

**COMPATIBILITY OF NATIONAL MEASURES WITH THE FREEDOM
TO PROVIDE SEXUAL SERVICES IN EU LAW**

Natia Gogadze

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Abstract

General issues regarding sex work fall under the national competence of Member States of the EU. Thus, Member States have different national legislations on sex workers aiming mainly to combat trafficking and ignoring in most cases the existence of “voluntary prostitutes” and their rights. This thesis examines the possible violations of freedom to provide sexual services within the EU.

By analyzing the national legislations of Member States on sex work and case law of the Court of Justice, the thesis finds that if Member state allows sex work (under the national law or in practice) for its own nationals, then it cannot prevent the nationals of other Member States to provide sexual services.

Keywords: Sex workers, prostitution, EU law, freedom to provide services

Abbreviations

AG – Advocate General

CATW – Coalition Against Trafficking in Women

CEEC - Central and Eastern European Countries

CJ – Court of Justice

EC – European Communities

ECHR – European Convention on Human Rights

ECJ – European Court of Justice

ECSC – European Coal and Steel Community

EEA – European Economic Area

EFTA – European Free Trade Association

EP – European Parliament

EU – European Union

MS – Member States

STD – Sexually Transmitted Diseases

TEC – Treaty establishing the European Communities

THB – Trafficking in Human Beings

TFEU – Treaty on Functioning the European Union

UN – United Nations

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1. INTRODUCTION

1.1 Background

Prostitution is the world's oldest profession, may it also be one of the world's oldest problem? A frank discussion of either sex or money is rare and, shortly, prostitution is about sex and money; open investigation into what may be modern society's two most covert topics is generally out-of-bounds in polite society. This taboo creates the lack of information on the topic of prostitution.¹

Opinions on prostitution both between and within the member states of the EU are sharply divided – there are many viewpoints, ranging from the moral over the feminist to the economic. What stance to take in Europe on prostitution is not a rhetorical question² – it is a question which deserves a straightforward answer when especially the freedom within the EU law is concerned.

1.2 Problem discussion

General issues regarding prostitution fall under the national competence of Member States of the EU.³ Thus whether or not Member States criminalise, tolerate or regulate the sex industry has always been a matter for their sole discretion.⁴ When combating the trafficking in human beings became the main concern for the EU, Member States adopted different national legislations on prostitution aiming mainly to combat trafficking and ignoring in

¹ Encyclopedia of prostitution and sex work, edited by Melissa Hope Ditmore. Greenwood press, London, 2006

² Council of Europe, Parliamentary Assembly, Report, doc. 11352, Prostitution – Which Stance to Take? 9 July 2007, Committee on Equal Opportunities for Women and Men, Rapporteur: Mr Leo Platvoet

³ Parliamentary questions, answer given by Mr. Barrot on behalf of the Commission, 1 February 2010, available at: <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2009-6346&language=EN>

⁴ Heli Askola, European Legal Responses to Trafficking in Women (Hart Publishing, Oxford, 2007)

most cases the existence of “voluntary” prostitutes and their rights. It seems, that does not matter which legislation model on prostitution Member States have, they all leave this problem apart either not really wanting to deal with the phenomenon now or not knowing how to deal with it at present. This gap provokes imposition of some incompatible national measures by the MS to the nationals of other MS when they want to provide sexual services in this country, the right guaranteed to them under the Article 56 of the TFEU.⁵

This thesis examines the possible violations of freedom to provide sexual services within the EU and tests the hypothesis - If Member State allows prostitution for its own nationals, then it cannot claim that service is sufficiently serious to restrict freedom to provide this service for nationals of other Member State.

1.3 Aim and tasks

The aim of this thesis is to analyze the compatibility of national legal and regulatory measures concerning sex services with the fundamental freedom of Article 56 of the TFEU. For this aim the national legislations of different EU member states will be assessed and national measures specified, which may be considered to give rise to internal market barriers; and the justifications for national restrictive legislative measures and their proportionality will be examined according to ECJ case law. The last task will be the assessment and interpretation of findings with suggestion of possible solutions.

⁵ “Restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.” (ex Article 49 TEC)

1.4 Target group

The target group of this thesis are academics and students who are interested in prostitution issues in the EU law. The study might be also interesting for women across the EU who are involved in prostitution or plan to provide sexual services in future and merely for public interested in women's rights.

1.5 Delimitations

For the purpose of this paper, homosexual and heterosexual prostitution services offered by men are not included in the analysis. Certainly, females vastly outnumber males as sellers of sexual services despite the fact that male prostitution is experiencing an increasing path (mostly oriented to male customers),⁶ but the main reason of exclusion of male prostitutes from this thesis is the orientation towards women's rights in the EU.

This thesis does not analyze trafficking in human beings and its problematics, it concerns the issue as far as it is connected to national legislations of Member States of the EU on prostitution and distinction between voluntary and forced prostitution.

1.6 Structure

The thesis consists of "Introduction" and 3 main chapters with "Conclusions and suggestions" at the end.

⁶ R. Albert, F. Gomez, Y.G. Franco, Regulating Prostitution: A Comparative Law and Economics Approach, available at <http://mle.economia.unibo.it/Papers%20MTM/Workshop%20in%20Law%20and%20Economics%20-%202007/Regulating%20Prostitution%20-%20Albert,%20Franco%20&%20Gomez.pdf>

Introduction introduces the research topic, formulates problems and objectives and describes the methodology used throughout the research. Chapter 2 presents a theoretical framework on which the legislation on prostitution is based. Chapter 3 compares the national legislation of different EU Member States on prostitution. Chapter 4 analyzes the compatibility of national measures with the freedom to provide sexual services in EU law and the last chapter presents conclusions and suggestions.

1.7 Methodology

Legal analyze is the essential approach to this master thesis. Doctrinal methodology is used to find one “right answer” to a particular legal question. Primary sources consist of relevant articles of TFEU, ECJ case law, EU directives and national legislations. Secondary data was collected from books, academic articles, magazines, journals, reports, reviews and internet sources.

Socio-legal methodology is used to analyze and interpret relevant data and come up with conclusions. Transcrime reports (2009) are applied for this.

Comparative law method, both descriptive and normative, is used for the purposes of analyzing and comparing the different national legislations.

2. THEORY

2.1 The notion of prostitution

Prostitution has varying definitions in different contexts. Some of these are based on the definition of prostitution in law, or what is illegal. Legal definitions change over time and place, leading to great confusion if one relies on one definition from the criminal code or one from the civil code, as they do not travel well. Despite the difficulty of terminology, prostitution as a sexual exchange for money or other valuables is the general definition of prostitution.⁷

The terms “sex work” and “prostitution” are used nearly interchangeably. The American Heritage Dictionary of the English Language (2006 fourth edition) defined sex work as: "The performance of sex acts for hire; prostitution."⁸

The Network of Sex Work Projects and Jo Bindman in the 1997 report "Redefining Prostitution as Sex Work on the International Agenda," provided the following: "The terms 'sex work' and 'sex worker' have been coined by sex workers themselves to redefine commercial sex, not as the social or psychological characteristic of a class of women, but as an income-generating activity or form of employment...We propose the following definition of sex work: Negotiation and performance of sexual services for remuneration

1. with or without intervention by a third party
2. where those services are advertised or generally recognised as available from a specific location
3. where the price of services reflects the pressures of supply and demand.

⁷ Encyclopedia of prostitution and sex work, edited by Melissa Hope Ditmore. Greenwood press, London, 2006

⁸ American Heritage Dictionary of the English Language, 2006, fourth edition

In this definition, 'negotiation' implies the rejection of specific clients or acts on an individual basis. Indiscriminate acceptance by the worker of all proposed transactions is not presumed - such acceptance would indicate the presence of coercion."⁹

The UNAIDS Inter-Agency Task Team on Gender and HIV/AIDS, in its fact sheet "HIV/AIDS, Gender and Sex Work," published in its 2005 Resource Pack on Gender and HIV/AIDS, stated:

"A broad definition of sex work would be: 'the exchange of money or goods for sexual services, either regularly or occasionally, involving female, male, and transgender adults, young people and children where the sex worker may or may not consciously define such activity as income-generating'. There is a widespread view that occasional engagement in transactional sex, or sexual barter, constitutes 'sex work'...

Sex work may be formal or informal. In some instances, sex work is only a temporary informal activity. Women and men who have occasional commercial sexual transactions or where sex is exchanged for food, shelter or protection (survival sex) would not consider themselves to be linked with formal sex work. Occasional sex work takes place where sex is exchanged for basic, short-term economic needs and this is less likely to be a formal, full-time occupation. Commercial sex work may be conducted in formally organised settings from sites such as brothels, nightclubs, and massage parlours; or more informally by commercial sex workers who are streetbased or self-employed."¹⁰

"Sex work" was conceived as a nonstigmatizing term, without the taint of the words "whore" and "prostitute." The point of the term was to convey the professionalism of the sex worker rather than her lack of worth as seen by much of society. ¹¹

Prostitution is seen by many as the absolute embodiment of patriarchal male privilege.¹²

⁹ The Network of Sex Work Projects, report, "Redefining Prostitution as Sex Work on the International Agenda, Jo Bindman, 1997

¹⁰ Resource Pack on Gender and HIV/AIDS, fact sheet "HIV/AIDS, Gender and Sex Work," 2005

¹¹ Encyclopedia of prostitution and sex work, edited by Melissa Hope Ditmore. Greenwood press, London, 2006

¹² Kari Kesler, "Is a Feminist Stance in Support of Prostitution Possible? An Exploration of Current Trends", Sexualities Copyright © 2002 SAGE Publications , Vol 5(2): 219–235

The concept of “sex work” emerged in the 1970s through the prostitutes’ rights movement in the United States and Western Europe (although sex worker’s movements are not exclusive to the United States or Western Europe). The term emerged as a counterpoint to traditionally derogatory names, to emphasize the legitimacy of sex work as a form of labor and the rights of sex workers as working people. “Sex worker” is a term used to refer to people who work in all aspects of the sex trades, indoor or street-based, legal and criminalized, and can include people who trade sex for money as well as safety, drugs, hormones, survival needs like food shelter or clothing, immigration status, or documentation. Although this gendered labor sector is being redefined all over the world, the majority of sex workers are women.¹³

2.1.1 Legal approach

Prostitution, so far its legal regulation is concerned, has traditionally been studied in a one-dimensional perspective, namely: to legalize or not to legalize the activity. Legal rules and legal thinking on this matter have traditionally presented a global picture on how to deal with prostitution as a social phenomenon. The specificities of each segment in the fragmented market of prostitution require a separate analysis, and probably also differentiated policy responses to tackle the problems involved in each segment.¹⁴

When dealing with the legal treatment of prostitution, either it is the prostitute’s right to freedom, his or her right to enter the job market and freely exercise the chosen job, the right to physical integrity, the right to personal dignity or it may also be a question of the client’s right to privacy.

¹³ Kamala Kempadoo, "Globalizing Sex Workers' Rights," in *Global Sex Workers: Rights, Resistance and Redefinition* 2-4, Kamala Kempadoo and Jo Doezema, eds., Routledge (1998)

¹⁴ R. Albert, F. Gomez, Y.G. Franco, *Regulating Prostitution: A Comparative Law and Economics Approach*, available at <http://mle.economia.unibo.it/Papers%20MTM/Workshop%20in%20Law%20and%20Economics%20-%202007/Regulating%20Prostitution%20-%20Albert,%20Franco%20&%20Gomez.pdf>

Considering prostitution from a legal perspective, it can be conceived as a contract to have sex for money, by an agreement arranged between two consenting adults: the seller of the sexual services, i.e. the prostitute and the buyer.¹⁵ But prostitution is very seldom considered as an ordinary contract, under the general provisions of Contract Law.

First of all, the validity and enforceability of the contract, as in any other contract, requires the voluntary consent of both parties. Here, as elsewhere, one cannot speak of a contract if it is not based upon the consent of the parties thereto. Prostitutes voluntarily swap sex for cash. Thus, leaving apart those cases when the prostitute is somehow compelled or forced to carry out a sexual service. Among the category of non-agreed prostitution is included the cases of child prostitution, trafficking in women, forced prostitution, and any other form of violence or coercion. For prostitution to hypothetically qualify as a contract, that the prostitute, on the basis of general principles of contractual freedom, must also enjoy the right to accept or reject any given contract partner or client. In any way, she should have the opportunity to say “no” if, for instance, the potential client does not seem reliable.¹⁶

Before assuming that prostitutes voluntarily agree to enter the prostitution market, we must consider whether they have, in fact, alternative opportunities. In other words, the link between poverty and prostitution, and its consequence. At least, it does not appear to be relevant in all types of prostitution, and absolutely not in the higher segment of the market. Even in the case of street prostitutes –arguably, the segment in which working conditions are harsher, and thus represents the lower segment from the supply side - quite often immigrants¹⁷ escaping away from poverty, it would not be accurate to assume they are universally and systematically enslaved or forced into prostitution. Prostitution is not an attractive, pleasant, or rewarding occupation. It is a low-skilled job, but a well-paid one, women are attracted by the potential earnings offered by prostitution compared with other low skilled occupations.

¹⁵ R. Albert, F. Gomez, Y.G. Franco, *Regulating Prostitution: A Comparative Law and Economics Approach*, available at <http://mle.economia.unibo.it/Papers%20MTM/Workshop%20in%20Law%20and%20Economics%20-%202007/Regulating%20Prostitution%20-%20Albert,%20Franco%20&%20Gomez.pdf>

¹⁶ Trebilcock, M.J., *The Limits of Freedom of Contract*, Harvard University Press, 1993

¹⁷ Moffat, P.G., “Economics of prostitution”, in S.W. Bowmaker, ed., *Economics Uncut: A Complete Guide to Life, Death and Misadventure*, Edward Elgar., 2005

Of course, it should not be disregarded the constraints that they face when they make the choice of enter prostitution: unemployment, lack of education, sometimes drug addiction, etc. Furthermore, they make an choice between prostitution and other low-skilled – and comparatively badly-paid alternatives of employment. Of course, these circumstances do influence their freedom of choice, as long as they reduce alternative choices and the ability to assess them. But do those constraints invalidate by themselves the voluntary nature of the exchange? The scarcity of opportunities must not be mistaken with true coercion. Otherwise, all people employed in hard and unpleasant activities are contracting under duress.¹⁸

The contracting parties, prostitute and client, are not the only players in the transaction. The presence of third party intermediaries in this voluntary transaction has been, and still is, widespread. Pimps or madams are some of the traditional names for such parties. They invest resources in, and profit from, facilitating prostitution. Thus, they reduce transaction costs, broadly understood, that is, not only the costs of bringing parties to the agreement, but also the expected costs of the transaction itself, e.g., reducing the risk of violence by the client towards the prostitute, or the risk or robbery to the client by the prostitute or an associate. They may also contribute to reduce another important source of transaction costs, namely information costs, both through direct transmission of relevant information, and through contract safeguards of quality and other relevant contractual variables. Pimping is legal in some countries and illegal in others, depending on its consideration as pure intermediation, or as an activity of abuse or exploitation of others. Again, pimping is included in the definition of prostitution as a voluntary transaction between (or among) adults if it does not involve abuse, i.e., when pimping does not imply any kind of violence or fraud against prostitutes, but it is a mere intermediation or brokerage activity.¹⁹

¹⁸ R. Albert, F. Gomez, Y.G. Franco, *Regulating Prostitution: A Comparative Law and Economics Approach*, available at <http://mle.economia.unibo.it/Papers%20MTM/Workshop%20in%20Law%20and%20Economics%20-%202007/Regulating%20Prostitution%20-%20Albert,%20Franco%20&%20Gomez.pdf>

