



## BRIEFING

ON THE LEGAL CONSEQUENCES IN EU LAW OF THE UNITED KINGDOM'S DECISION TO OPT OUT OF THE DRAFT DIRECTIVE ON PREVENTING AND COMBATING TRAFFICKING IN HUMAN BEINGS AND PROTECTING VICTIMS (COM(2010) 95)

### **Purpose of the Briefing**

This briefing is designed to provide information for NGOs and lawyers working with victims of human trafficking, as well as lawmakers and government officials. It provides information on the **legal consequences** of the UK's decision, announced earlier this year, to opt out of the proposed Directive.<sup>1</sup>

ATLeP is an organisation made up of lawyers and others who meet bi-monthly in London to discuss legal issues affecting victims of human trafficking. The AIRE Centre is a London-based charity whose mission is to promote awareness of European law rights and assist marginalised individuals and those in vulnerable circumstances to assert those rights.

This briefing is intended to complement the efforts of other NGOs who are promoting awareness of the consequences of the UK's decision to opt out of the Directive, such as Anti-Slavery International, ECPAT UK and the POPPY Project. This briefing is not meant to prejudice the efforts of NGOs such as the European Women's Lobby, La Strada International, Save the Children, ECPAT, Terre des Hommes, Amnesty International and the Churches Commission on Migrants in Europe who have been contributing to the sound development of the proposal with the aim of securing the greatest possible level of protection for victims and potential victims of human trafficking. This briefing will not offer ATLeP and the AIRE Centre's views of the substantive provisions of the draft Directive, which are still subject to negotiation as part of the EU legislative procedure, but rather will discuss generally the consequences of the UK opt out.

### **Background**

The UK has indicated that it will opt out of the Directive on the basis that 'the UK already complies with much of the draft EU directive'.<sup>2</sup> Only the UK and Ireland have the possibility of opting out of this kind of legislative measure, and only the UK intends to opt out. The Directive is still being negotiated between the European Commission, the European Parliament and the Council of the European Union. Although the UK has already opted out of the Directive, once the instrument is

<sup>1</sup> See <http://www.europeanlawmonitor.org/legislation/2010/COM201095text.pdf>.

<sup>2</sup> See <http://www.homeoffice.gov.uk/media-centre/news/trafficking-directive>.

adopted the UK authorities could change their mind and agree that the UK will be bound by the instrument.<sup>3</sup>

The Home Office argue that opting out is appropriate because, in their view, the proposed Directive's provisions for enhanced co-operation between States do not add value to the UK's anti-trafficking efforts. The Home Office make no reference however to the support measures for victims of trafficking that the Directive will contain, except to say the following: '*opting in now would also require us to make mandatory the provisions which are currently discretionary in UK law. These steps would reduce the scope for professional discretion and flexibility and might divert already limited resources*'. ATLeP and the AIRE Centre find this reasoning inadequate: the proposed Directive sets minimum, EU-wide standards for the protection of victims of human trafficking. It is significant that human trafficking is explicitly prohibited by the EU Charter of Fundamental Rights (Article 5(3)), which, since the coming into force of the Lisbon Treaty now has equal status with the EU Treaties themselves; the Directive can therefore be seen as giving effect to fundamental rights principles protected at the highest level of the EU legal order. Fundamental rights are not a matter for discretion and cannot be sacrificed to improve flexibility or save money.

This briefing covers two issues which the UK's decision to opt out of the draft Directive raises:

- the effect of the opt out on the rights of victims of human trafficking; and
- the compatibility of the opt out with the Council of Europe Convention on Action Against Trafficking in Human Beings.

### **The Effect on the Rights of Victims of Trafficking**

As a matter of UK domestic law (The European Communities Act 1972) and general EU law principles, any provision of an EU Directive has *direct effect* in national law if the provision is clear, precise, unconditional and the deadline for implementation has passed. Provisions of Directives must be incorporated into domestic law in any event, but if they have not, or have not been incorporated properly, individuals may rely directly on those directly effective provisions before domestic courts. Individuals can also bring actions for damages against the authorities for failing to implement the provisions of a Directive that have direct effect.

This has important consequences for the rights of victims. To see why, it is useful to divide the provisions of the proposed Directive into three categories, based on the UK government's own analysis<sup>4</sup> of the proposal presented by the European Commission to the Council.

1. *Provisions with which the UK purports to comply as a matter of law.* Provisions in this category will not, government officials have concluded, require any changes to UK law or practice. For example, Article 3 of the Directive would require the UK to ensure that instigating, aiding and abetting human trafficking are punishable, which the authorities claim is already the case. Other provisions that fall into this category include: Article 4 (penalties for traffickers); Article 5 (liability for legal persons); Article 6 (sanctions against legal persons); Article 7 (possibility for prosecutors not to pursue victims of trafficking whose offences were the result of having been trafficked); Article 8 (necessary measures to investigate and prosecute trafficking cases); Article 15 (training and measures to discourage demand); Article 16 (monitoring mechanisms). The government's view of the UK's

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<sup>3</sup> Once the final version of the Directive has been adopted, ATLeP and the AIRE Centre intend to produce an amended briefing about the UK's compliance with the Directive's provisions.

