USING THE JOINT INVESTIGATION TEAM AS A LEGAL TOOL FOR INVESTIGATING HUMAN TRAFFICKING FOR SEXUAL EXPLOITATION WITHIN THE EU

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CHAPTER I. INTRODUCTION.

Trafficking in human beings (hereinafter referred to as **"THB"**) is a serious crime, often committed by organised criminal groups and involving severe violations of fundamental human rights and exploitation of victims. As such, it is prohibited by the *Charter of Fundamental Rights of the European Union* (Art. 5.3), and defined by *the Treaty on the Functioning of the European Union* as a particularly serious form of organised crime (Art. 83), with links to immigration policy (Art. 79). Moreover, trafficking in women for sexual exploitation is considered to be one of the most profitable crimes. European citizens themselves are often part of the trafficking process, either as victim or as perpetrators. Therefore, all European countries are affected, and depending on their wealth are predominantly either countries of origin, transit countries or destination countries.

With a view to the above, trafficking in human beings is considered to be one of the main threats to the internal security of the European Union (hereinafter referred to as the **„EU"**) and the freedom of its citizens and remains among the EU's priorities for the fight against organised crime between 2014 and 2017. In particular, trafficking in women is a phenomenon that strongly affects Bulgaria, which is predominantly a country of origin for victims of trafficking, and also a transit country due to its strategic geographical location.

According to data provided by the *Group of Experts on Action against Trafficking in Human Beings of the Council of Europe* (GRETA), over the period from 2013 to 2015 Bulgaria remained mostly a country of origin for trafficking of victims to other EU member states (hereinafter referred to as **„Member State"**). Over the period in question, there was also an increase in the number of cases where Bulgaria was a country of transit or destination for victims. The GRETA report stated that Bulgarian citizens were trafficked mostly for sexual exploitation (77 per cent). The annual reports of Bulgaria's Supreme Prosecutor's Office of Cassation contained similar data.

From a judicial perspective investigation of women trafficking for sexual exploitation is extremely complex since the criminal activity investigated involves increasingly well organized groups, target vulnerable victims and generate profits that are hard to track and to confiscate. The international dimension of the crime is a source of difficulty in terms of gathering solid and admissible evidence that could be used in the national prosecutor's offices and courts involved, while the lack of cooperation between the affected states could lead to parallel investigations on national level. In addition, the need of fast and reliable exchange of information between the different national authorities in charge of investigating cross-border THB is crucial for the successful completion of the investigation works. The main challenge

toward the investigating officials is proving the entire chain of cross-border trafficking (recruitment, transportation and exploitation) committed on the territory of different Member States.

The outlined problems impose the need for a common response and the importance of all concerned to work together. Traditional mutual legal assistance (hereinafter referred to as **"MLA"**) in the outlined situations could prove to be cumbersome and time-consuming due to substantial differences in the involved legal systems. Therefore, finding a comprehensive and coordinated approach is essential to ensuring that work is not carried out in parallel. The above aims could be reached by means of Joint investigation teams (hereinafter referred to as **"JIT"**) which have proven as a very effective platform for international cooperation, ensuring the flow of information between all partners.

Eurojust action plan against trafficking in human beings for years 2012 - 2016 indicates JITs as *"...suitable and useful tools for effective investigations and prosecutions of THB cases."*. The use of JITs in THB cases has been identified as a solution for addressing some of the problems encountered in the investigation of cross-border THB cases. Many national authorities now recognise that the efficiency and effectiveness of THB investigations would be seriously impeded if only MLA requests were employed. Solutions for effective investigations of traffickers are increasingly found in the establishment of JITs, as a tool for national authorities to overcome the disadvantages of MLA and, sometimes, the lack of resources and expertise.

CHAPTER II. TRAFFICKING IN HUMAN BEINGS.

1. LEGAL FRAMEWORK

The below legislative review aims to outline the key legal instruments formulating the concept of THB and shall not focus on exhaustive enumeration of all legal acts concerning in some way human trafficking.

The international legislative anti-trafficking framework has been consolidated through the elaboration of several instruments. On international level, the *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* (hereinafter referred to as the **"Palermo Protocol"**) and at regional level the *Council of Europe Convention on Action against Trafficking in Human Beings*, adopted in Warsaw on 16th of May 2005 (hereinafter referred to as the **"Council of Europe Convention"**), are key instruments. The Council of Europe Convention is the first international instrument to explicitly admit trafficking as a violation of human rights and focuses on the protection of its victims. It

contains an evaluation mechanism, composed of the Group of experts on action against trafficking in human beings (GRETA) and the Committee of the Parties.