¹⁹ *ibid*

Some scholars claim that significant differences exist between the prostitution contract and the labor contract: “The prostitution contract is entered into with the male customer, not with an employer. The prostitute may or may not be a paid employee (worker); some prostitutes are more adequately described as small-scale private entrepreneurs.”²⁰

One aspect of the debate on prostitution that has been particularly contentious has been over the role of commodification and how the commodity within prostitution is understood. In some accounts, women sell themselves or are sold into prostitution; women are bought and sold on the market like any other commodity. Here, prostitution is seen as selling the “body” or “self.” Alternatively, prostitution may be regarded as the exchange of a sexual service for money or other goods and services. In these accounts, what is sold is not a body or a self but a “service.”²¹

What makes prostitution more problematic than other activities is not just the use of the human body but the sexual use of a woman’s body (Pateman 1988, 204).²² Sexuality is regarded as one of the most intimate aspects of the self. It is integral to and cannot be separated from the self; therefore, a prostitute who sells her sexuality is also selling her “self.” In order to protect her “self” psychologically, a prostitute must distance herself from her sexual use (Pateman 1988, 207).²³ While this process of emotional distancing, disengagement, and segmentation is vital to women’s survival in prostitution, it is also “destructive of women’s humanity” and intensifies the damage and psychological toll on them (Barry 1995, 32).²⁴ The buying and selling of sexuality for the client’s own use transforms the body into a vessel or object; the body becomes alienated as it is used as a “thing” for someone else. This process of objectification is also seen to spill over to the objectification of all women. In some radical feminist accounts, prostitution is also seen as enslaving (i.e., as a form of “sexual slavery”). Prostitution is counterposed to noncommodified forms of sexual exchange, such as in gift giving, which are considered

²⁰ Pateman, C. *The sexual contract*. Stanford, Calif.: Stanford University Press., 1988

²¹ Marjolein van der Veen, “Rethinking Commodification and Prostitution: An Effort at Peacemaking in the Battles over Prostitution”, *Rethinking Marxism*, Volume 13, Number 2, 2001

²² Pateman, C. *The sexual contract*. Stanford, Calif.: Stanford University Press., 1988

²³ *ibid*

²⁴ Barry K. *The prostitution of sexuality*. New York: New York University Press., 1995

affirming and reciprocal (founded on mutual attraction or the mutual sharing of pleasure) rather than degrading.²⁵

In contrast to the radical feminist position, sex radicals and prostitution rights advocates argue that what is sold in prostitution is not a body but a service. There is much labor, skill, technique, and expertise involved, and the provision of specific services is clearly delineated and negotiated beforehand. The buyer does not necessarily have unilateral access to the body of the sex worker. Rather, sex workers negotiate the specificity of the service and length of time of its provision with their clients, and are able to refuse particular clients or refuse to perform particular services. Indeed, Linda Singer points out that sex workers are “in a better position than most women, especially wives, to determine the time, circumstances, and conditions under which the sexual encounter will take place, as well as to be in charge of establishing its limits, temporally and substantively. What she will and won’t do is much more subject to explicit bargaining” (1993, 54).²⁶ The practice of distancing and manipulating emotions as a form of boundary maintenance is a positive sign of professionalism rather than uniquely dehumanizing or pathological (Chapkis 1995).²⁷

2.1.2 Economic view

While the topic of prostitution has not traditionally been a major focus for economic analysis and has received much more attention within other disciplines, especially within the law and feminism, economists have had a few things to say on the topic. Most notable are the neoclassical economists’ accounts of and justifications for market-inspired cost-benefit calculations in all areas of life, including marriage, sex, and love (Becker 1991; Posner 1992). In his economic analysis of sexuality in “Sex and Reason”, Posner (1992) theorizes such sexual activities as prostitution as determined by rational, utility-maximizing individuals who conduct

²⁵ Marjolein van der Veen, “Rethinking Commodification and Prostitution: An Effort at Peacemaking in the Battles over Prostitution”, *Rethinking Marxism*, Volume 13, Number 2, 2001

²⁶ Singer, L. 1993. *Erotic welfare: Sexual theory and politics in the age of epidemic*. New York: Routledge

²⁷ Chapkis, W. 1995. *Prostitution politics and policies: An examination of the commercial sex trade*. Ph.D. diss., University of California, Santa Cruz.

cost-benefit analyses in making decisions regarding their sexual choices.²⁸ In a similar vein, Reynolds (1986) presents an economic theory of prostitution where rational agents maximize their profit and utility (by supplying and demanding sex in the market) subject to constraints.²⁹

These economistic analyses of prostitution see nothing inherently “wrong” with prostitution: it is merely the result of economic logic, rational choices, and free-market mechanisms. Since it is merely economic logic that determines the individual choices to buy or sell sex as a commodity, prostitution is seen as a “natural” outcome of various factors—that is, the various costs and benefits entailed in the supply and demand for sex.³⁰

Criticism of the way economists have naturalized the phenomenon of prostitution has come from various directions, including dissenting economists themselves. Radin (1996) also criticizes the neoclassical world-view in which all goods and services are bought and sold on the market and all decisions are subject to cost-benefit analysis. She explores what is wrong with the commodification of things that are so close to “personhood,” such as the selling of sex in prostitution. She presents an argument why some things should just be “not for sale,” due to the transformation in meaning and value when such things are treated as commodities. Namely, that the spread of markets into intimate terrain so closely tied to personhood is “unnatural.” Prostitution is the area where commodification remains highly contested; they have not yet been naturalized as commodities like other goods that are routinely bought and sold in everyday life.³¹

Prostitution is based on markets, and thus potentially of special interest to economists.³² Even prostitution market is divided: At the bottom is street prostitution, followed by brothels, bars and clubs. Call girls and escort agencies occupy the middle to high slots, and kept women the top rungs. Higher end prostitutes are better looking, younger, and healthier; charge more per

²⁸ Posner, R. 1992. *Sex and reason*. Cambridge, Mass.: Harvard University Press

²⁹ Reynolds, H. 1986. *The economics of prostitution*. Springfield, Ill: C. C. Thomas

³⁰ Marjolein van der Veen, “Rethinking Commodification and Prostitution: An Effort at Peacemaking in the Battles over Prostitution”, *Rethinking Marxism*, Volume 13, Number 2, 2001

³¹ Radin, M. 1996. *Contested commodities*. Cambridge, Mass., Harvard University Press

³² Steven D. Levitt and Sudhir Alladi Venkatesh, *An Empirical Analysis of Street-Level Prostitution*, 2007, available at <http://economics.uchicago.edu/pdf/Prostitution%205.pdf> Hotelling, Harold. 1929. “Stability in Competition.” *Economic Journal* 39:41-57

client and spend more time with each. Typically, both earnings and working conditions are better more up market: clients are fewer, venues more agreeable, and client screening more selective.³³

Prostitutes and customers need to find one another. Concentrating prostitution activities in well known, stable areas facilitates search in a similar manner to that observed in other types of retail sales (Hotelling 1929, Wolinsky 1983). Indeed, for street prostitutes, geographic concentration may be even more important than for other types of services because of the difficulty of reaching customers through traditional marketing channels such as advertising or displaying the store's name and logo on the outside of the building. Organizing prostitution on long stretches of major roads (as opposed to, say, a four bloc by four block rectangle) makes it possible for customers to easily survey the market without behavior appearing suspicious.³⁴³⁵

Combining their results with survey data on prostitutes from Matthews (1997), they also compute average weekly earnings of a prostitute, finding that prostitutes earn about twice the weekly wage of a typical non-manual female worker and three times that of manual workers.³⁶ Pickering and Wilkens (1993) also find high wages for prostitutes.³⁷

The key to this puzzle may lie in the following observation: a woman cannot be both a prostitute and a wife. Combine this with the fact that marriage can be an important source of income for women, and it follows that prostitution must pay better than other jobs to compensate for the opportunity cost of foregone marriage market earnings.³⁸

Prostitution has an unusual feature: it is well paid despite being low-skill and labor intensive. Earnings even in the worst paid type, streetwalking, may be several multiples of full time earnings in professions with comparable skill requirements.

³³ Lena Edlund and Evelyn Korn, A Theory of Prostitution, 2001, available at:

<http://www.hawaii.edu/hivandaids/A%20Theory%20of%20Prostitution.pdf>

³⁴ Wolinsky, Asher. 1983. "Retail Trade Concentration Due to Consumers' Imperfect Information." *Bell Journal of Economics* 14(1): 275-282.

³⁵ Hotelling, Harold. 1929. "Stability in Competition." *Economic Journal* 39:41-57

³⁶ Matthews, R. 1997. *Prostitution in London: An Audit*. Middlesex University

³⁷ Pickering, H. and Wilkins, H. 1993. "Do Unmarried Women in African Towns Have to Sell Sex, or is it a Matter of Choice?" *Health Transitions Review* 3: 17-27.

³⁸ Lena Edlund and Evelyn Korn, A Theory of Prostitution, 2001, available at:
<http://www.hawaii.edu/hivandaids/A%20Theory%20of%20Prostitution.pdf>

An economic view on prostitution suggests, that what consenting adults do privately, in this, as in other matters, is their own business, and, as such, it should not be considered as affecting the welfare of others. Why legal systems have historically, and continue to do so, heavily regulate what appears to be a voluntary interaction among consenting adults? Whether prostitution should be prohibited or regulated? One possible answer is that legal systems take morality – or at least dominant social conceptions of it, seriously, and try to help its enforcement with the use of legal rules. Economists believe that prostitution deserves some thinking in terms of whether and how to legally regulate it, but the reason lying in the fact must be a potential source of negative externalities. The prostitution market, if left entirely unregulated, may generate negative externalities, which should be internalized in order to induce socially efficiency levels of prostitution. Scholars essentially refer to the following externalities: (i) Health effects, basically the spread of HIV/AIDS; (ii) public disorder, not only referred to public scandal or outrage related to the exhibition of prostitutes marketing their services in the street, but specially to the crimes often associated to prostitution, usually exercised against prostitutes themselves by their clients and others: assault, robbery, rape, and other expressions of abuse and violence; (iii) the potential (and actual) loss of housing value in the areas where prostitution rises; (iv) trafficking in human beings, under age prostitution and, in sum, the rise of black markets involving criminal actions and managed by criminal gangs. These groups can engage in the above mentioned criminal activities, and moreover they can take advantage from the illegality of the activity as such, independently of the criminal actions individually committed: As long as the activity is hidden, they may get an implicit subsidy, because they do not pay taxes, social security contributions, health insurance for their employees, etc.³⁹

Trebilcock (1993:75) suggests that the inclusion of moral externalities in the picture, far from clarifying the debate on the effects of prostitution, would lead to obscure it, probably without remedy. It is more helpful to frame the problem as a matter of rights and autonomy, rather than as a question of morality.⁴⁰

³⁹ R. Albert, F. Gomez, Y.G. Franco, *Regulating Prostitution: A Comparative Law and Economics Approach*, available at <http://mle.economia.unibo.it/Papers%20MTM/Workshop%20in%20Law%20and%20Economics%20-%202007/Regulating%20Prostitution%20-%20Albert,%20Franco%20&%20Gomez.pdf>

⁴⁰ Trebilcock, M.J., *The Limits of Freedom of Contract*, Harvard University Press, 1993

Economist view finds externality approach more suitable to neutrally and comprehensively analyze the regulation of prostitution markets. But looking generally, it does not give straightforward answer, whether to outlaw, regulate or prohibit entire market of prostitution as a whole.

2.2 Voluntary and forced prostitution, trafficking

The author intends to touch the distinction issues between the forced and voluntary prostitution. Use of the word “voluntary” is stipulated by the lack of a better term. But the author suggests not to use “voluntary prostitution” as the term, rather to cut from the term “prostitution” negative meaning and assume it only as a voluntary, without forced character. As a result, the antonym of the “forced prostitution” will be just “prostitution” and when speaking about sex work, “forced prostitution” can be easily changed by the term “trafficking”, taking into account that sex trafficking is one of the forms of trafficking.

There are big differences between women trafficked into sexual slavery and voluntary sex workers.

Voluntary prostitution is defined as prostitution exercised by persons over the age of 18 having chosen prostitution as a means to make a living of their own accord. ⁴¹

Forced prostitution and trafficking in human beings should be unreservedly condemned as modern-day slavery and one of the most serious violations of human rights in Europe today. These crimes must be resolutely combated, and its victims protected. ⁴²

Child prostitution can never be voluntary, as children do not have the capacity to “consent” to prostitution. Following the United Nations Convention on the Rights of the Child,

⁴¹ Council of Europe, Parliamentary Assembly, Report, doc. 11352, Prostitution – Which Stance to Take? 9 July 2007, Committee on Equal Opportunities for Women and Men, Rapporteur: Mr Leo Platvoet

⁴² *ibid*

the Assembly defines children as anyone under the age of 18. The Assembly believes that child prostitution needs to be combated as energetically, if not more, than other forms of forced prostitution. It recommends a zero-tolerance approach based on prevention, protection of victims, and prosecution of clients.⁴³

The „Global Alliance Against Traffic in Women“, proposes a differentiation between voluntary and forced prostitution and supports measurements which protect women in voluntary prostitution, whereas the „Coalition against Trafficking in Women“ defines prostitution as an offence against human rights supporting the prohibition of prostitution (Raymond 1998).⁴⁴ In countries like the Netherlands and Germany many activists support the first position (prostitution as a women's job); the second position (prostitution as violence against women) is supported in countries like Sweden, in which from 1999 on prostitution is a criminal act for customers, not for prostitutes.⁴⁵

Sex trafficking is an odious form of trafficking, so forced prostitution may be deemed as a trafficking. The trafficking of women and children into sexual slavery is undeniably a gross abuse of human rights, but it must not be confused with the voluntary prostitution, sex work.

No one denies that prostitution and trafficking are closely interrelated and if it were not for the existence of prostitution, and the demand it generates for sexually accessible bodies, sex trafficking would not exist.⁴⁶ Sexual trafficking is the recruitment, transportation (within national or across international borders), transfer, harboring, or receipt of persons for the purposes of prostitution and/or other forms of commercial sexual exploitation. That sexually trafficked persons are trafficked for purposes of prostitution, and not cookie baking.⁴⁷ Thus, understanding the nature of prostitution is central to understanding the experiences of sexually trafficked persons but trafficking and prostitution is not the same.

⁴³ ibid

⁴⁴ Raymond, J. 1998, Prostitution as violence against women, *Women's Studies International Forum*, 1, pp. 1-9:

⁴⁵ Margrit Brückner, "Women in Prostitution and Social Responsibility", *Journal "Marginalized Youth"*, Issue 2, Volume 6 (2008)

⁴⁶ Jennifer Friedlin, "Debate Roars Over Anti-Trafficking Funds," *Women's eNews* 16 April 2004 (Statement from Donna Hughes). <<http://www.womenenews.com/article.cfm/dyn/aid/1792>>.

