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## BREXIT AND THE FIGHT AGAINST HUMAN TRAFFICKING: ACTUAL SITUATION AND FUTURE UNCERTAINTY

**Matilde VENTRELLA\***

### ***Abstract***

*By leaving the EU, the UK will also leave EU agencies such as Europol and Eurojust. Brexit, therefore, may create a gap in cooperation between law enforcement authorities of different Member States in their ability to detect human trafficking. Legal instruments such as the European Arrest Warrant may be repealed and the UK may reduce their cooperation in EU criminal matters. While the UK remains in the EU, it can join EU legal measures in the criminal area. After Brexit, this option will no longer be available. There is thus the risk that the UK will decide not to be bound by the Human Trafficking Directive. This article seeks to explore where the UK stands in the fight against human trafficking and what position it may adopt after Brexit. Subsequently, the article explicates the claim that a larger number of vulnerable people may be targeted by criminal organisations and recruited for the purpose of human trafficking and forced labour because EU citizens may no longer be entitled to live in the UK with the same rights and entitlements. This analysis will be conducted by examining EU legislation in the criminal area, UK legislation on human trafficking and the proposals presented by the UK government.*

**Keywords:** *EU and UK criminal area, human trafficking, vulnerable migrants, EU citizens.*

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## BREXİT VE İNSAN TİCARETİNE KARŞI MÜCADELE: MEVCUT DURUM VE GELECEKTEKİ BELİRSİZLİK

### Öz

*Birleşik Krallık (BK) Avrupa Birliği'nden (AB) ayrıldığında, Europol ve Eurojust gibi AB ajanslarından da ayrılmış olacaktır. Brexit, bu nedenle, farklı AB üyesi ülkelerin kanun yürütücü otoriteleri arasında insan ticaretini tespit etme yetenekleriyle ilgili işbirliğinde bir uçurum yaratabilecektir. Avrupa Tutuklama Emri/(Müzekkeresi) gibi yasal araçlar iptal edilebilecek ve BK'nın AB ile cezai alanlardaki işbirliği azalabilecektir. BK AB içindeyken, cezai alandaki AB yasal tedbirlerine katılmayı seçebilmektedir. Brexit sonrasında, bu seçenek mevcut olmayacaktır. Bu yüzden de BK'nın İnsan Ticareti Yönergesi'ne bağlı olmamaya karar verme riski vardır. Bu makale, BK'nın insan ticaretine karşı mücadelede nerede durduğunu ve Brexit sonrasında nasıl bir tutum takınacağını inceleyecektir. Müteakiben, makale Brexit sonrasında AB vatandaşları BK'da aynı haklara sahip olamayacağından, insan ticareti ve zorla çalıştırma amaçlarıyla suç örgütlerinin hedefinde yer alabileceği için zarar görebilir kişilerin artacağını iddia etmektedir. Bu inceleme, AB'nin cezai alandaki müktesebatını ve BK'nın insan ticareti hakkındaki mevzuatını ve BK hükümeti tarafından ileri sürülen önerileri sorgulayarak yapılacaktır.*

**Anahtar Kelimeler:** AB ve BK cezai alanı, insan ticareti, zarar görebilir/savunmasız göçmenler, AB vatandaşları.

### Introduction

The UK's departure from the EU is causing considerable concerns in how to address human trafficking. This is because the UK will re-consider their position in the fight against human trafficking along with the EU, the use of the European Arrest Warrant (EAW) and the access to Europol and Eurojust to detect criminals and suspected criminals perpetrating this crime at trans-national level. Human trafficking is a very widespread crime in the EU and in the UK. Causes of human trafficking are vulnerability due to poverty, conflicts, marginalisation, social exclusion, discriminations against women and children (European Commission, 2018). It has been estimated that criminal groups "take advantage of discrepancies in labour law to organise the exploitation of victims in the grey zone between legal employment and labour exploitation" (European Union, 2017). Brexit may have serious consequences in the fight against human trafficking as EU citizens will not be protected by EU law on free movement of workers anymore because they will be required to provide a visa in order to enter the UK for working. Strict controls over immigration can cause an increase of human trafficking as it has been reported that criminal organisations target non-

EU vulnerable migrants by threatening them to confiscate their passport and by other forms of coercion. EU citizens are less vulnerable as they are not subject to strict immigration controls as they can move freely from one Member State to another. However, the UK's departure from the EU can change the situation as the UK can make strict controls over EU citizens who consequently, will be more vulnerable and more exposed to exploitation.

In the criminal area, there is at least one certainty: The UK aims to continue to co-operate with the EU in fighting trans-national crimes. From this point of view, it seems that "the future of the EU/UK relationship on security will not be vastly different from the present" (Peers, 2017). Certainly, the UK has clearly stated that they do not want to be bound by the Court of Justice of the European Union (CJEU) jurisdiction after their departure from the EU. Consequently, it must be evaluated how the UK intends to continue to co-operate with the EU in the fight against trans-national crime.

Concerns have also been expressed in relation to the new status of EU citizens because, after a specified date, they will no longer be free to move to the UK without immigration controls. This means that EU citizens will be required to register their arrival in the UK. There is the risk that many of them will not register their arrival as they may not be entitled to remain in the UK. Consequently, these people will become vulnerable to exploitation by traffickers. There is uncertainty concerning the status of EU citizens whilst the negotiations are being discussed.