<sup>4</sup> See <http://www.statewatch.org/news/2010/sep/eu-uk-trafficking-em.pdf>.

compliance with these measures may of course change if the provisions of the draft Directive change before it is adopted. It is worth noting, however, that even though the authorities claim that the UK complies with these provisions (as they were in the Commission's proposal), this may not actually be the case in practice. Evidence of this can be found in the complaints several victims of human trafficking have recently made to the European Court of Human Rights about the UK authorities' failure to carry out proper investigations and prosecutions of traffickers. Two such cases have been communicated to the UK government. This means that the European Court of Human Rights considers that there is a case to answer. The cases are *C.N. v the United Kingdom* (Application Number 4239/08) and *Kawogo v the United Kingdom* (Application Number 56921/09). In a third communicated case against the UK, *L.R. v the United Kingdom* (Application Number 49113/09), the applicant has complained about a failure to protect her from her trafficker and his associates, whom she denounced to the police; the complaint is based on the authorities' intention to expel the applicant to Albania, where there is a real risk that the trafficker and his associates, as well as her family, will harm her.<sup>5</sup> These communicated cases suggest that the UK may not be in effective compliance with Articles 3 and/or 8 of the proposed Directive. Participating in the Directive would clarify and make concrete the obligations police and prosecutors have to investigate and prosecute human trafficking offences and protect victims and witnesses. Participating in the Directive would also promote awareness of these obligations, which this litigation before the European Court strongly suggests is inadequate. Lastly, to the extent that the measures in the Directive have direct effect, participating in the Directive would expand the remedies available at domestic level for these violations. This would potentially reduce the need to have recourse to the European Court of Human Rights when the authorities get things wrong.

2. *Provisions with which the UK admittedly does not comply as a matter of law.* If the UK were to participate in the Directive, some legislative changes would, the government admits, be necessary to fill in gaps in UK law. For example, it appears that the UK would have to extend extra-territorial jurisdiction in order to prosecute acts of human trafficking committed overseas where the offender is a British Citizen or has her/his habitual residence in the UK (Article 9). It would also be necessary to provide for the appointment of a special representative for child victims of trafficking in all cases (Article 14); such an appointment is currently discretionary. These provisions would result in improvements in the fight against human trafficking and the protection of victims.

3. *Provisions that are at present a matter of discretion or guidance in the UK.* Most of the provisions of the draft Directive which deal with victim protection correspond to a grey area in UK law: as government officials admit, guidance recommends that the authorities should comply with those provisions, but the authorities are not required to do so as a matter of domestic law, reducing (and increasing the cost of) the remedies that victims have at domestic level if they do not enjoy the benefit of these measures. From a legal perspective, this is a **casual approach to the protection of victims' rights**. It creates potential problems for victims as well as for the authorities who are responsible for securing victims' rights; such a casual approach means that the latter often do not understand what their responsibilities are. The rights involved are contained in Article 10 of the draft Directive (support for victims before, during and after criminal proceedings); Article 11 (legal advice and representation for victims); and Articles 12 and 13 (support and protection for child victims). These provisions correspond to many of the victim protection provisions found in **The Council of Europe Convention on Action Against Trafficking in Human Beings**, which the UK has ratified and by which it is bound as a matter of international law. It might be surprising therefore to find that the UK

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<sup>5</sup> See [http://www.echr.coe.int/NR/rdonlyres/EBEC266A-8EA3-4826-95FE-3B1BB81B5903/0/FICHES\\_Forced\\_labour\\_EN.pdf](http://www.echr.coe.int/NR/rdonlyres/EBEC266A-8EA3-4826-95FE-3B1BB81B5903/0/FICHES_Forced_labour_EN.pdf).

authorities treat these rights so casually, talking about discretion, flexibility and resources (see above, 'Background'). They can do so because in the UK, unlike in many other European States, the provisions of an international treaty do not become part of the domestic legal system unless they are incorporated into domestic law, usually through an Act of Parliament. This has led to confusion in the UK about the rights of victims of human trafficking, confusion which the following hypothetical example illuminates.