⁴⁷ Dorchen Leidholdt. "Prostitution and Trafficking in Women: An Intimate Relationship." Melissa Farley ed. *Prostitution, Trafficking and Traumatic Stress*. p 169. 2003. The Haworth Maltreatment & Trauma Press

The tendency to treat trafficking and prostitution as if they were the same thing has a long and problematic history. Legislation and social discussion have often blurred or denied any difference, but that has always made things worse rather than better for those involved.⁴⁸

Treating sex work as if it is the same as sex trafficking both ignores the realities of sex work and endangers those engaged in it. Sex workers include persons who offer sexual services in exchange for money. Sex workers engage in this for many reasons, but the key distinction here is that they do it voluntarily. They are not coerced or tricked into staying in the business but have chosen this from among the options available to them.⁴⁹

A key goal of sex worker activists is to improve sex-working conditions, but self-organization is impossible when sex work is regarded as merely another form of slavery. Then authorities and laws trying to stop true slavery -- trafficking -- get misapplied to sex workers, clients and others involved in the sex industry. This exposes sex workers to an increased risk of violence and denies them any protection of laws against assault or access to medical, legal and educational services. It denies them their human rights.⁵⁰

Despite the obvious reality of this perspective, the popular imagination of sex work tends to return to images of young girls forced into sexual slavery.

Traditional standards of morality have been a major influence on legislation aimed at trafficking, and on the ways that trafficking legislation changes the legal treatment of prostitution. But the 'moral' position opposing sex work is actually a specific political and ideological position, and its net effect is typically to limit women's autonomy.

The confusion squanders opportunities to address real victimization and to assist people in real situations of abuse. Resources, time and energy that might actually help trafficking

⁴⁸ Melissa Ditmore, "Sex Work vs. Trafficking: Understanding the Difference", 2008, available at <http://www.alternet.org/reproductivejustice/84987>

⁴⁹ *ibid*

⁵⁰ *ibid*

victims are wasted in sensational "rescues" that are also ineffective and often counterproductive.⁵¹

There is a clear need to formulate public policy that is less emotionally driven and better able to recognize the real causes, nature and effects of trafficking in persons. People concerned about should choose to talk in terms of sex workers' rights, rather than confusing matters by using the term "trafficking" with everything related to sex work. That should help clear the debating field for useful and separate discussions of both.⁵²

Although prostitution, thus, can be seen as a voluntary interaction even in the lower layers of the prostitution market, it cannot be denied that organized criminal groups operate in the prostitution market. There seem to be evidence showing the proliferation of organized criminal groups – mafia, for short- intended to “import” men and women for prostitution from less developed countries.⁵³ There exists the cases in which people are tricked from the beginning and sometimes are recruited, in theory, to work legally e.g. in a factory or something of the sort, but in reality their true labour destination is prostitution. If leaving that apart, in contrast, some empirical evidence suggests that a substantial number of immigrants employed in prostitution come to developed countries with the goal – initially, at least - to work in the prostitution market. They are running away from poverty and expect to make money quickly in a low-skilled and well-paid industry. Fraud typically appears later, when they are demanded to refund an unaffordable debt, allegedly the cost of the trip. Therefore, the link with the mafia cannot be easily severed, and they become trapped in prostitution, maybe for years, without receiving the expected amount of earnings.⁵⁴ However, notwithstanding ex-post fraud, which must not be forgot and, of course, should be deterred, the point is that they voluntarily agree to enter the prostitution market initially.

⁵¹ Dorchen Leidholdt. “Prostitution and Trafficking in Women: An Intimate Relationship.” Melissa Farley ed. Prostitution, Trafficking and Traumatic Stress. p 169. 2003. The Haworth Maltreatment & Trauma Press

⁵² *ibid*

⁵³ International Labour Organization, Global Report 2005: “A Global Alliance against Forced Labour”.

⁵⁴ R. Albert, F. Gomez, Y.G. Franco, Regulating Prostitution: A Comparative Law and Economics Approach, available at <http://mle.economia.unibo.it/Papers%20MTM/Workshop%20in%20Law%20and%20Economics%20-%202007/Regulating%20Prostitution%20-%20Albert,%20Franco%20&%20Gomez.pdf>

Matthaei (1995) analyzes prostitution through the concept of the sexual division of labor. Women often worked as prostitutes when other lucrative employment alternatives were unavailable to them, given the gender discrimination and occupational segregation that funneled women into particular occupations.⁵⁵ Even in these situations, as if women are obliged to provide sexual services for remuneration, they always have a free choice - either to enter the prostitution market or not, no one deprives them the right to stay unemployed. The situation of working as a prostitute and wishing a better job does not involve the element of “force”. According to this logic, the dustmen can also be assumed as victims of coercion as this job is not among “honoured” and “desired” jobs as well.

The scholars, who do not view the individual, whose sex is bought and paid for, as a whole person with an identity, an intellect, a spirit, but as merely a body for rent, claim that there is no such thing as unexploitive commercial sex. Irrespective of the degree of autonomy of the individuals whose bodies are utilized in commercial sex, exploitation occurs.⁵⁶ But there is a good argument against such statements - the element of consent from the prostitute and it does not matter how the buyer perceives her as an object or as a self-employed person providing sexual services.

There is no compulsory requirement that the women and girls in prostitution must inevitably enjoy the sex. The absence of pleasure while providing sexual services cannot change the form of prostitution. In any case, prostitute voluntarily relieves the customer of any obligation to respond to her sexual and emotional needs and voluntarily provides sexual services not awaiting for pleasure but only for remuneration. Prostitution is not the mutual, pleasurable exchange, ⁵⁷many other services also cannot guarantee the pleasant consequences. For example, hairdresser while cutting the hair may not be doing it with pleasure, but again for the money. In contrast, sex workers have asserted that at times they do experience pleasure and satisfaction in their work—there is nothing inherent in sex work that prohibits this.⁵⁸ Even if the prostitute

⁵⁵ Matthaei, J. 1995. The sexual division of labor, sexuality, and lesbian/gay liberation: Toward a Marxist-feminist analysis of sexuality in U.S. capitalism. *Review of Radical Political Economics* 27 (2): 1–37.

⁵⁶ Lisa L. Thompson, *Faces of prostitution: portraits of exploitation*, 2006, available at: www.iast.net/documents/Facesofprostitutionlanguage_000.doc

⁵⁷ Pateman, C. *The sexual contract*. Stanford, Calif.: Stanford University Press., 1988

⁵⁸ Marjolein van der Veen, “Rethinking Commodification and Prostitution: An Effort at Peacemaking in the Battles over Prostitution”, *Rethinking Marxism*, Volume 13, Number 2, 2001

might be able to determine the nature of the service, she can limit the work to only that which she finds pleasurable.

Some scholars are convinced that while the vast majority of adult women in prostitution in any given country experience levels of physical and psychological coercion, abuse, and torture that plainly classify them as victims of sex trafficking.⁵⁹ But the prostitutes can find themselves in such situation without being trafficked and the means of combatting the violence and protecting the human rights can be found in national legislations and regulatory measures on prostitution.

2.3. Legislation models on prostitution

2.3.1 Abolitionism

Abolitionism is a term that refers to a particular ideological and legal approach to prostitution. The approach has its roots in 19th-century feminism and is still a potent force in contemporary politics around prostitution. “Abolitionism” was a term borrowed from the campaigns against the slave trade. However, “abolitionism,” when used in relation to prostitution, did not refer to the abolition of prostitution, but rather to certain laws enacted in England and Wales in the 1860s. These laws were known as the Contagious Diseases Acts. Under these acts, any woman who was suspected of prostitution could be detained by the police and forced to undergo an internal examination. Thus abolitionism arose as a movement against the state regulation of prostitution.⁶⁰

Abolitionism is still a powerful philosophy among contemporary feminists. The strongest advocate for abolitionism internationally is the Coalition Against Trafficking in Women (CATW).

⁵⁹ Lisa L. Thompson, *Faces of prostitution: portraits of exploitation*, 2006, available at: www.iast.net/documents/Facesofprostitutionlanguage_000.doc

⁶⁰ *Encyclopedia of prostitution and sex work*, edited by Melissa Hope Ditmore. Greenwood press, London, 2006

A country falls under this model if outdoor and indoor prostitution are not prohibited. The State decides to tolerate prostitution and not to intervene in it. Prostitution by adults is not subject to punishment, but profiting from another person's prostitution is, however, criminalised.

New abolitionism is a development on the "abolitionism" model. A country falls under this model if outdoor and indoor prostitution are not prohibited, but with reference to the latter the State intervenes to explicitly prohibit the existence of brothels.⁶¹

Abolitionism exists halfway between prohibition and regulation, there are some countries where simply prostitution and/or pimping are not considered as crimes, but are not regulated either. An informal market prevails, where the legal status of prostitution as an activity, and the transactions involved, is unclear. We can say that prostitution stays in a legal limbo, implying that the transaction is not legal, but there are no sanctions for the parties involved.

Theoretically, this hands-off approach could be an effective and cheap way to deter prostitution, if that is what the lawmaker intends, for reasons of the intrinsic immorality of the interaction, or for some other reason. This goal can be attained by exploiting the incentives for opportunistic behaviour by the parties to the transaction.⁶²

2.3.2 Prohibitionism

A country falls under this model if outdoor and indoor prostitution are prohibited. Parties involved in prostitution can be liable to penalties, including in some cases, the clients.⁶³

⁶¹ Di Nicola A., Orfano I., Cauduro A., Conci N., National legislation on prostitution and the trafficking in women and children, 2005, available at:

http://transcrime.cs.unitn.it/tc/fso/Altre%20pubblicazioni/legislation_on_prostitution_english.pdf

⁶² R. Albert, F. Gomez, Y.G. Franco, Regulating Prostitution: A Comparative Law and Economics Approach, available at <http://mle.economia.unibo.it/Papers%20MTM/Workshop%20in%20Law%20and%20Economics%20-%202007/Regulating%20Prostitution%20-%20Albert,%20Franco%20&%20Gomez.pdf>

⁶³ *ibid*

Criminal sanctions are the main defining feature of this model, based on the idea of the immorality of prostitution. Not surprisingly, this regulation model is advocated by moral conservatives of different creeds. The starting point seems to be moral outrage at the practice: as long as morality is compromised when a society allows prostitution, it has to be forbidden. In consequence, the ones who openly engage in immoral behaviour have to be sanctioned. Thus pimps, clients and prostitutes should be sanctioned as criminals to adequately deter their offensive conduct.⁶⁴

In accordance with this view, the prostitute is deemed a criminal, not a victim of prostitution. Consequently, his or her conduct must be punished or, at least, re-educated by forced periods in a re-education institution.

Prohibition is aimed at deterring both the demand and the supply of prostitution, as a result of the potential sanctions, and the probability of police apprehension and effective prosecution. As a consequence, the amount of transactions is expected to diminish, to a variable extent, depending on the expected sanction, and the elasticity of demand and supply with respect to it, compared with a situation without prohibition.⁶⁵

However, prohibiting prostitution does not mean that it disappears, but that it may, to a lower or greater extent, simply hide. The activity keeps going in an informal market for prostitution.⁶⁶

Furthermore, prohibition often gives advantage to the criminal gangs, and weakens the position of both clients and prostitutes, often seriously endangered. Thus, in such an illegal market, as long as prostitution is considered a crime, prostitutes face increased costs of obtaining effective protection of the Law if they are abused. They are aware of the fact that they will be

⁶⁴ Heli Askola, *European Legal Responses to Trafficking in Women* (Hart Publishing, Oxford, 2007)

⁶⁵ Di Nicola A., Orfano I., Cauduro A., Conci N., *National legislation on prostitution and the trafficking in women and children*, 2005, available at:

http://transcrime.cs.unitn.it/tc/fso/Altre%20pubblicazioni/legislation_on_prostitution_english.pdf

⁶⁶ R. Albert, F. Gomez, Y.G. Franco, *Regulating Prostitution: A Comparative Law and Economics Approach*, available at <http://mle.economia.unibo.it/Papers%20MTM/Workshop%20in%20Law%20and%20Economics%20-%202007/Regulating%20Prostitution%20-%20Albert,%20Franco%20&%20Gomez.pdf>

arrested if they go to the police. Hence, pimps, mafias and even clients may be more inclined to engage in various kinds of abusive behaviour against the prostitutes.⁶⁷

Prohibition may also imply that the information exchanged in the market worsens, as intermediaries and market agents themselves face increasing obstacles in the transmission of information, obstacles which negatively influence both the amount and the reliability of information.⁶⁸

Prohibitionism developed “emancipatory model”, that can be called also as Swedish - prohibition with sanctions only for the client, and eventually the pimp. This approach seeks to dismantle the sex industry based on the idea that prostitutes are victims of gender violence, thus the measures should be applied essentially on the demand side. It is the buyer of sex who should be punished, not the prostitute. Sanctions on the supply side are ancillary to this goal: Intermediaries are not seen as entrepreneurs or information providers, but as co-operators in female exploitation, and thus punished as well.

Consequently, the main expected effect of abolition is the reduction of the demand of prostitution as a consequence of the prosecution and punishment of clients. A priori, one can think that this scheme can also lead to the rise of the informal market, with all the above mentioned side effects associated with black markets. Besides, the expected sanction increases the cost of the interaction for the clients, who will attempt to transfer it to the prostitute by lowering the prices they are willing to pay for the service.⁶⁹

2.3.3 Regulationism

A country falls under this model if outdoor and indoor prostitution are regulated by the State and are therefore not prohibited when exercised according to this regulation. Prostitutes

⁶⁷ R. Albert, F. Gomez, Y.G. Franco, *Regulating Prostitution: A Comparative Law and Economics Approach*, available at <http://mle.economia.unibo.it/Papers%20MTM/Workshop%20in%20Law%20and%20Economics%20-%202007/Regulating%20Prostitution%20-%20Albert,%20Franco%20&%20Gomez.pdf>

⁶⁸ *ibid*

⁶⁹ *ibid*

are often registered by local authorities and are in some cases obliged to undergo medical controls.⁷⁰

A model advocating regulation instead of prohibition, combining legalization with specifically tailored regulatory measures is aimed –nominally, at least- at eliminating or curbing the negative effects associated with prostitution. This approach to prostitution is based on the idea that prostitution has to be regulated by public authorities in order to internalize external harms, and this control can only be exercised if the activity is legal. Many of those externalities, or so it is claimed, arise precisely due to the prohibited or ignored nature of the activity by the law.⁷¹

This regulatory mode is expressed through two slightly different models. One could be characterized as full legalization, other systems have opted for legalization coupled with specific regulation, but with a special emphasis on the element of special zoning of the legalised activity. In this case, the regulatory policy entails the creation of toleration zones, where prostitution can be exercised legally: the so-called red-light districts.⁷²

Both policies based on the idea of legalizing the activity are aimed at controlling the exercise of the prostitution by means of a combination of labour, health and social regulatory measures. The prostitution industry is seen as an economic activity, and prostitutes as sex workers. Recognizing prostitution as an occupation implies the parallel recognition of a series of legal rights, such as the right/obligation to pay Social Security contributions (which, in turn, implies, among others, access to health coverage, unemployment subsidies and benefits, and pensions); the right to create or to belong to unions; the right to be protected from employment hazards and risks, particularly the effectively protected right to receive police protection in case

⁷⁰ Di Nicola A., Orfano I., Cauduro A., Conci N., National legislation on prostitution and the trafficking in women and children, 2005, available at:

http://transcrime.cs.unitn.it/tc/fso/Altre%20pubblicazioni/legislation_on_prostitution_english.pdf

⁷¹ R. Albert, F. Gomez, Y.G. Franco, Regulating Prostitution: A Comparative Law and Economics Approach, available at <http://mle.economia.unibo.it/Papers%20MTM/Workshop%20in%20Law%20and%20Economics%20-%202007/Regulating%20Prostitution%20-%20Albert,%20Franco%20&%20Gomez.pdf>

⁷² Van Somersen, P. and S. Flight (2004), “Design Against Kerb-Crawling: Toppelzones (vice zones)”, European Experiences in Displacement

of abuse while exercising prostitution, etc. Regulation, at least in theory, is intended also to diminish the social stigma associated to prostitution, as a step to ease the social insertion for prostitutes, in an attempt for eliminating marginality.⁷³

2.3.4 Correlation between legislation models on prostitution and number of trafficked women

This section aims to underline, where and if possible, some correlations between the type of legislation on prostitution and the amount of trafficked women. It will draw some picture, if certain legislation models are successful in combating trafficking and reducing the number of trafficked persons in prostitution. As the author is convinced, different legislation models on prostitution are stipulated by this main reason and the issue of morality and prostitute's rights goes in the background.

