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On the Basis of Sex: The Effect of EU's Silence on Sex Workers' Rights; Can the Silence be Broken?

Author: Artemis Giasimakopoulou

Supervisor: Dr Birte Bök

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Abstract:

This research presents a critical assessment of the impact of EU policies on the human rights of sex workers, while aiming to draw attention to sex work as work. Sex work has been interpreted to fall outside of the EU's competences, despite its recognition as an economic activity, according to the Court of Justice of the European Union. However, attempts of framing the issue as an inherent violation of human dignity and gender equality perpetuate the stigma and discrimination, whilst silencing sex workers and portraying them as victims in need of salvation. The victimization of sex workers and the denial of their agency under the neo-abolitionist regime has been working against the protection of individuals in the sex industry, and especially migrant sex workers. While addressing the complexities that the issue of sex work entails, such as the impact of moral perceptions, societal gender roles and presumptions on migration, that lead to its conflation with human trafficking for the purpose of sexual exploitation, it is argued that the voices of sex workers need to be heard in the policy-making process. Taking into account the silence of the EU on the matter, this research argues that the recognition of the issue as a matter of work, would be more effective in upholding the rights of sex workers and recognizing their agency.

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Introduction

Sex work is an issue full of complexities, where the elements of gender, class and race intertwine. The EU Member States, who have the authority to regulate sex work at the domestic level, have developed different approaches towards it. They either criminalize sex work itself, the sale of sexual services or they treat the issue as a matter of labor. These different approaches have led to three different sex work regimes. At the same time, the inconsistency in policy implementation also leads to the emergence of hybrid regimes, often resulting in a situation of legal uncertainty for the individuals engaged in the sex work industry. All three sex work regimes significantly impact the human rights of sex workers and often put them at risk. These rights include the right to working conditions that respect their dignity and safety,¹ the right to freely choose one's occupation,² alongside with their right not to be subjected to discrimination, including discrimination on the grounds of their nationality.³

The regulationist regime treats sex work as work, however it presents gaps in the protection of the socioeconomic rights of sex workers. The neo-abolitionist regime, on the other hand, which criminalizes the purchase of sexual services and not their sale, carries adverse impacts on the rights of sex workers, who are marginalized and faced with discrimination, in the name of gender equality. The ambiguous interpretation of gender equality is not only enabled when commodification of women's bodies and their sexuality are at stake, rather beginning before, when the denial of agency and the right to self-determination portrays them as victims. While their loss of autonomy renders them more susceptible to exploitation, when the issue is viewed under the lens of migration, it gets even more complicated. Migrant sex workers often navigate a convoluted mesh of stringent immigration policies, anti-trafficking measures and sex work policies. Anti-trafficking policies impact sex work policy implementation, due to the conflation of sex work with human trafficking for the purpose of sexual exploitation. As a result, the victimization of migrant sex workers increases, and so does the stigma and discrimination against the individuals that choose to engage in the industry. In the area of policy-making and implementation, this myopic approach often results in the complexity of the issue of sex work becoming obscured and overlooked, leading to

¹ Charter Of Fundamental Rights Of The European Union, 2012/C 326/02, art. 3, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012P%2FTXT>.

² Charter Of Fundamental Rights Of the European Union, art. 15.

³ Ibid, art. 21.

increasing an increase of the vulnerability of an entire sector which is predominantly comprised of women as the service providers.

At the EU level, sex work is not officially addressed, if not in the form of a reference to ‘prostitution’ as part of the EU’s commitment to gender equality and its anti-trafficking policy, both of which interpretations align with the neo-abolitionist framing of the issue. At the same time, the recognition of sex work as a form of economic activity by the Court of Justice of the European Union has not led to substantial contestation of the EU’s neo-abolitionist turn. In light of the above, the aim of this research is to answer the following Research Question: To what extent does EU’s silence on sex work affect the rights of sex workers, and can the silence be broken? By critically assessing the elements that affect the rights of sex workers under national and European law and the shortcomings of current sex work policies, this research argues from a feminist socio-legal angle and a human rights approach, that framing the issue with the focus on sex work as work is the most fitting way to address the socioeconomic inequalities amongst sex workers. This would constitute the first step towards establishing legal protection and safe working conditions at the EU level, while recognizing the agency of sex workers, which would mark an important step towards fulfilling EU’s commitment to gender equality in this context.

Literature Contribution:

The issue of sex work from a human rights perspective,⁴ the conflation of sex work and human trafficking,⁵ and the impacts of sex work regimes and particularly those of the neo-abolitionist regime,⁶ are issues that have been widely discussed in the

⁴ Marjan Wijers, ‘Sex Workers Rights Are Human Rights: Or Not? The Art of Stealing Back Human Rights’, *Sex Work, Labour and Relations. New Directions and Relations*, Teela Sanders, Kathryn, McGarry & Paul Ryan (Eds.), Springer Nature, 2022, <https://doi.org/10.1007/978-3-031-04605-6>.

⁵ Lara Gerassi, ‘From Exploitation to Industry: Definitions, Risks, and Consequences of Domestic Sexual Exploitation and Sex Work Among Women and Girls’, *Journal of Human Behavior in the Social Environment* 25, no. 6 (18 August 2015): 591–605, <https://doi.org/10.1080/10911359.2014.991055>; Jean Allain, ‘Genealogies of Human Trafficking and Slavery’, in *Routledge Handbook of Human Trafficking*, ed. Ryszard Piotrowicz, Conny Rijken, and Baerbel Heide Uhl, 1st ed. (1 Edition. | New York : Routledge, 2017.: Routledge, 2017), 3–12, <https://doi.org/10.4324/9781315709352-1>; Joyce Outshoorn, ‘The Political Debates on Prostitution and Trafficking of Women’, *Social Politics* 12(1), 2005.

⁶ Niina Vuolajarvi, ‘Governing in the Name of Caring: Migration, Sex Work and the “Nordic Model”’, *Rutgers, The State University of New Jersey*, January 2021; Charlene Calderaro and Calogero Giametta, ‘“The Problem of Prostitution”: Repressive Policies in the Name of Migration Control, Public Order, and Women’s Rights in France’, *Anti-Trafficking Review*, no. 12 (2 April 2019): 155–71, <https://doi.org/10.14197/atr.2012191210>; Sharron FitzGerald and Jane Freedman, *Gender, Equality and Social Justice: Anti-Trafficking, Sex Work and Migration Law and Policy in the EU*, 1st ed. (London: Routledge, 2022), <https://doi.org/10.4324/9781003162384>; Agustín, Laura María, *Sex at the*

scholarly debate. Many scholars have also dived into the political dynamics that cause the EU's silence on this issue and the silencing of sex workers themselves.⁷ However, most of the existing literature is either based on a comparative analysis between two or more Member States under a similar or a contrasting sex work policy regime, or often places the focus on one of the components of sex work (gender, class, migration). Even though the significant input of the existing literature on sex work has inspired this current endeavor, this research takes into account the intersectionality of the peripheral issues that arise, while assessing the consequences of sex work policies at the national and community level, from a human rights perspective. By adhering to the principles of non-discrimination, the indivisibility, inalienability, interdependency and interrelation of human rights,⁸ one of the aims of this research is to accentuate the importance of the protection of the socioeconomic rights of sex workers. Following a socio-legal methodology and tracing the root of the problem in the relationship between the law and the society, allows for such an analysis to unfold. Thus, this research contributes to the existing academic literature with an analysis that focuses on reassessing the components of sex work and the impacts that the misplaced focus of national and EU policies cause, while addressing sex work as work, based on the Court of Justice of the European Union's case law.

Methodology:

This research will follow a Feminist Socio-Legal Scholarship Methodology. Socio-legal methodology (SLS) is an interdisciplinary approach based on the notion that the law is both shaping and being shaped by society.⁹ It places the focus on the relationships between the law and legal institutions with the society, relying on external

Margins: Migration, Labour Markets and the Rescue Industry, Bloomsbury Collections, 2022, <http://dx.doi.org/10.5040/9781350222496.ch-001>; Carlotta Rigotti, 'When the Law Meets Feminisms: The Shortcomings of Contemporary Prostitution Policies across the European Union', *Women's Studies International Forum* 86 (May 2021): 102467, <https://doi.org/10.1016/j.wsif.2021.102467>; Teresa C. Kulig and Leah C. Butler, 'From "Whores" to "Victims": The Rise and Status of Sex Trafficking Courts', *Victims & Offenders* 14, no. 3 (3 April 2019): 299–321, <https://doi.org/10.1080/15564886.2019.1595242>.

⁷ Gill Allwood, 'Agenda Setting, Agenda Blocking and Policy Silence: Why Is There No EU Policy on Prostitution?', *Women's Studies International Forum* 69 (July 2018): 126–34, <https://doi.org/10.1016/j.wsif.2018.06.004>; Maria Gerdt, 'Shortcomings of the EU Gender Policy', *National Research University Higher School of Economic, Russian Federation, Methodical International Students' Scientific – Conference Academic Aspirations Of Youth: Insights In Economy, Management, Law And Technologies* 2021, 2021.

⁸ United Nations Population Fund (UNFPA), 'Human Rights Principles', <https://www.unfpa.org/resources/human-rights-principles>.

⁹ Nergis Canefe, 'Far from the Madding Crowds: Redefining the Field of Socio-Legal Studies from Within', 20.

criteria, such as the existing frameworks' effectiveness and consequences in reality. By questioning the centrality of the law, that the doctrinal scholarship takes for granted, SLS pursues a more complex understanding of how legal institutions, frameworks and doctrines co-define law in the empirical social context. Moreover, a Feminist Socio-Legal Scholarship inserts the element of critical assessment and intersectionality, as opposed to the original wave of feminist legal theory, which places the focus on the feminine whilst excluding the racialized and marginalized aspects.¹⁰

This method is highly valuable in the context of this research. The deconstruction of the issues surrounding sex work at the basis of its very definition, that constitutes the aim of the Chapter I, will benefit from the nuanced approach that investigates this dynamic process while considering the contribution of international organizations and human rights frameworks in the feminist debate. This methodology has been generally useful in facilitating comparison between working conditions, labor standards and expanding the conversation on sex worker's rights.¹¹ In that regard, the assessment of the impacts of Member States' policies on sex work that constitutes the aim of Chapter II takes into account the impact of social perceptions on sex work and migration, and as such, it is benefited by the interdisciplinarity of feminist socio-legal methodology.¹² Particularly in Chapter III of this research, feminist socio-legal methodology will allow for a holistic understanding of the gender dimension of sex work and the examination of the ways in which it is framed at the EU level. This more nuanced approach to sex work's gender dimension and the ways that the issue is influenced by gender roles and power dynamics will address the burden of traditional and, at times, oppressive gender norms.¹³ Feminist socio-legal methodology is also useful in seeking to understand the relationship between the law, legal institutions, social mobilization and counter-mobilization.¹⁴ In that respect, it is influential in understanding the dynamics within the EU institutions and the influence of Civil

¹⁰ Ibid, 7.

