



**EUROPOL JOINT SUPERVISORY BODY**

# **VICTIMS OF TRAFFICKING IN HUMAN BEINGS**

**a data protection perspective**





## EXECUTIVE SUMMARY

Countering trafficking in human beings and the protection of victims of this crime has high priority in the European Union. The policies and legal instruments of the European Union give a central role to the protection of victims.

A very important aspect of the fight against trafficking in human beings is the processing of data by law enforcement authorities and their responsibilities for this processing. The Europol Joint Supervisory Body experienced that on national and on international level more attention and harmonisation is needed for data processing activities by all competent authorities - police, prosecutors and investigative judges - involved in the fight against trafficking in human beings.

The victim centred approach of the European Union forces to invest in accurate data processing since the protection of these victims is directly linked to this processing. This report explores the synergy between the responsibility for the law enforcement process and the data protection responsibility for data processing. Specific conditions are introduced that will assist these authorities which according to the national law will be accountable and responsible for the processing of data on persons who - as victim of trafficking in human beings - need to be protected. These conditions should be widely promoted and implemented and the use of it should be subject of control.

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# Victims of Trafficking in human beings, a data protection perspective

## Introduction

Trafficking in human beings (THB) is a gruesome crime trampling on fundamental rights of its victims. According to the UN definition of THB<sup>i</sup>, terms such as *threat, use of force, exploitation, slavery or the removal of organs* all highlight the suffering of THB victims. The extent of such suffering and its subsequent impact cannot be ignored.

A specific EU strategy<sup>ii</sup> has been established to eradicate THB and it is one of the crimes listed in the Council conclusions on setting the EU's priorities for the fight against organised crime between 2011 and 2013 and between 2014 and 2017<sup>iii</sup>.

Furthermore, an EU Anti-Trafficking Coordinator was appointed in March 2011, responsible for improving coordination and coherence among EU institutions, EU agencies, Member States and international actors and developing existing and new EU policies to address trafficking in human beings. The EU Anti-Trafficking Coordinator also monitors the implementation of EU strategy and provides overall strategic policy orientation for the EU's external policy in this field.

Activities to eradicate and fight THB are **victim-centred**. This approach has consequences for the law enforcement activities and the related data processing activities of all actors in the law enforcement chain. In view of the international character of this crime, European Union law enforcement agencies such as Europol and Eurojust are involved in fighting THB. Since the data processing activities of these agencies are closely linked to the processing activities on national level and in view of the protective measures and rights linked to the status of victim, it is important that data on persons that are to be regarded as victim of THB are actually processed as such.

Europol and Eurojust process and analyse personal data transmitted by law enforcement authorities of the EU Member States and by third parties. Data processing by these agencies not only support the activities of national law enforcement authorities, it gives a helicopter view on how these national authorities process personal data when fighting against THB.

According to Europol's statistics<sup>iv</sup> on the analytical work file it operates on THB over the past 5 years it processes personal data on

- 1.531 males
  - 5.869 females
  - 1.411 minors,
- all being victim of THB<sup>v</sup>.

In this analytical work file data are collected from 25 of the 28 Member States, from three associated third States and Eurojust and analysed. Based on Europol's analysing activities, various

intelligence notifications, strategic reports and analysis reports in specific investigations are produced.

Already since October 1998, the independent data protection supervisor of Europol, the Europol Joint Supervisory Body composed of representatives of the independent national data protection supervisors, monitors and supervises the processing of personal data by Europol.

On various occasions between 2007 and 2014, JSB inspections of Europol's data processing activities and the experiences of its members with the data processing on national level demonstrated the need to provide more awareness and guidance for law enforcement authorities when processing data on victims in relation to THB.

Data processing activities of law enforcement authorities are directly related to the legal task they have to perform. When assessing these data processing activities it will be necessary to have a comprehensive overview of the legal aspects relating to THB and the fight against it. This report presents an overview of the most important European Union and other international legal instruments in this field.

This assessment will be used to formulate guidelines for law enforcement authorities, national data protection supervisors and the supervisors in charge of supervising data processing in European Union and other international law enforcement organisations. These guidelines should stimulate a harmonised approach when qualifying the role of women and other victims in THB.

## **The obligation to protect victims of THB**

Protecting victims of THB is generally recognised as of such great importance that it is specifically mentioned in a wide variety of legal and policy documents and other publications. Within the European Union, many activities and instruments<sup>vi</sup> are introduced to come to a comprehensive and integrated approach on preventing and combating THB and to protect its victims. Without pretending to mention all measures taken or proposed, the following instruments are of great importance.