Under a model of regulationism, trafficked prostitution is more frequently exercised indoors.⁷⁴ It is highly likely that traffickers/exploiters, in a country where outdoor and indoor prostitution are not prohibited as long as it is conducted according to the State's regulation, choose not to exploit their victims outdoors, since a violation of the rule would be more visible and, consequently, more risky.

Under a model of abolitionism, trafficked prostitution is more frequently exercised indoors.⁷⁵ This could be due to at least two reasons. First, given the fact that the traffickers/exploiters are free to choose where to display their criminal activities, it is more likely that they will choose the less visible segment of the market. In practice, abolitionist countries

⁷³ R. Albert, F. Gomez, Y.G. Franco, *Regulating Prostitution: A Comparative Law and Economics Approach*, available at <http://mle.economia.unibo.it/Papers%20MTM/Workshop%20in%20Law%20and%20Economics%20-%202007/Regulating%20Prostitution%20-%20Albert,%20Franco%20&%20Gomez.pdf>

⁷⁴ Source Transcrime Reports, n. 17, 2009

⁷⁵ *ibid*

often tolerate much more indoor prostitution, as it is less disturbing for the population, and concentrate law enforcement efforts more on the outdoor segment.

Under a model of “new abolitionism”, trafficked prostitution is more frequently exercised outdoors.⁷⁶ It is the examples, which tolerate outdoor and indoor prostitution but criminalise the running of brothels. This criminalisation of one of the main forms of indoor prostitution could have pushed the market to spread outdoors. Some countries does not fall under this rule, though being a new abolitionist country, they do not treat indoor and outdoor prostitution the same way. Indoor prostitution, due to its invisibility, is much more tolerated than the outdoor market.

Under a model of prohibitionism, trafficked prostitution is more frequently exercised indoors.⁷⁷ This is the case when the rate of indoor prostitution is indeed greater and visible prostitution on the streets is therefore less, and this can be attributed to the law.⁷⁸

Speaking generally about the decline or increase in the number of trafficked women according to different legislaion models on prostitution, they do not seem interdependant. It can't be claimed that one of the legislation models is more effective in tackling trafficking, if outdoor cases of trafficking is less in one case, the indoor trafficking increases and vice versa, if indoor trafficking decreases, outdoor trafficking increases, without any influence to whole number of trafficked women.

⁷⁶ Source Transcrime Reports, n 17, 2009

⁷⁷ *ibid*

⁷⁸ Di Nicola A., Orfano I., Cauduro A., Conci N., National legislation on prostitution and the trafficking in women and children, 2005, available at:

http://transcrime.cs.unitn.it/tc/fso/Altre%20pubblicazioni/legislation_on_prostitution_english.pdf

3. LEGAL REGULATION OF PROSTITUTION IN THE EU MEMBER STATES

3.1 The Netherlands

The Netherlands is, of course, famous for its supposed ‘tolerance’. In line with classic abolitionism, prostitution itself has been legal since 1810, with all forms of exploitation of prostitution (pimping, brothel-keeping) forbidden by the Law of 1910. For a long time prostitution was ‘tolerated’ both as regards Dutch and foreign women as long as public order was not violated and as long as it could be restricted to certain locations. After the sexual revolution and economic boom of the 1970s the sex business, initially small scale, became visible and in the 1980s it became clearer that the industry was increasingly complex, and difficult to influence through a ‘hands off’ policy. At the same time the emerging sex worker lobby started to challenge the idea of their status as victims. It was argued that the right to self-determination must involve the ‘freedom’ to choose to engage in prostitution. And, since prostitution is work, this work has to be cleansed from ‘non-work’ elements (such as violence and abusive conditions). In 2000 the ban on brothels (Art. 250bis, in force since 1911) was lifted and the ‘exploitation’ of (profiting from) voluntary prostitution was decriminalised. Brothels now operate on a system of licences (with requirements for safety, hygiene and self-determination of sex workers).⁷⁹

In the Netherlands prostitution is legal since 1 October 2000, which makes the Dutch country fall within the regulationism model. Since the lifting of the general ban on brothels, it is legal to voluntarily sell and buy sexual services between consenting adults, under the rules set by the State. Before 2000 prostitution was neither regulated nor prohibited, only running a brothel was expressly forbidden, thus including the Netherlands in the new abolitionist model.⁸⁰

⁷⁹ Heli Askola, *European Legal Responses to Trafficking in Women* (Hart Publishing, Oxford, 2007)

⁸⁰ The Dutch Ministry of Foreign Affairs, *Dutch policy on prostitution, Question and Answers*, 2004

The objectives of the change were, among other things, to provide better instruments and possibilities for controlling and regulating the running of brothels, to better combat forced prostitution (Trafficking in Human beings) and to ensure that underage persons were better protected from sexual abuse. The Ministry of Justice has formulated 6 major aims with this proposal:

1. to control and regulate of the exploitation of prostitution
2. to improve the prosecution of involuntary exploitation
3. the protection of minors
4. the protection of the position of prostitutes
5. to combat the criminal affairs related to prostitution
6. to combat the presence of illegal aliens in prostitution⁸¹

Prostitution has never been illegal in the Netherlands. The legalisations means that sex clubs and brothels are able to operate as legal enterprises as long as they meet certain conditions. Decriminalisation of the brothels did not entail any special regulation of prostitution at the national level. This is a municipal affair.⁸²

The sex sector is regulated by a system of licensing managed by the Municipalities, which are responsible for the elaboration of the local policies to govern prostitution. In this regard, the Association of The Netherlands Municipalities published a set of guidelines aimed at the owners of brothels, sex shops, and streetwalkers. Such guidelines specifically set rules as to the minimum size of working areas, location, safety, fire and hygiene measures, as well as the working conditions of prostitutes. Administrative sanctions are foreseen for those who do not comply with the requirements set by the competent municipality. The supervision and inspection may be performed by different actors (Municipal Medical and Health Service, fire service,

⁸¹ Dutch Ministry of Justice, Some background information on Trafficking in Human beings in the Netherlands, Den Haag, 2003

⁸² Wagenaar Hendrik, Democracy and Prostitution: Deliberating the legalization of brothels in the Netherlands, Netherlands Institute for the Study of Crime and Law Enforcement, Den Haag, 2004

Health and Safety Inspectorate, Tax and Customs Administration) however in most cases, police officers are appointed to check the regular functioning of the sex establishments.⁸³

Part of the current debate focuses also on the different prostitution rules implemented by the Dutch municipalities, which cause great mobility of prostitutes among different cities. The lack of harmony between the local prostitution policies causes a constant movement of sex workers.⁸⁴

In compliance with the provisions set out by the Hague Declaration (1997),⁸⁵ in the year 2000, The Netherlands appointed the National Rapporteur on Trafficking in Human Beings (NRM). The main tasks of the NRM are “to collect information and report to the Dutch government on THB”, that should then consequently discuss, plan, and adjust anti-trafficking measures. The anti-trafficking legislations have also provided for the appointment of a national Judicial Officer and some regional Judicial Officers on Human Trafficking; the establishment of THB contact functionaries of the Immigration and Naturalisation Services; and the Project Group on Prostitution and Trafficking of the Police. Both at the judicial and the law enforcement level, ad hoc guidelines to investigate THB cases have been issued.⁸⁶

Article 250a (which repealed article 250bis) of the Criminal Code of the Netherlands defines the following acts as offence.

“1. With a prison sentence not exceeding six years or a fine of the fifth category will be punished

1. he or she who, by physical coercion or another act of violence or by threat of physical coercion or another act of violence, coerces another person into making him- or herself available to engage in sexual activities with a third party against remuneration or who

⁸³ Norwegian Ministry of Justice and Police Affairs, A report from the working group on the legal regulation of the purchase of sexual services, 2004

⁸⁴ Van Doorninck Marieke, Prostitution policies in the Netherlands, Dutch Institute for Prostitution Issues, Amsterdam, 2001

⁸⁵ The Hague Ministerial Declaration, 1997, the first international document which recommends EU Member States to establish a national reporting mechanism, giving birth to the concept of the National Rapporteur

⁸⁶ Dutch Ministry of Justice, Some background information on Trafficking in Human beings in the Netherlands, Den Haag, 2003

otherwise, by abusing the predominance ensuing from physical coercion or by deception, induces another person to make him or herself available to engage in sexual activities with a third party against remuneration, or who otherwise, under aforementioned circumstances, undertakes any action that he or she knows or can reasonably suspect will induce the other person to engage in these activities.

2. he or she who recruits, brings back or abducts another person with the intention of inducing this person to make him- or herself available to engage in sexual activities with a third party against remuneration in another country.

3. he or she who induces another person to make him- or herself available to engage in sexual activities with a third party against remuneration, or who otherwise undertakes any action that he or she can reasonably suspect will induce the other person to engage in these activities, whilst the other person is a minor.

4. he or she who deliberately takes advantage of another person's sexual activities with a third party against remuneration, while he or she knows or can reasonably suspect that the other person makes him or herself available to engage in these activities under the conditions mentioned under 1..

5. he or she who deliberately takes advantage of another person's sexual activities with a third party against remuneration, if the other person is a minor.

2. The culprit will be punished with a prison sentence not exceeding eight years or with a fine of the fifth category, if:

1. the criminal offences, defined in section one, are perpetrated by two or more joined parties:

2. the minor has not yet reached the age of sixteen:

3. grievous bodily harm is caused by physical coercion or another act of violence as referred to in section 1. .

3. The criminal offences, defined in section one, which are perpetrated by two or more joined parties under the conditions referred to in section two under 2. and 3., will be punished with a prison sentence not exceeding ten years or with a fine of the fifth category.”⁸⁷

As voluntary prostitution is not prohibited, the Dutch Penal Code is limited to Trafficking in Human beings with the purpose of exploitation. The Penal Code art. 250a is not directed at the prostitute's clients. The purchasing of sexual services is not a criminal offence.

The Netherlands puts principle of tolerance into practice. Political pragmatism makes it possible to see the sex industry as just another social phenomenon. A number of 'private' activities that take place in public or semi-public locations are officially tolerated as long as they do not interfere with public order. So if prostitution is not disrupting ordinary life in a residential area the brothel, shop window or sex club will be allowed to exist openly. The rationale behind is that prosecution will produce more problems than it solves.⁸⁸

This so-called Dutch tolerance is based on pragmatism and maybe also indifference. As long as one doesn't bother others, or interferes in their daily life, you can do what you like. The moral attitude of Dutch people however, is not much different from that of other countries in the European Union: prostitution is not considered proper or acceptable behaviour and sex workers face the same condemnation and stigma.⁸⁹

The Dutch approach towards prostitution is a sharp division between voluntary prostitution and involuntary prostitution. If a man or women considers prostitution an option to earn a living, he or she should be able to work under good conditions and should have the same right as any worker has. If a man or woman is lured into prostitution or faces violence, abuse or deceit, law should protect him or her. In order to indeed give prostitutes the same rights as others

⁸⁷ The Criminal Code of the Netherlands, Article 250a

⁸⁸ Pauline Vincenten, Master Thesis, A historical institutionalist explanation of the current prostitution policy of Sweden and the Netherlands, 2008

⁸⁹ Van Doorninck Marieke, Prostitution policies in the Netherlands, Dutch Institute for Prostitution Issues, Amsterdam, 2001

workers the ban on brothels had to be lifted in order to make the working places legal. In order to protect victims of trafficking the penalties had to increase and social measures had to be taken.⁹⁰

The present national legislation of Netherlands has two main aims: first, to legalize the organization of voluntary prostitution; second, to increase the penalties against those involved in the organization of involuntary prostitution (through violence, force or coercion and fraud).⁹¹

No one argues that the Dutch legislation sets out a clear and coherent prostitution policy, but it is the local authorities that will control and regulate the conditions under which sex work is permitted. Agencies such as the local authorities, police, health and social services have worked collaboratively for reform with a firm commitment to harm minimization and consultation with sex workers. These reforms meet some, but by no means all, of the demands of sex worker organizations for the right to work, as adults, through choice, and in reasonable conditions.⁹²

What concerns the legislation on trafficking, it is regulated on the State level. The criminal code prohibits bringing somebody to prostitution by means of violence, deceit and abuse of authority with a penalty of 6 years imprisonment.⁹³ Several measures were taken to facilitate the prosecution of traffickers and to protect victims. In 1988 a special ruling was added to the aliens law stated that "in the presence of the least suspicion of traffic a woman should be allowed time to consider pressing charges. When she has done so she should be allowed to stay in the Netherlands until the whole juridical process has been completed". The reflection period is three months, during which a woman is entitled to safe shelter, legal advice, and social security

⁹⁰ Norwegian Ministry of Justice and Police Affairs, A report from the working group on the legal regulation of the purchase of sexual services, 2004

⁹¹ Jan Visser (1997) 'The Dutch law proposal on prostitution: text and explanation', available at: http://www.mrgraaf.nl/2_ef.htm

⁹² Jo Doezema (1998) 'Forced to choose: beyond the voluntary v. forced prostitution dichotomy' in Kamala Kempadoo and Jo Doezema (1998) editors, *Global Sex Workers: Rights, Resistance, and Redefinition*, London: Routledge.

⁹³ The Criminal Code of the Netherlands, Article 250a

benefits. A residence permit is granted for the duration of the investigation, the prosecution and the trial. She is not allowed to work in this period.⁹⁴

The government also subsidises the Foundation against Traffic in women. This organisation does merely all the social work for victims. There were several problems with implementing the policy. The victims had to be referred to the Foundation by the police who had to be able to identify the migrant prostitutes as victims. For individual policemen it was not always easy to distinguish. Therefore the Dutch Attorney General's office formulated directives in order to facilitate the prosecution of traffickers and to achieve a uniform national policy in the approach of traffic in women. Guidelines were made for policemen to detect a situation of abuse and on how to identify victims. It was decided that there should be special police units dealing with traffic, traffic should be regarded as a form of organised crime and receive priority and all information on traffic should be transferred to the National Criminal Intelligence. Through the years the directives and the implementation were evaluated and revised.⁹⁵

Thus the author of this thesis wants to emphasize that despite the fact that regulation of prostitution and trafficking is clearly divided, still regulation on trafficking is centralized and legally well formed, while the regulation of prostitution is decentralized and carried by the national municipalities which have discretion to impose different regulatory measures.