¹¹ Raguparan Menaka, "'If I'm Gonna Hack Capitalism': Racialized and Indigenous Canadian Sex Workers' Experiences within the Neo-Liberal Market Economy.", *In Women's Studies International Forum* 60, no. Pergamon (2017): 69–76.

¹² Darren O' Donovan, 'Socio-Legal Methodology: Conceptual Underpinnings, Justifications and Practical Pitfalls', no. Chapter 7 (n.d.): 11.

¹³ Elizabeth Bernstein, 'Carceral Politics as Gender Justice? The "Traffic in Women" and Neoliberal Circuits of Crime, Sex, and Rights', *Theory and Society* 41, no. 3 (May 2012): 233–59, <https://doi.org/10.1007/s11186-012-9165-9>.

¹⁴ Canefe, 'Far from the Madding Crowds: Redefining the Field of Socio-Legal Studies from Within', 22.

Society Organizations in shaping EU's policy towards sex work, as another aim pursued in Chapter III.

Socio-Legal Scholarship has been influential in shaping scholarly discussions around human rights and economic and social rights, due to its interdisciplinary approach, including the rights to health, decent work and human dignity.¹⁵ This influence also becomes apparent in broadening the conversation on sex work, by connecting it with other forms of labor and addressing the criminalization of the sex industry and the discrimination faced by sex workers. As the last part of Chapter III focuses on sex work as a form of economic activity, this approach remains pivotal. For those reasons, it is the methodology preferred and used throughout this research.

However, the limitations of this methodology are also acknowledged. Socio-legal methodology is often criticized for its wide scope, due to its interdisciplinary or multidisciplinary analysis, that renders it difficult to define. Furthermore, it is accused for producing generalized findings, that depend on the way in which the results of the research have been interpreted. For reasons of clarification, a pro sex-work position is openly adopted, as unavoidably shaped by the human rights perspective that this research adheres to. Therefore, the interpretation of the findings is conducted for the most part through a pro-sex work lens.

Chapter Overview:

Chapter I of this research serves as an introduction to the complexities of the issues surrounding sex work. Firstly, the focus is placed on the disparity of opinions regarding the terminology used to describe the provision of sexual services in exchange for remuneration.¹⁶ This Chapter explores the distinctive meanings of the terms 'sex work' and 'prostitution', while identifying the perceptions of morality and agency that are condensed in each term respectively. Secondly, it explores the issue of consent, which presents the main controversy in the feminist scholarly debate.¹⁷ This part provides the layout of the contrasting opinions on the issue of consent: namely, abolitionist feminists, who view sex work as a coerced situation, to which consent is

¹⁵ Ibid, 12.

¹⁶ Karen McMillan, Heather Worth, and Patrick Rawstone, 'Usage of the Terms Prostitution, Sex Work, Transactional Sex, and Survival Sex: Their Utility in HIV Prevention Research', *Archives of Sexual Behavior* 47, no. 5 (July 2018): 1517–27, <https://doi.org/10.1007/s10508-017-1140-0>.

¹⁷ Jessica Elliott, *The Role of Consent in Human Trafficking*, 0 ed. (Routledge, 2014), 3, <https://doi.org/10.4324/9780203594810>.

irrelevant,¹⁸ and the liberal feminists, who advocate for the individual agency and bodily autonomy of sex workers from a human rights perspective, distinguishing sex work from forced prostitution.¹⁹ By highlighting that consent is often viewed as invalid in the context of sex work, the next part links the debate on consent and coercion to the conflation of sex work and human trafficking for the purpose of sexual exploitation, which involves force, coercion and abuse of power. It is further argued that this conflation of sex work and human trafficking creates obstacles for sex workers' rights and leads to the creation of a grey zone that treats both as the same.

Chapter II explores how the elements of contestation outlined in the previous Chapter translate into the policy implementation within EU Member States legal orders. Even in countries where sex work is legalized, national criminal laws may still apply to related activities, creating complexities in the legal landscape of the EU. Different policy regimes have emerged in order to regulate or criminalize the entirety or certain aspects of sex work, leading to the following division of approaches: prohibitionist, abolitionist and regulationist.²⁰ This Chapter traces the shortcomings of the two prevailing sex work regimes, namely the neo-abolitionist and the regulationist regime, in regards to the protection of the rights of sex workers, while acknowledging that the inconsistency in sex work policies among Member States has also led to the emergence of hybrid regimes where sex work is not regulated, but only tolerated.²¹ Meanwhile, as migration flows increase within the European Union, the demographic makeup of sex workers is evolving to include a significant portion of migrant sex workers.²² While the victimization portrayal of migrant sex workers is influenced by class dynamics,²³ the conflation of sex work with human trafficking in policy making and implementation also perpetuates the victim narrative, denying agency and self-determination to migrant

¹⁸ Ivana Bacik, 'Developing an Understanding of "Compromised Consent": How Reconsideration of Consent as a Legal Concept May Inform a Feminist Theoretical Framework for the Introduction of "Nordic Model" Prostitution Laws and Did Inform the Motivations of Lawmakers in Ireland' PhD Thesis, no. School of Law, Trinity College, Dublin (2022).

¹⁹ François Foret and Lucrecia Rubio Grundell, 'European Morality Politics in the European Union: The Case of Prostitution', *Sexuality & Culture* 24, no. 6 (December 2020): 1806, <https://doi.org/10.1007/s12119-020-09720-w>.

²⁰ Joyce Outshoorn, 'Gender, Sexuality and Global Change', *Institute of Thematic Gender Studies: Dept. of Gender Studies, Linköping University*, no. Chapter 17, 'The Politics of Prostitution Revisited: Trends in Policy and Research' (November 2008).

²¹ Håkan Johansson and Sara Kalm, eds., *EU Civil Society* (London: Palgrave Macmillan UK, 2015), <https://doi.org/10.1057/9781137500724>.

²² Synnove Okland Jahnsen, Hendrik Wagenaar, *Assessing Prostitution Policies in Europe*, Routledge, London and New York, Interdisciplinary Studies in Sex for Sale, 2018, 357.

²³ Agustin, Laura María, *Sex at the Margins: Migration, Labour Markets and the Rescue Industry*.

sex workers. Under the light of the above, the need for a more nuanced approach emerges; one that respects the rights and agency of sex workers while addressing the underlying socioeconomic inequalities that contribute to exploitation and trafficking. While providing an overview of the human rights situation within Member States under sex work regimes, this Chapter adheres to a critical perspective and follows a descriptive approach. The question that Chapter II will answer is the following: What are the adverse impacts of EU Member States policy implementations on the human rights of sex workers in the EU taking into account the influence of societal perceptions of migration and gender?

Chapter III pursues an examination particularly of the gender dimension of sex work and its influence towards EU's approach towards sex work, under the light of the EU treaty-based commitment to gender equality. The European Union plays a pivotal role in shaping the discourse and policies on sex work in its Member States, while at the same time its silence on the issue carries adverse impacts on the rights of sex workers. Its commitment to gender equality, as embodied in its founding treaties, forms the bedrock of its approach to issues, including sex work and human trafficking. By firstly deconstructing the gendered presumptions on sex work, taking into account the sociological concept of risk behavior,²⁴ this part explores the gender perceptions that lead to EU's neo-abolitionist turn. In that regard, the role of Civil Society Organizations in Europe that aim to bring sex work into EU's agenda by linking it to the EU's gender equality obligation and its anti-trafficking policy,²⁵ is also examined. In light of the above, the aim of the first part of Chapter III is to answer the following question: How does the EU gender equality commitment shape EU's stance towards sex work, taking into account the political dynamics and the influence of Civil Society Organizations in the framing of the issue? in its Member States the While the EU's neo-abolitionist turn is explained, the second part of Chapter III highlights the disparity on the issue of sex work even among EU institutions, with the Court of Justice of the European Union (CJEU) having recognized sex work as an economic activity.²⁶ What is often not

²⁴ W. Chan, 'Risk, Crime and Gender', *British Journal of Criminology* 42, no. 4 (1 September 2002): 743–61, <https://doi.org/10.1093/bjc/42.4.743>.

²⁵ Lucrecia Rubio Grundell, 'The Rise of Neo-Abolitionism in Europe: Exploring the Role of the Neoliberalism–Vulnerability–Security Nexus in the Prostitution Policies of the United Kingdom, Spain, France, and Ireland', *Social Politics: International Studies in Gender, State & Society* 29, no. 3 (15 September 2022): 1034–56, <https://doi.org/10.1093/sp/jxab018>; Foret and Rubio Grundell, 'European Morality Politics in the European Union'.

²⁶ 'Case C-268/99, Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie, Judgment of the Court of 20 November 2001. -Freedom of Establishment- "Economic Activities- Whether or Not They

discussed, is that the CJEU's recognition of sex work as an economic activity further underscores the EU's commitment to gender equality, which provides a significant legal basis for advocating for the socio-economic rights and the protection of sex workers under EU law. The last part of this Chapter discusses the CJEU's approach to sex work and its classification as an economic activity. While acknowledging the potential impact of the CJEU's rulings on EU policymaking, this part highlights the challenges of generalizing these rulings,²⁷ under the aim of answering the question: To what extent does the recognition of sex work as an economic activity influence the framing of sex work as work at the EU level? Finally, answering this question will allow for an answer to the main research question, before this research reaches a conclusion.