This article will examine EU trafficking legislation and the actual UK's position towards this legislation. Subsequently, it will focus on how Brexit may affect the fight against human trafficking and co-operation between Member States where the crime is perpetrated. Finally, the article will also focus on the consequences that Brexit may have on the free movement of EU citizens and on how proposed changes may affect EU citizens and their risk of becoming victims of human trafficking.

### **EU Trafficking Directive**

Human Trafficking is regulated by Framework Decision 2002/629/JHA, adopted in 2002 and by Directive 2011/36/EU (from now on Trafficking Directive), which has replaced the previous Framework Decision.

This directive not only describes the crime but also establishes a comprehensive programme for the protection of human trafficking victims (Directive 2011/36/EU: Articles 1 and 11-16). The Directive is more specific in the definition of trafficking and in providing protection, compared to the previous Framework Decision. It defines the "position of vulnerability as a situation in which the person concerned has no real or acceptable alternative but to submit to

the abuse involved” (Article 2 Para 2 Directive 2011/36/EU 5 April 2011). The Trafficking Directive also recalls two very important legal sources which are Framework Decision 2001/220/JHA and Directive 2004/81/EC (Residence Permit Directive). Paragraph 17 of the Trafficking Directive reveals the difference from the Residence Permit Directive and it clarifies that while the latter deals with third-country nationals who are victims of trafficking, the Trafficking Directive deals with “specific protective measures for any victim of trafficking in human beings” (Para 17). Article 1 of the Residence Permit Directive states that the aim of this Directive “is to define the conditions for granting residence permits of limited duration... to third-country nationals who cooperate” against trafficking and smuggling (Article 1 of Residence Permit Directive). Article 3 (1) states that the provisions of this “Directive shall be applied to the third-country nationals who are, or who have been victims of offences related to the trafficking in human beings, even if they have illegally entered the territory of the Member State” (Directive 2004/81/EC).

The Trafficking Directive includes additional forms of sexual and labour exploitation which were outside the scope of Framework Decision 2002/629/JHA and which are “begging, slavery or practices similar to slavery, servitude or the exploitation of criminal activities, or the removal of organs” (Directive 2011/36/EU: Paragraph 1 and Article 2(3)). The Trafficking Directive complies fully with the requirements of the European Court of Human Right (Strasbourg Court from now on) which considers human trafficking a form of slavery prohibited by Article 4 ECHR (Case *Rantsev v. Cyprus and Russia*, Application no. 25965/04, judgement of 7 January 2010, paragraphs 282 at 283. See Case *Siliadin v. France*, Application no. 73316/01, Para 112. Case *Chowdury and others. V. Greece*, Application No. 21884/15, 20/3/2017. For an in-depth analysis of trafficking as a form of slavery (Piotrowicz, 2012). The Trafficking Directive also complies with the Strasbourg Courts’ case-law which has recognised that State Parties have the positive obligation to protect victims of trafficking. The Strasbourg Court has been very strict on this point and has sanctioned Greece because they did not protect a victim of human trafficking as they did not undertake investigations on trafficking and did not prosecute criminals in a reasonable time (Case *L. E. v. Greece*, Application no. 71545/12, Judgement of 21 January 2016). The Trafficking Directive states that Member States shall impose appropriate penalties and shall use effective investigations instruments to ensure that perpetrators of trafficking are arrested and prosecuted (Directive 2011/36/EU: Articles 4 and 9(4)). The Directive requires that Member States impose jurisdiction over human trafficking when the crime “is committed in whole or in part within their territory; or the offender is one of their nationals” (Article 10 Para 1).

Member States can impose extraterritorial jurisdiction by informing the Commission when the crime has been committed against one of its national or against a person who has the habitual residence on their territory; when the offence is committed for the interests of a legal person established on its territory or the perpetrator has his or her habitual residence on its territory (Article 10 Para 2). Extraterritorial jurisdiction cannot be subject to the condition that the act is a criminal offence in the place where it is committed and that the prosecution can be initiated following a statement made by the victim or the State of the place where the crime was committed (Articles 10 Para 3 (a) and (b)). The Directive pays particular attention to the protection of victims by imposing Member States not to criminalise victims and not to bind investigation and prosecution to the report of the victim (Articles 8 and 9 Para 1). There are specific Articles in the Trafficking Directive establishing the form of protection victims of human trafficking are entitled to and there is a particular attention given to children. Conversely, the Framework Decision had only one provision on the protection of victims as it prioritized the fight against trafficking rather than protection of victims (Council Framework Decision 2002: Article 7). The victim centered approach can also be found in other provisions of the Trafficking Directive which establish that victims shall receive assistance and support before, during and after the conclusion of criminal proceedings for an appropriate period of time (Directive 2011/36/EU: Article 11 Para 1).

The Directive has a provision, very wide in scope, which supports the identification of victims. The provision states that victims shall be provided support as soon as ‘the competent authorities have a reasonable-grounds indication for believing that the person might have been subjected’ to human trafficking (Article 11 Para 2 Directive 2011/36/EU 5 April 2011. Article 12 Para 1 of the Trafficking Directive states that provisions on the protection of victims of trafficking in criminal investigations, “shall apply to the rights set out in Framework Decision 2001/220/JHA” (Directive 2011/36/EU 5 April 2011). This Framework Decision provided protection of victims of crimes in criminal proceedings and has been replaced by Directive 2012/29/EU. By linking the legal framework on the protection of victims in general to victims of human trafficking, these provisions further highlight the importance of protecting victims and the importance of ensuring that they are not victimized again. This is because victims of human trafficking can be protected under the specific provisions established by the Residence Permit Directive or by the Trafficking Directive in connection with Directive 2012/29/EU on protection of victims of crime. Article 1 Para 1 of this latter Directive states that “The purpose of this Directive is to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings”. Article 2 Para 1 (a) (i) states that “‘victim’ means a natural person who has suffered harm, including physical, mental or emotional harm or economic loss

which was directly caused by a criminal offence”. Victims of human trafficking can fall into this category and receive the appropriate protection.