Decentralisation is chosen, as it is the municipalities and local authorities that are actually confronted with the prostitution. As such the local authorities are also to be the authorities that deals with the prostitution activity. Legal authority for the municipalities' regulation of prostitution is set out in the art. 151a of the Dutch Law on Municipalities.⁹⁶

In accordance with the Law on Municipalities art. 151a local authorities have the jurisdiction to adopt municipal rules on how enterprises that offer the opportunity to have sexual

⁹⁴ Dutch Aliens Law, "Paragraph B17"

⁹⁵ Dutch Ministry of Justice, Some background information on Trafficking in Human beings in the Netherlands, Den Haag, 2003

⁹⁶ Dutch Law on Municipalities, art. 151a

relations with a third party for compensation, are to be run – these are licencing, control and enforcement and sanctions.⁹⁷

The intention of the regulatory power given to municipalities is that municipalities will lay down rules in their bylaws for the establishment, installation and management of sex establishments within their borders. This discretion creates the situations, where brothels are banned in the Netherlands within the local authority boundaries.⁹⁸

Some municipalities in the Netherland also regulate street prostitution. The model consists of a street or an area (“zone”) that has been assigned by the city as the spot on the map where inconvenience for residential areas is minimised and where a reasonable degree of safety for prostitutes can be organised. The hours of business for this zone are during the evening and night, depending on the local situation.⁹⁹

As local authorities are not bound by the national law, their freedom in discretion may lead to discrimination against foreign women on the grounds of nationality.

An important positive effect of Netherland law on prostitution is that the prostitution sector became more open. Officials of the major cities started to think about the prostitution business in their own town. Civil servants visit the brothels on a regular basis; So both sides have had sufficient opportunity to reflect upon the new situation and made necessary preparations, bad situations can be detected earlier.¹⁰⁰

Another positive effect of regulation is that it will allow distinguishing between the good guys and the bad guys among brothelowners. Those who have a brothel for quick and easy money, or use it to cover criminal activities, will no longer be part of the legal sex industry, as they won't meet the requirements for a licence. Those who want to be regarded as normal

⁹⁷ Norwegian Ministry of Justice and Police Affairs, A report from the working group on the legal regulation of the purchase of sexual services, 2004

⁹⁸ Report of the Dutch national Rapporteur, Trafficking in Human Beings, 2008

⁹⁹ *ibid*

¹⁰⁰ The Dutch Ministry of Foreign Affairs, Dutch policy on prostitution, Question and Answers, 2004

businessmen will invest in their property and obey the rules in exchange for having a legal business.¹⁰¹

On the whole, the sex industry became more professional. For persons, owners as well as sex workers who consider the job as easy way to get money, who evade paying taxes, who do not want or cannot conform to the rules it will be difficult to survive. To work in the sex industry became more of a well-considered choice. But prostitution policies are also facing some big difficulties.

The Netherlands has the ambition to try to regulate an industry, which attained its current dimensions just by operating as an informal and non-regulated business. For a lot of people a regulated official sex industry will be less attractive. Will they disappear, will they find another sphere of activity or will they set up an illegal circuit? We must keep in mind that by regulating the sex-industry, a very profitable business is taken away from some criminals. Or not only criminals, but also owners of small brothels who can't afford to make the investments needed to improve their brothels. Will they be willing to leave the business they worked in for so many years, voluntary?¹⁰²

There is a danger of having a perfectly regulated sex industry that is under the control of the municipality on the one hand and on the other an underground illegal sexbusiness which is inscrutable and inaccessible. It will be a refuge for criminals and a place where illegal women work under even worse conditions.¹⁰³

One of the goals of legalisation is to improve the position of the prostitutes. The present legislation improves the position of sex workers in several aspects. The requirements concerning safety, hygiene, and sex workers' self-determination rights, which the brothelowner has to meet in order to get a licence, will improve the working conditions of the sex workers. But clean sheets and fire safety instructions only are by far not enough to really improve their position. Neither national government, nor the local governments seem to have a single clue what else has

¹⁰¹ The Dutch Ministry of Foreign Affairs, Dutch policy on prostitution, Question and Answers, 2004

¹⁰² Jan Visser (1997) 'The Dutch law proposal on prostitution: text and explanation', available at: http://www.mrgraaf.nl/2_ef.htm

¹⁰³ Norwegian Ministry of Justice and Police Affairs, A report from the working group on the legal regulation of the purchase of sexual services, 2004

to be done. And more important the government tries to withdraw from its responsibilities towards sex workers. Local governors as well as most governmental institutions now claim that they are not authorised to interfere in relations between employers and employees so there is nothing they can do.¹⁰⁴

Because sex work is now officially considered as labour, sex workers are supposed to stand up for their rights as any other employee does. The problem is that most labour has a history of nearly a century of emancipation. Large and influential labour unions defend the rights of their members. But the emancipation of sex workers has just started. In most cases working conditions are still bad and the relations between employers and employees are far from equivalent. As long as the position of sex workers towards brothelowners as well as to society is not strong enough to stand up for their rights it ought to be the governments responsibility to create opportunities and conditions in which sex workers can work on their emancipation. The most important part is that the government should acknowledge its responsibility in this process.¹⁰⁵

The overall goal of the new legislation is the normalisation of the prostitution sector in the Netherlands. They have to take into account the migrant sex worker whose position is at stake.

Normalisation and integration are not something that can be achieved by changing the law, it's a process. But it is a process that needs guidance and stimulation and a lot of preparation. The national government and the local governments seem to be more or less prepared to implement the license system, the tools to control and regulated the sex industry. But at this moment, the new possibilities that decriminalisation has offered are mainly used to develop new instruments for control and regulation of the sex industry, rather than to take positive measures aimed at sex workers to improve their position, to develop and introduce standards in the sex industry, to regulate labour relations, to support the labour emancipation of prostitutes and to lift existing discriminatory practices of both public and private institutions

¹⁰⁴ Norwegian Ministry of Justice and Police Affairs, A report from the working group on the legal regulation of the purchase of sexual services, 2004

¹⁰⁵ *ibid*

(such as the denial of access to social benefits and refusal by insurance companies and banks to accept sex workers as clients).¹⁰⁶

They have to take into account the migrant sex worker whose position is at stake. If the government doesn't put more effort in trying to improve the position of sex workers which is vital in order to have a more healthy and normal sex industry the impression raises that the legalisation of brothels is only a tool to defend public order and to regulate and control the sex business instead of improving it. In order to achieve the goals of the new prostitution policies a different outlook on towards prostitution is needed, at least, national measures of the Netherland as a member state of the EU have to be in compliance with the EU law and freedoms guaranteed under it.

3.2 Sweden

Sweden reformed its prostitution laws in 1918 by abolishing the previous regulatory system. For most of the 20th century Sweden had a low level of prostitution, with prohibitions against the typical forms of the exploitation of prostitutes (habitual profiting, procuring, and (implicitly) brothel-keeping etc) as well as 'nuisance' practices (aggressive soliciting). In 1995 the Commission set up to examine what should be done about the increase in prostitution (especially in the big cities and by a growing number of foreigners) recommended that both selling and buying of sexual services should be criminalised. The suggestion received criticism from enforcement authorities due to its 'impracticability' and feminist organisations and politicians who claimed that the women in prostitution were victims, and that if anyone should be punished, it should be the customer. The latter claim was expressed in terms of 'prostitution is a form of male violence against women', which should be eradicated to create a truly equal society. The argument proved effective and the bill for

¹⁰⁶ Jan Visser (1997) 'The Dutch law proposal on prostitution: text and explanation', available at: http://www.mrgraaf.nl/2_ef.htm

a new prostitution provision was included as part of a larger government package to address violence against women. The law was passed in parliament and client criminalisation took effect in 1999, leaving selling legal.¹⁰⁷

In 1999, Sweden criminalized the buying but not the selling of sex. Sweden recognized explicitly that prostitution constitutes “male violence against women and children” and it should be abolished. From the Swedish perspective, prostitution constitutes a social problem which not only affects prostituted persons, but also to the whole society. The new law included in the Penal Code, prohibited the purchase of sexual services by imposing punishments of fines or imprisonment to the offenders.

Winberg (2002) explains the Swedish position:

“We have long taken a position against prostitution and the oppression of women that this entails. We have made clear in no uncertain terms that those men who buy and sexually exploit women and children commit a crime”.¹⁰⁸

By doing this Sweden penalizes the customers, procurers and traffickers and protects the prostituted person who is considered to be in a vulnerable position. The enactment of the new law put into action the provision of services to prostituted persons in order to help them finding other ways of living. By making efforts to combat prostitution, Swedish government’s purpose is to strengthen women’s positions in the society by achieving equality between men and women at national and international level.¹⁰⁹

According to the Swedish perspective, the beneficiaries of the legalization of prostitution are procurers, traffickers, consumers and also the countries that have regulated or decriminalized

¹⁰⁷ Heli Askola, *European Legal Responses to Trafficking in Women* (Hart Publishing, Oxford, 2007)

¹⁰⁸ Winberg, 2002: “Speech by Deputy Prime Minister Margareta Winberg”. In Ekberg et al, 2002: “Seminar on the Effects of Legalisation of Prostitution Activities”. Available in: <http://www.sweden.gov.se/content/1/c4/22/84/0647d25a.pdf>

¹⁰⁹ National Board in Health and Welfare, 2003: “Prostitution in Sweden 2003. Knowledge Beliefs, & Attitudes of Key Informants”. Available in: <http://www.socialstyrelsen.se/en/showpub.htm?GUID={A688D624-4505-431F-A9CF-DCD7C12D0539}>

the activity. From this view the states that legalize prostitution become sponsors of the activity, while making profit of the taxes paid by women who have being sexually exploited.¹¹⁰

From the Swedish point of view, it is very clear that the acquisition and transportation of women aims to sell them to the prostitution market and when the demand of sexual services has been prohibited and criminalized, the possibilities to sell women into these markets are drastically reduced. Thus, Sweden considers the demand of sexual services as one of the main causes of trafficking for sexual exploitation. They relate the demand of sexual services with cultural patterns of oppression over women and girls.¹¹¹

In 1999, after years of research and study, Sweden passed legislation that a) criminalizes the buying of sex, and b) decriminalizes the selling of sex. The novel rationale behind this legislation is clear: "In Sweden prostitution is regarded as an aspect of male violence against women and children. It is officially acknowledged as a form of exploitation of women and children and constitutes a significant social problem... gender equality will remain unattainable so long as men buy, sell, and exploit women and children by prostituting them."¹¹²

In addition to the two-pronged legal strategy, a third and essential element of Sweden's prostitution legislation provides for ample and comprehensive social service funds aimed at helping any prostitute who wants to get out, and additional funds to educate the public. As such, Sweden's unique strategy treats prostitution as a form of violence against women in which the men who exploit by buying sex are criminalized, the mostly female prostitutes are treated as victims who need help, and the public is educated in order to counteract the historical male bias that has long stultified thinking on prostitution.¹¹³

¹¹⁰Vasiliki Theocharidou, Virginia Guigou, Sex trafficking: Swedish Policy and Different Approaches, Master thesis, University of Goteborg, 2006

¹¹¹ National Board in Health and Welfare, 2003: "Prostitution in Sweden 2003. Knowledge Beliefs, & Attitudes of Key Informants". Available in: <http://www.socialstyrelsen.se/en/showpub.htm?GUID={A688D624-4505-431F-A9CF-DCD7C12D0539}>

¹¹² Marie De Santis, Sweden Treating Prostitution as Violence Against Women, available at: <http://www.rapereliefshelter.bc.ca/issues/SwedenTreatingProstitution.pdf>

¹¹³ ibid

The Swedish Government has given priority to combating prostitution and trafficking in human beings for sexual purposes and has placed the issue higher in the political agenda, nationally and internationally. It is considered to be a significant social problem, which is harmful not only for the prostituted women, but also for the society at large. “Gender equality will remain unattainable as long as men buy, sell and exploit women by prostituting them”. For combating prostitution and trafficking the Swedish government has put into place legal measures and special regulations in order to prosecute the perpetrators and offer support and protection to the victims.¹¹⁴

On January 1, 1999, the Act prohibiting the purchase of sexual services entered into force. The law was part of a Violence against Women Act package (Kvinnofrid), which was enacted on July 1, 1998.¹¹⁵

In Sweden prostitution is regarded as a form of men's violence against women. This law prohibits men from buying sexual services and it determines this action as a criminal offense, which is punishable by a fine or up to six months imprisonment.¹¹⁶

The National Criminal Investigation Department of the National Criminal Police stated that during the past years, there are clear indications that the “Law that prohibits the purchase of sexual services has positive effects on the trafficking in human beings”.¹¹⁷ On the other hand, the prostitution can move indoors as less visible for the governments.

¹¹⁴ Nordic-Baltic Campaign against Trafficking in Women, 2004: “Trafficking. Final Report 2002”.Ed. Nordon, Copenhagen.

¹¹⁵ The Act Prohibiting the Purchase of Sexual Services (SFS 1998:408) entered into force on 1 January 1999. In connection with the sexual crimes reform of 2005, the Act was revoked and replaced by new legislation on the purchase of sexual services (Chapter 6, Section 11 of the Penal Code).

¹¹⁶ Swedish Penal Code, Chapter 6, Section 11

¹¹⁷ National Criminal Investigation Department, and National Criminal Intelligence Service and Illegal Immigration Unit, (2002): “Trafficking in Women Reports”. Available in: http://www.polisen.se/mediaarchive/4347/3474/4637/Report_5_02.pdf [Acceded 10 March 2007]

Swedish policy on prostitution proves that sex trafficking is a priority among politicians, authorities and media on the treatment of the issue. It does not put prostitution from the one hand and trafficking from the other, rather puts it together.¹¹⁸

In Sweden the legislation for procuring is being used a lot for prosecution of trafficking cases. This is because the legislation on human trafficking requires today, some kind of unlawful coercion or deception or any other such improper means has been used by the recruitment. One weak point of the law is that sometimes can be difficult to prove 'unlawful improper means' for prosecutors.¹¹⁹

According to the Swedish Penal Code (chapter 4, s.1.a), criminal liability for trafficking in human beings applies to anyone who through the use of unlawful coercion or deception, by exploiting a person's vulnerability or by any other similar improper means, recruits, transports, harbors, receives or takes other similar actions towards a person and thereby gains control over that person to be: "subjected to sexual offenses as stated in the Penal Code, chapter 6, sections 1, 2 ,3, 4, 5 or 6, casual sexual relations or other forms of exploitation for sexual purposes."¹²⁰ The parliament has decided by applying the above Penal Code, to sentence to jail for a minimum of two years and at most of ten years, for any person who is found guilty of the crime of trafficking.¹²¹

Swedish government has started to develop a National Action Program for combating trafficking in human beings. The work on the first plan can be characterized as an interdepartmental work being appointed by the government, where a group is consisted of different representatives of ministries, who work under the leadership of the Division for Gender Equality in the Ministry of Industry.¹²² The proposal of the National Action Plan is related with

¹¹⁸ Ministry for Foreign Affairs, 2003: "Poverty and Trafficking in Human Beings: A strategy for combating trafficking in human beings through Swedish development cooperation". Ed. Vastra Aros

¹¹⁹ Ministry of Industry, Employment and Communications, 2005: "Prostitution and trafficking in human beings". Available in: <http://www.sweden.gov.se/content/1/c6/04/28/96/88110928.pdf>

¹²⁰ Swedish Penal Code , Chapter 4, Section1.a)

¹²¹ Ministry of Industry, Employment and Communications, 2005: "Prostitution and trafficking in human beings". Available in: <http://www.sweden.gov.se/content/1/c6/04/28/96/88110928.pdf>

¹²² Boynton & Hagström. (2005), "Dilemmas of Irregularity: an Interpretive Policy Analysis of the Swedish Trafficking Approach" Master Thesis, Malmö University

the continuance on the work against prostitution and trafficking in human beings for sexual purposes within a number of areas, in order to make the work more substantial and effective. Furthermore, it will include a survey of measures taken in the past about actions against prostitution and trafficking in Sweden.¹²³ The plan focuses on action that will discourage the demand of prostitution in Sweden, as well as measures that have to do with the improvement of protection and assistance towards the victims of prostitution and trafficking. Additionally, the proposal will put emphasis on issues related to current punitive measures, including the development of the work within the justice system, the Police force and social services and also on the humanistic perspective of the problem.¹²⁴

There is a view, that sees a clear connection between trafficking and prostitution and believes that prostitution policy within a country can influence the issue of trafficking. The following statement explains clearly this view: “It has been more difficult for the traffickers to bring women to Sweden, because they know it is against the law to buy sexual services so the market is not so attractive any more...Sweden is a difficult country for trafficking.”¹²⁵

The prostitution policy has been criticized a lot by other countries and particularly by those who implement a more liberal policy towards prostitution. If some agree that the law has influenced the issue of trafficking and they believe trafficking cases have decreased, others state that the law has to be dealt with more serious eyes and effective interventions.¹²⁶

It is under doubt, how Swedish government is going to achieve its purpose in strengthening women’s positions, while preventing them to provide sexual services voluntarily and eliminating for them one of the high paid job opportunities.