List of Objectives:

1. What are the adverse impacts of EU Member States policy implementations on the human rights of sex workers in the EU taking into account the influence of societal perceptions of migration and gender?
2. How does the EU gender equality commitment shape the EU's stance towards sex work, taking into account the political dynamics and the influence of Civil Society Organizations in the framing of the issue?
3. To what extent does the recognition of sex work as an economic activity influence the framing of sex work as work at the EU level?

The aim of this research is to answer the following Research Question: To what extent does the EU's silence on sex work affects the rights of sex workers, and can the silence be broken?

Include the Activity of Prostitution', <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61999CJ0268>.

²⁷ Cremona, Marise, ed., *Compliance and the Enforcement of EU Law.*, Oxford University Press, USA, 2012, https://books.google.gr/books?hl=en&lr=&id=8fWuubpjO-gC&oi=fnd&pg=PP1&dq=related:V2L9Hu2povoj:scholar.google.com/&ots=z8q8Ltpm4R&sig=8w4z0YU6ZOi8xOwyIWAAnQqCo7KU&redir_esc=y#v=onepage&q&f=false.

Chapter I

Defining Sex Work

Sex work has been a morally, politically and legally contested issue. There have been strong and ongoing debates surrounding the issue of sex work, which often find ground primarily on the very definition of the social, economic and political phenomenon. The conceptualization of sex work may differ depending on the context of each society and the cultural lens through which the issue is examined.²⁸ Due to contrasting societal views and cultural interpretations on sex work, the definition of the issue at hand may present difficulties or raise disagreements. It has been argued that these disparities commence from the terminology used to address the issue of sex work, as each term used enables a different perspective.²⁹ This part of the research will examine the usage of the commonly used term ‘prostitution’ as opposed to the term ‘sex work’, while assessing the nuances that both terms entail. Although it will be argued that terminology matters, there are a number of factors that according to the existing scholarly debate, seem to interfere with the definition of sex work, and therefore deserve closer examination.³⁰ One of those is the issue of consent, which has been the element to cause fragmentation within feminist legal analysis.³¹ The disparity of opinions on the issue of consent affects the very definition of sex work and it further influences the latter’s relation to human trafficking for sexual exploitation.³² At the European Union level, where there is increased polarization in the debate surrounding the definition of sex work,³³ the two are often seen to be conflated.³⁴ Before addressing the EU’s stance on the issue of sex work, both separated from and in relation to human

²⁸ McMillan, Worth, and Rawstorne, ‘Usage of the Terms Prostitution, Sex Work, Transactional Sex, and Survival Sex’, 1520.

²⁹ Ibid, 1525.

³⁰ Ibid, 1517–18.

³¹ Ivana Bacik, ‘Developing an Understanding of “Compromised Consent”’: How Reconsideration of Consent as a Legal Concept May Inform a Feminist Theoretical Framework for the Introduction of “Nordic Model” Prostitution Laws and Did Inform the Motivations of Lawmakers in Ireland’ PhD Thesis, no. School of Law, Trinity College, Dublin (2022): 69.

³² TAMPEP International Foundation, ‘Sex Work in Europe- A Mapping of the Prostitution Scene in 25 European Countries’, 2009, 49, <https://tampep.eu/wp-content/uploads/2017/11/TAMPEP-2009-European-Mapping-Report.pdf?fbclid=IwAR3ek0Qtmu13Z6FY7iWBk929GmSelPCaoHwGgURuKIhZLHOYQPmPiBKk-WA>.

³³ Allwood, ‘Agenda Setting, Agenda Blocking and Policy Silence’, 127.

³⁴ European Parliament, ‘Report on the on Sexual Exploitation and Prostitution and Its Impact on Gender Equality’, (2013/2103(INI)). A4-0372/97. Brussels, 2014.

trafficking, this part of the research will focus on the implications that this very conflation creates.

The different legal approaches of Member States towards sex work are also an indication that definitions influence the debate on whether sex work can be considered a legitimate form of work within legal orders and under EU law.³⁵ For that purpose, this Chapter will examine 1) the different connotations that surround the terms ‘sex work’ and ‘prostitution’, 2) the relevance of consent to the definition of sex work and 3) the distinction between sex work and human trafficking

1.1. Sex work or Prostitution?

There is disparity of opinions concerning the term to be used in order to describe the provision of sexual services in exchange for remuneration or other forms of compensation. As the different usage of terms may conceal distinct motivations, scholars often argue that each can be strategically used to serve different legal stances on the matter.³⁶ Although this research will examine the issue under the term ‘sex work’ (the rationale behind which will follow in this Chapter), the term ‘prostitution’ is still very commonly used by scholars and European institutions.³⁷

The term ‘prostitution’, traditionally referred to as ‘the world’s oldest profession’, was initially employed by researchers, prevention policy and decision makers on HIV matters. The term was used, and continues to be used, often by legal codes that list the exchange of sexual services, or their sole purchase, as a criminal offense.³⁸ However, even when the term does not refer to criminally punishable conduct, it has been characterized as marginalizing and denoting misdemeanor.³⁹ It should be noted, however, that the use of the term ‘sex work’, instead, does not automatically suggest the opposite stance.⁴⁰ In fact, in the academic literature on sex

³⁵ Gabriella Mesce, ‘Sex Work Decriminalization and Feminist Theory’, *Senior Thesis*. 365., 2020, 9, https://scholarcommons.sc.edu/senior_theses/365.

³⁶ McMillan, Worth, and Rawstorne, ‘Usage of the Terms Prostitution, Sex Work, Transactional Sex, and Survival Sex’, 1518.

³⁷ European Parliament, ‘Report on the on Sexual Exploitation and Prostitution and Its Impact on Gender Equality’, (2013/2103(INI)). A4-0372/97. *Brussels*, 2014.

³⁸ Isabel Crowhurst and May-Len Skilbrei, ‘Swedish, Nordic, European’, in *Nordic Criminal Justice in a Global Context*, by Mikkel Jarle Christensen, Kjersti Lohne, and Magnus Hörnqvist, 1st ed. (London: Routledge, 2022), 95–110, <https://doi.org/10.4324/9781003195504-8>.

³⁹ McMillan, Worth, and Rawstorne, ‘Usage of the Terms Prostitution, Sex Work, Transactional Sex, and Survival Sex’, 1519.

⁴⁰ Ivana Bacik, ‘Developing an Understanding of “Compromised Consent”’: How Reconsideration of Consent as a Legal Concept May Inform a Feminist Theoretical Framework for the Introduction of

work the terms ‘prostitution’ and ‘sex work’ are sometimes used interchangeably.⁴¹ Though, the distinction of the two lies in that the term ‘prostitution’ is often perceived as morally tinted and as McMillan argues, it may suggest a lack of integrity that follows the sexual misuse of the self.⁴² Similarly, Bindman and Doezema posit that the term ‘prostitution’ suggests opposition to the recognition of sex work as a legitimate profession.⁴³

On the other hand, critics have argued that the term ‘sex work’ is nothing but a euphemism of ‘prostitution’. Ivana Bacik argues that ‘sex work’ is masking the socioeconomic inequalities and vulnerabilities that lead one to sell sexual services, as a display of economic agency driven by entrepreneurship.⁴⁴ In the same perspective, referring to prostitution under the term ‘sex work’ may also imply that there is little, if any, acknowledgement of the distinct risks that sex workers face, as they may fall outside the traditional occupational risks.

This calls for a necessary clarification of the reasons that lie behind the usage of the term ‘sex work’. As Helen Le Bail argues, the term ‘sex work’ does not misrecognize the socioeconomic vulnerabilities and distinct risks that selling sexual services as a profession entail.⁴⁵ Nor does linking the sale of sexual services to work, serves as an advertisement of sex work.⁴⁶ Rather, it lays the ground for an approach stripped off of moralistic perceptions and judgements regarding the character of sex workers, while it starts to pave the way towards addressing those vulnerabilities and recognizing the occupational domain, as such, according to a human rights-based approach.⁴⁷ In regards to the latter, human rights institutions and organizations have employed the term ‘sex work’ instead of the term ‘prostitution’,⁴⁸ as their aim is

“Nordic Model” Prostitution Laws and Did Inform the Motivations of Lawmakers in Ireland’ PhD Thesis, School of Law Trinity College, Dublin (2022): 199–200.

⁴¹ Foret and Rubio Grundell, ‘European Morality Politics in the European Union’, 1806.

⁴² McMillan, Worth, and Rawstorne, ‘Usage of the Terms Prostitution, Sex Work, Transactional Sex, and Survival Sex’, 1519.

⁴³ Bindman, J., & Doezema, J., ‘Redefining Prostitution as Sex Work on the International Agenda.’, (1997), <http://www.walnet.org/csis/papers/redefining.html>.

⁴⁴ Bacik, ‘Developing an Understanding of “Compromised Consent” (2022), 201–202.

⁴⁵ Helene Le Bail, Calogero Giametta, Noemie Rassouw, ‘What Do Sex Workers Think About the French Prostitution Act?’, pt. Terminology.

⁴⁶ Marjan Wijers, ‘Sex Workers Rights Are Human Rights: Or Not? The Art of Stealing Back Human Rights’, 3.

⁴⁷ Bindman, J., & Doezema, J., ‘Redefining Prostitution as Sex Work on the International Agenda.’, para. 2a.

⁴⁸ Human Rights Watch, ‘Why Sex Work Should Be Decriminalized’, (2019).

advocating for the rights of sex workers for the obvious reason: because sex workers' rights are human rights.