It should be noted that the Human Trafficking Directive has provided a wide definition of trafficking, which includes slavery and other forms of exploitation. However, it has not provided adequate provisions for the identification and protection of victims of human trafficking. Article 11 Para 2 leaves wide discretion to the competent authorities of Member States by requiring them to give assistance and support to people on the basis of the ‘reasonable-ground indication’. If from one side, the ‘reasonable-grounds indication’ criteria can permit them to identify as many victims as possible at an early stage and identification is very important, in order to grant victims the residence permit and to prevent re-victimization (Craggs and Martens, 2010). This is because victims would not be left in detention centers with other migrants or deported unidentified. Indeed, if they are left in detention centers, they will be at high risk of re-victimization (Craggs and Martens, 2010: 56). From the other side, leaving wide discretion to Member States can lower the standard of protection of the Council of Europe Trafficking Convention (CoE Trafficking Convention) (Stoyanova, 2017: 448). This is because the Trafficking Directive does not establish a specific procedure that can permit the identification of victims and prevent their immediate deportation on the basis of the reasonable grounds to believe that they could be victims of trafficking rather than only irregular migrants that should be deported (Stoyanova, 2017: 449).

What is the actual situation in the UK and how will Brexit impact on the identification and protection of trafficking’s victims? In order to answer these questions, the article will clarify the UK’s position towards the Human Trafficking Directive and other EU legal instruments which can support the fight against human trafficking.

### **The UK’s Position Towards the Trafficking Directive**

At international level, the UK ratified the Council of Europe Convention on Action against Trafficking in Human Beings (CoE Trafficking Convention) in 2009 (Council of Europe, 2017). At EU level, the UK pre-Brexit had a particular position in the criminal area which, before the entry into force of the Lisbon Treaty, was incorporated in the third pillar of the EU Treaty.<sup>1</sup> Under the Lisbon Treaty, the UK retained this right to opt out from the criminal area which was part of Title V of the Treaty on the Functioning of the European Union (TFEU) entitled Area of Freedom, Security and Justice (AFSJ) for a transitional period of five years from the entry into force of the Treaty and the transitional period expired in 2014 (Article 10 Protocol 36. (Mitsilegas, 2017) The UK decided to

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<sup>1</sup> For an in depth analysis see Peers (2016: 41-44).

opt out from the new Title V and from the Schengen *acquis* and their position is regulated by Article 1 Para 1 of Protocol (No 21) and by Protocol 19 of the EU Treaty. However, the UK also decided to opt in some measures concerning the criminal area<sup>2</sup> and in between these measures there are Europol and Eurojust, Joint Investigation Teams (JITs) and the EAW.<sup>3</sup>

In addition, the UK can request to participate in measures concerning the Schengen *acquis* and the Council will take the decision on the UK's participation through unanimous votes (EU Treaty: Protocol (No 19), Article 4). The same principles apply to the participation in measures concerning Title V TFEU. The UK can request to the President of the Council to participate within three months, after a proposal or an initiative has been presented to the Council which, can allow the UK to opt in by unanimous votes (EU Treaty: Protocol (No 21), Article 3 Paras 1 and 2). The UK can also notify the intention to accept a measure concerning Title V TFEU to the Council and the Commission, after the measure has been adopted (EU Treaty: Protocol (No 21), Article 4). In that case, in order to permit the UK to be bound by the measure, the provisions on enhanced co-operation and indicated by Article 331 Para 1 TFEU will apply (Article 4).

As far as the EU Trafficking Directive is concerned, the UK initially decided not to participate in its adoption. On that occasion, the Home Office sent a letter to the Chairman of the European Scrutiny Committee where they explained the decision not to opt in the proposed Trafficking Directive (Home Office Letter, 2010). The Home Office explained that their reasons were mainly related to the fact "The Directive will not make a significant practical difference to the way we combat trafficking and support victims" (Home Office: 2010). The Home Office added

...there may be changes to the Directive as a result of the remaining negotiations with the European Parliament which could affect UK interests, such as expanding support provisions for those who have not yet

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<sup>2</sup> See List of Union acts adopted before the entry into force of the Lisbon Treaty in the field of police cooperation and judicial cooperation in criminal matters which cease to apply to the United Kingdom as from 1 December 2014 pursuant to Article 10(4), second sentence, of Protocol (No 36) on transitional provisions. OJ C 430/17, 1/12/2014. See List of Union acts adopted before the entry into force of the Lisbon Treaty in the field of police cooperation and judicial cooperation in criminal matters which have been amended by an act applicable to the United Kingdom adopted after the entry into force of the Lisbon Treaty and which therefore remain applicable to the United Kingdom as amended or replaced. On OJ C 430/23, 1/12/2014.

<sup>3</sup> See Annex to Council Decision 2014/836/EU of 27 November 2014 determining certain consequential and transitional arrangements concerning the cessation of the participation of the United Kingdom of Great Britain and Northern Ireland in certain acts of the Union in the field of police cooperation and judicial cooperation in criminal matters adopted before the entry into force of the Lisbon Treaty. On OJ L 343/11, 28/11/2014.



been identified as victims of trafficking, and expanding extra-territorial jurisdiction. (Home Office: 2010).