¹²³ Ministry of Industry, Employment and Communications, 2005: “Prostitution and trafficking in human beings”. Available in: <http://www.sweden.gov.se/content/1/c6/04/28/96/88110928.pdf>

¹²⁴ Boynton & Hagström. (2005), “Dilemmas of Irregularity: an Interpretive Policy Analysis of the Swedish Trafficking Approach” Master Thesis, Malmö University

¹²⁵ Vasiliki Theocharidou, Virginia Guigou, Sex trafficking: Swedish Policy and Different Approaches, Master thesis, University of Goteborg, 2006

¹²⁶ Ekberg, 2002: “The International Debate about Prostitution and Trafficking in Women: Refuting the Arguments” In: Ekberg et al, 2002, “Seminar on the Effects of Legalisation of Prostitution Activities”, available at: <http://www.sweden.gov.se/content/1/c4/22/84/0647d25a.pdf>

But what is of great importance is that the prostitutes do not risk any legal repercussions, because they are considered as the weaker part that have been exploited both by the procurers and the buyers and they will still try to provide sexual services. In this stence, they will be less protected. Sweden Law doesn't really penalize the sex buyers, when the punishment is to pay a fine. In reality, those who can pay can possibly repeat the same action. According to the respondent, although the legislation penalizes the sex buyers it doesn't prevent men from consuming sex services.¹²⁷ In this case the national legislation of Sweden may turn to be discriminatory if in practice women in Sweden will be able to provide sexual services while the entry of prostitutes from other member states of the EU will be prohibited.

3.3 Italy

Italy, like the majority of EU Member States, follows a model where prostitution is permitted (both for sellers and buyers), but is not really considered work or violence against women, but mainly 'immoral' (despite an officially abolitionist policy). The following remain criminalised: the facilitation of prostitution, the exploitation of prostitution, organising prostitution in closed surroundings (clubs, apartments) and brothel-keeping. Also soliciting used to be illegal, but currently it is merely a more or less tolerated misdemeanour (aggressive soliciting can be a crime). Due to the ban on using apartments for prostitution purposes, prostitution in Italy often takes the form of street-walking.¹²⁸

In 1958, brothels were abolished in Italy by Law 75/1958 formally known as the Abolition of the Regulation of Prostitution and the Fight Against the Exploitation of the Prostitution of Others (Abolizione della Regolamentazione della Prostituzione e Lotta Contro lo

¹²⁷ Ministry of Industry, Employment and Communications, 2005: "Prostitution and trafficking in human beings". Available in: <http://www.sweden.gov.se/content/1/c6/04/28/96/88110928.pdf>

¹²⁸ Heli Askola, *European Legal Responses to Trafficking in Women* (Hart Publishing, Oxford, 2007)

Sfruttamento della prostituzione Altrui), and more popularly called “Legge Merlin” after the woman parliamentarian who proposed the law.¹²⁹

After 1958, there has been no change in the prostitution policy of Italy, meaning that the state does not regulate it. But many attempts were made and number of proposals¹³⁰ put forth to regulate the prostitution in Italy. For example, in 2003, a bill was introduced which, in order to ‘clean’ the streets of the nuisance caused by prostitutes and cruising customers, foresees a fine for customers and stricter sanctions for prostitutes; it would allow indoor prostitution while ‘encouraging’ women in prostitution to undergo medical examinations (through sanctions against prostitutes who cause an ‘STD injury’ to clients).¹³¹

Before the 1958 law came into force, prostitution was regulated by the State in Italy, and those in prostitution were governed by rules that subjected them to obligatory sanitary controls and checkups and obliged them to practice prostitution in places determined by law.¹³²

The Merlin law did not explicitly prohibit prostitution per se, so that prostituted women would not be penalized, but instead prohibited the exploitation of prostitution. Italy prohibits all forms of trafficking in persons under the Measures Against Trafficking in Persons law, which prescribes penalties of eight to 20 years’ imprisonment.¹³³

Thus, Italy does not guarantee any rights to prostitutes, but with its abolitionist approach towards prostitution and strict regulation of trafficking in human beings can be concluded that Italy considers trafficking and prostitution as two different phenomena.

¹²⁹ Aghatise Esohe, *Trafficking for Prostitution in Italy, Possible Effects of Government Proposals for Legalization of Brothels*, 2004, Turin, Italy: Associazione IROKO, available in <http://action.web.ca/home/catw/attach/Aghastise.pdf>

¹³⁰ See Proposals No. 2885, 2323, 3826, 2385, 2358, and 2359 on the Italian Parliament Website, www.parlamento.it

¹³¹ Heli Askola, *European Legal Responses to Trafficking in Women* (Hart Publishing, Oxford, 2007)

¹³² Aghatise Esohe, *Trafficking for Prostitution in Italy, Possible Effects of Government Proposals for Legalization of Brothels*, 2004, Turin, Italy: Associazione IROKO, available in <http://action.web.ca/home/catw/attach/Aghastise.pdf>

¹³³ *ibid*

3.4 Comparison

The comparison of national legislations on prostitution among different EU member states shows that they differ in large extent. Different legal approaches point out the advantages and disadvantages of the way in which prostitution is legally regulated in the Netherlands and Sweden and in Italy, where it is not regulated at all.

The objectives of regulation are viewed differently in the two countries – in the Netherlands prostitution is work, in Sweden prostitution is men's violence against women. The Netherlands often has a pragmatic approach to solving their social problems.¹³⁴

In the Netherlands, the situation for some sex workers improved: health and safety regulations will be introduced as in any other job, and sex workers will gain full social, legal and employment rights, they benefit in terms of access to health and other mainstream services. There operates a centre to advise on matters such as registering as a self-employed person, tax forms and pension schemes.¹³⁵

The new system of regulation in the Netherlands enables the normalization of some forms of sex work: sex workers can operate visibly and become part of public life, whether in small-scale businesses or in the large and diverse entertainment industries which yield a substantial revenue to the state.¹³⁶

The better conditions for prostitutes in the Netherlands caused an increase in the number of prostitutes, but is not a negative trend, if they bear the character of voluntariness.

¹³⁴ Norwegian Ministry of Justice and Police Affairs, A report from the working group on the legal regulation of the purchase of sexual services, 2004

¹³⁵ Judith Kilvington, Sophie Day and Helen Ward, Prostitution Policy in Europe: A Time of Change?, *Feminist Review* No 67, pp. 78–93, 2001

¹³⁶ *ibid*

In contrast, the first visible effect of the Swedish legislation was an immediate tenfold decrease in the numbers of women working visibly on the streets. This reduction in numbers is unlikely to reflect a move out of sex work altogether. It is more probable that both workers and customers have chosen less visible ways of making contact, so that the policy has led to a reorganization of the sex industry. Moreover, other developments in the sex industry make it easier to work less visibly including the use of the Internet to advertise services and mobile phones.¹³⁷

In The Netherlands policies distinguish between voluntary and forced prostitution while in Sweden all prostitution is seen as a social problem. The Dutch government recognizes the purchase of sexual services as a valid part of the industry. National laws and policies are normalizing the industry through legalisation and regulation, using a number of measures such as the legalization of brothels, decriminalization of street prostitution in certain areas and the recognition of prostitution as legitimate work.¹³⁸ In Sweden, sex workers are treated as victims of exploitation and abuse, they are encouraged to leave the business and clients are criminalized. The new legislation and related policing may have contributed to the trend for sex workers to work less visibly.¹³⁹

The Netherlands and Sweden have very different legislation on prostitution, but while regulating the prostitution, both strive to combat trafficking in human beings not concentrating on distinctive nature of prostitution. As for Italy, it also does not pay special attention to the prostitution phenomena not regulating it at all, but exactly from this approach can be concluded that Italy has clear distinction between prostitution and trafficking and does not consider necessary to legalize/restrict prostitution while combating the crime of trafficking.

Complex and decentralized regulation of prostitution in the Netherlands, strict approach from the side of Sweden and Italy's non-regulation policy may cause serious restrictions to the freedom to provide services in the EU, which will be analyzed in the following chapter.

¹³⁷ Second Pan-European Conference Standing Group on EU Politics, Debating prostitution/trafficking in Sweden and Finland, Bologna, 24-26 June 2004

¹³⁸ Report of the Dutch national Rapporteur, Trafficking in Human Beings, 2008

¹³⁹ Judith Kilvington, Sophie Day and Helen Ward, Prostitution Policy in Europe: A Time of Change?, Feminist Review No 67, pp. 78-93, 2001

4. FREEDOM AND PROSTITUTION IN EU LAW

4.1 Freedom to provide services

4.1.1 Freedom to provide services and other freedoms

After the entry into force of Lisbon Treaty,¹⁴⁰ the Treaty Establishing the European Community (the TEC) was renamed as Treaty on the Functioning of the European Union (the TFEU), the articles were renumbered, although the substance of freedom to provide services was not altered.

Article 56 TFEU¹⁴¹ provides a general right to provide services across the Member State borders in the internal market. The article states:

“...Restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.”¹⁴²

The concept of services is defined in Article 57 TFEU¹⁴³ by means of a non-exhaustive list of examples:

- (a) activities of an industrial character;
- (b) activities of a commercial character;
- (c) activities of craftsmen;

¹⁴⁰ Since 1 December 2009

¹⁴¹ Ex. Art. 49 TEC

¹⁴² Art. 56 TFEU

¹⁴³ Ex. Art. 50 TEC

(d) activities of the professions.

The case law, in line with the wider aims of developing the service economy, has expanded on the list of services covered in Article 57 TFEU. Tourism, medical treatment, financial services, business and education services, television signals, cable television signals, debt collection work, lotteries, insurance and prostitution have all been found to be services for the purposes of Article 56 TFEU. Given this diverse list, it would appear that there is little subject matter that would fall outside the provisions, the corollary to which is that there are very few individuals seeking to supply services on a temporary basis who are denied the benefits of Article 56 TFEU.¹⁴⁴

Services have to be normally provided for remuneration.¹⁴⁵ The essential characteristic of remuneration lies in the fact that it constitutes considerations for the service in question, and is normally agreed upon between the provider and the recipient of the service.¹⁴⁶ It means that service has to be an economic activity.

Court of Justice has held that it is not essential that the person who receives the service be the person who provides the remuneration.¹⁴⁷

Services guaranteed under the Article 56 TFEU must have cross-border character. The provisions of the Treaty on freedom to provide services do not apply to purely internal situations.¹⁴⁸

¹⁴⁴ Margot Horspool and Matthew Humphreys, *European Union Law*, Fifth Edition, London: Oxford University Press, 2008

¹⁴⁵ Article 57 TFEU

¹⁴⁶ Case 263/86 *Belgian State v René Humbel and Marie-Thérèse Edel* (1988) ECR 05365

¹⁴⁷ Case 352/85 *Bond van Adverteerders v Netherlands* (1988) ECR 02085

¹⁴⁸ Barnard, C., *The Substantive Law of the EU: The Four Freedoms* (Oxford: OUP, 2007)

Services have temporary character – the temporary nature of the provision of services is to be determined in the light of its duration, regularity, periodicity and continuity.¹⁴⁹

The rights created by Article 56 TFEU were originally understood in terms of the right of non-discrimination. The discrimination combated by Article 56 TFEU could take many forms; it may be direct or indirect, and much of the case law, in fact, involves indirect discrimination.¹⁵⁰

Freedom to provide services is not universal. Article 52 TFEU¹⁵¹ states:

“The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.”

It should next be pointed out that the rules relating to the freedom to provide services preclude national rules which have such discriminatory effects, unless those rules fall within the derogating provision.¹⁵²

Art. 52 must be interpreted strictly, that discriminatory rules may be justified on grounds of public policy, public security or public health.¹⁵³

In Case C-158/96 Kohll it was also affirmed that non-discriminatory measures can also create restrictions on freedom to provide services: Art. 56 TFEU precludes the application of any

¹⁴⁹ Case C-55/94 Reinhard Gebhard v Consiglio dell’Ordine degli Avvocati e Procuratori di Milano (1995) ECR I-4165

¹⁵⁰ Case C-33/74 van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid (1974).

¹⁵¹ Ex article 46 TEC

¹⁵² P. Craig, G. de Burca, EU Law. Text, Cases and Materials, 3rd Ed., New York, Oxford University Press, 2003

¹⁵³ Case C-260/89 ERT v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others. (1991) ECR I-02925

national rules which have the effect of making the provision of services between MSs more difficult than the provision of services purely within one MS.¹⁵⁴

Articles 56 and 57 TFEU require not only the elimination of all discrimination on the grounds of nationality against providers of services who are established in another MS but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other MSs, which is liable to prohibit, impede or otherwise render less advantageous the activities of a provider of services established in another MS where he lawfully provides similar services.¹⁵⁵

Such a restriction on the fundamental principle of freedom to provide services can be based only on rules justified by overriding requirements relating to the public interest and applicable to all persons and undertakings operating in the territory of the State where the service is provided, in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the MS where he is established.¹⁵⁶

The Court in *van Binsbergen* developed the possibility of objective justification, separate from TFEU, in this case, where the national law in breach of Article 56 is non-discriminatory.

Taking into account the particular nature of the services to be provided, specific requirements imposed on the person providing the service cannot be considered incompatible with the Treaty where they have as their purpose the application of professional rules justified by the general good—in particular rules relating to organisation, qualifications, professional ethics, supervision and liability—which are binding upon any person established in the state in which the service is provided, where the person providing the service would escape from the ambit of those rules being established in another Member State.¹⁵⁷

¹⁵⁴ Case C-158/96 *Raymond Kohll v Union des caisses de maladie* (1998) ECR I-01931

¹⁵⁵ Case C-58/98 *Joseph Corsten*, Reference for a preliminary ruling (2000) ECR I-07919

¹⁵⁶ *ibid*

¹⁵⁷ Case C-33/74 *Johannes Henricus Maria van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* (1974) ECR 01299

Such a line of reasoning has a close relationship with the approach to the free movement of goods, and the line of cases on mandatory requirements.¹⁵⁸

The tension between the general right to provide and receive services and state regulation of certain activities is similar to the developed case law on the free movement of goods, where a general right to trade is set against limits imposed on the movement of goods because of important national interests. The state may have determined that certain activities are illegal, or that consumers need protection in certain service sectors.¹⁵⁹

The Court's approach is to set out the general right to provide or receive a service, but to acknowledge that certain obstacles to service provision can be acceptable. As with the law on the free movement of goods, discriminatory measures can only be justified under the specific Treaty provisions setting out derogation from the general right, whereas measures applying in a non-discriminatory way, indistinctly applicable measures or measures with an effect on trade can fall foul of Article 56 TFEU, but can be objectively justified, if proportionate.¹⁶⁰

A national rule restricting either the freedom to provide services must be compatible with the requirements of Article 56 TFEU. The rule can demonstrate compatibility with the Treaty by satisfying a four-part test, as follows:

- 1) the rule must be non-discriminatory;
- 2) the rule must be justified by imperative requirements in the general interest;
- 3) the rule must be suitable for the attainment of the objective it pursues; and
- 4) the rule must not go beyond what is necessary in order to attain its objective.¹⁶¹

¹⁵⁸ Snell, J., *Goods and Services in EC Law* (Oxford: OUP, 2002).