At EU level, *Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA* (hereinafter referred to as **"Directive 2011/36"**) is the fundamental EU legislative act addressing trafficking in human beings. The Directive establishes robust provisions on victim's protection, assistance and support, but also on prevention and prosecution of the crime. It also adopts a broader concept of what should be considered trafficking in human beings in comparison to the definition given in the preceding Framework Decision 2002/629/JHA and therefore includes additional forms of exploitation, such as trafficking for forced begging, for the exploitation of criminal activities, for the removal of organs, as well as for illegal adoption or forced marriages. The instrument also introduces tougher penalties for traffickers and poses a requirement for non-prosecution or non-application of penalties to the victim.

On national level, in Bulgaria THB was criminalized in 2002 through the adoption of a new Chapter IX "Trafficking in Human Beings" in its *Bulgarian Criminal Code* (hereinafter referred to as **"BCC"**). The said legislative amendment was introduced in order to set the Bulgarian national law in compliance with the *International Covenant on Civil and Political Rights* and the Palermo Protocol. Based on the same international acts in 2003 the *Combating Trafficking in Human Beings Act* was adopted, which created the institutional framework for developing, implementing and monitoring of the national policy and strategy on combating trafficking.

The described development of the relevant legislative framework determines THB as a comparatively new crime at international, as well as at European level. The lack of experience gained through a longer period of time may cause some discrepancies in the interpretation and application of the legal texts on national basis. However, given the existing comprehensive international regulation, we consider that the ratification by each Member State of all relevant international instruments is the first step in the mutual cooperation in combating trafficking in persons, and in particular trafficking in women, and will make the work against that phenomenon more effective, coordinated and coherent.

2. DEFINITION

The adoption and application of a universal definition of trafficking in persons at international and in particular at EU level is essential for facilitating convergence in national approaches with regard to the establishment of domestic criminal offences that would support

efficient international cooperation in investigating and prosecuting trafficking in persons cases. Due to the international nature of the crime and the usual involvement of more than one states in the pre-trial proceedings, any discrepancy between the national legal definitions of the crime or in its interpretation established in the case law of the affected states are a possible source of problems to the investigation. However, consistency in the different national concepts is not always achievable due to the specific features of manifestation of trafficking in the different countries owing to local environment and domestic social conditions.

THB is a complex phenomenon which takes various forms. It was first considered a separate crime in the international legal world around 2000. Trafficking was acknowledged as a problem not solely by national states but also as a transnational crime, often affecting at least two states in each case. With the adoption in 2001 and entry into force in 2003 of the Palermo Protocol, trafficking in human beings was given a definition, which the ratifying states were obliged to implement in their national legislations. The international definition for "*trafficking in human beings*" given in Art. 2 from the Palermo Protocol was further fully implemented in Art. 4 of the Council of Europe Convention and consequently broadened in terms of its scope by adding new hypotheses of exploitation (please see Chapter II, item 1 herein above) and specifying some attitudes relating to exercise of control over the victims. In Art. 2 of Directive 2011/36 THB is defines as: *"The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation".* Further, in Para. 3 of Art. 2, the directive enumerates the different kinds of exploitation aimed by the trafficking, namely: *"...the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs".*

In its essence, the cited descriptive definition is composed of three distinct elements:

- "The activity" – the recruitment, transportation, transfer, harbouring or receipt of persons, including the exchange or transfer of control over those persons;
- "The means" – including the threat or use of force, deception, coercion or abuse of power, or of a position of vulnerability, and
- "The purpose" – the exploitation of trafficked persons.

A criminal activity does not qualify as trafficking in human beings unless all these elements are present. In the case of child victims (persons below the age of 18), however, a crime of trafficking does not have to involve the means mentioned above.

In general this broad definition aims to cover all possible manifestations of the crime in real life and thus serves as a minimum standard suited for direct implementation in the national jurisdictions, due to which it is capable to promote unification of the national resolutions to the problems posed by THB.

Considering that Chapter I, Section IX "Trafficking in People" from the BCC was adopted to implement the Palermo Protocol in the national legislation, the definition of trafficking in persons formulated in Art. 159a of the code repeated the definition of Palermo Protocol. Consequently, by amendment to the BCC as of 2009, made in compliance with Art. 19 of the European Council Convention, a new corpus delicti of human trafficking was introduces in Art. 159в by criminalizing use of services which are object of exploitation.

In contrast to the definition given in the Palermo Protocol and Directive 2011/36, the basic corpus delicti given in Art. 159a, Para. 1 of the BCC considers that human trafficking shall be committed even if an adult victim is being trafficked upon his/her own will, regardless of whether or not means were used for exerting influence over the victims as set forth in the international instruments (such as threat, use of force, coercion, abduction, fraud, deception etc). Hence, the conclusion that according to Bulgarian criminal law an action shall be considered THB in all cases when any or all of the provided criminal activities were committed in combination with the purpose for exploitation, and irrespectively of the use of any means by the perpetrator. Yet, the abovementioned means as various ways for influencing the victim's will are stipulated as aggravating circumstances in Para. 2, items 1-6 of Art. 159a of the BCC, and refer not to giving rise to criminal liability but to the punishment to be imposed therefore. Based on the above, there should be explicitly stressed that Bulgarian law gives the possibility for bringing criminal charges to a wider circle of human traffickers, because the responsibility for the basic corpus delicti is not dependent on additional elements, such as the methods used by the perpetrator. Respectively, the scope of the victims is broader since it includes also persons who did not suffer coercion or other form of illicit influence over their will.