L is a victim of trafficking from Romania. He is nineteen years old. His traffickers told him that as an EU citizen he has the right to work in the UK; he was not aware he needed authorisation. Once he arrived in London they 'employed' him in a factory making counterfeit cigarettes in exploitative conditions: he was never paid, had to work eighteen hours a day, seven days a week, under threat of violence, and was locked in a building, only occasionally taken out to help move goods. He was afraid to leave because the traffickers threatened his family. After six months though he escaped and went to the police, who started an investigation. He was afraid to return to Romania and in any event wanted to stay in the UK to see the traffickers brought to justice. Although he is allowed to live in the UK as an EU citizen, he cannot work without authorisation; he can only be self-employed. At present he is too traumatised to try to start his own business. He was told by the authorities that it was not possible to find accommodation for him and he would have to find a charity to help him, and they said they would help him find a charity that could house him.

Under Article 12(1)(a) of the Trafficking Convention, the UK is required to provide L with 'standards of living capable of ensuring [his] subsistence, through such measures as appropriate and secure accommodation'. Helping L get housed by putting him in touch with charities which are not closely regulated and that do not receive funding from the State is insufficient. This is an obligation that the UK has undertaken as a matter of international law, by ratifying the Council of Europe Convention. However, because this provision of the Convention has not been incorporated into domestic law, L cannot challenge the way he has been treated directly in the domestic courts, except perhaps by way of judicial review and by making novel, untested arguments, requiring intensive legal advice and services. Most importantly, there does not appear to be a remedy capable of providing him with the immediate solution he needs.

Participating in the Directive would mean incorporating this provision of the Council of Europe Convention into domestic law; Article 10(5) of the draft Directive, as it stood at the time of the Commission's proposal, would require EU Member States to provide 'standards of living capable of ensuring victims' subsistence through measures such as appropriate and safe accommodation'. The UK would have a period of time in which to make changes to domestic law to ensure that all trafficking victims had secure and appropriate accommodation – an obligation that the UK has already undertaken in the Council of Europe Convention but not yet given effect to in law. If L was not given appropriate accommodation, he could bring straightforward legal proceedings under the Directive and/or the domestic legislation adopted to bring the UK in line with this requirement. Local authorities, police and others would have no doubt as to their responsibilities.

### **Compatibility of the Opt Out with the Council of Europe Convention on Action Against Trafficking in Human Beings**

The Council of Europe Convention came into force with respect to the UK in April 2009. As a matter of international law, that means that the provisions of the Convention are binding on the UK, even if, as explained above, there are some questions about the ability of UK courts, as a matter of domestic

law, to give effect to those rights unless the UK adopts domestic legislation incorporating those provisions into domestic law.

Article 40(3) of the Convention, the so-called ‘disconnection clause’, concerns the applicability of EU law in the field of human trafficking:

*Parties which are members of the European Union shall, in their mutual relations, apply Community and European Union rules in so far as there are Community or European Union rules governing the particular subject concerned and applicable to the specific case, without prejudice to the object and purpose of the present Convention and without prejudice to its full application with other Parties.*

The UK opt out from the Directive, even if permitted under EU law, may pose a problem under Article 40(3): ‘in so far as there are European Union rules’ on human trafficking, the UK, as a party to the Council of Europe Convention and a member of the European Union, ‘shall... apply’ them. By voluntarily ratifying the Trafficking Convention, the UK apparently agreed to be bound by EU rules in this area, in so far as such rules exist. Such a requirement makes sense: EU Member States that sign up to the Trafficking Convention have undertaken a particular commitment to combat human trafficking and protect victims, and EU legislation provides enhanced mechanisms for them to do so. The EU made clear in a statement about the disconnection clause that the purpose of the clause was to ensure clarity about the law. The EU expressed its commitment to giving full effect to the Convention in the light of the particular nature of the European Union’s legal system.

By opting out, the UK may be in breach of Article 40(3) of the Council of Europe Convention; it is certainly undermining the system of enhanced cooperation EU law provides to combat human trafficking and creating considerable confusion about what officials’ responsibilities and victims’ rights are. It may also be that the UK is required to comply with the provisions of the Directive in substance, even if it does opt out, by operation of the Council of Europe Convention and/or Article 5(3) of the EU Charter of Fundamental Rights. If that is the case, the opt out simply obscures what the UK’s legal obligations really are. It also remains unclear to what extent the UK will remain bound by the Framework Decision on combating trafficking in human beings that the UK participates in and which the Directive is intended to replace.

This legal confusion – a result of a casual approach to combating trafficking and securing victims’ rights – will have a detrimental impact on efforts to bring traffickers to justice and protect people from them. Resolving this confusion will be costly to victims of trafficking and to the State.

The failure to respect, as a matter of law, minimum standards concerning victims’ rights undermines the UK’s position in relation to other EU Member States as a credible partner in the fight against trafficking. Other EU Member States can no longer be certain that the UK respects these minimum standards for investigating acts of trafficking, prosecuting traffickers and protecting victims.

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