The Internal Security Strategy for the European Union: "Towards a European Security Model" adopted by the Justice and Home Affairs Council at its meeting on 25 and 26 February 2010, and approved by the European Council on 25 and 26 March 2010<sup>vii</sup>. mentions as important principle: "the **protection** of all citizens, **especially the most vulnerable**, with the **focus on victims of crimes such as trafficking in human beings** or gender violence, including victims of terrorism who also need special attention, support and social recognition."

Important milestones are the already mentioned EU strategy and the adoption of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims<sup>viii</sup>, that should be fully transposed by the Member States by 6 April 2013.

Both instruments put emphasis on the position of the victims and the need to protect them. This is highlighted in the preamble of Directive 2011/36/EU:

*Preamble 14*

*Victims of trafficking in human beings should, in accordance with the basic principles of the legal systems of the relevant Member States, be protected from prosecution or punishment for criminal activities such as the use of false documents, or offences under legislation on prostitution or immigration, that they have been compelled to commit as a direct consequence of being subject to trafficking. **The aim of such protection is to safeguard the human rights of victims, to avoid further victimisation** and to encourage them to act as witnesses in criminal proceedings against the perpetrators. This safeguard should not exclude prosecution or punishment for offences that a person has voluntarily committed or participated in.*

*Preamble 18*

*It is necessary for victims of trafficking in human beings to be able to exercise their rights effectively. Therefore assistance and support should be available to them before, during and for an appropriate time after criminal proceedings. Member States should provide for resources to support victim assistance, support and protection*

*A person should be provided with assistance and support **as soon as there is a reasonable-grounds indication for believing that he or she might have been trafficked** and irrespective of his or her willingness to act as a witness*

*Preamble 19*

*In addition, victims of trafficking in human beings should be given access without delay to legal counselling and, in accordance with the role of victims in the relevant justice systems, to legal representation, including for the purpose of claiming compensation.*

*Preamble 20*

*Victims of trafficking who have already suffered the abuse and degrading treatment which trafficking commonly entails, such as sexual exploitation, sexual abuse, rape, slavery-like practices or the removal of organs, **should be protected from secondary victimisation and further trauma during the criminal proceedings.***

*To this end victims of trafficking should during criminal investigations and proceedings receive treatment that is appropriate to their individual needs.*

Directive 2011/36/EU obliges Member States to take specific measures and activities regarding the protection of victims:

*Article 11*

*1. Member States shall take the necessary measures to ensure that assistance and support are provided to victims before, during and for an appropriate period of time after the conclusion of criminal proceedings in order to enable them to exercise the rights set out in Framework Decision 2001/220/JHA, and in this Directive.*

*2. Member States shall take the necessary measures to ensure that a person is provided with assistance and support **as soon as the competent authorities have a reasonable-grounds indication for believing that the person might have been subjected** to any of the offences referred to in Articles 2 and 3.*

*4. Member States shall take the necessary measures to establish **appropriate mechanisms aimed at the early identification of, assistance to and support for victims**, in cooperation with relevant support organisations.*

The position of victims of crimes in general is also subject of EU legislation.

Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime<sup>ix</sup>.

A Communication on the EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016 mentions that:

*Identifying, protecting and assisting victims of trafficking is one of the five priorities of the EU.*

It furthermore emphasises in point 2.1 that:

*It is crucial to identify potential victims, so that anyone who has dealings with a victim of human trafficking can best attend to the "five broad needs of victims", respect and recognition, assistance, protection, access to justice and compensation.*

In October 2011, Europol, Eurojust and other Justice and Home Affairs EU Agencies signed on the occasion of the 5th EU Anti-Trafficking Day, a Joint Statement<sup>x</sup> to address THB in a coordinated, coherent and comprehensive manner. In this joint statement, the agencies call for:

- a more effective protection of victims in compliance with fundamental rights standards,*
- particular attention should be paid to the protection of rights and adequate treatment of vulnerable groups of victims of THB,*
- committing to ensure that differences in practice and tradition will not jeopardise or prejudice the rights of victims of trafficking.*

In October 2012, Eurojust adopted a report on a Strategic project on Eurojust's action against THB of October 2012.<sup>xi</sup>

This report highlights the main problems encountered by the national authorities in prosecuting THB and presents solutions for addressing these difficulties.

This report mentions that "*One of the main difficulties encountered in the investigation and prosecution of THB is the initial identification of cases and victims*".

