trafficking is identified or exploitation has or is

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59 Prostitution Act of December 20 2001 (Federal Gazette I p 3983) as amended by Section 2 of the Act of 21 October 2016 (Federal Law Gazette I 2372, entered into force on 1 January 2002).

60 The New Prostitute Protection Act of 2017, p. 3, Heading: “[The Prostitution Act \(Das Prostitutionsgesetz\)](#)”.

61 *Ibid.*, Chapter 2, Section 4, para. 7.

62 *Ibid.*, Chapter 5, para. 6.

63 *Ibid.*, Section 14, para. 1.

occurring, they can be enhanced further to ensure more effective application in line with Article 9 of the Palermo Protocol and other international norms.

56. **It is therefore recommended to clarify who should, and according to which criteria, assess whether there are any “indications of exploitation or coercion”. The standard for the assessment should be objective, and include mandatory age verification of the person attempting to register in prostitution. In case there is a clear indication that a person engaged in prostitution is induced by a third party to engage in prostitution, the case should be referred to the relevant authorities, irrespective of the age of the person. Any act falling under Article 232a of the Criminal Code, on the exploitation of the prostitution of others, including procuring (pimping), should be immediately notified and investigated. Failure to do so should also lead to prosecution and punishment. Furthermore, it is suggested to evaluate the impact of the Law on fighting demand for sexual exploitation as well as assess national legislation with a view to increase the emphasis on preventing exploitation taking place from the start.**
57. Furthermore, the Explanatory Note to the Prostitute Protection Act of 2017<sup>64</sup> states that any individual who may wish to leave a job as a person engaged in prostitution is entitled to receive support from the job centre in the search for another job.<sup>65</sup> **It is important to ensure that the State also offers similar support to victims of trafficking and those persons engaged in prostitution who operate “illegally”.**
58. The registration as a “*prostituierte*” (prostitute) is valid for two years and one year for persons who are older than 18 but younger than 21. The registration procedure involves an interview, during which information and consultation are provided on available health and social advice services and getting help in emergency situations. Prior to commencing work, a health advice counselling session must be attended at the public health service and repeated at yearly intervals or every six months for persons under 21.<sup>66</sup> While Article 33 of the Prostitution Protection Act provides that persons engaged in prostitution who fail to register are subject to an administrative liability, the effectiveness of this measure may be limited, and unregistered persons engaged in prostitution remain unknown to the State.
59. The Prostitute Protection Act 2017 also introduces a number of obligations on the sex industry but focuses less on issues such as legal redress. Inspections and the necessity to reveal personal data raises concerns — it creates obligations and restrictions for persons engaged in prostitution, alongside extensive powers to control their activities. The fear is that these measures will lead to many persons engaged in prostitution evading registration, which will make trafficking for the purposes of sexual exploitation a more likely scenario, thereby contravening Articles 3 and 9 of the Palermo Protocol. Persons may not want to register due to various vulnerabilities including a lack of residence status or lack of documents, which will push them further into dangerous working conditions, obscurity and render them vulnerable to violence and exploitation. Individuals being trafficked into prostitution are also unlikely to register as a person in prostitution so as to avoid detection by authorities. The majority of persons in prostitution in Germany are reported to be unregistered, making them unknown to the State and the protection

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64 Explanatory Note to the Prostitute Protection Act of 2017, page 10.

65 *Ibid.*, page 10, where it is stated: “For example, if you no longer want to work as a prostitute, then under certain circumstances you can get help through the job centre. This applies to means of subsistence for yourself and your children as well as to various kinds of assistance that help make you ‘fit for the labour market’. You do not need to provide a reason why you no longer want to work in the prostitution industry. Special rules apply to migrants. Access to the basic support benefits depends, among other things, on the type of residence permit you have and on how long you had been working in Germany or cared for yourself independently.”

66 Prostitute Protection Act 2017, Section 10.

mechanisms created by the Acts.<sup>67</sup> The Council of Europe Group of Experts on Action against Trafficking in Human Beings (GRETA) has also pointed the issue of the possible reluctance of migrants to report to authorities due to fear of expulsion.<sup>68</sup> It should also be noted that the vast majority of identified victims of trafficking for sexual exploitation in Germany are migrants.<sup>69</sup> It is worth considering that this lack of registration of persons engaged in prostitution, combined with a lack of non-legislative efficient tools to discourage the demand may lead to the increased risk of trafficking in human beings for the exploitation of others, by providing greater opportunities for traffickers to exploit vulnerable persons into prostitution.