¹⁵⁹ P. Craig, G. de Burca, *EU Law. Text, Cases and Materials*, 3rd Ed., New York, Oxford University Press, 2003

¹⁶⁰ Margot Horspool and Matthew Humphreys, *European Union Law*, Fifth Edition, London: Oxford University Press, 2008

¹⁶¹ *ibid*

In Case C-288/89 (1991) Gouda¹⁶² the Court listed the public interest grounds that it recognized: efficient administration of justice; cohesion of the tax system; protection of recipient of services; consumer protection; protection of workers; protection of creditors; professional ethics; intellectual property; cultural policy, historic and artistic treasures; diversity of opinion; language requirements.¹⁶³

As with the free movement of goods derogations under the Cassis de Dijon mandatory requirements, the Gouda list is not exhaustive, and as such other justifications have been recognised.¹⁶⁴

The right to provide a service is a fundamental freedom under the EU law. They are part of the basis upon which the market is constructed. So any restriction of this freedom will be scrutinised carefully. In any case where a Member State has invoked a public interest requirement which has been accepted by the Court of Justice, any steps taken to guard this interest will be assessed in light of the principle of proportionality, which basically raises questions as to whether the measures are suitable for securing the attainment of the objective and, secondly, whether they go beyond what is necessary in order to attain it.¹⁶⁵

Important issue related to services is the Service Directive, Directive 2006/123, which removes obstacles to service providers from one EU Member State establishing themselves in another EU Member State, especially regarding authorisation schemes and other potentially restrictive requirements. Service Directive removes obstacles for cross-border provision of services, introducing a 'country of origin' principle whereby service providers would only be governed by the rules and regulations of the country where they are established; Encourages

¹⁶² Case C-288/89 Stichting Collectieve Antennevoorziening Gouda and others v Commissariaat voor de Media (1991) ECR I-01007

¹⁶³ Weatherhill S. Cases and Materials on EU Law, Seventh Edition, London: OUP, 2008

¹⁶⁴ Margot Horspool and Matthew Humphreys, European Union Law, Fifth Edition, London: Oxford University Press, 2008

¹⁶⁵ *ibid*

administrative simplification and better information and promotes administrative cooperation and supervision.¹⁶⁶

The regulation of services can be compared with the law and regulation providing for the free movement of goods. There are many parallel approaches and similar regulatory results. However, services and goods are different since goods are tangible items and services are not. Services then are primarily associated with people because services must be provided by someone and there is no service if no one is there to provide it. So the law on services also has a close relationship with the free movement of workers and due to some similarities, with freedom of establishment as well.¹⁶⁷

The Court of Justice's approach to such scenarios is to apply the freedom set out in Article 56 TFEU on services wherever the provisions on free movement for workers or the right of establishment do not fit. The freedom to provide services is guaranteed in so far as that interest is not safeguarded by the rules to which the provider of a service is subject in the MS where he is established.¹⁶⁸

To see the differences between freedom to provide services and free movement of workers, it has to be defined the terms "self-employed" and "worker". In matters concerning EU law the terms worker and employee have become synonyms. The Court defined 'worker' in the famous Lawrie-Blum case independently of national laws, thus making it a EU concept. The Court ruled that: the essential features of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.¹⁶⁹

¹⁶⁶ Hans van Meerten, A Comparison of the services directive with the case law of the Court of Justice: A case study, Griffin's view Vol. 7 No. 2, available at: http://www.rechten.vu.nl/en/Images/7-2%20-%20Comparison%20of%20the%20Service%20Directive_tcm23-46077.pdf

¹⁶⁷ Snell, J., Goods and Services in EC Law (Oxford: OUP, 2002).

¹⁶⁸ Case C-355/98 Commission of the European Communities v Kingdom of Belgium (2000) ECR I-01221

¹⁶⁹ Case 66/85 Deborah Lawrie-Blum v Land Baden-Wurttemberg (1986) ECR 2121, para 17.

Nevertheless, it is not too surprising that the Court has abstained from providing a detailed definition of activities pursued in a self-employed capacity. The reason for that is lack of harmonization in the field of self-employment. Thus, a definition of what constitutes a self-employed person in the EU context can be acquired as follows: it needs to be examined whether the particular economic activities can be classified as employment, essentially focusing on existence of a subordination aspect.¹⁷⁰

Gebhard case is relevant to recall here as it brought defining features of establishment as participation in the economic life on a “stable and continuous basis” and “regularity, periodicity or continuity” of services provided performing an economic activity.¹⁷¹

Interpretation of freedom to provide services is the background for further considerations in this thesis as prostitution will be reviewed as a service under the article 56 of the TFEU.

4.1.2 Prostitution – a service under the Art. 56 of the TFEU

Does prostitution satisfy all the requirements to qualify as a “service”? Why prostitution is analyzed here under the freedom to provide services and not under the other freedoms of the EU such as free movement of workers or freedom of establishment? These two questions will be analyzed in this chapter for the purposes of this thesis.

For the nature of prostitution, freedom to establishment seems exaggerated. It is not possible to imagine, it is just prohibited, some prostitution enterprises established in the EU

¹⁷⁰ Spīgulis Artūrs, Freedom of establishment : Means of overcoming restrictions on free movement of employees, RGSL Working Papers No. 25, 2005

¹⁷¹ Case C-55/94 Reinhard Gebhard v Consiglio dell’Ordine degli Avvocati e Procuratori di Milano (1995) ECR I-4165

member states or stable and continuous participation by the person concerned (prostitutes) in the economic life of the host Member State.

Situation is more complicated explaining that for the purposes of identifying possible restrictions related to prostitute's free movement, it's more appropriate to consider it from the services point of view.

The thing is that EU prostitutes cannot work as employed workers due to restrictions imposed by the majority of MS, but they can freely exercise their rights and pursue an intended economic activity as self-employed persons thus benefiting from broad scope of applicability of the freedom to provide services. Hence it will be demonstrated that the restrictions on free movement of workers are not absolute and there actually exists free movement of workers, provided that they are self-employed workers.¹⁷²

Free movement of employed workers is one of the key principles of the European Union. However, free movement of employed workers is also one of the most sensitive areas for EU MS. The MS have always sought to protect their national labour markets and this has been done especially neatly during the enlargement of the EU. The enlargement in 2004 was not an exception and the EU-15 MS applied their protectionist policies with regard to workers from prospective MS already since the Europe Agreements entered into force. In contrast to previous accessions, the last one was not only the biggest ever but also significant by the fact that most of the EU-15 MS decided to protect national labour markets also after accession. Protection was implemented through the Europe Agreements and Accession Treaty, by not granting free movement rights to employed workers from the new MS. It was intended that full free movement rights to workers from the new MS will be granted after lapse of a transitional period, which can last seven years. However, when restricting the free movement of workers from the EU-10 States, the MS did not pay adequate attention to the fact that workers can be split into two categories: employed workers and self-employed workers.¹⁷³

¹⁷² Spīgulis Artūrs, Freedom of establishment : Means of overcoming restrictions on free movement of employees, RGSL Working Papers No. 25, 2005

¹⁷³ *ibid*

The rights and conditions in relation to entrance and residence for persons exercising freedom to provide services are laid down in a number of directives and regulations. Possibly the most important of these is Directive 73/148/EEC, which today applies throughout the EU-27, imposing a clear obligation on EU MS to abolish any kind of restrictions put on nationals of a MS who are established or who wish to establish themselves in another MS in order to pursue activities as self-employed persons.¹⁷⁴

The contribution of Directive 73/148/EC to development of establishment can not be underestimated, since the right of entry into the host MS “...merely on production of a valid identity card or passport” was a major step forward and truly stands for abolition of restrictions on freedom to provide services. Crucially, the directive applies not only to service providers, but also to their family members.¹⁷⁵

As in the case of free movement of workers, the EU member states are free to provide national restrictions, they will face more difficulties in doing so if prostitutes are self-employed persons.

Activities as self-employed persons has the same meaning concerning both the TFEU and Europe Agreements.¹⁷⁶ The Court shifted the burden of proof on national authorities as concerns the difficulties to check whether the activity in question indeed is pursued in a self-employed capacity and not in an employment relationship. The Court also argued that any difficulties in checking the nature of activities cannot permit the assumption that an activity is disguised employment relationship and thus reject application for establishment.¹⁷⁷

In other words, the fact that a particular activity usually is carried out on the basis of employment relationship cannot serve as a valid argument for national authorities to

¹⁷⁴ Council Directive 73/148 of 21 May 1973 on the Abolition of Restrictions on Movement and Residence Within the Community for Nationals of Member States with Regard to Establishment and the Provision of Services, (1973) OJ L 172 p. 14.

¹⁷⁵ Spīgulis Artūrs, Freedom of establishment : Means of overcoming restrictions on free movement of employees, RGSL Working Papers No. 25, 2005

¹⁷⁶ Case C-268/99 Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie [2001] ECR I-8615.

¹⁷⁷ *ibid.*, para. 18.

reject application for establishment, where this activity is claimed to be performed in a self-employed capacity.¹⁷⁸

Furthermore, the Court in the case *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie* set the boundaries for assessment whether prostitution is carried out in self-employed capacity and proposed the relevant conditions as follows:

- Prostitution has to be carried out outside a relationship of subordination as concerns the choice to pursue it as an activity as well as working and remuneration conditions;
- Prostitution has to be carried out under the concerned persons own responsibility;
- Prostitution has to be performed against remuneration in full paid directly to the person concerned.¹⁷⁹

Jany undoubtedly came as a surprise to both the Court and MS because not many could imagine that such issues will have to be resolved by the supreme judicial organ of the EU.¹⁸⁰

Thus, the Court of Justice in its case law affirms that prostitution is an economic activity and may be carried out under the freedom to provide services in the EU law. By analyzing further the Court of Justice case-law on prostitution, it will be assessed what restrictions are imposed by the member states and whether they are justifiable or not.

¹⁷⁸ Spīgulis Artūrs, *Freedom of establishment : Means of overcoming restrictions on free movement of employees*, RGSL Working Papers No. 25, 2005

¹⁷⁹ Case C-268/99 *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie* [2001] ECR I-8615. para. 70

¹⁸⁰ Spīgulis Artūrs, *Freedom of establishment : Means of overcoming restrictions on free movement of employees*, RGSL Working Papers No. 25, 2005

4.2 The Court of Justice case law on prostitution

The case of Adoui & Cornuaille¹⁸¹ concerned two French women denied residence permits in Belgium on the grounds that they were (suspected of being) prostitutes, hence making the case fall under the public policy exception to free movement of workers (ex Art. 39 EC, now Art. 45) and freedom of establishment (ex Art. 43, now Art. 49). The ECJ concluded that if the Member State in question allows prostitution for its own nationals (as abolitionist Belgium arguably did – it did not adopt repressive measures against prostitution as such; it banned soliciting, incitement to debauchery, exploitation of prostitution, keeping a disorderly house and living on immoral earnings), then it cannot claim the activity is sufficiently serious to deny free movement for prostitution for nationals of other Member States.¹⁸²

This position was reaffirmed twenty years later in the similar case of Jany and Others¹⁸³ which extended this tolerance of prostitution, based on the Association Agreements, to nationals of the (then) Candidate Countries of Central and Eastern Europe, provided the self-employment in question is ‘genuine’. In this case, concerning six women of Polish and Czech nationality denied permits to stay in the Netherlands on the grounds that prostitution is not a socially acceptable form of work, the ECJ merely repeated the argument that since the Netherlands does not prohibit prostitution (determined by the ECJ to be an ‘economic activity’) for Dutch (or EU) nationals, it cannot invoke the public policy exception to prevent the free movement of (at that time) Candidate Country nationals to establish themselves as sex workers.¹⁸⁴

In 2002 another case was referred to the Court for a preliminary ruling by the national court of Netherlands and the issue at stake again was six persons - two Bulgarian, three

¹⁸¹ Joined cases 115 and 116/81 Rezguia Adoui v Belgian State and City of Liège; Dominique Cornuaille v Belgian State (1982) ECR 01665

¹⁸² Heli Askola, *European Legal Responses to Trafficking in Women* (Hart Publishing, Oxford, 2007)

¹⁸³ Case C-268/99 Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie [2001] ECR I-8615

¹⁸⁴ Heli Askola, *European Legal Responses to Trafficking in Women* (Hart Publishing, Oxford, 2007)

Polish and one Slovak, that intended to establish themselves as self-employed prostitutes. That was the Panayotova case.¹⁸⁵

The right to resort to national measures was somewhat limited by the Adoui & Cornuaille and Jany case and became even more restricted following the AG's opinion in Panayotova case, proposing that national measures have to be based on objective criteria, have to be consistent with general principles of law and fundamental rights and cannot "...adversely affect the right of establishment so that its exercise is impossible or excessively difficult" and they are acceptable on condition that their purpose is to control immigration.¹⁸⁶

The AG provided the guidelines for national measures on the entry and residence of nationals covered by the Europe Agreements who want to provide services in any of the EU Member States, namely:

- National measures have to be based on objective criteria that should be available for applicants before applying and measures should subject for review by the national courts;
- the measures should not adversely affect the right of establishment so that its exercise is impossible or excessively difficult and they are acceptable on condition that their purpose is to control immigration;
- the measures have to be consistent with the relevant fundamental rights and general principles of law that are binding for the MS concerned.¹⁸⁷

The Court's interpretation of the Europe Agreements has provoked it to apply a similar interpretation with regard to the TFEU, now extending the case law the other way round - from Europe Agreements to the TFEU.¹⁸⁸

¹⁸⁵ Case C-372/02 Lili Georgieva Panayotova and Others v Minister voor Vreemdelingenzaken en Integratie (2004)

¹⁸⁶ Opinion of Advocate General Poiares Maduro, delivered on 19 January 2004 in Case C-372/02 Lili Georgieva Panayotova and Others v Minister voor Vreemdelingenzaken en Integratie

¹⁸⁷ *ibid*

¹⁸⁸ Spīgulis Artūrs, Freedom of establishment : Means of overcoming restrictions on free movement of employees, RGSL Working Papers No. 25, 2005

According to the case law of the Court of Justice, hypothesis stated at the beginning of the research is proved to be right. If Member State allows prostitution for its own nationals, then it cannot claim that service is sufficiently serious to restrict freedom to provide this service for nationals of other Member State.

4.3 Possible restrictions and justifications

As discussed above, the legal regulation of prostitution is a domestic matter for European Union Member States. Thus they have discretion to criminalise, tolerate or regulate the sex industry, but when prostitution gains the cross-border character and the nationals of EU member states express the will to provide sexual services in another MS, the destination member state restricts the freedom, underpinning the EU law fundamental freedoms.