This conclusion reveals nothing new. In 2005, a report of Anti-Slavery International<sup>xii</sup>, Protocol for Identification and Assistance to Trafficked Persons and training kit already mentions that

*One of the key problems remaining is the lack of identification of trafficked persons as such.*

The Eurojust report presents several solutions regarding the position of victims. They include:

- protection and support of victims should always be prioritised, also in view of securing their testimony. An environment where victims feel secure to testify is needed.*
- Victims should not be prosecuted or have penalties imposed upon them for minor offences (e.g. use of fake identity, pick pocketing) that they may have been compelled to commit while being trafficked.*
- Clear and simple procedures should be implemented to ensure that any suspected THB case is followed up in a professional and structured fashion to reduce the risk that the identification of victims is neglected.*

Apart from the European Union initiatives, many other initiatives and instruments are developed on a world wide scale. For this report two European instruments are of great importance.

The first is the Council of Europe Convention on Action against Trafficking in Human Beings<sup>xiii</sup>, that (also) aims to protect the human rights of the victims of trafficking, to design a comprehensive framework for the protection and assistance of victims and witnesses, while guaranteeing gender equality, as well as to ensure effective investigation and prosecution<sup>xiv</sup>.

According to Article 10 of this convention dealing with the identification of victims,

*each Party shall provide its competent authorities with persons who are trained and qualified in preventing and combating trafficking in human beings, in identifying and helping victims, including children, and shall ensure that the different authorities collaborate with each other as well as with relevant support organisations, so that victims can be identified in a procedure duly taking into account the special situation of women and child victims and, in appropriate cases, issued with residence permits under the conditions provided for in Article 14 of the present Convention.*

Article 11 of the convention dealing with the protection of private life obliges that:

*Each Party shall protect the private life and identity of victims. Personal data regarding them shall be stored and used in conformity with the conditions provided for by the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108).*

Secondly, the Council of Europe Convention on preventing and combating violence against women and domestic violence<sup>xv</sup>, applies to all forms of violence against women, including domestic violence, which affects women disproportionately.

This convention describes "violence against women" as:

*a "violence against women" is understood as a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life;*

and describes victims as

*"victim" shall mean any natural person who is subject to the conduct specified in points a and b;*

What cannot be missed in this overview is of course the **view of the victims** themselves. In a Guide of Trafficking of Women<sup>xvi</sup>, they state: "*We wish to draw attention to the **negative consequences which can arise from the mis-identification of a victim**, as in these circumstances the person can be detained or deported.*"

However for all of these activities, it is the implementation of all policies and legal instruments that matters.

## Focussing on law enforcement and data processing

As already mentioned, there are many initiatives, legislative actions and awareness activities.

The most recent awareness activities have a focus on specific aspects of THB. Guidelines for consular Services and Border Guards<sup>xvii</sup>, the Identification of victims of trafficking in human beings in international protection and forced return procedures<sup>xviii</sup>, the Protocol for Identification and assistance and training kit from Anti-Slavery International<sup>xix</sup> and the Anti-human trafficking manual for criminal justice practitioners of the United Nations Office on Drugs and Crime<sup>xx</sup>, these are just some examples of what is already available. The most recent initiative is the adoption by the Council of the European Union of a Handbook on trafficking in human beings - indicators for investigating police forces.<sup>xxi</sup>

One may deduct from all the studies made, that the initial information leading to a possible suspicion of THB or a possible victim may come from various sources. Labour-inspection services, healthcare workers, social workers, embassies and consulates, NGO's, these are just some examples of the many sources of information. All these persons or organisations may report to a law enforcement authority about (possible) victims of THB. Depending on the situation it may also be the law enforcement authority that has the first contact with a person.

This report will not cover all activities (awareness/indicators, guides) directed to or developed by all possibly involved persons or organisations. This report is limited to the data processing activities of law enforcement authorities following these signals or following certain law enforcement activities.

## THB difficult to detect and to investigate.

THB crimes are difficult crimes to detect and to investigate. The Eurojust report on a Strategic project on Eurojust's action against THB<sup>xxii</sup> presents a clear overview of difficulties encountered in identifying THB cases and problems in identifying victims. For example, the report mentions that changing *modus operandi* might lead to situations in which it seems that a person consents and even profit from the situation they are forced in (collusion-control).

It should however be highlighted that Article 2 (4) of Directive 2011/36/EU<sup>xxiii</sup> states that:

*The consent of a victim of trafficking in human beings to the exploitation, whether intended or actual, shall be irrelevant where any of the means set forth in paragraph 1 has been used.*

The means referred to in this paragraph refer to intentional acts used with the purpose to exploit a person such as threats.