Under the same light, and with the aim to examine the possibility of the recognition of sex work as a matter of labor under EU law, the usage of the term 'sex work' appears to be most fitting. This research will approach sex work using the definition adopted by international organizations such as Amnesty International and the World Health Organization (WHO).⁴⁹ According to the latter two, sex work stands for the exchange of sexual services between consenting adults in return for compensation, often but not exclusively, monetary.⁵⁰ The exchange of consensual sexual services can be a regular or an occasional activity. There is no agreement in connection to frequency and consistency under which sex work needs to be performed in order to fall under the umbrella of the definition.⁵¹ Therefore, sex work can take variable forms between and within countries, and it can vary in regards to organization and 'formality'.⁵²

In clarification of the term 'sexual services', all forms of services of that nature as well as sexual acts, including penetrative sex are considered. While there is no universal agreement on what sex work specifically entails, it has been accepted that unlike the term 'prostitution', sex work implies a much broader scope of activities, which are not limited to physical sexual contact.⁵³ The definition of sex work as set forth by Amnesty International does not include adult dancing and pornography. It is true that the differentiation between forms of sex work may carry respectively fluctuant levels of risks for the sex workers involved that call for different levels of attention.⁵⁴ Under a broader definition of sex work, however, the inclusion of pornography and adult dancing along with other forms of sexual services serves a more accurate

⁴⁹ World Health Organization, *Prevention and Treatment of HIV and Other Sexually Transmitted Infections for Sex Workers in Low- and Middle-Income Countries: Recommendations for a Public Health Approach* (Geneva: World Health Organization, 2012), 12,

<https://apps.who.int/iris/handle/10665/77745>; Amnesty International, 'POLICY ON STATE OBLIGATIONS TO RESPECT, PROTECT AND FULFIL THE HUMAN RIGHTS OF SEX WORKERS', 26 December 2016, pt. Terminology, 3,

<https://www.amnesty.org/en/documents/pol30/4062/2016/en/>.

⁵⁰ Amnesty International, 'POLICY ON STATE OBLIGATIONS TO RESPECT, PROTECT AND FULFIL THE HUMAN RIGHTS OF SEX WORKERS', pt. Terminology, 3.

⁵¹ *Ibid.*, 3.

⁵² World Health Organization, *Prevention and Treatment of HIV and Other Sexually Transmitted Infections for Sex Workers in Low- and Middle-Income Countries*, pt. 1.4, 12.

⁵³ McMillan, Worth, and Rawstorne, 'Usage of the Terms Prostitution, Sex Work, Transactional Sex, and Survival Sex', 1519.

⁵⁴ Plumridge, L., & Abel, G., *A 'Segmented' Sex Industry in New Zealand: Sexual and Personal Safety of Female Sex Workers*. (Australian and New Zealand Journal of Public Health, 25, 2001), 78–83.

representation of the scale and scope of the sex industry. Furthermore, it has been pointed out that pornography, especially in the Internet era, is closely linked to digital labor, which is a constantly evolving form of labor.⁵⁵ However, pornography is often subjected to different national legislation models than those that regulate sex work in brothels, street sex work or other forms of providing services at a self-employed capacity.⁵⁶ For that reason, and as the aim of this research is exploring the issue of sex work as a form of labor under EU law, the regulation of pornography will not be addressed, while analyzing the issue of sex work.

The term ‘sex work’ instead of ‘prostitution’ is adopted and used throughout the paper, in accordance with the terminology used by the aforementioned international organizations. However, when reference is made to legislative frameworks that use the term ‘prostitution’ to describe sexual exchange services, this paper will maintain the term used by the sources for clarity and the avoidance of any confusion.⁵⁷ Outside of these references the examination of the possibility that sex work is considered as labor suggests the use of the term sex work. Similarly, this paper will refer to people over the age of 18,⁵⁸ who engage in all activities pertaining to the definition of sex work under the general term ‘sex workers’. While taking into consideration that the individuals engaging in sex work may not necessarily identify with this term,⁵⁹ in absence of a universally agreed upon term, for the purposes of consistency and clarity this general term will be used.

1.2. Consent

Consent in the context of sex work has not been clearly and unanimously defined under international or European law. The issue of consent is essentially the main controversy regarding sex work and its very distinction from human trafficking in the feminist debate.⁶⁰ Consent, as a crucial element that distinguishes between sex work and human trafficking, was a conflicting issue during the discussions framing the UN

⁵⁵ Helen M. Rand, ‘Challenging the Invisibility of Sex Work in Digital Labour Politics’, *Feminist Review* 123, no. 1 (November 2019): 41, <https://doi.org/10.1177/0141778919879749>.

⁵⁶ Synnove Okland Jahnsen, Hendrik Wagenaar, *Assessing Prostitution Policies in Europe*, 176.

⁵⁷For example: ‘European Parliament Resolution of 26 February 2014 on Sexual Exploitation and Prostitution and Its Impact on Gender Equality (2013/2103(INI))’, 2014.

⁵⁸ World Health Organization, *Prevention and Treatment of HIV and Other Sexually Transmitted Infections for Sex Workers in Low- and Middle-Income Countries*, 12.

⁵⁹ ‘New Zealand Prostitutes Collective (NZPC)’, *Global Network of Sex Workers*, 2017, <https://www.nswp.org/featured/new-zealand-prostitutes-collective-nzpc>.

⁶⁰ Elliott, *The Role of Consent in Human Trafficking*, 3.

Trafficking Protocol.⁶¹ Some positions viewed sex work either as an inherent human rights violation or as human trafficking, irrespective of the element of consent.⁶² Others pointed out that denying the ability of women to consent to commercial sexual transactions poses an immense threat to sex workers' (mostly cis and trans women's) sexual autonomy and agency and represent an anti-feminist approach, rather than a position that stands up for the human rights of sex workers.⁶³ More than twenty years later the issue of freedom of consent remains a controversial one within the feminist debate. Particularly, it could be argued that it gets more complex in societies where the national laws are shaped by notions of morality and social ideals that question the agency of sex workers.⁶⁴

The fragmentation of the feminist legal approaches on the issue of consent in sex work is represented by the following theoretical frameworks, each of which analyses how legal institutions should respond to sex work. These frameworks are abolitionism, neo-abolitionism on the one side, and liberal feminism or regulationism, and decriminalization on the other.⁶⁵

1.2.1. Consent in abolitionist terms:

Feminist theorists supporting abolitionism of sex work rely on the notion that sex work is an inherent violation of 'women's rights' and a 'manifestation of gender oppression and exploitation'.⁶⁶ According to the abolitionist movement, 'prostitution' cannot constitute a choice, exactly because it is triggered by circumstances that amount to coercion. Yasin and Namoco conclude that poverty, lack of education and systemic marginalization, especially in the case of trans people,⁶⁷ strip them of alternative choices. Under the same light Melissa Farley also finds the consensual participation in

⁶¹ Jo Doezema, 'Who Gets to Choose? Coercion, Consent, and the UN Trafficking Protocol', *Gender & Development* 10, no. 1 (March 2002): 20–27, <https://doi.org/10.1080/13552070215897>.

⁶² *Ibid*, 22.

⁶³ *Ibid* 21 As it is argued here: 'This position has its root to the assumption that a woman's consent to undertake sex work is meaningless'.

⁶⁴ Ronald Weitzer and Gayle Rubin as cited in Mesce, 'Sex Work Decriminalization and Feminist Theory', 18. They argue that the legal definition of 'sex work as an inherent violation' has created a 'moral panic' that shapes the legal and political discourse.

⁶⁵ Mesce, 12–16.

⁶⁶ Butler, 2015 as cited in Mesce, 14.

⁶⁷ Raheel Yasin and Sarah I. Obsequio Namoco, 'Prostitution: A New Dynamic of Discrimination', *Gender in Management: An International Journal* 36, no. 4 (21 May 2021): para 'Conceptual Framework', <https://doi.org/10.1108/GM-07-2020-0205>.

sex work impossible.⁶⁸ Therefore sex work cannot be considered to be a voluntary decision, meeting the criterion of consent, because is it by nature created by gendered subordination.⁶⁹

Abolitionist feminists argue in favor of the full criminalization of sex work, meaning both the sale of sexual services, as well as their purchase.⁷⁰ On the other hand, neo-abolitionism is based on the foundations set by abolitionism, except neo-abolitionists support the criminalization of solely the purchase of sexual services, but not their sale.⁷¹ The neo-abolitionism framework is also known as the Nordic model,⁷² and will be further discussed hereunder in this research. These arguments have translated into legal frameworks on sex work forming a diverse legal arena around the EU. Opponents of the recognition of the agency argument that frames the issue of consent are often subsequently supporters of the national legal models that criminalize the clients of sex workers. According to neo-abolitionism, sex workers cannot be agents, since they are portrayed as victims.⁷³ This victim label approach criticizes the ‘pro-sex work’ argumentation on the grounds that it ignores the historic intersectional discrimination that continues to oppress women.⁷⁴ Subsequently, these positions have received significant backlash from advocates of sex work and sex workers themselves, who oddly enough are often excluded from the discussion.⁷⁵ Discarding the agency of women, this view has been denounced for myopically focusing on the minority that is constituted by victims of coercion, while opposing to the argument that the majority of sex workers engage in sex work voluntarily.⁷⁶ Following the same logic, even though systemic and longstanding inequalities have been established by deeply rooted patriarchic foundations, it appears that denying the ability to consent only prolongs this pre-existing form of oppression. Under the same light, the ‘prohibition of prostitution’ is seen as a panacea, meant to neutralizes the issue, whereas it is driving it underground

⁶⁸ Melissa Farley, ‘Prostitution, Trafficking, and Traumatic Stress.’, 2004, 65
<https://doi.org/doi:10.4324/9780203822463>.

⁶⁹ Butler, 2015 as cited in Mesce, ‘Sex Work Decriminalization and Feminist Theory’, 14.

⁷⁰ Ibid, 14.

⁷¹ Foret and Rubio Grundell, ‘European Morality Politics in the European Union’, 1806.

⁷² Crowhurst and Skilbrei, ‘Swedish, Nordic, European’, pt. Introduction.

⁷³ Butler, Cheryl Nelson, *A Critical Race Feminist Perspective on Prostitution & Sex*, 2016.

⁷⁴ Bacik, ‘Developing an Understanding of “Compromised Consent”: How Reconsideration of Consent as a Legal Concept May Inform a Feminist Theoretical Framework for the Introduction of “Nordic Model” Prostitution Laws and Did Inform the Motivations of Lawmakers in Ireland’, 34.

⁷⁵ Allwood, ‘Agenda Setting, Agenda Blocking and Policy Silence’, 131.

