



ACT's commentary on the EU strategy towards the Eradication of Trafficking in Human Beings (COM (2012) 286 final)

As an international organisation against trafficking in children for adoption, we are convinced of the crucial importance and necessity of the work of the European Union against trafficking.

Although we welcome the new EU strategy on Trafficking in Human Beings and its ambitious aim to eradicate trafficking, we identified several deficiencies in this strategy. In the following text, we would therefore wish to offer a number of recommendations and observations to improve the strategy and, in particular, to guide the Council conclusions on the strategy. This commentary focuses on a number of activities best undertaken by the EU as well as activities requiring implementation on national level. It highlights a number of issues that needs further elaboration in order for the Anti-trafficking Directive (2011/36/EU) to be implemented in accordance with a human rights-centred approach. We would especially highlight the importance of the United Nations Convention on the Rights of the Child (UNCRC) in guiding EU and Member State activities regarding preventing and combating trafficking and protecting its victims.

1. Trafficking for illegal adoption is not included in the strategy

The new Anti-trafficking Directive (2011/36/EU) contains a broader concept of what should be considered trafficking in human beings (THB) than the previous framework decision. The new definition of THB also covers additional forms of exploitation other than for the purpose of sexual exploitation or forced labour, such as the removal of organs, forced marriage or illegal adoption. It is the first time since the development of international anti-trafficking instruments in the area of criminal law that illegal adoption is explicitly mentioned as a form of THB.

In the Preamble to the EU Anti-trafficking Directive, recital 11, illegal adoption is considered as a form of THB in so far as it fulfils the constitutive elements of trafficking in human beings. Regrettably, this consideration is not elaborated in the directive itself. Also, no attention is paid to the matter of illegal adoption as a form of THB in the new strategy. As illegal adoption is mentioned in the Preamble, we think the EU is obliged to explore the link between illegal adoption and trafficking in human beings.

2. Definitions are left open

In the EU Anti-trafficking Directive, the definitions of 'illegal adoption' and 'exploitation', as one of the constitutive elements of THB, are left open. Therefore, it is unclear what is meant by illegal adoption, in what sense illegal adoption implies exploitation, and thus to what extent illegal adoption is covered by the directive.

3. Definition of illegal adoption

The lack of definition of illegal adoption in the directive is problematic for several reasons. First, adoption is regulated by EU Member States national civil law and does not fall within the competition of the EU. The definition of illegal adoption thus differs per Member State. Differing definitions form an obstacle to a common EU approach in preventing and combating THB and protecting its victims, which is contrary to the purpose of the directive. Second, an illegal adoption does not exist as such. As any adoption is only an official adoption, rather than some other form of transfer or removal, when the adoption has been approved by a judge, an adoption is always legal.

We strongly recommend the EU and its Member States to act in compliance with the UNCRC, being part of the *acquis communautaire*. The convention contains specific provisions regarding child protection, alternative child care and intercountry adoption. Particularly, we refer to articles 20 and 21 of the convention. We recommend the EU to take the stance that all adoptions arranged in violation with the UNCRC can be considered illegal.

4. Definition of exploitation

Exploitation, as one of the constitutive elements of the current definition of THB, is not strictly outlined in the directive. ‘As a minimum,’ several examples of exploitative acts are mentioned. The focus lies traditionally on exploitative acts such as the exploitation of sex and labour. However, the directive aimed at including additional forms of exploitation. The EU therefore could take the occasion that the directive offers and adopt a progressive definition of exploitation. It can be argued that in the ethics of law and of human rights exploitation can be defined as ‘making use of a person for e.g. financial or emotional gain (commodification), while violating the human rights of that person’.¹

5. Illegal adoption as exploitation

To conclude from the above, illegal adoption could be defined as an adoption arranged in violation with human, or specifically, children’s rights as laid down in the UNCRC. Exploitation could be defined as one person making use of another person for certain benefits, thereby violating the other person’s human rights. An adoption in violation of the UNCRC, for the financial benefit of the intermediaries and the emotional benefit of potential adoptive

¹ Presentation of Isabelle Lammerant, expert on adoption and children’s rights, *The right to a family: analysis of the existing legal framework*, Joint Council of Europe and European Commission Conference, *Challenges in adoption procedures in Europe: Ensuring the best interests of the child*, 30 November - 1 December 2009, Strasbourg. Retrieved 20 October 2011 from http://ec.europa.eu/justice/civil/files/brochure_conference_adoption_en.pdf. p. 56.;

- “[T]o exploit a person involves the *harmful, merely instrumental utilization* of him or his capacities, for one's own advantage or for the sake of one's own ends.” (Buchanan 1985, 87).;

- “Exploitation of persons consists in ... wrongful behavior [that violates] the moral norm of *protecting the vulnerable*.” (Goodin 1988a, 147).;

- “Common to all exploitation of one person (*B*) by another (*A*)...is that *A* makes a profit or gain by turning some characteristic of *B* to his own advantage...exploitation ... can occur in morally unsavory forms without harming the exploitee's interests and ... despite the exploitee's fully voluntary consent to the exploitative behavior...” (Feinberg 1988, 176-79).

parents, could be considered a form of exploitation. Hence, illegal adoption falls within the scope of the directive and should be included in the new strategy also when the adopted child is not subsequently exploited for e.g. sex or labour.

6. Trafficking for any purpose

We furthermore wish to draw attention to article 35 UNCRC that indicates that States must take all appropriate measures to prevent the abduction of, the sale of or **traffic in children for any purpose or in any form**. This means that, apart from identifying illegal adoption as a form of exploitation, it could also be considered that trafficking in children *for the purpose* adoption should be defined illegal, as in line with the UNCRC.

To conclude, we would once again like to congratulate the Commission for the new strategy towards the Eradication of Trafficking in Human Beings. As outlined above, a number of issues will need to be carefully elaborated so that the directive and the strategy are implemented in accordance with a human rights and child rights-centred approach. We affirm the willingness and readiness of our organisation to assist with and advise on the implementation of the strategy and the directive so that trafficking in children for any purpose or in any form will be eradicated.

For an extensive research to the matter of illegal adoption as child trafficking we would like to refer to the following Master thesis:

I. de Witte, *Illegal adoption as child trafficking: The potential of the EU Anti-trafficking Directive in protecting children and their original family from abusive intercountry adoption*, Master thesis, University of Amsterdam, May 2012. Available at:

Signatories:

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