The Eurojust report further concludes that:

*Clear and simple procedures should be implemented to ensure that any suspected THB case is followed up in a professional and structured fashion to reduce the risk that the identification of victims is neglected.*

In this respect, the report also mentions that:

*Victims might come to the attention of national authorities not as victims, but rather as offenders, as they could be forced to participate in illegal acts.*

When a victim of THB commits minor offences that they may have been compelled to commit while being trafficked, the Eurojust report suggest that:

*these victims should not be prosecuted or have penalties imposed upon.*

This is in line with Article 8 of Directive 2011/36/EU, indicating that competent national authorities should be entitled not to prosecute or impose penalties on

*victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 2.*

THB can be described as an "Octopus". The main body presenting the main elements of the crime: coercion, threats, deceit and exploitation, the tentacles of the Octopus presenting the various forms of exploitation and the facilitation of THB coming to the attention of law enforcement authorities such as, promotion of prostitution, labour, crimes to be committed by victims such as pick pocketing, falsifying of documents and illegal immigration. In practice, it will not always be possible to directly recognise THB even when it takes place in front of you.

Not detecting THB or only focussing on the tentacles of the Octopus, might prevent law enforcement authorities from detecting victims or even denying a victim status and thus depriving this person from protective measures, help and rights linked to the victim status.

Eurojust's report on a Strategic project on Eurojust's action against THB describes this as follows:

*Traffickers are frequently prosecuted for less serious crimes, such as procuring or facilitating illegal immigration, rather than for THB crimes. 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 knowledge, awareness 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 neglected or simply undiscovered.***

The Europol Knowledge Product on THB in the European Union<sup>xxiv</sup>, describes some situations making it difficult to detect victims of sexual exploitation:

*Victims are moved in and around the European Union, both across borders and internally, and are exploited in all environments. The active rotation of women forced into prostitution is aimed not only at maximising the profit by supplying new "faces" to clients and by exploring new markets, but also at avoiding victims establishing relationships and, consequently, avoiding law enforcement detection.*

Europol's report also notes an increasing proportion of female offenders involved in THB for sexual exploitation: women controlling victims and organising business operations. Their role is specific in the modus operandi of Nigerian sponsored trafficking.

## Countering Trafficking in Human Beings: how data processing and data protection can play a role

The right of protection of personal data is enshrined in Article 8 of the Charter of Fundamental Rights of the European Union. Fundamental data protection principles are codified in many European Union and European legislative instruments<sup>xxv</sup> and national laws.

One of these principles<sup>xxvi</sup> plays a very important role in relation to the early recognition of victims of THB: Personal data processed by police and judicial authorities must always be

**adequate**, relevant and not excessive in relation to the purposes for which they are processed **and accurate**.

Being a fundamental data protection principle, the concept of adequacy and accuracy of data is - in general - also an essential element of lawful, effective and accountable activities of all participants in the law enforcement chain. Proper implementation of this principle ensures protection for those that need protection and at the same time contributes to effective law enforcement.

The Handbook on Performance Indicators for Counter-Trafficking Projects of the International Organisation for Migration<sup>xxvii</sup> notes in this respect that:

*Accuracy and truthfulness of data are equally important aspects of data quality as they may have an impact on the services rendered to victims of trafficking*

As already mentioned, the objective of this report is to develop and stimulate a harmonised approach when qualifying the role of women in THB. In view of the complexity of this crime and the need to protect victims, it is necessary to further explore how this principle of adequacy and accuracy should be applied in law enforcement data processing activities when fighting THB.

Data processing activities by law enforcement authorities may have a great impact on citizens and their rights. Indicating that a data subject is a victim or a suspect is very relevant for the investigation and subsequent judicial proceedings. In view of the obligations to protect victims of THB and to safeguard the various rights for these victims, the identification of victims of THB is essential. It is also relevant for the implementation of different data protection obligations, such as the right to information, the exercise of the right of access, the storage periods and the periodical reviews. In view of the vulnerable position of victims, specific protective measures to limit the access to these data may be needed<sup>xxviii</sup>.

When developing a harmonised approach for identifying victims and subsequent processing data on victims, it is necessary to recognise the wide variety of exploitation taking place.<sup>xxix</sup>

## Data processing should be adequate

The term "adequate" indicates that data (to be) processed should be sufficient to fulfil the purpose of processing. It is an element of assessing whether a certain category of data should be processed in order to fulfil a certain purpose.

Since the detection of victims is a crucial element of the fight against THB, identifying victims and processing of personal data on these victims may be data regarded as adequate, not only for the operational purpose but also for ensuring that these victims by being recognised as such may profit of the safeguards they are entitled upon.