This approach adopted by Bulgarian legislation corresponds to a full extend to the international and EU provisions[1] regulating THB and reflects the principle of respecting the sovereignty of the national state to determine the criminal corpus delicti of the offenses in view of the national needs for effective legal regulation that are tailored to the specifics of the country.

The social practice shows that in Bulgaria there are typical groups of girls - often very young - who are exposed to the risk of becoming victims of trafficking. By dropping out of school right after finishing their secondary education, at the age of 14 and 15 years, they have few opportunities to find a job given the level of unemployment and social hardship in the country. It is mostly for financial reasons that most of these girls do not continue to high school. It is very easy to involve them in trafficking by luring them with get-rich-quick promises and without applying any coercion or force. An example from real life that demonstrate this issue is of a Bulgarian singer convicted to 12 years of imprisonment. The performer took advantage of his fame to contact his potential victims and convinced them to be trafficked in Western Europe by offering them a monthly remuneration of 5,000 Euro for working as prostitutes. Consequently, after the girls started their work as prostitutes they never received the promised remuneration which was regularly decreased with fines imposed over them by their pimps for claimed violations of their supposed work obligations.

CHAPTER III. JOINT INVESTIGATION TEAM.

1. GENERAL LEGAL FRAMEWORK

The need for tackling international crime (and cross-border THB in that matter) has called to life various legal tools, established by acts of the EU and international treaties, dating back as far as 1959 when the *European Convention on Mutual Assistance in Criminal Matters* was introduced by The Council of Europe. What first began as a formal procedure for MLA between sovereign countries later evolved into the possibility for direct gathering and exchange of information and evidence between officials from different states. One of the means through which the latter was made possible is the JIT.

On October 15th and 16th, 1999 The European Council held a special meeting in Tampere, Finland, calling for JITs to be set up *"…as a first step, to combat trafficking in drugs and human beings…"*. It wasn't long before *Council Framework Decision* of 13 June 2002 on joint investigation teams (hereinafter referred to as the "**Framework Decision**") was

[1]This approach is consistent with the provisions of Art. 5 with regard to Art.3 of the Palermo Protocol as well as with Art.18 and 19 of the European Council Convention.

adopted. After the Framework Decision, on 29 May 2000 *The Convention on Mutual Assistance in Criminal Matters* between the Member States of the European Union (hereinafter referred to as "**Convention 2000**") was signed in Brussels and entered into force on 23 August 2005. With the Framework Decision and the signing and entering into force of Convention 2000 (Art. 13, 15 and 16 in particular) Member States have legal basis for easily setting-up JITs as means to ease cross-border THB investigation related to any other Member State.

Although this report focuses on JITs between Member States the former are not something known only in the EU as ways for combating THB. There are several international treaties establishing the possibility for joint investigations between non-Member States and Member States[2]. JITs can also be set-up pursuant to bilateral agreements between states.

2. WHAT IS A JIT?

The legal definition of a JIT is given in Art. 13, it. 1 of Convention 2000. The latter reads – "*By mutual agreement, the competent authorities of two or more Member States may set up a joint investigation team for a specific purpose and a limited period, which may be extended by mutual consent, to carry out criminal investigations in one or more of the Member States setting up the team. The composition of the team shall be set out in the agreement.*". Regarding the above, the JIT itself can be defined as a team of judicial and law enforcement officials from two or more Member States which conducts criminal investigation within the borders of one or more of the involved Member States. The team is established by a written agreement between the participating Member States (hereinafter referred to as "**establishing agreement**") for a limited duration and has a specific purpose – to carry out criminal investigation in a complicated case involving cross-border criminal activity (especially cross-border THB for sexual exploitation). As a legal tool it enables close coordination between the Member States, direct gathering and exchange of information and evidence, immediate participation of domestic and foreign officials in the process of investigation and other advantages.

3. WHEN IS THE JIT AN APPROPRIATE LEGAL SOLUTION?

[2]the Agreement on Mutual Legal Assistance between the European Union and the United States of America; the Police Cooperation Convention for South-East Europe; the Second Additional Protocol to the European Convention on Mutual Legal Assistance; United Nations Convention against Transnational Organized Crime; United Nations Convention against Corruption; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, etc.

JITs are used in cross-border criminal cases of legal and factual complexity or as stated in Art. 13, it. 1, letters (a) and (b) of Convention 2000, a JIT may, in particular, be set up where *"a Member State's investigations into criminal offences require difficult and demanding investigations having links with other Member States"* and where *"a number of Member States are conducting investigations into criminal offences in which the circumstances of the case necessitate coordination, concerted actions in the Member States involved"*. These are usually cases in which the authorities of one Member State face a necessity to gather information and evidence outside of their jurisdiction, resulting in the need for MLA and a number of investigative measures to be undertaken abroad.