⁷⁶ Beloso, Brooke M., “‘Sex, Work, and the Feminist Erasure of Class’”, *Journal of Women in Culture and Society* Vol. 38, No.1. (2012), digitalcommons.butler.edu/facsch_papers/454/.

instead.⁷⁷ Criminalization of clients is seen as a way of ‘turning a blind eye’ towards an issue that doesn’t cease to exist only because of the criminalization, rather the result is driving sex work under the radar of the law.⁷⁸

1.2.2. Consent from a liberal feminist and a human rights perspective:

The opposing feminist group is comprised by the liberal feminists, or else the regulationist approach, and the legalization-decriminalization approach. In practice, these movements draw a line between forced prostitution and sex work. They consider the later as an expression of self-determination.⁷⁹ Liberal feminists argue that ignoring the individual’s ability to have agency over their own body and choices portrays sex workers once again as pawns, instead of players under their own terms in a ‘game’ they chose to partake in.⁸⁰ Instead of viewing sex work as a sector that inherently enforces objectification, liberal feminism considers the recognition of sex work as work as a way to amend the pre-existing asymmetries between genders.⁸¹ Sex worker’s agency and their right to self-determination is the basis for the freedom of consent. This position aligns with the human rights perspective Marjam Wijers adopts while arguing that agency represents the capacity to make decisions and exercise control over one’s own life, and the ability to consent or withhold consent is intrinsically linked to human nature.⁸² Therefore, denial of the ability to consent, she argues, is denial of their humanness, while framing sex work as a violation of human dignity portrays sex workers as ‘deviant others’.⁸³

The recognition of sex workers rights as human rights means recognizing their agency, and as opposed to the neo-abolitionist narrative that reduces sex workers to

⁷⁷ Amnesty International, ‘Norway: The Human Cost of “Crushing” the Market: Criminalization of Sex Work in Norway’, no. EUR 36/4034/2016 (26 December 2016), <https://www.amnesty.org/en/documents/eur36/4034/2016/en/>.

⁷⁸ Amnesty International, ‘Ireland: Laws Criminalizing Sex Work Are Facilitating the Targeting and Abuse of Sex Workers’, 24 January 2022, <https://www.amnesty.org/en/latest/news/2022/01/ireland-laws-criminalizing-sex-work-are-facilitating-the-targeting-and-abuse-of-sex-workers/>.

⁷⁹ Foret and Rubio Grundell, ‘European Morality Politics in the European Union’, 1806.

⁸⁰ K. Cruz., *Beyond liberalism: Marxist feminism, migrant sex work, and labour unfreedom* (Feminist Legal Studies, 2018) 26(1)

⁸¹ Ane Mathieson, Easton Branam, and Anya Noble, ‘Prostitution Policy: Legalization, Decriminalization and the Nordic Model’, n.d., 378.

⁸² Marjan Wijers, ‘Sex Workers Rights Are Human Rights: Or Not? The Art of Stealing Back Human Rights’, 5.

⁸³ *Ibid*, 5.

‘objects instead of subjects’,⁸⁴ it challenges the mentality that sex workers lack the ability to take up positions of power.⁸⁵ The once perceived as inherently victimized ‘prostitutes’ can instead be sex workers and associates within the industry, and enjoy the legal protection that these roles would provide them. As Doezema argues, this feminist approach focuses on sex workers’ ability to move ‘beyond the legacy of repression clinging to the trafficking framework, because it this new framework [was] developed by sex workers themselves’.⁸⁶

By giving consent to engage in a sexual service, a sex worker is not consenting to anything that deviates from the prior agreed upon terms and of course, not to violence or abuse.⁸⁷ Similarly, in the case that a sex worker verbally refuses to offer their services, or chooses to disrupt their performance, consent is explicitly lacking. Therefore, consent must be ongoing. It can be withdrawn at any moment. Rescinding consent must be respected by the parties involved.⁸⁸ If the latter does not happen, the act constitutes rape or sexual assault and must be treated as a criminal offense. According to Amnesty International, assumptions that are based on the notion that sex workers always consent to sexual acts, since it is part of their work, are based on stereotypes entrenched in discrimination, severely threatening towards the human rights of sex workers, their human dignity and their protection under the law, and are therefore considered irrelevant.⁸⁹

However, it is important to highlight that this disparity of opinions on the issue of consent has also blurred the line between sex work and human trafficking not only in the scholarly debate of sex work, but also in the legal approach of both sex work and human trafficking. From a neo-abolitionist perspective, and more specifically through the lens of a ‘compromised consent’ it is argued that sex work relies on a superficial narrative of consent, which conceals the gendered exploitation that serves as the very foundation of sex trade and human trafficking.⁹⁰ According to Bacik’s position,

⁸⁴ Ibid, 5.

⁸⁵ Ibid, 3.

⁸⁶ Doezema, ‘Who Gets to Choose?’, 25.

⁸⁷ Amnesty International, ‘ISSUE BRIEF- Sex Worker’s Rights’, n.d., pt. What Amnesty International means by decriminalisation.

⁸⁸ Amnesty International, ‘POLICY ON STATE OBLIGATIONS TO RESPECT, PROTECT AND FULFIL THE HUMAN RIGHTS OF SEX WORKERS’, 15.

⁸⁹ Ibid, 15.

⁹⁰ Bacik, ‘Developing an Understanding of “Compromised Consent”: How Reconsideration of Consent as a Legal Concept May Inform a Feminist Theoretical Framework for the Introduction of “Nordic Model” Prostitution Laws and Did Inform the Motivations of Lawmakers in Ireland’, 7.

feminist scholars that view involvement in sex work as a free choice may also recognize the ability to consent to being trafficked or to suffer gender based violence.⁹¹ It can be argued that this is a rather aphoristic approach to the issue of consent, as it takes away the legal meaning of the contexts that it relies on, inevitably leading to a logical leap. Despite that, the contrasting opinions on the issue of consent have led to the conflation of sex work with human trafficking, as will be discussed in the next part of this Chapter.

1.3. Sex Work or human trafficking?

As outlined above, the link between sex work and human trafficking is reinforced by neo-abolitionist interpretation that views consent in the context of sex work as intrinsically invalid, as the latter is equated to sexual violence.⁹² Chimienti and Bugnong argue that this results in the creation of grey zone that blurs the clear distinction of sex work and sexual exploitation treating both as the same and carrying dangerous consequences for the rights of sex workers.⁹³ The tendency to equate sex work and human trafficking for sexual exploitation finds its logical basis in a narrative that ignores sex workers' agency and affirms their victimization.⁹⁴ Tellingly though, the 'victim' label is something that many sex worker's associations and advocates are actively fighting against, and sex workers themselves do not identify with.⁹⁵

While acknowledging that the issue of consent is still complexed within the feminist debate, it is argued here that by recognizing the agency of sex workers and the right to freely chose an occupation,⁹⁶ the issue of consent becomes fairly straight forward. To that end, the crucial distinction between the two is that human trafficking is a crime, that lacks the element of consent. More so, it includes the threat or the use of force, coercion, abduction, deception or abuse of power or the position of

⁹¹ Bacik, 8, para 4.

⁹² Rachel Moran and Melissa Farley, 'Consent, Coercion, and Culpability: Is Prostitution Stigmatized Work or an Exploitive and Violent Practice Rooted in Sex, Race, and Class Inequality?', *Archives of Sexual Behavior* 48, no. 7 (October 2019): pt. Link Between Trafficking and Prostitution, <https://doi.org/10.1007/s10508-018-1371-8>.

⁹³ Chimienti and Bugnong on Switzerland's policy on sex work point out that: 'Fighting against human trafficking or exploitation is, indeed, more difficult than punishing illegal stay and work, which leads the authorities to focus on this latter kind of control', Synnove Okland Jahnsen, Hendrik Wagenaar, *Assessing Prostitution Policies in Europe*, 146.

⁹⁴ 'Understanding Sex Work in an Open Society', *Open Society Foundations*, April 2019, pt. What is human trafficking and how is sex work different?, <https://www.opensocietyfoundations.org/explainers/understanding-sex-work-open-society>.

⁹⁵ TAMPEP International Foundation, 'Briefing Paper', July 2015, 2–3, https://tampep.eu/wp-content/uploads/2017/11/TAMPEP-paper-2015_08-PORT.pdf.

⁹⁶ Charter Of Fundamental Rights Of The European Union 2012/C 326/02, art. 15.1.

vulnerability as basic elements of its definition, as outlined by Article 2 of the European Parliament's (EP) Directive 2011/23/EU on Preventing and Combating Trafficking in Human Beings and Protecting its victims.⁹⁷

According to the Directive 2011/23/EU, consent under these circumstances is irrelevant.⁹⁸ For the purposes of a holistic definition of human trafficking under human rights law, this research also takes into account the definition set forth by the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.⁹⁹ Based on this definition three elements should be in place for something to be considered human trafficking: an 'action', meaning the recruitment or transfer of persons, a 'means' which allows for the action to be achieved, meaning deception, force or abuse of power, and finally the 'purpose' of exploitation. In light of these definitions, human trafficking is a blatant violation of human rights. This research refers to sex work as a service outside the grey zone of conflation with trafficking for the purpose of sexual exploitation. In this context, all involved individuals are adults, aware and accepting of the transactional nature of the service. Taking into account the outline of the feminist debate on the definition of consent and the arguments presented in favor of sex work, it is argued the mere act of consensually selling or buying sexual services should be diversified from the blatant violation of human rights violation that is human trafficking.

However, when the issue is examined under the light of the existing sex work and anti-trafficking policies of EU Member States, this conflation remains quite prominent.¹⁰⁰ Although, trafficking for sexual exploitation has been estimated to constitute only a subsample within the overall industry of sex work, meaning that the two are not identical in terms of scale either,¹⁰¹ this conflation persists and constitutes

⁹⁷ 2011/36/EU of the European Parliament and the Council of, 'Directive on Preventing and Combating Trafficking in Human Beings and Protecting Its Victims, and Replacing Council Framework Decision', no. 2002/629/JHA (5 April 2011).

⁹⁸ Directive 2011/23/EU, Article 2(4).

⁹⁹ United Nations Office of the High Commissioner, 'Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime', 2241 UNTS 507, 15 November 2000, art. 3.

¹⁰⁰ Synnove Okland Jahnsen, Hendrik Wagenaar, *Assessing Prostitution Policies in Europe*, 69 In the example of Ireland, the Criminal Law (Sexual Offences) Act 2017 frames 'prostitution' as inseparable from human trafficking.