60. By focusing on the regulation of prostitution and the conditions of work for those who engage in the activity, the Prostitution Protection Act 2017 and the Prostitution Act 2002 should be in compliance with the obligations inherent upon States according to Article 9(4) of the Palermo Protocol. Namely, the laws strive to reduce the vulnerability of women and girls to being trafficked for the purpose of sexual exploitation. According to the authorities, the aim of the Prostitute Protection Act is to “*strengthen the sexual self-determination rights of persons engaged in prostitution, create the legal conditions to ensure favourable working conditions, prevent harmful forms of prostitution and combat crimes such as human trafficking, violence, exploitation of persons engaged in prostitution and pimping*”.<sup>70</sup> However, as noted above, the vast majority of persons engaged in prostitution operate outside the parameters of the statutes.
61. Moreover, the legislation (Prostitution Protection Act 2017 and the Prostitution Act 2002) should also seek to address the obligations set out in Article 9(5) of the Palermo Protocol. While creating a regulatory framework for prostitution in Germany that seeks to establish mechanisms for victim identification and protection for persons who seek to register as a person in prostitution, authorities should evaluate if and to what extent the Acts in combination with other provisions of the existing legislation reduce the vulnerability of persons in prostitution or the demand that fosters exploitation.
62. The Acts also do not include provisions which provide for the monitoring or verification of online offers for sexual services. Thus, there seems to be no legal structure or system to ensure that those advertised online are of legal age, registered as working in prostitution and are not victims of trafficking in human beings. Nor do they contain provisions establishing responsibilities for websites which facilitate the sale of sexual acts and implementing measures to prevent the exploitation of the prostitution of others. The lack of attention to these issues may leave the online demand that fosters trafficking for the purpose of sexual exploitation undeterred and thus undermines Germany’s obligation to meet the requirements of Article 9(4) and (5) of the Palermo Protocol to reduce vulnerability and to discourage the demand that fosters exploitation that leads to trafficking. **The legislation should be complemented accordingly.**
63. Moreover, national legislation would benefit from further improvements through the adoption and strengthening of legislative and non-legislative measures to discourage demand and to address the root cause of prostitution that fosters exploitation, along the line of those indicated under Sub-Section 2.1 above. Regulatory framework for prostitution in Germany should seek to enhance mechanisms for victim identification and protection for persons who seek to register as a person in prostitution, thus substantively

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67 The German Statistical Office reported that at the end of 2021, 23,700 individuals were registered in prostitution. Estimates by civil society groups put the number of persons in prostitution in Germany between 400,000 and 1,000,000.

68 Greta: [Guidance note on preventing and combatting trafficking in human beings for the purpose of labour exploitation](#), para. 23

69 See [GRETA Report](#), published 20 June 2019.

70 *Ibid.*, (GRETA report 2019), para. 110. See also the [Website of the Federal Ministry for Families, Seniors, Women and Youth](#). (visited on 7 December 2022).

reducing their vulnerability and thus preventing exploitation of individuals engaged in prostitution or prevent exploitation from occurring in practice.

#### **RECOMMENDATION A**

1. Incorporate legislative and non-legislative tools to discourage the demand that fosters exploitation which leads to trafficking within state-funded programs and/or organized public health, education and awareness campaigns;
2. Consider legislation to reduce demand, in line with Palermo Protocol Article 9(5) by addressing the root cause of prostitution that fosters exploitation that leads to trafficking;
3. Ensure that websites which facilitate the sale of sexual acts implement measures to prevent the exploitation of the prostitution of others, including age verification of the persons depicted in advertisements and limiting advertisements to only persons who are registered as employed in prostitution; and more generally, develop legal provisions to prevent trafficking for the purpose of sexual exploitation including pornography production, sexual exploitation and forced prostitution online;
4. Clarify and provide better guidance and criteria for the identification of persons “being induced”, under coercion or exploitation by a third party to engage in or continue to engage in prostitution;
5. Clarify specific examples and concrete factual indications of force or coercion or exploitation of vulnerability or abuse of power or inequality in existing prostitution law and regulations;
6. Assess and review the systems of registration and regulations for persons engaged in prostitution with a view to introducing more effective measures or alternative measures to identify and support those who are exploited, coerced or trafficked into prostitution for lack of ability to adhere to all of the registration rules set out in the law;
7. Ensure that any act falling within the definition of trafficking or sexual exploitation should be immediately notified under Article 232a of the Criminal Code and investigated, when there is a clear indication that a person engaged in prostitution is induced by a third party to engage in prostitution.