Because there are more than one Member States affected by the same criminal activity it is common that parallel investigations are ongoing. The identification of such parallel investigations is good grounds for beginning negotiations and eventually setting-up a JIT. By doing so the parties combine forces in tackling the same crime through joint investigative effort, have a wider view of the whole criminal activity and *ne bis in idem* is respected.

Taking into account the criminal nature of cross-border THB for sexual exploitation JITs are a convenient way of conducting a thorough and meticulous investigation. The usage of this legal tool is sometimes a necessity due to the fact that this type of crime: 1) is in most cases committed by organized crime groups whose members are highly mobile; 2) there are more than one place where the criminal activity occurs; 3) there is an unknown and constantly changing number of victims involved; 4) the victims are usually moved from one Member State to another in short periods of time; 5) the lucrative nature of this crime provide the perpetrators with good resources; 6) if coordinated and/or simultaneous actions in different Member States are not undertaken this could serve as a warning to the rest of the criminal group and thus jeopardizing future investigation against them.

4. THE ESTABLISHING AGREEMENT

As cited above, the general legal frame regulating JITs in the EU is set out in the Framework Decision and Art. 13, 15 and 16 of Convention 2000. They provide the basic conditions under which a JIT is established and operates. However, the specific terms and conditions regarding a JIT are negotiated by Member States for the purposes of a particular case and are laid down in an establishing agreement which is then signed by authorized representatives of the future parties. Since the general legal framework provides broad freedom in regard to the content of the agreement the parties are able to include what they deem appropriate for the current case at hand.

In order to facilitate the creation of JITs a model agreement has been developed by The Network of National Experts on Join Investigation Teams. It is a non-binding baseline which can be tailor-fit to each individual case. The model agreement includes clauses which are somewhat standard for any legal agreement – parties, duration, entry into force, the possibility for amendment and supplementation, it also contains special arrangements arising from the nature of the JIT – purpose of the JIT, criminal activity subject to investigation, place where the JIT will operate, JIT members, participation of Eurojust, gathering and access to information and evidence, exchange of evidence gathered prior to setting up the JIT, communication with the media, coordination and execution of certain investigative measures. The specific arrangements can also cover issues reaching beyond the process of investigation, for example the parties can negotiate a trial venue, determining the Member State which will hold the future defendants accountable for their crimes. All this provides the necessary flexibility for adapting the JIT to each particular case of cross-border THB.

The establishing agreement, as any other voluntarily concluded agreement, can be amended and/or supplemented according to the situation, making the JIT a preferable legal solution to problems that may occur during the process of investigation. Changes can refer to various aspects of the JIT – extension of its duration, composition of the JIT, adding or removing a Member State as a party, etc.

It is also worth noting that clauses of the establishing agreement should not violate or bypass national law of the party Member States. If otherwise, those clauses shall be deemed overruled by the national legislation. For example, in Bulgaria when search and seizure is conducted two controlling members of the public should be present. If the establishing agreement states that during such investigative activities only members of JIT can be present and the search and seizure is conducted in Bulgaria without the presence of two controlling members of the public evidence would be gathered in violation of Bulgarian law and therefore will be inadmissible before the court.

5. IDETIFICATION, ASSESSMENT AND NEGOTIATIONS

The negotiations and signing of the establishing agreement are preceded by a stage in which the future parties identify a common interest to cooperate through a JIT. This usually happens when law enforcement authorities of the Member States exchange information or by direct contact between judicial authorities. Let's say, for example, A. is being investigated in a Member State and in the course of the investigation information leading to ties with crimes committed by B. (in another Member State) are discovered. The first Member State would then turn to Europol, Eurojust or directly to the second Member State and ask if there are any

criminal records or procedures on her territory regarding A. and B. If the answer is positive, both Member States could be leading parallel investigations regarding the same criminal offences. It is also possible, A. and B.'s doings could be part of a larger international criminal operation. In both scenarios, a common interest for joining forces against A. and B. could be identified by the two Member States.

Once the common interest has been identified Art. 13, it. 2 of Convention 2000 states that a formal request[3] for cooperating through a JIT should be addressed from one Member State to another. This procedure is not always mandatory due to the fact that some national legislations do not require such formal request.

The next step for setting-up a JIT includes a series of meetings between the competent authorities of each Member State concerned (often with the help of Eurojust). During these meetings the future parties decide whether using the JIT is an adequate measure in view of the circumstances. In order to proceed with the setting-up the future parties have to evaluate the legal and factual complexity of the criminal activities subject to investigation, the degree of relation between the criminal activities in the Member States, the stages on which the national investigation are in (if such investigations exist), the legal provisions of each Member State's domestic law, the advantages which the JIT will have over the standard MLA in the current case and other questions. For example, even though a common interest for using a JIT has been found, if the timeframe for concluding an investigation provided by national law of one Member States is about to expire, the setting-up of the JIT will be undesirable. Or in another scenario, the cross-border criminal activity could be of no factual and legal complexity and standard MLA is therefore deemed more efficient for the case.