By the wordings of this letter, it can be deducted that the UK had two main concerns on the early draft of the Trafficking Directive. One concern was about the issue of national sovereignty as expanding extra-territorial jurisdiction over the crime of human trafficking could permit investigative and judicial authorities of other Member States to interfere with criminal issues which are of national sovereignty and which could jeopardise the British national interests. This fact can be drawn by the strict UK's position on national sovereignty shown when the European Commission proposed the establishment of the European Public Prosecution Office (The United Kingdom Parliament, Select Committee on European Communities, 1999). The second concern related to the identification of victims and this can be deducted by the letter itself where the government stated that they were reluctant to expand legal support to people who had not been identified as victims as yet. The UK's priority has always been to control unlawful immigration and to maintain border security and they continue to be their priorities above protection of people from criminal networks and human trafficking, even after Brexit (House of Commons Home Affairs Committee, 2017).

In any case, in 2010, the Home Office decided to review their position after the Directive was finalised with the purpose to evaluate better whether it can strengthen the efforts against human trafficking whilst preserving the UK's interests. In the meantime, the Trafficking Directive was adopted and stated that the UK was not taking part in the adoption of the Directive (Directive 2011/36/EU: Para 35). After the adoption of the Directive, the UK notified to the Commission and to the Council their intention to accept the Trafficking Directive, on the basis of Article 4 Protocol (No 21) TFEU (Commission Decision 2011/169/EU of 14 October 2011, OJ L 271, 18 October 2012: 49). Therefore, all provisions related to co-operation in the fight against human trafficking and on the identification and protection of victims, apply to the UK.

Following the acceptance of the Trafficking Directive, the UK adopted the Modern Slavery Act 2015. The Modern Slavery Act states that a person commits human trafficking if he or she facilitates the travel of another person with the aim to exploit the person (Modern Slavery Act, 2015 c. 30: s. 3). Subsequently, the Act states that a person is exploited if he or she is victim of slavery, servitude and forced or compulsory labour, sexual exploitation, removal of organs or if his or her services are secured by the use of force, threat or deception or if services are secured from children or other vulnerable persons. These sections of the Modern Slavery Act identify human trafficking as a form of slavery and this is required by the Trafficking Directive and by the Strasbourg Court's case-law, as explained in section 2 of this article. There are then provisions about the identification of

victims which state that the Secretary of State may make regulations with the purpose to provide assistance and support to victims when ‘there are reasonable grounds to believe’ that the persons ‘may be victims of slavery or human trafficking’ (s. 50 Para 1 (a)). The ‘reasonable grounds to believe’ expression has been taken directly from the Trafficking Directive which leaves wide discretion to Member States’ competent authorities to evaluate whether a person could be considered a victim as defined within the context of the Trafficking Directive. In these cases, the Trafficking Directive and the Modern Slavery Act 2015 state both that the person must be provided protection and support. However, as pointed out above, leaving too much discretion to States can cause misidentification because Member States can use their discretion in a narrow way to deport as many irregular migrants as possible without identifying victims of human trafficking in between migrants.

The Modern Slavery Act 2015 states that a person who has been found guilty of slavery or human trafficking, shall be prevented from travelling abroad for a period of no longer than 5 years (Modern Slavery Act, 2015: s. 25). This provision requires that the UK takes responsibility for persons who have committed slavery or human trafficking on their territories and this is also the requirement of the Human Trafficking Directive which establishes that Member States must “take the necessary measures to establish their jurisdiction on human trafficking when the offender has committed the crime in part or wholly on their territories” (Directive 2011/36/EU: Article 10 Para 1). The Modern Slavery Act states that the offender shall be requested to surrender all the passports which have been confiscated to the defendants (s. 25 Para 4).

The protection of identified victims of trafficking as required by the Modern Slavery Act, is actioned by the National Referral Mechanism (NRM). The NRM was established in 2009 following the ratification of the CoE Trafficking Convention (National Criminal Agency, 2017a). In 2015, the NRM has been extended to all victims of slavery, following the implementation of Modern Slavery Act 2015 (National Criminal Agency, 2017a). The NRM has the task to collect data on victims of human trafficking and slavery. For that purpose, the National Crime Agency (NCA) established the Modern Slavery Human Trafficking Unit (MSHTU) which coordinates the UK’s response to Human Trafficking and Modern Slavery domestically and internationally. (National Crime Agency, 2017b) The MSHTU support victims of human trafficking by identifying potential victims and by advising law enforcement authorities on how to gain their trust in order to obtain evidence against perpetrators of trafficking. (National Crime Agency, 2017c). Since 2015, efforts have been made by the British government in order to fight against human trafficking adequately and it is clear by reading the Modern Slavery Act and by the establishment of the NRM and MSHTU, that the UK have intention to focus on the protection of victims.

Victims have to be liberated by their perpetrators and have to be provided a shelter in order to be put in the position to decide whether they want to testify against their exploiters.

However, the 2015 Modern Slavery Act has been assessed by an independent review which revealed that often victims are not identified because their status of potential victims is confused with their immigration status when they apply for asylum and this fact discourages them, from reporting their status because they fear deportation (Craig, 2017). Complainants have also reported that they have not been provided with protection available to them during and after the trial (Home Office, 2016: 3). Reports have also been made by the Independent Anti-Slavery Commissioner who emphasised that the NRM should be radically improved to ensure that victims are identified and receive adequate support and this issue will be “at the centre of an improved process” (Independent Anti-Slavery Commissioner Report, 2016).