The principle of adequacy should lead to analysis of what personal data is truly needed for investigating THB cases. The repetitive attention for ensuring that victims are identified as soon as possible is already an indication. In its Mid-term report on the implementation of the EU strategy towards the eradication of trafficking in human beings, the Commission emphasised that the comprehensive EU legal and policy framework is **victim-centred**. It is fair to conclude that the EU strategy and the goals set in the legal and policy framework cannot be achieved without proper processing of data on victims.

As already referred to in this report, the principle of adequacy is also an essential element of lawful, effective and **accountable activities of law enforcement authorities**. This implicates that THB investigations should **be adequately structured to detect victims of THB and those involved should be aware of the victim-centred approach**. The EU legal and policy framework presents several initiatives to enhance the fight against THB and to protect its victims.

## Data processing should be accurate

The policy to eradicate and fight THB with a **victim-centred** approach, emphasises the importance of having data on victims accurately processed in police investigations and subsequent judicial proceedings. As already stated, accuracy has an impact on the services rendered to victims of THB. The accuracy principle should be applied taking account of the nature and purpose of the processing concerned<sup>xxx</sup>. Investigations by police and judicial authorities are generally focussed on suspects of crime and finding evidence. When victim data are assessed as necessary for detecting and investigating crimes, these data will also be processed and used in the further investigation and prosecution. The **victim-centred** approach introduces a new phenomenon for law enforcement authorities making it necessary to assess whether the data processing and investigation activities should be further conditioned.

For such assessment it will be necessary to distinguish the different phases in a law enforcement process. These phases could, in general, be described as follows:

- i) detection
- ii) investigation
- iii) prosecution

In these different phases, different categories of law enforcement authorities will be involved.

Phase i) will involve police authorities acting after complaint or after detecting a crime based on evidence or having caught someone in the act. Phase ii) will, dependent on the national structures and the possible international character of the crime, involve police authorities, Europol, Eurojust, prosecutors and/or investigation judges. Phase iii) will in general involve prosecutors and judges.

Accuracy is a term that refers to "the actual truth" about something. It is however not a purely scientific result<sup>xxx1</sup>. Especially in the area of law enforcement, finding the truth on what happened and especially on who has done it, is sometimes difficult. A possible lack of objective facts, the problems of proving those facts, and the human factor both from the law enforcement side and from those connected to the subject of investigation might be of influence on what seems or is accurate and what is not.

However, the aim of any investigation is that a prosecutor should be able to prove the truth about a case and a suspect before a court.

Applying the principle of accuracy should be directly linked to the data processed in these different phases of investigations. Whether something is accurate depends on many factors. Can facts or events objectively be established, what is the situation a law enforcement officer is confronted with, what is the reliability of statements, what is the reliability of the assessment of a law enforcement authority? It is evident that especially in the first two phases of law enforcement activities, accuracy is sometimes difficult to assess. What seems to be accurate at a certain moment might be inconsistent with findings in the further stages of the investigation. Inaccurate data in the first phase might create serious problems in the later phases of investigation and prosecution. What to do when a decision is made to prosecute a person for a certain crime when the suspect is as victim of THB forced to commit that crime? That the person is a suspect of that crime and at the same time victim is in this situation both accurate. The complexity of a crime such as THB and its international character only adds to this. Investigations in different Member States on the same person related to different activities might reveal contradictory assessments on the role of a victim.

The victim-centred approach introduces an important **indicator** when processing data on persons that came to the attention of law enforcement authorities and which are used in further investigations. The Eurojust report of a Strategic project of Eurojust's action against THB warns in this context for the risk that the identification of victims is neglected. This risk may lead to serious negative consequences in view of the international character of THB. Exchanging data on national level as well on international level only emphasises **the need to reduce the risks of not identifying victims** of THB. It should be prevented that inaccurate personal data are exchanged. The obligation to prevent that inaccurate data are exchanged is explicitly mentioned in Article 8 of Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters.

The priority given by the European Union to and the harmonisation of the fight against THB, make it necessary to raise awareness on THB and the victims of that crime.

Raising awareness on THB, the central role of victims, the various forms of exploitation and how to detect that crime and its victims are important aspects of ensuring accuracy in data processing. However, raising awareness and introducing general guidelines and indicators to detect THB and its victims alone might not be enough to ensure the necessary accuracy in data processing that is so needed in a victim-centred approach.

All activities against THB ranging from specific legislation to policies and guidelines will lead to data processing. Without processing of personal data on victims, fighting THB cannot be done effectively and, it also prevents that victims receive the necessary protection and assistance.