The negotiations on the establishing agreement include questions regarding the future work of the JIT – from place of operation, members and leaders, participation of Eurojust or other bodies to questions regarding simultaneous execution of investigative measure and common approach when contacting with the media, as well as other questions, as per item. 4 from this Chapter.

After a decision for using a JIT has been adopted and all relevant issues have been resolved the future parties proceed with the drafting and signing of the establishing agreement.

6. MEMBERS OF THE JIT

[3] The request contains information provided in Art. 14 of the European Mutual Assistance Convention and Art. 37 of the Benelux Treaty, as well as a "*...proposal for the composition of the team.*"

One of the main items in the establishing agreement regards the members of the JIT. The general provisions set out it Art. 13 of Convention 2000 state that a JIT consists of representatives of the Member State where the JIT operates and representatives of the other participating Member States (hereinafter referred to as "**seconded members**", as per Art. 13, it. 4 from Convention 2000).

Each JIT has a leader which is a representative of the competent authorities participating in criminal investigations form the Member State in which the JIT operates. If there is more than one states of operation, for example two, then two JIT leaders should be designated. The leader of the JIT acts within the limits of his/her competence under national law and is in charge of leading the investigation and supervising the other JIT members' activities. For example, the role of a JIT leader in Bulgaria can be performed by the prosecutor supervising the pre-trial proceedings.

The other members of the JIT perform the investigative measures and "…*shall carry out their tasks under the leadership…*" of the JIT leader. They are usually members of law-enforcement bodies or investigating magistrates.

Besides the representatives of the party Member States, the JIT may include other "*participants*" (as per the model agreement). These persons can, for example, be members of bodies of the EU, Eurojust members, Europol members, OLAF staff, members of non-government organizations.

7. ACTIVITIES OF THE JIT MEMBERS

Once established the JIT operates within the borders of a Member State. All investigative measures and operations are carried out in accordance with the law of the Member State of operation, as stated in Art. 13, it. 3 of Convention 2000. This means that JIT members from the Member State of operation conduct investigative measures in a legal manner no different that they usually do. As for the seconded members – if not otherwise decided by the JIT leader, they are entitled to be present during the investigative measures. This allows them to get an immediate impression of all facts and have a more complete view of the case. It is not mandatory for seconded members to be present during the investigation. It is an opportunity, a right, not an obligation. Furthermore, if a seconded member is not present during investigative measures this does not in any way affect the validity of the latter or the legitimacy of the evidence gathered. Seconded members can also be entrusted by the JIT leader to undertake investigative measures within the limits foreseen by the legislation of the Member State where the JIT operates where this has been negotiated in the establishing agreement.

The presence of seconded members can add value to the investigation. They can provide additional assistance to the members of the JIT entrusted with the execution of the investigative measures – for example provided expertise, share good practices, help with translation and communication with witnesses, share knowledge of certain facts, etc. By allowing seconded members to take an active role in the investigation the JIT provides them with the opportunity to personally gather evidence in a way most suitable for the needs of their domestic investigation and future trial. This is especially useful when interrogating witnesses because an answer given to a question by a witness can lead to a new question which can then be immediately asked by the seconded member. Such a situation would be hard to imagine if the interrogation was conducted through traditional MLA.

Convention 2000 covers two other important issues related to the work of the JIT – the criminal and civil liability of seconded members. In accordance with Art. 15, the latter "*...shall be regarded as officials of the Member State of operation with respect of offences committed against them or by them.*" – for example, if seconded member A. commits murder in Bulgaria he/she will be liable for aggravated murder. In regard to the civil liability of seconded members Art. 16 states that where "*officials of a Member State are operating in another Member State, the first Member State shall be liable for any damage caused by them during their operations, in accordance with the law of the Member State in whose territory they are operating.*", meaning that Member State A. shall be liable for the actions of seconded member A. on the territory of Member State B in accordance with the law of the latter. As for participants in a JIT which are not Member State officials, they are not granted the rights under Art. 13 of Convention 2000 to be present during or execute investigative measures (as explicitly stated in Art. 13, it. 12, sentence last of Convention 2000). They usually add value to the JIT by facilitating coordination between its members and expertise.

8. EVIDENCE AND INFORMATION

As an international legal tool for cooperation the JIT enables direct gathering and exchange of information and evidence. Evidence gathered in accordance with the law of the Member State of operation can be directly used in future criminal trials in any of the party Member States without the need for additional legalization or other MLA, as per Art. 13, it. 10, letter "a)" of Convention 2000. For example, if evidence have been obtained through a legally executed search and seizure in Member State A. these evidence can be directly used in a criminal trial held in Member State B.