The training of police forces, investigators and prosecutors is discontinuous and sometimes absent (Home Office, 2016: 3). Finally, there is “Insufficient quality and quantity of intelligence about the extent of modern slavery at regional, national and international level” (Home Office, 2016: 3). The Independent Anti-Slavery Commission has pointed out that the Modern Slavery Act has to prioritize, among others, the identification of victims, the improvement of law enforcement and criminal justice and international collaboration.

International collaboration is very important to detect criminal organizations perpetrating trafficking when this crime has a trans-national dimension. The Independent Anti-Slavery Commission has indicated international cooperation as a fifth priority (Independent Anti-Slavery Commissioner Report, 2017). The priority should be fulfilled by focusing on prevention, on enhanced European cooperation, by ensuring that modern slavery becomes part of the global agenda and by adopting protection measures in humanitarian responses.

Prevention of trafficking should be ensured by developing projects with countries of origin from where there is a high number of trafficked victims. The Independent Anti-Slavery Commission stated that this aim should be achieved by preventing human trafficking through cooperation between the Home Office, the Foreign and Commonwealth Office, the Department for International Development, the National Crime Agency (NCA), the Crown Prosecution Service and other statutory agencies, NGOs and international partners.

The Independent Anti-Slavery Commission highlighted that international collaboration should be strengthened by enhancing European collaboration. This is a very important aspect of international cooperation when the crime of human trafficking has a cross-border dimension. For this purpose, the UK should cooperate with the EU Anti-Trafficking Coordinator, the OCSE Special

Representative and Coordinator for Combating Trafficking in Human Beings, Europol and Eurojust. Particular attention is given to these two agencies to ensure an effective European response is given, when human trafficking has a cross-border dimension. It is highlighted that UK police forces should work with Europol and Eurojust in order to encourage the use of Joint Investigation Teams when the crime has a cross-border dimension. The Independent Anti-Slavery Commission also highlighted the importance of data and intelligence sharing with Europol in the fight against human trafficking and slavery.

In the next sections, the article will focus on issues concerning police and judicial cooperation in criminal matters. In particular, the article will focus on post-Brexit relationship between the UK and Europol and between the UK and Eurojust. The consequences that Brexit may have on the execution of the EAW will also be analysed. Subsequently, the article will focus on issues related to identification of victims and consequences that Brexit may have on victims and potential victims.

### **International Cooperation in the Fight against Human Trafficking and Issues Related to A Surge in Victims After Brexit**

Europol which stands for European Police Agency is a European agency established to support and strengthen actions of Member States competent authorities and their mutual cooperation in preventing and fighting against organized crime (Article 3 Regulation (EU) 2016/794). Eurojust was established to strengthen mutual cooperation between judicial authorities of Member States. The UK has supported the setting up of these two agencies and its departure from the EU could cause obstacles to investigations on crimes having a trans-national dimension, including human trafficking. (Article 3 of The Consolidated Version of the Eurojust Council Decision 2002/187/JHA on setting up Eurojust, as amended by Council Decision 2003/659/JHA, and Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust, 5347/3/09).

#### *Europol*

Brexit may make collaboration with Europol and Eurojust and the use of JITs very difficult to achieve if the UK by leaving the EU single market, will also leave Europol and Eurojust and important instruments such as the EAW which could strengthen the fight against slavery and trafficking when they have a transnational dimension. After the referendum, the British government published the Great Repeal Bill by which the existing EU law will be converted into British law and then, the Parliament will decide which of EU law will be amended, kept and repealed (Department for Exiting the European Union. 2017a: Para. 1.12). Following, the publication of the Bill, the EU Select Committee of the House of Lords focussed on future relationship between the UK and the EU on co-

operation against crimes with a trans-national dimension. The future cooperation with Europol and Eurojust were discussed as the execution of the EAW. These issues are very important as trafficking in human beings can have a trans-national dimension and the Independent Anti-Slavery Commission has stressed that collaboration with Europe is very important to detect this crime.

The UK has a very difficult position at the moment because they have used agencies such as Europol more than other EU countries (HM Government, 2016: Para 1.16). The UK has already confirmed that they will opt in the new Regulation which reformed Europol (Regulation 2016/794, 11 May 2016 and Letter from Brandon Lewis MP, 2016). However, leaving the EU will make the situation very problematic because the UK, by leaving the EU, will leave all EU measures adopted when they were a member of the EU. The NCA has stated that retaining the Europol's membership or exploring other options are the most important priorities in between all the measures in the AFSJ (House of Lords, European Union Committee, 2016). However, in the European Committee of the House of Lords, it was underlined that an agreement as third country with Europol would be quite problematic because these agreements are very difficult to achieve as they are "lengthy" and "measured in years and not months" (House of Lords, European Union Committee, 2016: Para. 52). It could take between five to seven years to conclude a new agreement between the UK and the EU on future Europol's relationship (House of Lords, European Union Committee, 2016: Para. 58). It must be added that even if an agreement between the EU and the UK is achieved, the UK would become an operational co-operation partner. This new position means that they UK will not be on the management board and thus, they will not have any influential position within the Europol (House of Lords, European Union Committee, 2016: Para 54). According to NCA, these agreements would not be sufficient to address the UK's issues (House of Lords, European Union Committee, 2016: Para 56). The UK would lose access to the Europol Information System which gathers information on suspected and convicted criminals and on suspected terrorists from all EU Member States (Para. 56). In this way, all enquiries on suspected criminals would take longer to be gathered because the NCA would not have direct access to the information any more (Para. 56). It was highlighted that leaving the Europol could mean not to be accountable anymore to the CJEU's jurisdiction (House of Lords, European Union Committee, 2016: Para 62). This may be welcomed by many British people. However, the Committee emphasised that lack of CJEU's jurisdiction could have a negative impact on any agreement with the EU on participation in Europol's activities because Europol is accountable before the European Commission, the CJEU and the European Parliament. Therefore, Lord Kirkhope questioned whether the EU would accept an agreement with the UK which excludes the accountability of Europol before the CJEU and other EU institutions (Para 62). Finally, it was pointed out that any future agreements with Europol