When in the first contact with a person it is not detected that he or she might be a victim of THB, this may have serious consequences for the further law enforcement activities and the position of

the victim. And when such a role can only be established in a later phase of an investigation, it will be necessary that this new classification of the role of a person is liaised with the original sources of information.

This makes it necessary to invest in enhancing and ensuring accuracy in data processing. Guidelines and indicators as already mentioned in this report are not detailed enough or do not include adequate data protection guidance concerning the processing of data on victims. The effect of these guidelines are also dependent on the knowledge of the existence of these guidelines. Awareness on THB is essential since the various crimes being a result of exploitation enlarges the group of law enforcement authorities that might come in contact with a victim without knowing it or without being sufficiently trained to recognise certain THB indicators.

This could not only be prevented by enhancing the level of training and information including the promotion of the use of indicators, it could also be prevented **by introducing strict conditions for processing data on suspects or victims in crimes that might be related to THB**. Such conditions should take account of the different phases in investigations and prosecutions and the difficulties that might occur when deciding whether a person should be regarded as victim. It is also important to recognise the different actors in the investigation and prosecution phase being responsible for such decisions.

### Conditions for data processing

According to Article 11(2) of Directive 2011/36/EU,

*Member States shall take the necessary measures to ensure that a person is provided with assistance and support as soon as the competent authorities have a **reasonable-grounds indication** for believing that the person might be subjected to any of the offences ...*

It is elementary for establishing whether reasonable ground indications exist that each law enforcement authority whether police, prosecutor or investigative-judge, is aware of THB, the crimes linked to THB and the position of victims. All these authorities should, when being in contact with a person or when to make a decision concerning that person, assess whether there are reasonable-grounds indications that a person is or might be a victim of THB. Such an assessment should always be done on a case-by-case basis. In view of the complex character of THB, the specific circumstances in which victims are found and the international character of THB, the decision whether reasonable grounds indications exist should be structured.

This could be done using a list of indicators developed specifically for that purpose. Perfect examples of such lists are Module 2 of the Anti-human trafficking manual for criminal justice practitioners of the United Nations Office on Drugs and Crime<sup>xxxii</sup> and the lists of the EU Handbook on trafficking in human beings - indicators for investigating police forces. These lists provide for various indicators that may help identifying victims. These lists also provides for general indicators and for specific indicators in relation to specific forms of crime.

The use of indicators should result in having the necessary information to construct whether reasonable grounds exist indicating that a person might be a victim. The victim-centred approach

should lead to categorisation of persons as a victim of THB when a reasonable ground indication is available.

The availability of indicators in the law enforcement organisation and their use is also an aspect of the responsibility of a controller. In view of the victim-centred approach of THB, any law enforcement authority should be able to motivate why a person is categorised as victim of THB in the same way as that authority should be able to motivate any other decision. **Being accountable for such a decision also derives from being responsible for the processing of data.**

The responsibility of a controller for data processing, the close relation between a classification as suspect or victim and the further activities in the law enforcement chain and the international cooperation when fighting THB makes it necessary to introduce the following conditions when processing data on victims of THB:

- i) the use of an uniform list of indicators for assessing whether reasonable grounds exist to classify that a person is victim of THB;*
- ii) all controllers of data processing in the law enforcement area may only process data on victims of THB with the use of that list of indicators.*
- iii) when sufficient indicators apply, a controller may only decide not to classify a person as victim when properly motivated.*
- iv) a person may also be classified as victim even when the indicators used do not apply*

## **Responsibility for data processing and accuracy**

Responsibility for data processing is explicitly regulated in the various EU and European data protection legislative instruments and in the national data protection legislation. In general, the authority being competent to decide on the purpose and means of data processing and the categories of data to be processed is defined as "the controller"<sup>xxxiii</sup> of the data processing. The controller is responsible for correct applying the data protection principles. It will depend on each national law as to who is designated as controller.

As already referred to, the responsibility for the controller includes the responsibility for the accuracy of data and the measures taken to ensure this accuracy.

However, authorities in the law enforcement chain of investigation and prosecution sometimes have overlapping responsibilities when investigating and prosecuting those involved in crime.

Depending on the national legislation and procedures in some Member States only the police is responsible for the lawfulness of the investigation where in other Member States the investigation is performed under the direction and responsibility of a prosecutor or investigative judge. This may create a situation where in some Member States the police is the only authority in charge and responsible for the investigation and data processing activities related to that investigation while in other Member States other forms of responsibility for the investigation exist that may have its influence on the responsibilities for data processing. The JSB came across situations where the

police authorities were obliged to treat persons as suspects of crime since a higher authority in the law enforcement chain ordered criminal proceedings against these persons. A possible assessment of the police that these persons might be victims is then overruled. This will also have its implications for the processing of data: based on the instruction of a higher authority a victim might become a suspect during the procedure and categorised as such.