¹⁰¹ Philippe ADAIR1 and Oksana NEZHVENKO, 'Sex Work vs. Sexual Exploitation in the European Union: What Are the Likely Guesstimates for Prostitution?', no. 6th Economics&Finance Conference, OECD, Paris (6 September 2016): 11, <https://hal.science/hal-01672874/document>.

the main approach that shapes EU's stance towards sex work.¹⁰² According to the neo-abolitionist approach, instead of addressing explicitly the multifaced risks created by regulatory gaps and faced by sex workers daily, the solution to the problem boils down to demand and supply systems. That said, the restriction of demand of sexual services (through the criminalization of purchase of sexual services) is perceived to inevitably lead to the reduction of supply, hence the elimination of human-trafficking for sexual exploitation.¹⁰³

The neo-abolitionist approach has been numerously condemned by human rights organizations advocating for the rights of sex workers, who underline that the elimination of 'prostitution' and trafficking based on 'killing the demand for transactional sex' has devastating impacts on sex workers.¹⁰⁴ Facing discrimination in the society and the law, they are lacking access to social security and safe working conditions, making them more susceptible to violence and exploitation.¹⁰⁵ Sex workers, and especially migrant sex workers, run an increased risk of being trafficked, a risk that is perpetuated by the absence of an accessible robust framework aimed at their protection as sex workers in the first place.¹⁰⁶ As will be discussed in the following Chapters, the practical implementation of these policies generates an eroded sample of what sex work and human trafficking is and where one stops for the other to begin.¹⁰⁷ The inevitable result is that these policies often fall short in combatting trafficking and effectively regulating sex work in a manner that safeguards sex workers' human rights respectively.

¹⁰² 'EU Strategy on Combatting Trafficking in Human Beings 2021-2025' COM(2021) 171 final (14 April 2021): pt. 3, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021DC0171&fbclid=IwAR3fGV7H_rEJDjXoGSm8lwRNTxI4TpKns3nrRCvJ4yd8Avbco_h0jC_LMHk.

¹⁰³ TAMPEP International Foundation, 'Briefing Paper', 3.

¹⁰⁴ Human Rights Watch, 'Why Sex Work Should Be Decriminalized'.

¹⁰⁵ Helene Le Bail, Calogero Giametta, Noemie Rassouw, 'What Do Sex Workers Think About the French Prostitution Act?'

¹⁰⁶ TAMPEP International Foundation, 'Briefing Paper', 3.

¹⁰⁷ Synnove Okland Jahnsen, Hendrik Wagenaar, 42, 74.

Chapter II

EU Member States: Sex Work Policies and Gaps

The ‘prostitution’ policies within Member States form a widely divergent legal landscape. The variation of the ways that EU Member States treat sex work can refer to the legal, or criminal status of the sale of sexual services, or their purchase and the different levels of discretion that is granted to local authorities for the regulation of sex work.¹⁰⁸ The divergent practices, sets of laws and intentions of each policy has been categorized by Joyce Outshoorn on the basis of two key factors: on whether ‘prostitution’ is something that is tolerated by the States, and whether the sex worker or ‘prostitute’ is criminalized.¹⁰⁹ Based on this distinction, three different regimes emerge: 1) prohibitionism, 3) abolitionism, and 2) regulationism.¹¹⁰

The prohibitionist regime stands for the ban of ‘prostitution’, and seeks to criminalize all the parties involved, while stigmatizing sex workers as individuals of immoral conduct.¹¹¹ Prohibition is similar to abolition in regards to some aspects. One of them is their main goal, which is to eliminate prostitution from societies.¹¹² Furthermore, neither of the two distinguishes ‘prostitution’ on the grounds of consent, meaning that they both equate sex work to forced prostitution and sexual exploitation. The difference between prohibitionism and abolitionism is that the former includes the moral condemnation of the sex worker, whereas the latter does not.¹¹³ The majority of States have abandoned the prohibitionist approach to sex work. Instead, the neo-abolitionist regime and the regulationist regime summarize the current tendencies of EU Member States on sex work, while it has been argued that the rise of both was due to the commonly shared impact of globalized neoliberalism in Europe.¹¹⁴ According to Greggor Mattson, both emerged as a way to protect the vulnerable group of women that

¹⁰⁸ Synnove Okland Jahnsen, Hendrik Wagenaar, 36.

¹⁰⁹ Joyce Outshoorn, ‘Gender, Sexuality and Global Change’, *Institute of Thematic Gender Studies: Dept. of Gender Studies, Linköping University*, Chapter 17, ‘The Politics of Prostitution Revisited: Trends in Policy and Research’ (November 2008): 94.

¹¹⁰ Eilís Ward, ‘Prostitution and the Irish State: From Prohibitionism to a Globalised Sex Trade’, *Irish Political Studies* 25, no. 1 (February 2010): 48, <https://doi.org/10.1080/07907180903431988>.

¹¹¹ Ward, 48; Johansson and Kalm, *EU Civil Society*, 2015, 139.

¹¹² Johansson and Kalm, *EU Civil Society*, 2015, 139.

¹¹³ Daniela Danna, *Report on Prostitution Laws in the European Union* (Università degli Studi di Milano Dipartimento di scienze sociali e politiche, 2014), 13.

¹¹⁴ Rubio Grundell, ‘The Rise of Neo-Abolitionism in Europe’, 1039–41.

are ‘prostitutes’ and by extension all women.¹¹⁵ Abolitionism in particular was originally born as a movement to defend ‘prostitutes’ as women and assert their civil rights.¹¹⁶ Daniela Dana highlights that this form of agreement, however, did not include legal guarantees: ‘In abolitionist countries this agreement/contract is void because it is contrary to morality’,¹¹⁷ which raises questions in regards to the influence of moral perceptions in the abolitionist context. Mattson observes that offering ‘protection’ to the most vulnerable was seen as way to reassert national sovereignty by linking national identity to moral values, both of which were under the threat of globalization, while he underlines that the anxiety over globalization lead to panic over the sex-trafficking of women.¹¹⁸

Accordingly, the neo-abolitionist regime views sex work as intrinsically linked to sex trafficking, and both as a subordination of women, framing them as equal enemies to gender equality.¹¹⁹ The abolitionist regime according to Outshoorn aims towards the ban of ‘prostitution’, and the criminal liability of third parties, as are considered, for example, brothel owners and clients.¹²⁰ At the same time the neo-abolitionist regime does not hold the sex workers in a position of criminal accountability or moral ambiguity. On the contrary, it considers sex workers to be victims of ‘social or psychological mal-adjustment’, and might propose their rehabilitation through programs of ‘social reintegration’, therefore provisioning state interference in their life.¹²¹ Relying on the existing power dynamics, gender inequality, and economic vulnerability as the factors that may drive individuals to enter the sex industry, it appears that the neo-abolitionist attributes a ‘victim’ label to sex workers to highlight their need for intervention and protection. At the same time, state intervention as part of the ‘rehabilitation’ programs raises concerns in regards to sex worker’s right to private life.¹²² In neo-abolitionist terms, ‘prostitution’ is a gendered issue, inherently linked to the victimization of women, while the notion of vulnerability, it has been argued, is eventually working against sex workers, who are depicted as both victims

¹¹⁵ Mattson, G. *The cultural politics of European prostitution reform: Governing loose women*, 2016, as cited in Rubio Grundell, 1039.

¹¹⁶ Daniela Dana, *Report on Prostitution Laws in the European Union*, 14.

¹¹⁷ *Ibid.*, 14-15.

¹¹⁸ Mattson, G. in Rubio Grundell, 1039.

¹¹⁹ Rubio Grundell, 1042.

¹²⁰ Joyce Outshoorn, ‘Gender, Sexuality and Global Change’, 94, para 3.

¹²¹ Synnove Okland Jahnsen, Hendrik Wagenaar, *Assessing Prostitution Policies in Europe*, 107 For example, France’s neo-abolitionist law.

¹²² Charter Of Fundamental Rights Of The European Union 2012/C 326/02, art. 7.

and offenders.¹²³ The ‘victim centered lens’ through which sex work is viewed as inherently linked to sex-trafficking has been contested by sex work positivists who recognize sex work as work. Although at the empirical level, commercial sex can include both the exploitation of individuals for sex-trafficking,¹²⁴ and the voluntary engagement which in this research is referred to as sex work, there are implications when the conflation of the two leads to the merging of anti-trafficking policies and sex work or ‘prostitution’ policies.¹²⁵ One of those implications is the disproportionate stigmatization of migrant sex workers, which has been highlighted in each of the policies, with the problem expanding to the institutional level in the countries that subscribe to the neo-abolitionist regime.¹²⁶

Originating from Sweden, and mainstreamed in Finland, Norway and Iceland the neo-abolitionist regime is also known as the Nordic Model.¹²⁷ In the last decade, it has also been spread to France, and most recently to Ireland, while official discussions on the adoption of a neo-abolitionism regime to treat sex work under national law have also occurred in Spain, which does not yet fully subscribe to any of the aforementioned regimes.¹²⁸ Debates surrounding the neo-abolitionist regime seem to have expanded, yet not in the form of actual policy implementation, even in countries (such as the Netherlands and Germany) traditionally subscribing to the other side of the pole, the regulationist regime, which treats sex work as a matter of labor.¹²⁹

The regulationist regime treats sex work as work and it stands for the application of a variety of administrative legal provisions, including labor laws and social welfare laws in regards to sex work.¹³⁰ According to Joyce Outshoorn, this policy regime aims at regulating all aspects of sex work, without ‘condemning’ the sex worker.¹³¹ The forerunner of the regulationist regime among EU Member States were the Netherlands, while the regulationist approach has also been adopted amongst other states by Germany, Austria and Belgium. Although there are basic differences between the two

¹²³ Rubio Grundell, ‘The Rise of Neo-Abolitionism in Europe’, 1050.

¹²⁴ Kulig and Butler, ‘From “Whores” to “Victims”’, 301.

¹²⁵ Gerassi, ‘From Exploitation to Industry’, 602.

¹²⁶ Niina Vuolajarvi, ‘Governing in the Name of Caring: Migration, Sex Work and the “Nordic Model”’, 282.

¹²⁷ Rubio Grundell, ‘The Rise of Neo-Abolitionism in Europe’, 1035.

¹²⁸ Ibid, 1042.