### **3.2 German Criminal Code**

64. In 2016, Germany transposed EU Directive 2011/36/EU into national law. The Act revoked three articles of the German Criminal Code related to trafficking in persons and introduced five new criminal offences, namely trafficking in human beings (Article 232), forced prostitution (Article 232a), forced labour (Article 232b), labour exploitation (Article 233), and exploitation by means of illegal restraint (Article 233a). At the time of enactment, Article 232a provided for the criminalization of the use of services of a trafficking victim.
65. In 2021, a further amendment to the newly introduced provision criminalizing the knowing use of services of victims of trafficking for the purpose of sexual exploitation (Article 232a of the Criminal Code), was introduced in order to reflect the standard of gross negligence or carelessness on the part of the purchaser of sexual acts. This

amendment aimed at expanding the scope of the statute from criminalizing only the knowing use of services from a victim of human trafficking, to also criminalizing an individual who purchased sexual acts and should have known the situation of the victim. The provision in Article 232a of the Criminal Code, para. 6, reads (with the 2021 amendments in bold):

*“(6) Whoever performs sexual acts on or allows sexual acts to be performed on them for a consideration by a person engaging in prostitution who has been the victim of:*

*1. human trafficking under section 232 (1) sentence 1 no. 1 (a), also in conjunction with section 232 (2), or*

*2. an offence under subsections (1) to (5), and in doing so takes advantage of that person’s personal or financial predicament or helplessness on account of being in a foreign country, incurs a penalty of imprisonment for a term of between three months and five years. **If the perpetrator during the sexual act at least carelessly ignores the circumstances of sentence 1 no. 1 or 2 or the personal or economic situation of the victim of his or her helplessness, the penalty is imprisonment for up to three years or a fine. According to sentences 1 and 2<sup>71</sup> whoever voluntarily reports an offence under sentence 1 no. 1 or 2 committed against a person engaging in prostitution within the meaning of sentence 1 to the competent authority or voluntarily occasions such a report to be made incurs no penalty under sentence 1, unless the act had already been discovered, in whole or in part, at the time and the offender knew this or, based on a reasonable assessment of the circumstances, should have expected this.**”*

66. In order for an act to qualify as an offence, the perpetrator must either be aware of the circumstances which impair the victim's freedom of consent and that the person concerned has been brought to take up or continue prostitution by others, or be able to reasonably assume or surmise that the victim is in a situation of human trafficking, or carelessly (*“leichtfertig”*) ignoring it.
67. While this statute has only recently been put into force, making its implementation hard to measure, the implementation of the previous statute was reviewed by the Criminological Research Institute for Lower Saxony on behalf of the German Federal Ministry for Justice and Consumer Protection. In evaluating the implementation of Article 232 of the Criminal Code, it was found that during the three year period of 2017 to 2019, only one criminal investigation pursuant to Article 232 para. 6 sentence 1 was conducted.<sup>72</sup>
68. These data indicate that while the German legislation on the knowing use of services from victims of trafficking in human beings is in line with the provisions set out in the Anti-Trafficking Convention and the EU Directive, the implementation of that statute may not be adequate, most likely because of the inherent deficiencies of such “knowing use” statutes as explained in paras. 46-51 above. **It is recommended that the new amendment on carelessness on the part of the purchaser of sexual acts and all relevant legislation be evaluated to assess whether it is an effective tool that discourages exploitation that in turn leads to trafficking.** It is also important that the burden of proof shifts so that **an accused trafficker or exploitive procurer (pimp) must**

71 The latter sentence of this paragraph 2 is an unofficial translation from German as this was introduced after the request was received.

72 Criminological Research Institute for Lower Saxony, [Evaluierung der Strafvorschriften zur Bekämpfung des Menschenhandels \(§§ 232 bis 233a StGB\)](#).

**disprove conditions of exploitation and abuse proffered by a claimed victim under existing criminal laws.**

69. Article 6 of the Anti-Trafficking Convention also includes an obligation to adopt other measures to discourage demand. In its latest report on Germany (2019), GRETA<sup>73</sup> recalls that its first report considered that the German authorities should make further efforts to discourage demand for the services of trafficked persons and for all forms of exploitation.<sup>74</sup> It was recommended this be conducted in partnership with the private sector and civil society, including trade unions and employers. Legislation is also only effective at achieving its desired aims through effective implementation. **To that end, it is strongly recommended that existing legislative measures to discourage the knowing or grossly negligent use of services from victims of trafficking in human beings receive greater attention by law enforcement authorities, including robust training and operational prioritization, as well as periodic evaluation and review.**

**RECOMMENDATION B**

1. Evaluate the effectiveness of recent amendment to Article 232a, para. 6 (2) of the Criminal Code relating to the “careless” conduct (“Leichtfertigkeit”) on the part of the purchaser of sexual acts, and all relevant legislation, to assess whether it is an effective tool to discourage demand that fosters exploitation that in turn leads to trafficking;
2. Review, with the possibility of revising, applicable rules on burdens of proof so that an accused trafficker or exploitive procurer (pimp) must disprove conditions of exploitation and abuse proffered by a claimed victim under existing criminal laws;
3. Provide regular training to enforcement authorities, including robust training and operational prioritization.