Evidence gathered within ongoing parallel investigations prior to the setting up of the JIT can be used by party Members States in a criminal trial if an explicit clause for doing so is incorporated in the establishing agreement.

If a necessity for conducting investigative measures outside of the Member State of operation occurs, the JIT has several options. If the measures should be undertaken in a Member State participating in the JIT, members seconded to the JIT by that Member State may request their own competent authorities to undertake those measures, as per Art. 13, it. 7 of Convention 2000. Evidence gathered by these national authorities are deemed gathered by the JIT and the above applies to them as well. If the investigative measures should be undertaken in a third state then members of the JIT have to use the standard procedures for MLA, as per Art. 13, it. 8 of Convention 2000. In the latter case the establishing agreement should state that evidence gathered through MLA by one party Member State can be used by the other party Member State/s.

Another important issue concerning evidence is their disclosure. Different national laws prescribe different disclosure regulationswhich should be taken into account when preparing a common investigation strategy.

CHAPTER IV. PROBLEMS IN INVESTIGATION OF THB FOR SEXUAL EXPLOITATION THAT COULD BE SOLVED WITH A JIT.

Among the possible difficulties that may arise with regard to investigation of THB for sexual exploitation are issues like difficulty to obtain victims' testimony, oral evidence not corroborated by other evidence, problematic judicial cooperation, lack of resources, identification of the cases and victims, high coordination and communication between criminal accomplices, mobility of the criminal activity, problems with funding of cross-border investigation, etc.

1. COMPLYING WITH THE PRINCIPLE OF "NE BIS IN IDEM"

One of the most frequent problems concerning investigation of cross-border criminal activity is **complying with the principle of *"ne bis in idem"***. The principle has been proclaimed in Art. 50 of the *Charter of Fundamental Rights of the European Union* and is binding to all Member States. According to the principle each human being is entitled to the right *"...not to be tried or punished twice in criminal proceedings for the same criminal offence"*. The first step to avoiding a situation of parallel criminal proceedings in different Member States against the same person in respect of the same facts is communication between the affected Member States, as well as coordination and negotiations concerning the progress of existing criminal proceedings. Therefore, the JIT may serve as an effective tool

for respecting this principle. The organization of coordination meetings preceding setting-up of a JIT proved to be a key for clarifying the issues and finding a common understanding on how to best overcome this obstacle. Moreover, Eurojust can be involved to provide advice as to which member state would be in a better position to prosecute.

2. EVIDENCE RELATED PROBLEMS

Another essential obstacle arising in the course of investigating cross-border THB continues to be gathering and admissibility of evidence, in particular evidence collected from the victims of trafficking. Victims' testimony provides crucial evidence in any investigation of human trafficking and is relied upon heavily in the criminal proceedings. In practice, identification and location of victims are reported as posing difficulties during the investigation, as victims usually fear for their security or the security of their families or do not trust the investigating authorities. In addition most THB victims are highly traumatised. This situation worsens when victims are brought back in their home countries, because an additional jurisdiction needs to be involved in obtaining their testimony. On the other hand, traditional MLA amongst source, transit and destination countries is usually time consuming and often problematic, mainly due to different admissibility requirements in national legislations. Other evidence problems may originate from different provisions on disclosure of evidence, especially when it comes to classified information, on the possibility for police and investigating officers to provide oral statements in court.

The analysis of the case work indicates that the use of cross-border special investigative techniques, such as intercept material, in general seems to be recurrently posing a problem. The difference in legislation in relation to wiretapping measures was identified by Eurojust as a hindrance in a particular case involving Bulgaria, the legal system of which provides that wiretapping measures can only be conducted for a maximum period of six months which, in that case, could not accommodate the joint investigations.

3. IDENTIFICATION OF THB CASES AND VICTIMS

One of the main difficulties encountered in the investigation of THB is the initial identification of cases and victims. The importance of identifying victims has also been recognised in the *Strategic Project on Eurojust's Action Plan against THB,* where it is the first of five identified priorities. Traffickers are frequently prosecuted for less serious crimes, such as procuring or facilitating illegal immigration, rather than for THB. This situation is partly due to the fact that THB consists of many specific elements that can individually be prosecuted as stand-alone crimes and partly due to a lack of special knowledge and experience among investigators, prosecutors and judges or misconceptions of the

phenomenon. It is also due to an insufficient number of investigators and scarce use of intelligence-based investigation. As a result, the THB indicators frequently remain undiscovered.

Both the *modus operandi* of traffickers and the profile of traffickers and victims have changed. The perpetrators use a new tactic: instead of abusing the victims, locking them up and taking their IDs and all the profits generated by the victims, they seek a more "balanced arrangement", sometimes resulting in the victims consenting to deliver sex services in return for some limited benefits. A new form of exploitation has also developed recently in which the victims are involved in the profits of their own exploitation.