should be concluded only if the UK meets the data protection standards required by the EU (House of Lords, European Union Committee, 2016, Para 63). There is uncertainty on the Europol's scope in a post-Brexit Europe and this issue may complicate cooperation with the EU-27 in the fight against slavery and human trafficking which is already problematic as stated by the Independent Anti-Slavery Commission.

### *Eurojust*

Another EU agency Brexit will impact on is Eurojust which supports and coordinates national investigating and prosecuting authorities on serious crimes perpetrated in two or more EU Member States (Article 3 of The Consolidated Version of the Eurojust Council Decision 2002/187/JHA on setting up Eurojust, as amended by Council Decision 2003/659/JHA, and Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust, 5347/3/09). Support and coordination can include the facilitation of mutual legal assistance, the execution of the EAW and the establishment of JITs teams set up by Council Framework Decision 2002/465/JHA. The UK opted in the JITs in 2014 (Commission Decision 2014/858/EU of 1 December 2014) Eurojust can be a significant support in investigations concerning human trafficking when the crime is committed in different EU Member States. The Crown Prosecution Service (CPS) emphasised that they are habitual users of Eurojust "listing it among their top priorities for any forthcoming negotiation on Brexit" (House of Lords, European Union Committee, 2016: Para 74). The Director of Public Prosecutions pointed out that the Eurojust's features facilitate investigations because their work is undertaken multilaterally rather than bilaterally. In this way, it is possible to evaluate who has the evidence and who has to work together and whether it is necessary to have JITs. In addition, the Director stated that Eurojust being a neutral agency, permits immediate flexibility and the opportunity to communicate with many Member States at the same time rather than bilaterally. Leaving Eurojust could mean losing the influential position on decisions affecting this agency (House of Lords, European Union Committee, 2016: Para 77).

The British Government is exploring the possibility of concluding an agreement with Eurojust similar to those agreements put in place with Norway, Switzerland and the US (House of Lords, European Union Committee, 2016: Para 78). These nations post Liaison Prosecutors to Eurojust without being part of this EU agency. However, bilateral agreements could be difficult to achieve as Eurojust will be accountable to EU institutions such as the CJEU. The UK has clearly stated that they do not want to continue to be bound by the CJEU (House of Lords, European Union Committee, 2016: Para 32). This decision could create a political obstacle to future agreements in the criminal area (House of Lords, European Union Committee, 2016: Paras 78 and 83).

*The European Arrest Warrant*

Accountability before EU institutions such as the CJEU is an issue for dealing with Eurojust and Europol but also for the execution of the EAW. Maintaining the EAW is very important because it facilitates extradition of criminals between EU Member States to face prosecution and it facilitates the implementation of prison sentences for existing convictions. The British government in a recent White Paper, asserted that they want to bring an end to the CJEU's jurisdiction. (Department for Exiting the European Union, 2017b: Para 2.3). However, the British government has intention to retain the EAW after Brexit as "it is a priority for [the Government] to ensure that we remain part of the arrangement" (House of Lords, European Union Committee, 2017: Para 2). The problem emphasised by the European Union Committee of the House of Lords is that retaining the EAW can be very difficult because even if the 27 EU Member States (EU-27) and the UK reach an international agreement on the EAW, all international agreements on future arrangements between the UK and the EU-27 are subject to the CJEU's interpretation because the CJEU has the role to interpret the Treaties that the EU signs with third countries (House of Lords, European Union Committee, 2016: Para 32). Hence, it is very difficult to continue to be part of the EAW without accepting the CJEU's jurisdiction.

The UK has already accepted that existing CJEU's case-law will not be disputed after Brexit (House of Lords, European Union Committee, 2017: Para 40). However, the UK has intention not to recognise case-law after Brexit and this decision of the Government could be difficult to achieve because, as the European Union Select Committee has emphasised, the CJEU's post-Brexit case-law, could still have authority in Britain because it could be an essential requirement for any future agreements between the EU-27 and the UK on extradition. However, the British government is not persuaded that this should be the direction to follow as they prefer to replace the CJEU's jurisdiction with an arbitration mechanism such as EFTA (House of Lords, European Union Committee, 2017: Para 41); However, this idea does not appear to be a solution as the EFTA Court has only jurisdiction for infringement actions in the single market's area against the EFTA Countries which are Iceland, Liechtenstein and Norway (House of Lords, European Union Committee, 2017: Para Box 2 and Para 34). The EFTA system does not apply to JHA and any dispute related to the criminal area (House of Lords, European Union Committee, 2017: Para 34). The UK government has also explored the possibility of other options rather than the EAW. One of these options is to substitute the EAW with the 1957 Council of Europe Convention on extradition (House of Lords, European Union Committee, 2017, Para 55). Sir Francis Jacobs pointed out that the 1957 Council of Europe Convention is not an adequate replacement of the EAW and in order to apply the extradition as established by the Convention, it would be necessary to update