**4. RECOMMENDATIONS RELATED TO THE LAW-MAKING PROCESS**

70. OSCE participating States have committed to ensuring that legislation will be “*adopted at the end of a public procedure, and [that] regulations will be published, that being the condition for their applicability*” (1990 Copenhagen Document, par. 5.8).<sup>75</sup> Moreover, key commitments specify that “[l]egislation will be formulated and adopted as the result of an open process reflecting the will of the people, either directly or through their elected representatives” (1991 Moscow Document, par. 18.1).<sup>76</sup> The Venice Commission’s Rule of Law Checklist also emphasizes that the public should have a meaningful opportunity to provide input.<sup>77</sup> In its General Recommendation no. 38, CEDAW Committee specifically recommends to ensure “*the full, effective and meaningful participation of women and girls, especially victims of trafficking, those at risk of being trafficked and communities affected by trafficking and/or anti-trafficking measures, in all levels of decision-making and at all stages of efforts to prevent and combat trafficking, in the design of human rights-based, gender-sensitive response measures, including in the*

73 GRETA: [Action against Trafficking in Human Beings - Germany](#).

74 Op. cit. footnote 69 ([GRETA's Report and Government's Comments](#), second evaluation round), para. 31.

75 Available at <<http://www.osce.org/fr/odihr/elections/14304><http://www.osce.org/fr/odihr/elections/14304>>.

76 Available at <<http://www.osce.org/fr/odihr/elections/14310><http://www.osce.org/fr/odihr/elections/14310>>.

77 See Venice Commission, [Rule of Law Checklist](#), CDL-AD(2016)007, Part II.A.5.



*development, implementation, monitoring and evaluation of anti-trafficking legislation, policy and programmes”.*<sup>78</sup>

71. It is understood that an assessment of the Prostitute Protection Act of 2017 will be conducted pursuant to Article 38 of the Prostitute Protection Act. In this respect, it will be important to investigate the reasons why the administrative regulations, including the employee benefits guaranteed, are minimally used. Moreover, it is imperative that lawmakers consult, in particular, persons engaged in prostitution themselves and survivors of trafficking in human beings who were exploited within prostitution in Germany, as well as survivor-led networks to inform changes in law, administration and cultural education. ODIHR International Survivors of Trafficking Advisory Council can also assist in such consultations.
72. For such consultations to be effective, they need to be inclusive and also provide sufficient time to stakeholders to prepare and submit recommendations on draft legislation, while the State should set up an adequate and timely feedback mechanism whereby public authorities should acknowledge and respond to contributions, providing for clear justifications for including or not including certain comments/proposals.<sup>79</sup> To guarantee effective participation, consultation mechanisms must allow for input at an early stage *and throughout the process*,<sup>80</sup> meaning not only when the draft is evaluated and amendments are being prepared by relevant ministries but also when it is discussed before Parliament (e.g., through the organization of public hearings).
73. **Finally, it is important for the authorities to engage actively with civil society in monitoring the situation, developing policy and continuing to build partnerships to reduce vulnerability.**

#### RECOMMENDATION C

To ensure that the review of the Prostitute Protection Act 2017 investigates the reasons why the administrative regulations, including the employee benefits guaranteed, are minimally used while ensuring that such a review is part of a comprehensive and inclusive consultation process with the main stakeholders, including persons engaged in prostitution, survivors of trafficking in human beings who were exploited within prostitution in Germany, survivor-led networks, organisations assisting trafficked persons, labour inspectorates and local authorities, as well as to engage actively with civil society in monitoring the situation of persons engaged in prostitution, developing policies and continuing to build partnerships to reduce vulnerability and risk of trafficking of persons engaged in prostitution.

[END OF TEXT]

78 See UN CEDAW Committee, *General recommendation No. 38 (2020) on trafficking in women and girls in the context of global migration*, para. 48.

79 See e.g., [Recommendations on Enhancing the Participation of Associations in Public Decision-Making Processes](#) (from the participants to the Civil Society Forum organized by the OSCE/ODIHR on the margins of the 2015 Supplementary Human Dimension Meeting on Freedoms of Peaceful Assembly and Association), Vienna 15-16 April 2015.

80 See e.g., ODIHR, [Guidelines on the Protection of Human Rights Defenders](#) (2014), Section II, Sub-Section G on the Right to participate in public affairs.