¹²⁹ Rubio Grundell, 1026; Synnove Okland Jahnsen, Hendrik Wagenaar, *Assessing Prostitution Policies in Europe*, 86, 88.

¹³⁰ Synnove Okland Jahnsen, Hendrik Wagenaar, *Assessing Prostitution Policies in Europe*, 91.

¹³¹ Ward, ‘Prostitution and the Irish State’, 48.

regimes, in practice, when it comes to the states entire territorial jurisdiction, rarely are sex work policies homogenous, adhering to one sex work regime. It is often the case that hybrid regimes emerge within national legislations, deeming the clear categorization of State's policies all the more complex.¹³² However, a close examination of the implementation of the policies belonging to the regulationist and the neo-abolitionist regime shows that despite their differences and the unique national historical, political and socio-economic challenges of each state, the impacts of these policies on the lives of sex workers are comparable, making the human rights standards of sex workers an EU-wide issue.

In light of the above, this Chapter will address the gaps that emerge from the practical implementation of the existing sex work regimes, namely: regulationism and legalization and neo-abolitionism.

A detailed analysis of each Member State's legal regime governing sex work, their impact on sex workers rights and connection to human trafficking policies is beyond the scope of this research. In what has been described as 'a colossal undertaking', the practical challenges of such an endeavor were overcome by a collective research completed and published in 2018, comprised of case studies of prostitution policies in 22 European States and published in English.¹³³ In their research titled 'Assessing Prostitution Policies in Europe', a group of academics were charged with the work of providing the historical evolution, the national legislative framework, the policy implementation and impacts, as well as a description of the sex work sector in each European country, at the time of writing. The following section will rely in part on the findings and conclusions drawn from this study in order to illustrate the different legal approaches to sex work.

By critically examining the portrayal of sex workers as victims, the following is section of the research will: 1) provide an overview of the gaps and inconsistencies of the Regulationist regime on sex work and 2) critically assess of the effects that anti-trafficking policies in the neo-abolitionist context have on sex workers rights, due to the conflation of sex work with human trafficking.

¹³² Hubbard, 2006, as cited in Ward, 'Prostitution and the Irish State', 48.

¹³³ Synnove Okland Jahnsen, Hendrik Wagenaar, *Assessing Prostitution Policies in Europe*, pt. Acknowledgements, 21.

2.1. Sex Work: legal, regulated or tolerated?

The initial basis of the distinction between EU Member States' policies on sex work is whether the issue is viewed as a matter of labor law, or as an issue exclusively pertaining to criminal law. The ways we can differentiate between Member States' policies on sex work do not only include the legal status that sex work has within legal orders, but also the varying levels of the authority that local governments have in the regulation of sex work.¹³⁴ In some countries the regulation of sex work pertains to decentralized administration, meaning that the regulation of sex work on the municipality level is often up to the regional authorities.¹³⁵

As opposed to the criminalization of the purchase of sexual services that the neo-abolitionist regime proposes, some EU Member States consider that the regulation of sex work is a matter of labor law, and as such it requires a regulatory approach that treats the issue as an economic activity. The regulationist regime is focused on establishing a set of rules in order to ensure control over all aspects of sex work by the state or by local authorities. It has been praised for providing access to socioeconomic rights for sex workers, and while there are criticisms in regards to the shortcoming of the implementation of regulationist regimes,¹³⁶ this approach is advocated for by sex workers organizations, academics and international organizations.¹³⁷ However, as will be further discussed below, the legal amalgam that rules the sex work sector in every Member State may result in shifting the focus away from the labor rights of sex workers, even in Member states where sex work is considered a labor issue.¹³⁸ Sex work is rarely seen purely as an issue of labor law in practice,¹³⁹ as it is often the case that sex work calls for the application of national criminal, migration, fiscal or administrative laws.¹⁴⁰ The regulationist regime may, therefore, present significant variations from state to state, and has been criticized for being 'insufficiently consistent', alongside with the

¹³⁴ Ibid, 279. For example, in Spain the 17 autonomous regions are charged with different levels of authority over legislation on matters including sex work. Similarly, under Greek administrative law, municipalities are responsible for licensing and revoking the licenses for premises used by sex workers, 335.

¹³⁵ Synnove Okland Jahnsen, Hendrik Wagenaar, 87.

¹³⁶ Jane Pitcher, Marjan Wijers, *The Impact of Different Regulatory Models on the Labour Conditions, Safety and Welfare of Indoor-Based Sex Workers*, vol. Criminology & Criminal Justice, Vol. 14(5) 549–564, 2014, 550.

¹³⁷ Synnove Okland Jahnsen, Hendrik Wagenaar, *Assessing Prostitution Policies in Europe*, 350.

¹³⁸ Ibid, 86.

¹³⁹ Ibid, 86.

¹⁴⁰ Ibid, 38.

other policy regimes.¹⁴¹ In some States whose policies can be described as hybrid, sex work is subjected to criminal law, and while the working conditions of sex workers may be regulated to some extent, gaps in regulation and implementation obstruct access to sex workers' right not to be subjected to discrimination, their right to safe working conditions, access to health care and the protection of their private life.¹⁴²

At the same time, in some countries the deviation of local policies from the national legislation can be considerable.¹⁴³ Even in countries where sex work is legal, national criminal laws may apply to activities closely related to sex work, such as pimping or brothel owning and running, while on the municipal level administrative fines and sanctions developed through the co-application of administrative and criminal law may be imposed without the interference of a court judgement.¹⁴⁴ Although in most states sex work in brothels and special facilities is legalized, whether street sex work is legal can vary within a country depending on the region. For instance, in Austria street sex work is permitted in Vienna, but prohibited in other regions.¹⁴⁵ While there are differences between the policy regulations between municipalities within the States, it is also important to note that national policy implementations of the regulationist approach may differ significantly from one EU Member State to another.

The Netherlands was a pioneer EU Member State in regards to its legalization policy. The ban on brothels was lifted, and legalization was seen as a way to 'normalize the prostitution sector' which also meant the legal recognition of sex work as labor.¹⁴⁶ Sex work is a matter pertaining to administrative law in regards to the function of sex establishment, and to labor law in regards to the labor rights of sex workers.¹⁴⁷ However, even though, the situation for sex workers is better than in countries where sex work is criminalized, there are still issues arising, which became more prominent during the Covid-19 pandemic. Sex work was suspended, however most sex workers, as opposed to other individuals exercising 'contact professions' did not receive the

¹⁴¹Ibid, 25.

¹⁴² Synnove Okland Jahnsen, Hendrik Wagenaar, *Assessing Prostitution Policies in Europe*, 336; Charter Of Fundamental Rights Of The European Union 2012/C 326/02, arts. 21, 31.1, 35, 7.

¹⁴³ Synnove Okland Jahnsen, Hendrik Wagenaar, *Assessing Prostitution Policies in Europe*, 39. For example the German Law on the decriminalization of sex work has been barely implemented by some regions, like Bavaria, 139.

¹⁴⁴ Ibid, 90. The research highlights the example of Utrecht, where at the municipality level, over 300 licenses of window owners were revoked under the presumption of involvement in sex-trafficking.

¹⁴⁵ Ibid, 141.

¹⁴⁶ Ibid, 84.

¹⁴⁷ Ibid, 85.

financial support provided by the state, despite paying taxes.¹⁴⁸ No income or state support meant for many sex workers the inability to sustain their place of residence and at that risk, many continued to exercise their profession.¹⁴⁹ In order to target the latter group, the police's tactic was to pretend that they were clients and set up meetings, which in fact were organized police raids that led to fines, evictions and deportation for the undocumented migrants.¹⁵⁰ The TAMPEP 2021 Survey on the impacts of Covid-19 highlights that tracking down sex workers was a popular municipality policy in the Netherlands, however the pandemic provided the circumstances for a legal basis for the raids, since sex work was not considered to be a criminal activity prior to the pandemic measures.¹⁵¹

Outside of the impacts that Covid-19 measures had on sex workers, the legality of sex work can often be compromised by the very reality of the infrastructure. An example of the latter is set by the case of Germany and Greece, where sex work premises are not supposed to be situated in areas near hospitals, schools, libraries, youth and athletic centers, children's playgrounds, churches, or even squares.¹⁵² According to Greek law, in cities which are very densely habituated, the conditions imposed by the law to deem the sex work facility legal are almost impossible to be met. This creates a regime of legal uncertainty in which licensed and medically tested sex workers are forced to work in illegal premises, and run the constant risk of being arrested even though they have complied with the requirements of the law to the extent possible.¹⁵³ In some respects it may seem that these types of policies are in fact aimed at making it as difficult as possible for sex workers to carry out their profession.¹⁵⁴

At the same time, in many EU countries, the issue of sex work is regulated in regards to their personal lives, their relations with others and the conditions of sex work facilities.¹⁵⁵ Despite seemingly more progressive stances in the regulatory spectrum of sex work policies in Member States such as Greece, that treats sex work as a matter of administrative, as well as criminal, law, in practice the preconditions for issuing a

¹⁴⁸ TAMPEP International Foundation, 'Survey: Migrant Sex Workers and the Covid-19 Crisis', March 2021, pt. Netherlands, <https://tampep.eu/declaration/survey-msw-covid-19/>.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid, pt. Netherlands.

¹⁵¹ Ibid, pt. Netherlands.

¹⁵² Synnove Okland Jahnsen, Hendrik Wagenaar, *Assessing Prostitution Policies in Europe*, for Greece, 332. For Germany, 124.

¹⁵³ Ibid, 335.

¹⁵⁴ Ibid, 29.