arrangements for surrenders otherwise when the UK will leave the EU “there will be a cliff-edge” (House of Lords, European Union Committee, 2017: Para 57). In other words, there is the risk that the UK and the EU-27 will not find any agreements on the EAW. If this is the case, it is predicted that the UK will have to amend the Extradition Act 2003 and reconsider EU Member States not as category 1 States where the EAW applies but as category 2 and this means that ordinary extradition regime will apply on cooperation between the EU-27 and the UK and no longer the EAW (House of Lords, European Union Committee, 2017: Para 58). There is the risk that the UK will have to make arrangements for extradition request with each Member State if there are not pre-existing arrangements with EU Member States (House of Lords, European Union Committee, 2017: Para 59). It must also be pointed out that the EAW overcame bureaucratic problems which slowed the extradition procedures, by applying the principle of mutual recognition. The traditional extradition procedure would pose the same problems again. In other terms, there would be “A return to a political, rather than a judicial approach to extradition” (House of Lords, European Union Committee, 2017: Para 60) because the 1957 Extradition Convention would shift responsibility to diplomatic channels. Instead, the EAW transferred the responsibility to courts and they can only authorize extradition (Para 60). In this way, delays can be avoided where by the extradition procedure; they will be unavoidable as they will be caused by the involvement of diplomatic channels. Finally, the EU-27 may rule out the issue of extradition orders whether there is the risk that data protection standards between them and the UK may diverge and against their nationals outside the scope of the EAW and outside the concept of EU citizenship on which the EAW is based (House of Lords, European Union Committee, 2017: Paras 67 *at* 68).

The British government is aware of all these difficulties and thus, it explored the alternative to negotiate a bilateral agreement similar to the one concluded by Iceland and Norway with the EU (House of Lords, European Union Committee, 2017: Para 70). From one side, it has been pointed out that these agreements have been concluded with two States which are preparing to join the EU and that are part of the Schengen Area (Para 70). From the other side, it has been argued that the agreement contains dispute resolution mechanism and thus, it is worthy to be taken into account as the British government plans to leave the CJEU’s jurisdiction (Para 70). In any case, the European Union Committee concluded that it would be better not to leave the CJEU’s jurisdiction and to continue to rely on the EAW (House of Lords, European Union Committee, 2017: Para 71). The reason is mainly because the 1957 Council of Europe Convention on Extradition would slow down the extradition procedure. (House of Lords, European Union Committee, 2017: Para 73). There is also the risk of a ‘cliff-edge’ after the deadline to negotiate an agreement with the EU which is March 2019 (House of Lords, European Union Committee, 2017: Paras 71 and 72). A ‘cliff-edge may



have a negative impact on the fight against human trafficking. If from one side, the British government has shown a willingness to co-operate with EU-27 in the fight against cross-border crime. The accountability before the CJEU can be challenging as it can cause obstacle in co-operation in criminal matters. Most recently the UK has confirmed their commitment to co-operation with the EU in criminal matters but recent developments have not clarified how their position to leave the CJEU's jurisdiction can be reconciled with their wish to continue to co-operate with EU 27 in the fight against crime. (HM Government, 2017a). These issues can aggravate investigations on human trafficking as uncertainty will not contribute to improve co-operation in between law enforcement authorities in detecting criminals and identifying victims. This uncertainty also characterises the position of EU citizens in the UK after the UK's departure from the EU.

### **Identification of Victims and the Consequences of Brexit**

The UK's departure from the EU can affect the identification of victims. Identification of victims and potential victims is essential in the fight against human trafficking. At the European level, the CoE Trafficking Convention states that States Parties "shall provide... a recovery and reflection period of at least 30 days, when there are reasonable grounds to believe that the person concerned is a victim" (Council of Europe, 2005: Article 13 (1)). As shown in section 3 of this article, the Anti-Slavery Commission has stressed the importance of identifying and protecting victims of human trafficking. The NRM has five days from when a person has been referred for protection, to decide whether there are reasonable grounds to believe that the person is a potential victim of human trafficking and slavery (National Referral Mechanism, 2017). Subsequently, the person has 45 days of reflection and recovery period during which, the Competent Authority decides whether the person is a victim or no. The 45 days comply with the requirements of the CoE Trafficking Convention. Therefore, even after Brexit, the minimum requirements of 45 days will be kept in place. Certainly, the Human Trafficking Foundation has reported that 45 days are not sufficient to recover victims as they are still very vulnerable after this short period of time. (Human Trafficking Foundation, 2016). However, even if reforms are desirable, after Brexit, the UK cannot grant a recovery period shorter than 30 days.