The responsibility of a controller may thus be partly influenced by another authority.

This interlinked responsibilities for the lawfulness and accountability of an investigation and or prosecution and the data protection responsibility, demonstrates that - in practice - the responsibility of a controller is not a separate and fully autonomous responsibility. The interaction between police and judicial authorities based on national laws and practices has its consequences for the responsibility of the controller of police data processing. The impact of this might differ between the Member States.

This only highlights the importance of ensuring an unambiguous assessment of the role of a person being a victim of THB by introducing an obligation for police authorities, prosecutors and investigative-judges to use a set of indicators to detect whether a person is a victim of THB. The use of the same set of indicators should promote a balanced assessment of the role of a certain person throughout the whole process of investigation and prosecution.

As already stated, THB is a difficult crime to detect. It is also possible that even when using proper indicators to assess whether a person is to be regarded as a victim, a black or white answer is not always possible. It might not always be clear whether a person is actually a victim. Since an aspect of accuracy is also showing that something is not clear yet, the data processed on a person could also indicate that the possibility that the person's status will later be assessed differently should not be ruled out ( i.e. not identified/confirmed as victim).

In view of the victim-centred approach and the importance of recognising the vulnerable position of victims, a controller should in these situations put the emphasis on the aspect of THB that must be protected with priority: the victim. Identifying a person as **potential victim**<sup>xxxiv</sup> would be justified.

*A controller should - because there are reasonable grounds that someone is a victim - although it cannot be ruled out that the person's status will later be assessed otherwise, indicate that the person is considered as a (potential) victim rather than a suspect.*

## Conclusions

This report analysed the consequences of the EU policy of a victim centered approach in the fight against THB. An important consequence of this approach is the need to ensure harmonisation between all parts of the law enforcement chain. Harmonisation also includes the introduction of specific conditions for processing data on persons by law enforcement authorities. These conditions are necessary to ensure accountable responsibilities for data controllers.

Pursuant to the responsibilities of those involved with law enforcement, the following conditions apply when assessing if a person is or might be victim of THB and should be applied by all involved in the investigation and prosecution process.

1. The risks for not identifying victims of THB should be reduced.
2. All authorities involved should use an uniform list of indicators for assessing whether reasonable grounds exist to classify that a person is a victim of THB.
3. All controllers of data processing in the law enforcement area may only process data on victims of THB with the use of that list of indicators.
4. When sufficient indicators apply, a controller may only decide not to classify a person as a victim when properly motivated.
5. A person may also be classified as victim even when the indicators do not apply.
6. A controller should - because there are reasonable grounds that someone is a victim - although it cannot be ruled out that the person's status will later be assessed otherwise, indicate that the person is considered as a (potential) victim rather than a suspect.

### Role of national data protection authorities

National data protection supervisors monitor the proper implementation of data protection principles by police and judicial authorities. The emphasis placed by the European Union on the protection of victims of THB justifies that national data protection authorities pay specific attention to this subject. The aforementioned conditions developed by the Europol Joint Supervisory Body and supported by the Eurojust Joint Supervisory Body should be used as a harmonising instrument for advising national police and judicial authorities and to assess their implementation. National data protection authorities should actively promote these conditions and exchange experiences on the use of these guidelines. The implementation and use of these conditions should be subject of monitoring and reporting.

### Role of European Union and other international data protection authorities

European Union data protection supervisors and other international data protection authorities monitor the proper implementation of data protection principles by European Union agencies for police and judicial cooperation and other international fora for police and judicial cooperation. The emphasis placed by the European Union on the protection of victims of THB justifies that these data protection authorities pay specific attention to this subject. The aforementioned conditions developed by the Europol Joint Supervisory Body and supported by the Eurojust Joint Supervisory Body should be used as a harmonising instrument for advising the various European Union agencies and international organisations and to assess their implementation. These international data

protection authorities should actively promote these conditions and exchange experiences between them and with national data protection authorities on the use of these conditions. The implementation and use of these conditions should be subject of monitoring and reporting.