4. KNOWLEDGE AND EXPERIENCE

Here we would like to mention the problems and possible solutions related to the lack of experience or specialised knowledge of authorities involved in investigations of THB. As is the case with other types of criminality, THB cases often go undetected or unreported. Therefore, the real dimension of the problem remains unknown, possibly due to denial of the problem on the level of society. As a consequence, lack of proper knowledge might result in misinterpretation of concrete elements of THB, including the *modus operandi* of traffickers and the recognition of a person as THB victim. Failing to achieve the right focus may occur on all levels, from law enforcement to judiciary.

If the competent authorities cannot recognise a person asking for help as a victim of THB, the victim may even be accused of committing a crime (e.g. as an illegal immigrant), which will inevitably weaken trust in law enforcement agencies. As a consequence, more cases go unreported and victims show less willingness to cooperate.

Another problem is the lack of sufficient human resources. Often States have very few or only one dedicated investigative team responsible for THB that, in addition to its primary role as an investigative force, must also provide tactical advice to other non-specialised units. The question, however, is whether or not such people are available to support others and share their expertise. In addition, units or departments responsible for organised crime in general also often must handle THB cases.

5. SOLUTION

As a solution for the above mentioned problems in THB cases is the use of JITs. The analysis of casework shows that the involvement of Eurojust (and Europol) in THB cases brings added value to investigations and prosecutions. Setting-up a JIT facilitates the exchange of experience and best practices of the involved Member States, provides additional funding for the cross-border activities and interaction. Exchange of information leads to better

identification of cases and victims and gathering evidence directly in the Member State of operation, as well as in the Member State of origin.

CHAPTER V. PRACTICAL CASE.

All of the above can be illustrated with the following practical case of THB aimed at sexual exploitation of women.

In the summer of the year 2015 a young girl from Bulgaria entered one of Berlin's police stations claiming that she was deprived of her right of free movement by a man from Bulgaria and that her ID documents were also taken by that man (hereinafter referred to as "**A.**"). As soon as the police officers saw the girl they immediately began questioning trying to gather information about the circumstances regarding her claims. It was ascertained that she had been trafficked from Bulgaria to Germany along with several other girls by A. They were exploited by the latter as prostitutes on the streets of Berlin and were being held in different apartments.

Based on the above, an investigation was initiated. During the process the German authorities began wiretapping A.'s phone and discovered that he regularly spoke with or referred to a woman (hereinafter referred to as "**B.**"). B. was known to the German authorities as a brothels and sex-cinemas owner in Berlin. As a result of the information received via the wiretapping a suspicion arose that A. and B. were running joint criminal activity and that A. was head of the organization. Since it was discovered that both A. and B. were Bulgarian citizen an inquiry regarding their criminal status was sent to Bulgaria. The Bulgarian authorities answered that only B. was a suspect in an ongoing investigation for trafficking in women for purposes of sexual exploitation.

Due to the findings and information gathered a common interest for cross-border cooperation was indentified between Germany and Bulgaria. This resulted in a coordination meeting held in Sofia, Bulgaria. During the meeting the participants exchanged information on the progress of the two parallel investigations, on the evidences gathered and came to the conclusion that a joint investigation team should be set-up for the purpose of mutual investigation. It was also decided that Eurojust would be part of the envisaged JIT. The establishing agreement of the JIT itself was signed on a second meeting held in Eurojust headquarters in Hague, the Netherlands.

Due to the circumstances several specific conditions were included in the establishing agreement for the JIT, as follows:

- The court trial against the future accused perpetrators would be held in Germany;

- Exchange of evidence and other information within the JIT could also be done via electronic means, including e-mail;
- The costs for translation of all gathered evidence and documents for the purpose of the trial would be at the German side's expense;
- Execution of simultaneous search and seizure activities and questioning of witnesses in both countries in one action day;
- Secondment of JIT members during the action day.

As a next step in the cooperation the German authorities sent to their Bulgarian colleagues a detailed questionnaire containing questions which among other things aimed at determining the victims' social background, living conditions and incomes in Bulgaria as a possible reason driving them to prostitution in Germany.

In the process of wiretapping A. in Bulgaria it was found that A. had three more accomplices in trafficking the women to Germany and wiretapping of their telephone conversations was conducted.

An action plan for the contemplated search and seizure activities was prepared on a third meeting in Berlin, Germany. On the 24th of October 2016 the parties proceeded with the realization of the plan simultaneously in Bulgaria and Germany. In Germany the brothels and apartments accommodated by the prostituting girls were searched with the participation of two seconded members of the JIT from Bulgaria. Whereas, in Bulgaria the search and seizure activities took place in the premises of A. and his three accomplices. On the same action day A. and the other three suspects were constituted as accused parties in the preliminary proceedings in Bulgaria, as well as all victims located in Bulgaria were summoned and interrogated. This simultaneous execution of a large number of investigative activities was aimed to surprise the suspects, prevent hiding of evidences and information leak. As a result of the searches in Bulgaria gold jewels and bank-notes of Euro and Bulgarian leva were seized which could serve as evidences for charges in money laundering.