This seems to be the only positive aspect concerning the future fight against human trafficking and modern slavery. This is because after Brexit, the status of EU citizens will change and their new status will create a situation of uncertainty among EU citizens and their risk to be exploited and enslaved will increase (FLEX-LEAG, 2017). In June 2017, the British government published a proposal on the position of EU citizens in the UK and UK nationals living in the EU. In the proposal, the government clearly stated that after Brexit, the UK law will create new rights for EU citizens residing in the UK before the exit from the EU (HM Government, 2017b: 4). The government explained that after the UK

departure from the EU, EU law will become international law and that the CJEU will not have jurisdiction within the UK legal system any more. In the proposal, the government highlighted that EU citizens already residing in the UK will be granted indefinite leave to remain (settled status) as established by the Immigration Act 1971. All EU citizens and their families who have been resident in the UK for five years before a specified date will acquire settled status. EU citizens and their dependant families who have resided in the UK less than five years before a specified date, will have to complete a continuous period of 5 years to acquire settled status. The specified date will not be earlier than 29 March 2017, date when Article 50 EU Treaty was triggered by the UK government to initiate the UK's withdrawal from the EU, and no later than the date the UK formally withdraws from the EU (HM Government, 2017b: 5).

EU citizens who arrive after the specified date will be recognised the right to remain in the UK for a temporary period and will be granted settled status on a case by case basis, even though "this group should have no expectation of guaranteed settled status" (HM Government, 2017b: 4). This proposal is temporary, but it is clear that after a certain date EU citizens arriving after Brexit in the UK will have the same immigration status of third country nationals arriving in the UK. EU citizens will no longer be able to travel to the UK and apply for jobs free from immigration controls; and if they do not comply with UK immigration law, they will be subject to immigration restrictions, including being returned to their countries of origin. There is, thus, the risk that the new legal status will increase human trafficking. The Labour Exploitation Advisory Group (LEAG) reported that the uncertainty experienced by EU citizens after the Brexit Referendum, is causing vulnerability (2017: 4). The focus on immigration restrictions is feared very much by EU citizens as they think that barriers to enter the UK and work will see a surge in the number of undocumented workers "creating a hidden workforce who are much more vulnerable due to lack of status" (FLEX-LEAG, 2017: 6). It has also been reported by LEAG members that EU workers are already experiencing exploitation. This is because EU citizens have to demonstrate to have exercised Treaty rights in order to obtain permanent residence certificates. Therefore, they are accepting any kind of work including exploitative work to demonstrate their status (FLEX-LEAG, 2017). Reduction of legal routes and other immigration restrictions will mean that traffickers will bring to the UK more undocumented migrants for the purpose of exploitation. Migrants will have no choice other than accepting exploitation, as they will be under the traffickers' threat to be arrested, imprisoned and deported. Prioritizing immigration control, may lead to criminalise victims of exploitation. LEAG members emphasised that restrictive immigration policies will cause an increase of human trafficking and labour exploitation (FLEX-LEAG, 2017: 8). Therefore, there will be the need to strengthen training for border control, labour market enforcement and of officials from the Home Office, in order to ensure

that EU nationals, who become victims of human trafficking and labour exploitation are identified and supported rather than criminalised, detained and deported after the UK's departure from the EU.

### **Conclusions**

This article has shown that there is uncertainty in the way trafficking in human beings will be tackled by the UK when they will leave the EU. The article has shown uncertainty by focusing on the consequences that Brexit can have in the fight against human trafficking in co-operation with the EU-27 when the crime has a trans-national dimension. The UK is very keen to continue police and judicial co-operation with the EU-27 but since they want to leave the CJEU's jurisdiction, there can be issues related to the accountability of EU agencies such as Europol and Eurojust as they are subject to the control of European institution. Another problem which has been risen by the article is the application of the EAW. The UK has relied on the EAW very often but leaving the EU may mean having to return to the use of diplomatic channels rather than legal channels in order to be able to arrest a suspected criminal. The EAW is based on mutual judicial cooperation and mutual trust between EU Member States and these principles might be jeopardised by the UK leaving the EU.

On top of this situation there is the uncertainty which characterises the free movement of persons. The UK aim to impose immigration controls and restrictions on new EU citizens moving to the UK. In the future, new EU entrants may become irregular migrants and this fact can make them vulnerable and easy targets for human traffickers. Criminal organisations target vulnerable individuals. EU citizens would become vulnerable individuals if subjected to immigration controls. They may risk living in hiding in the UK. Criminal organisations may take an advantage of this situation by threatening to report them to the authorities. EU citizens may accept to become victims of human trafficking to prevent criminal organisations report them. This situation may contribute to increase the number of human trafficking victims'. These problems are not being addressed in the negotiations as the priority seems to be to impose more immigration controls after the UK will leave the EU.

It can be concluded that if from one side, it is desirable that the EU and the UK find an agreement because they both benefit from EU police and judicial co-operation. (Carrapico et al, 2017) From the other side, the UK will not be able to exercise any influential position anymore by staying out from the EU, by not accepting the CJEU's jurisdiction and by imposing immigration controls over EU citizens. Some scholars are arguing that the fact that the UK has always taken initiatives and provided expertise in the area of internal security, may mean that "Brexit has the potential to disrupt internal security processes at different levels" (Carrapico et al, 2017: 24-25). Certainly there is this risk. However, it is greater

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for the UK than the EU because Brexit represents an opportunity for the EU which can strengthen “harmonization of norms and deeper integration without having to cope with the operation of two or more parallel systems” (Carrapico et al, 2017: 24). The problem is heavier for EU citizens who will move to the UK after Brexit as they will not benefit from the status of EU citizens living in a EU country any more. This situation can be detrimental for the fight against human trafficking as victims and potential victims could increase. This problem should be seriously focused by the EU and the UK which should prioritize people and their protection from human trafficking and slavery to any trade agreement. It is hoped that they will prioritize citizens and that the UK will not be left without agreement at the end of the two years mainly because this will have negative consequences for human beings.

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