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- i The United Nations Convention against Transnational Organized Crime is adopted by General Assembly resolution 55/25 of 15 November 2000.  
Article 3, paragraph (a) of the [Protocol to Prevent, Suppress and Punish Trafficking in Persons](#) defines Trafficking in Persons as the recruitment, transportation, transfer, harbouring or receipt of 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. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.  
Article 3, paragraph (b), *The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;*
- ii Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee and the Committee of the Regions, The EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016, COM(2012) 286 final
- iii Council conclusions, Justice and Home Affairs Council meeting in Luxembourg, 9 and 10 June 2011 and Council conclusions, Justice and Home Affairs Council meeting in Luxembourg, 6 and 7 June 2013
- iv Statistics October 2014
- v 23.632 people were identified or presumed victims of trafficking in the EU over the 2008-2010 period, 30146 victims were registered in the 28 Member States over the period 2010-2012, Commission Staff Working Document, Mid-term report on the implementation of the EU strategy towards the eradication of trafficking in human beings COM (2014) 635 final of 17.10.2014, [http://europa.eu/rapid/press-release\\_IP-13-322\\_en.htm](http://europa.eu/rapid/press-release_IP-13-322_en.htm)
- vi For an overview of actions following the EU strategy see the overview included in Communication COM(2012) 286 final
- vii Doc.7120/10CO EUR-PREP 8 JAI 182
- viii Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, OJ.L.101, 15.4.2011, p. 6
- ix Directive 2012/29/EU of the European Parliament and of the COuncil of 25 October 2012, OJ.L. 315, 14.11.2012, p.57
- x <http://www.eurojust.europa.eu>
- xi <http://www.eurojust.europa.eu>
- xii [http://www.antislavery.org/includes/documents/cm\\_docs/2009/p/protocoltraffickedpersonskit2005.pdf](http://www.antislavery.org/includes/documents/cm_docs/2009/p/protocoltraffickedpersonskit2005.pdf)
- xiii Warsaw, 16 May 2005, (ETS 197), entry into force on 1 February 2008
- xiv Council of Europe Convention (ETS 197), Article 1 (1)(a)
- xv Istanbul, 11 May 2011, (ETS 210), entry into force on 1 August 2014
- xvi [www.mujerfrontera.org/#!guide-on-trafficking-of](http://www.mujerfrontera.org/#!guide-on-trafficking-of)
- xvii [www.ec.europa.eu/anit-trafficking/](http://www.ec.europa.eu/anit-trafficking/)
- xviii European Migration Network Study, March 2014
- xix Anti-Slavery International, [www.antislavery.org](http://www.antislavery.org)
- xx UN.GIFT, Global Initiative to Fight Human Trafficking, [www.unodc.org](http://www.unodc.org)
- xxi Adopted on 30 March 2015; not published
- xxii <http://www.eurojust.europa.eu>
- xxiii Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, OJ.L.101, 15.4.2011, p. 6
- xxiv [www.europol.eu](http://www.europol.eu)
- xxv - Article 5 Convention for the protection of individuals with regard to automatic processing of personal data, of January 1081 (ETS 108)
- 28 - Principle 3 Council of Europe Committee of Ministers Recommendation No.R (87)15 regulating the use of personal data in the police sector

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- Article 3 of Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, OJ.L 350, 30.12.2008, p. 61
- xxvi This principle is also included in the proposal for a new data protection directive with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data. COM (2012) 103
- xxvii International Organization for Migration, ISBN 978-92-9068-440-4, page 48
- xxviii See in this respect also Article 6 (4) of Council Decision 2009/936/JHA of 30 November 2009 adopting the implementing rules for Europol analysis work files, OJ.L. 325, 1.12.2009, p.14
- xxix See Europol Knowledge Product on THB, 1 September 2011; the early warning notification nr. 2014/8, March 2014, on marriages of convenience, March 2014; the intelligence notification nr. 15/2014, October 2014 on THB and internet and the intelligence notification 16/2014, October 2014 on child trafficking for exploitation in forced criminal activities and forced begging, [www.europol.eu](http://www.europol.eu).
- xxx See preamble 12 of Council Framework Decision 2008/977/JHA and preamble 21 of the proposal for a new data protection directive with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data. COM (2012) 103
- xxxi See in this respect also a statement from the European Data Protection Supervisor, "Even where an assessment is *based on incorrect facts*, the requirement of accuracy cannot appertain directly to the accuracy of that particular assessment (it might still be accurate for other reasons), but only to the underlying facts. "  
[https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/14-02-25\\_GL\\_DS\\_rights\\_EN.pdf](https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/14-02-25_GL_DS_rights_EN.pdf)
- xxxii UN.GIFT, Global Initiative to Fight Human Trafficking, [www.unodc.org](http://www.unodc.org)
- xxxiii See for example Article 2, Council of Europe Convention (ETS 197)
- xxxiv The term "potential victim" is used in the European Migration Network Study, March 2014 and in the EU Strategy 2012-2016





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