After the end of the investigative works in Bulgaria a team of JIT members from the German side visited the country and were given access to the case file in order to copy all necessary information. The four accused persons were transferred to Germany where the trial venue was agreed. Due to the effective joint cooperation between the JIT members sufficient evidence was collected and submitted to the German court proving the guilt of A. and the other defendants. As a result they were sentenced to jail.

With a view to this case we would like to draw your attention to certain challenges identified in the process of the joint investigation.

On the first place, differences in the substantive laws of the two member states regulating the concept of trafficking led to requirement from German side for collecting of evidence regarding victims' social background and financial status. Providing of pictures of the victims' houses and living conditions were required, as well as a detailed questioning of the victims about the above circumstances. This approach is not used in Bulgaria due to the fact that according to the BCC the victim's consent is irrelevant for the criminal liability of the perpetrator (please see Chapter II, it. 2).

Second - a problem concerning the special intelligence devices arose during the pre-trial procedure. In particular, special intelligence devices in the form of wiretapping were used in both Member States with differences in the two national procedures. While German legislation allows preparation and enclosing of the recorded wiretapping to the file case within few days, the *Bulgarian Special Intelligence Devices Act* provides for a long procedure which could take up to six or more months for preparation of the evidence. Due to the long term stipulated in Bulgarian law there was a risk for not presenting the information obtained through wiretapping in Bulgaria as evidence before the German court.

Third - during the trial against A. and his accomplices the German court summoned the Bulgarian investigating magistrate to appear before the court and testify as a witness. The requested appearance before court was declined by the Bulgarian judicial authorities due to the fact that by virtue of Art. 118, Para. 1 of the Bulgarian Criminal Procedure Code investigating officials which have conducted investigation on a particular case are not allowed to testify as witnesses for facts regarding the latter. With a view to the foregoing, in future cases it would be recommendable for the parties to clarify and settle such legislative discrepancies between national regulations in the initial stage of their negotiations. In its practice Eurojust reported a similar problem concerning Bulgaria which was resolved by adding a special clause to the JIT agreement saying that even though persons involved in the conduct of the investigation (i.e. police officers and prosecutors) would be prevented from giving oral evidence before a court in Bulgaria, they would be entitled to give evidence before a court in the other Member State that was part in the JIT.

As a conclusion, the added value of the above JIT for the investigation could be summarized as follows: 1) Eurojust financial support for the investigation proved to be of great importance. The provided funding facilitated the holding of work meetings between JIT members, preparation of cross-match and analytical reports, secondment of JIT members

during the action day, translation of significant quantities of evidential data (including telephone intercept materials and testimonies of victims and witnesses); 2) The JIT provided the parties with the opportunity to establish close contacts between themselves which enabled good communication, building up an effective joint investigative strategy and efficiency of the operational activities in both countries. The good operational action plan showed its result in the simultaneous realization of the search and seizure activities and interrogation of the victims which were completed in one day in Bulgaria and Germany. As a result exchange of information between the suspects had been avoided, as well as the possibility some of the victims to warn the suspects about the ongoing investigation which could have resulted in hiding of essential evidence.

CHPTER VI. CONCLUSION.

In the light of the progress of MLA at EU level the JIT constitutes a necessary next step in developing international cooperation tailored as a counter force against emerging organized crime. Following one of its main goals to ensure "*...an area of freedom, security and justice...*" the EU and its Member States are to develop and use legal tools for cross-border cooperation corresponding to the constantly developing and evolving ways of commiting THB for sexual exploitation. Close cooperation between official authorities and fast exchange of information and evidence has proven to be essential when dealing with such criminal activity. Not only does the JIT provide all of the latter but also the ability to build and promote mutual trust between national authorities, thus facilitating the access to justice.

The traditional MLA tools proved to be too formal with regard to the means of communication used, compared to the face-to-face meetings and electronic exchange of information and evidence provided by the JITs. Moreover, the traditional MLA tools do not give solution to the material problems arising in the process of cooperation, such as funding of translation of documents. In contrast, setting up a JIT with the participation of Eurojust gives the parties the opportunity to apply for and receive funding for their travel and accommodation expenses, translation of evidence and provision of special equipment. However, funding granted within a JIT does not cover costs for storing of seized tangible evidence, which is a problem that could be thought about in future. In the practice of Bulgarian investigating magistrates this proved to be a problem in cases when evidence was seized and stored in Bulgaria upon the request of another JIT member.

Having in mind everything said above, JITs could be assessed as a successful and flexible solution to the problems posed by complex investigations with multinational dimensions such as THB for sexual exploitation.