It is clear from the beginning that national measures that do restrict the scope of services cannot be applied in a discriminatory manner, since the right to non-discrimination is expressly provided and has direct effect.¹⁸⁹

Discrimination takes place when the nationals of other MS are treated differently from own nationals. In the Netherlands the requirement of working visas and etc, thus preventing EU nationals to enter the Netherlands are at the beginning discriminatory. The nationals of other MS do not have the opportunities to provide sexual services as the Dutch prostitutes have, where the prostitution is legal. Same concerns Italy, but imposition of national measures by Sweden does not constitute a discrimination under the EU law. Swedish prostitutes, although not criminalized

¹⁸⁹ N. Reich, S. Harbacevica, "The Stony Road to Brussels: The Many Ways of EA Nationals and Residents into Union Citizenship – and the Many Attempts to Keep Them Out", (2002), *Europarattslig Tidskrift*, Nummer 3, 2002, Argang 5, p. 424.

by law, cannot provide sexual services legally within the country as they do not have lawful buyers.

The legal ambiguity over the permitted yet undesirable work that prostitution represents is evident not only in the law but most of all in its enforcement, which in practice targets the women in prostitution even when officially directed both at customers and prostitutes and which is notorious for lack of enforcement when it comes to pimp/customer/police violence against women in prostitution. This serves to keep women in prostitution as a separate and stigmatised category of women.¹⁹⁰

The E. U. is nearly all abolitionist by declaration, with few countries adopting public regulation of prostitution and almost none prohibiting the exchange of sex and money. If we look at the laws, instead, we will see a much more varied picture with very different models, and it will be clear that some abolitionist countries really have adopted prohibitionist provisions, while others leave to prostitution more room than expected. At the policy level, more pragmatic approaches emerge, frequently at the local level, and - given the extension of the phenomenon, perhaps not surprisingly - a formal or informal regulation approach will prevail in the relative majority of the states.¹⁹¹

This phenomenon of law and practice (difference between them) is too big to be successfully stopped by the strictest laws, so the results are that indoor prostitution is generally tolerated, and so are the announcements to advertise its locations to clients. Police corruption is another well known effect.¹⁹²

EU Member States, including the three examined here, evidence a factual market trend towards the foreignerisation of women in prostitution together with a legal demarcation in the treatment of foreign and national women in prostitution.¹⁹³

¹⁹⁰ Heli Askola, *European Legal Responses to Trafficking in Women* (Hart Publishing, Oxford, 2007)

¹⁹¹ Daniela Danna, *Trafficking and prostitution of foreigners in the context of the E.U. countries' policy about prostitution*. NEWR Workshop on Trafficking, Amsterdam 25-26.4.2003, available at: http://www.childtrafficking.com/Docs/danna_03_tra_foreigners_0708.pdf

¹⁹² *ibid*

¹⁹³ Heli Askola, *European Legal Responses to Trafficking in Women* (Hart Publishing, Oxford, 2007)

To think further, what can happen to national of other MS rather than the Netherlands in Netherlands if she is granted to enter the territory? It won't be direct discrimination any more, but the local authorities, who regulate the prostitution in different local areas, must create obstacles for their freedom to provide services. They can request foreign prostitutes to take additional health checks, registration, thus impede the freedom.

Contemporary prostitution policy within the European Union has coalesced around the view that female prostitution is rarely voluntary, and often a consequence of sex trafficking.¹⁹⁴

The sweeping affirmation of the economic value of commercial sex, although in line with the principles of EU free movement law aiming at removing obstacles to free movement, has posed challenges to domestic prostitution policies, which are premised on a rather delicate balance between competing interests. Even regulationist governments that allow and even tax prostitution as work (such as the Netherlands) recognise that prostitution is not work just like any other and negotiate the boundary between 'freedom to sell sex' and the need to ensure that those who do are genuinely 'free' to do it. This is essentially recognising the dual status of many women in prostitution as both 'choosers' and 'losers'.¹⁹⁵

Abolitionist domestic policies also seek to convey an underlying idea that sexuality should not be commercialised. In addition, and quite importantly, the provisions on prostitution also aim to diminish the scope of the phenomenon, considered unwelcome even in countries where legalisation has taken place.¹⁹⁶

In most cases, when national measures are imposed on the freedom to provide sexual services, the public policy exception is invoked meaning that EU member states combat trafficking by imposing restrictions on freedom to provide sexual services. That's why there are no case law of the Court of Justice where the national restrictive measures were justified. Trafficking must not be combated on the expense of violating EU law.

¹⁹⁴ Phil Hubbard; Roger Matthews; Jane Scoular, Regulating sex work in the EU: prostitute women and the new spaces of exclusion, *Gender, Place & Culture: A Journal of Feminist Geography*, 1360-0524, Volume 15, Issue 2, 2008, Pages 137 – 152

¹⁹⁵ Heli Askola, *European Legal Responses to Trafficking in Women* (Hart Publishing, Oxford, 2007)

¹⁹⁶ *ibid*

Questioning the free will of prostitutes and restricting the growth of sex industries is in obvious tension with the logic of the Internal Market that seeks to facilitate the growth of markets. It is for this reason that the Court of Justice did not and really could not ask questions about why and how women in prostitution ended up selling sex in the first place, whether enforcing their freedom of movement for prostitution was the appropriate way of improving their situation and what broader consequences that might have for sex industries in the EU.¹⁹⁷

The Court of Justice in *Jany and Others* did emphasise the condition of a prostitute's independence from potential exploiters such as pimps and traffickers. The Court also noted that there is little consensus within European countries on prostitution but since most of them do not decidedly and firmly ban selling sex, it must be acceptable.¹⁹⁸ The Court of Justice was claiming not to take a stand on an issue on which there is little common ground between the Member States, but the logic and context of the judgments support the growth prostitution markets, without being able to rebalance the essentially domestic Member State policy concerns.¹⁹⁹

Maybe it's time something to be done concerning prostitution on the level of the EU.

4.4 Non-EU prostitutes

While the differences on prostitution policy between Member States' approaches are significant, practically all EU Member States share a commonality: the European Union have

¹⁹⁷ Heli Askola, *European Legal Responses to Trafficking in Women* (Hart Publishing, Oxford, 2007)

¹⁹⁸ Case C-268/99 *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie* [2001] ECR I-8615 Para. 57

¹⁹⁹ Heli Askola, *European Legal Responses to Trafficking in Women* (Hart Publishing, Oxford, 2007)

increasingly restricted opportunities for external migration, ie migration from outside the EU. Paradoxically though, EU Member States also need the cheap workforce provided by migrants. The exclusion of non-EU migrants is evident in the strive towards establishing the European Union as an Area of Freedom, Security and Justice, where these restrictions on certain kinds of ‘third-country nationals’ operate as the flipside of the free movement of ‘EU citizens’ within European Union.²⁰⁰

Such measures, however, go against a trend with regard to the so-called ‘3D-jobs’ (dirty, demanding and dangerous), which are increasingly performed by external migrants. Prostitution is one of these sectors: the growing expansion of the sex industries in many countries goes hand in hand with a consistent tendency towards the ‘foreignerisation’ of women in prostitution. Prostitution has of course never been a particularly homogenous phenomenon; however, the present day is characterised by a manifest (further) diversification and transnationalisation of the commercial market for sex.²⁰¹

The increasing involvement of women in prostitution outside their own countries reflects the broader structural improvements in the position of the relatively privileged women in the West who, due to socio-economic improvement, no longer enter prostitution. At the same time the global ‘supply’ of potential prostitutes is expanding due to various ‘root causes’, many of which relate to violence against women (domestic violence, sexual violence) along with the particular impact of globalisation forces (for instance economic liberalisation and restructuring).²⁰²

External migration restrictions have made migration more difficult, but have not eliminated the demand for migrant women in developed countries’ sex industries or migrants’ need to migrate. As a result, although percentages vary, it can be stated that a large proportion, or in many EU Member States, most women in prostitution in EU Member States are external migrants, either from Eastern Central Europe, the Balkans or from outside Europe altogether.²⁰³

²⁰⁰ Heli Askola, *European Legal Responses to Trafficking in Women* (Hart Publishing, Oxford, 2007)

²⁰¹ *ibid*

²⁰² *ibid*

²⁰³ M Lehti, *Trafficking in women and children in Europe* (Heuni, 2003)

Moreover, this trend towards the involvement of (external) migrants has tended to go hand in hand with exploitation that is linked not only to migration policy dynamics but also to the involvement of organised crime. Prostitution (a borderline case between the legal and illegal) has, in particular in the global setting, the capacity to create huge profits which attracts and also sustains the interest of criminal enterprises. This links with the now-famous phenomenon of trafficking in women for sexual exploitation, ie the exploitation of migrant women who have been tricked or deceived into migrating and who end up working in the sex industry under coercion or debt-bondage, often suffering severe human rights violations. Increasingly, criminal networks but also less organised middlemen are involved in arranging irregular migration opportunities, making use of the global and regional processes, which channel migrants into the informal and irregular routes in order to migrate and their capacity to navigate in the new environment by subverting migration controls.²⁰⁴

The involvement in prostitution of non-EU migrant women as well as the exploitation that has accompanied it have posed crucial challenges to domestic prostitution policies. While strictly speaking prostitution is legal in EU Member States, practically all of them also seek to repress the growth of the sex industry, considering it undesirable. This is true even of the Netherlands, where many cities have restricted the permitted number of legal brothels to the number or an area that already exist, and which have recently shut down their streetwalking zones.²⁰⁵

As an attempt to restrict the spread of sex industries, also all of the three Member States discussed in more detail above have sought to limit legal access to prostitution by foreign women (whilst introducing some provisions against trafficking-like phenomena). In the Netherlands, non-EU nationals cannot work legally in prostitution unless they have a residence permit without restrictions on working: there is no employment permit covering sex

²⁰⁴ A Aronowitz, 'Smuggling and Trafficking in Human Beings: The Phenomenon, the Markets that Drive It and the Organisations that Promote It' (2001) 9 *European Journal on Criminal Policy and Research* 163.

²⁰⁵ Heli Askola, *European Legal Responses to Trafficking in Women* (Hart Publishing, Oxford, 2007)

work and no residence permit is given if the stated purpose is to work in prostitution as a self-employed person.²⁰⁶

If prostitution is a job, there should be a way of immigrating in the country with this purpose, on an equal foot with the general provisions regarding immigration. But again public policy exception comes in play, here with the more probability to be justified.

We can shortly describe the situation for immigrants: work permits are not issued for purposes of prostitution in any of the E. U. countries. People entitled to stay in an E. U. country to work are generally allowed to engage in prostitution, but expelled if they are caught soliciting. People with other kind of permits and undocumented people are generally expelled, while tolerated only in some countries or in some situations, as the "tippelzonen" of the Netherlands. But where foreigners manage to sell sex for money, it is usually for a lack of resources in one of the rings of the chain of repression: the surveillance, the identification, the arrest, the deportation. According to the Schengen agreement, the tolerance of undocumented migrant prostitution has then come to an end.²⁰⁷

There is no legal way for non-EU women to be involved in prostitution. This contradiction is due to the general incompatibility of increasingly strict external migration rules (for instance visa or other permit requirements) with continuing migration, including but not only for prostitution, which is not considered legitimate for non-EU nationals even in the Netherlands. The options available to would-be migrants are limited in ways that open a space for abusive practices such as trafficking; at the same time the relatively weak position of external migrant women compared to EU nationals is used as an argument to justify upholding a demarcation between EU citizens and others in order to 'protect' the latter from exploitation.²⁰⁸

As things stand, EU Member States have tried to tackle prostitution as a domestic matter the external side has been dealt with solely through some attention to the problem of

²⁰⁶ Daniela Danna, Trafficking and prostitution of foreigners in the context of the E.U. countries' policy about prostitution. NEWR Workshop on Trafficking, Amsterdam 25-26.4.2003, available at: http://www.childtrafficking.com/Docs/danna_03_tra_foreigners_0708.pdf

²⁰⁷ *ibid*

²⁰⁸ Heli Askola, *European Legal Responses to Trafficking in Women* (Hart Publishing, Oxford, 2007)

trafficking in women, which is approached through more effective criminal policy against it. This approach is however not integrated with the policy choices on prostitution and the underlying migration considerations.²⁰⁹

Restrictive national measures from the EU member states on non- EU prostitutes may be deemed as appropriate and even necessary and what's of great importance, not in contrary to EU law.

²⁰⁹ Heli Askola, *European Legal Responses to Trafficking in Women* (Hart Publishing, Oxford, 2007)

5. CONCLUSIONS AND SUGGESTIONS

Conclusions

1. The EU member states fail to acknowledge that many women provide sexual services voluntarily and willingly; they are not tricked or kidnapped and forced into prostitution.
2. Different legislative models on prostitution is stipulated by the different view's of EU member states how to combat trafficking and are not aimed at regulating prostitution as such. Still, no certain legislative model seems to be more effective in combating trafficking more than others.
3. Despite the fact that regulation of prostitution and trafficking is clearly divided in the Netherlands, still regulation on trafficking is centralized and legally well formed, while the regulation of prostitution is decentralized and carried by the national municipalities which have discretion to impose different regulatory measures. As local authorities are not bound by the national law, their freedom in discretion may lead to discrimination against women from another EU member states on the grounds of nationality when enjoying the right to freedom of services.
4. The national legislation of Sweden may turn to be discriminatory if in practice women in Sweden will be able to provide sexual services while the entry of prostitutes from other member states of the EU will be prohibited. Thus, Sweden has to control its "unique" legislation on prostitution to be properly implemented in practice.
5. Italy considers trafficking and prostitution as two different phenomenas. While not regulating prostitution at all, Italy cannot impose national measures on prostitutes from another EU member states.

6. Complex and decentralized regulation of prostitution in national legislations of the EU member states creates the largest threat for the nationals of other member states the EU to provide sexual services within this country and are often discriminatory in nature.
7. Under the freedom to provide services, it's more difficult for member states to justify the imposition of national measures rather than on free movement of workers.
8. There are no Court of Justice case law on EU prostitutes and their freedom to provide services, where the Court found the national restrictive measures justifiable.
9. The public policy exception on the freedom to provide sexual services may be only justified if all the forms of prostitution are prohibited at the national level.
10. There is no legal way for non-EU women to be involved in prostitution. The public policy exception is more probable to be justified in this case.
11. If Member State allows prostitution for its own nationals, then it cannot claim that service is sufficiently serious to restrict freedom to provide this service for nationals of other Member State.

Suggestions

1. Prostitution and trafficking should be regulated and treated differently as they are two different phenomena. The meaning of national prostitution law must not be to combat trafficking.

2. The EU member states, while concentrating on combating transnational crime of trafficking, must not prevent free movement of prostitutes from another member state for this reason, if they do not prohibit prostitution for their own nationals.
3. The harmonisation of national legislative frameworks of EU member states on prostitution would greatly contribute to freedom to provide services within the EU, but it seems rather unattainable because of different moral views.
4. The EU must be more actively involved in prostitution matters not leaving the issue solely to member state's discretion. The EU must balance domestic policy's of member states, moreover that the Court of Justice has already resolved the issues related to prostitution.
5. Actions should be taken from member states of the EU to identify the real nature why the certain woman wants to provide sexual service, not automatically restrict all the prostitutes to enter the country.
6. Actions should be taken from member states of the EU who allow prostitution to protect the rights of prostitutes and guarantee that national prostitutes and prostitutes from another member states are equally protected.
7. The EU member states and EU institutions must fund studies to collect information on prostitution taking into account the possible hidden nature of this phenomena and if appropriate change the national legislation on prostitution.
8. Generally, more attention has to paid to the prostitution as on national level as on EU level.

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