¹⁵⁵ Ibid, 37.

license for legal sex work activity pose severe restrictions on the private lives of sex workers. Amongst the criteria as set forth by the Greek law for the legal registration and the issuing of a certificate for a sex worker to exercise their profession, is the prerequisite that the sex worker is unmarried, widowed or divorced.¹⁵⁶ This is a direct violation to the constitutional and internationally recognized human right to marry and create a family.¹⁵⁷

While some Member States make it their goal to improve the situation of sex workers within their jurisdiction,¹⁵⁸ it appears that this goal is not commonly shared by all Member States¹⁵⁹. For example, in Italy, ‘prostitution’ is not illegal, yet remains unregulated. The Merlin law was employed back in 1958 and to this day remains unchanged and officially uncontested in parliamentary debates.¹⁶⁰ According to this law, regulationism of sex work is abolished within the Italian state, and while ‘prostitution’ is not a crime, brothel running and owning, soliciting and advertisement about sex work are criminal offenses.¹⁶¹ Furthermore, the registration or any form of licensing of sex workers, and women suspected to be involved in the sex industry, by public health authorities, the police, or any administrative body is prohibited.¹⁶² The prohibition of granting access to registration in public bodies that are charged with the responsibility to safeguard the socioeconomic rights of the citizens shows, according to Rigotti, “the transposition of the general stigma attached to ‘prostitution’ into other branches of the law”.¹⁶³ Italy is an example of what has been also regarded as subscribing to a so-called ‘tolerance regime’ which, is based the notion that ‘prostitution’ is a ‘necessary evil’ and its legal treatment, according to Roberto and Gabriella Scaramuzzino, is led by notions of morality.¹⁶⁴ According to them, this is one of the differences between regulationist regimes and tolerance regimes. Rigotti points out that both the letter of the Italian law and its application “tend to follow a presumption of prostitution based on the

¹⁵⁶ Ibid, 331.

¹⁵⁷ European Convention on Human Rights, Art 12, Nov.4, 1950, 213 U.N.T.S. 221.

¹⁵⁸ Jean-Pierre Stroobants, ‘Belgium Decriminalizes Sex Work’, *Le Monde*, 2 June 2022, https://www.lemonde.fr/en/international/article/2022/06/02/belgium-decriminalizes-sex-work_5985486_4.html.

¹⁵⁹ Synnove Okland Jahnsen, Hendrik Wagenaar, 28.

¹⁶⁰ Ibid, 309.

¹⁶¹ Ibid, 307.

¹⁶² Ibid, 307–9.

¹⁶³ Rigotti, ‘When the Law Meets Feminisms’, 7, para 2.

¹⁶⁴ Håkan Johansson and Sara Kalm, eds., *EU Civil Society* (London: Palgrave Macmillan UK, 2015), 139, <https://doi.org/10.1057/9781137500724>.

individual's behavior and way of dressing",¹⁶⁵ irrespective of the existence of evidence, or their absence, that the individual is threatening urban security. In line with the perception that sex workers are likely to pose a threat to urban safety, this predisposition creates a regime littered with notions of morality and legal uncertainty, whose consequences may therefore be imposed arbitrarily, whilst violating the sex workers' right to self-determination.¹⁶⁶

In certain member states, such as Portugal, sex work is not considered a crime, nor is it, however, a regulated activity.¹⁶⁷ The policy on sex work includes only criminal laws, while there are no applicable provisions pertaining to labor or tax laws.¹⁶⁸ While promoting, encouraging or facilitating 'prostitution' leads to criminal consequences,¹⁶⁹ sex workers who work together under the same roof run the risk of being prosecuted, even if their relationship is solely collaborative.¹⁷⁰ As only individuals who live alone can work as sex workers in their place of residence, the circumstances of the work increase the risk of violence, which is likely to remain unreported, due to the lack of trust towards the authorities, or simply not taken seriously by the police.¹⁷¹ The implementation of sex work policies, national or regional is almost exclusively in the hands of the police in the vast majority of Member States, which makes the relationship of distrust between sex works and the police a concerning issue.¹⁷² Although Portugal went from a regulationist regime, to a criminalization policy and then back to decriminalization, the current national discourse leans towards the recognition of sex workers as victims rather than professionals.¹⁷³ Victimization is more prominent when it comes to migrant sex workers, rather than to the Portuguese sex workers.¹⁷⁴

This variation of practices even within States creates the feeling of legal insecurity among sex workers,¹⁷⁵ not to mention the risk of being arbitrarily accused,

¹⁶⁵ Rigotti, 'When the Law Meets Feminisms', 7, para 2.

¹⁶⁶ Ibid, 7.

¹⁶⁷ Synnove Okland Jahnsen, Hendrik Wagenaar, 294, 308.

¹⁶⁸ Ibid, 295.

¹⁶⁹ Ibid, 294.

¹⁷⁰ Ibid, 300.

¹⁷¹ Ibid, 301.

¹⁷² Ibid, pt. Western and Central Europe, Nordic countries, Former Eastern Europe, Southern Europe. This is the case in most countries that are included in the research. For example: France, 110. Sweden, 184. Czech Republic, 270. Spain, 284. Portugal, 301.

¹⁷³ Synnove Okland Jahnsen, Hendrik Wagenaar, 293.

¹⁷⁴ Ibid, 295.

¹⁷⁵ Ibid, 309, 310, 336.

or even harassed by the police.¹⁷⁶ In its conclusion, the collaborative study titled ‘Assessing Prostitution Policies in Europe’ is highly critical of the effectiveness and alignment to the human rights doctrine of all EU Member States policies on sex work.¹⁷⁷ Supporting this argument, it is argued here that EU Member States follow a rather simplistic approach towards a very complex issue, resulting in pushing a group of individuals to the margins of society, and treating them as second-class citizens.¹⁷⁸ There appear to be gaps in many EU Member States’ policies on sex work,¹⁷⁹ making them insufficient to provide the level of protection required for the fulfilment of the human rights of sex workers.¹⁸⁰ Based on these findings, it becomes rather obvious that the regulation of the issue may often aim mostly towards keeping sex workers away from the focus of society, rather than enabling mechanisms that ensure full protection and access to their human rights, even in Member States subscribing to the regulationist regime.

2.2. Anti-Trafficking Legislation in Neo-Abolitionism Terms and the ‘Victimization’ of Migrant Sex Workers:

The study titled ‘Assessing Prostitution Policies in Europe’ indicates that the situation as described above is significantly more difficult for migrant sex workers.¹⁸¹ The common denominator in all EU member states is the link between sex work and migration, that leads to the enablement of anti-trafficking policies in order to eradicate sex work, while presumably combatting sex-trafficking in the same way. To that end, it appears that the regulation of sex work and its legal recognition as work is more often seen as an ineffective policy of combatting sex trafficking, rather than an efficient way of guaranteeing the fulfilment of the socioeconomic rights of sex workers.¹⁸² The issue gets even more perplexed due to the conflation of sex work with human trafficking, which translates into the conflation of sex work policies with immigration policies.¹⁸³

¹⁷⁶ Ibid, see for example: Belgium, 104. Austria, 139. Slovenia, 235. Spain, 285.

¹⁷⁷ Ibid, 23.

¹⁷⁸ Ibid, 41.

¹⁷⁹ Rigotti, ‘When the Law Meets Feminisms’, 7.

¹⁸⁰ Synnove Okland Jahnsen, Hendrik Wagenaar, *Assessing Prostitution Policies in Europe*, 37–38.

¹⁸¹ Ibid, 300–302.

¹⁸² Ibid, 349.

¹⁸³ Niina Vuolajarvi, ‘Governing in the Name of Caring: Migration, Sex Work and the “Nordic Model”’, *Rutgers, The State University of New Jersey*, January 2021, 9.

In Finland, the sex work sector is migrant- dominated.¹⁸⁴ At the same time, sex work constitutes grounds for deportation according to the Aliens Act, and since the law provides that the issuing of residence permits is depended on a person’s line of work, sex workers cannot declare their profession.¹⁸⁵ They are, therefore, obliged to work under the radar of the law, and running a higher risk of being subjected to violence. A qualitative research conducted by Niina Vuolajarvi, based on 210 interviews and fieldwork in Sweden, Norway and Finland, has shed light on the experiences of migrant sex workers and the empirical, evidence-based reality of the intersection of immigration policies and the Nordic policy approach.¹⁸⁶ According to her research, many buyers of sexual services who display criminal behavior such as harassment or abuse, towards non-EU migrant sex workers, are taking advantage of the fact that they are granted much lower levels of protection than EU migrants, and are at risk of deportability.¹⁸⁷ In other words, their vulnerability is due to their uncertain legal status, and constitutes the reason that they are most often targeted.¹⁸⁸ Reports have shown that in Norway, the situation has not only created an uninviting environment for people who are established in the country and earn their living, but also puts them in a situation of constant uncertainty and fear of being harassed, prosecuted or deported.¹⁸⁹

The execution and compliance with sex work policies, and anti-trafficking measures, is in every Member State a duty of the police. The problem becomes more so evident when police harassment, insults and racist remarks create a situation of fear, frustration and mistrust towards the executive authorities on the part of sex workers. According to Vuolajarvi’s research, turning to the police for intervention requires a very high threshold: it is not enough if the right to physical integrity or sexual autonomy is on the line, but as a migrant sex worker’s testimony points out :“you don’t call the police if it is not about life”.¹⁹⁰ In Finland, women sex workers have reported disrespectful police behavior, while club owners and managers were encouraged by the authorities ‘to use racial profiling’ under the threat of ‘human trafficking accusations’,

¹⁸⁴ Synnove Okland Jahnsen, Hendrik Wagenaar, *Assessing Prostitution Policies in Europe*, 210.

¹⁸⁵ *Ibid.*, 214.

¹⁸⁶ Niina Vuolajarvi, ‘Governing in the Name of Caring: Migration, Sex Work and the “Nordic Model”’, 5.

¹⁸⁷ Kontula, Anna. 2005. *Prostituutio Suomessa*. Helsinki: Sexpo säätiö, as cited in Niina Vuolajarvi, 122.

¹⁸⁸ Niina Vuolajarvi, 120–22.

¹⁸⁹ Synnove Okland Jahnsen, Hendrik Wagenaar , 201.

¹⁹⁰ Niina Vuolajarvi, ‘Governing in the Name of Caring: Migration, Sex Work and the “Nordic Model”’, 121, para 2.

which made public surveillance of prostitution a degrading and invasive procedure, rather than a lawful application of a policy aimed at combatting human-trafficking.¹⁹¹

The frequent conflation of sex work with human trafficking which has led to the prevalence of neo-abolitionist regimes, has spread in States with policies falling under the regulationist regime.¹⁹² An example is traced in the Netherlands, where the discourse about combatting trafficking has taken precedence over improving the working conditions of sex workers and their legal security.¹⁹³ According to Marjam Wijers, in Amsterdam a considerable number of window brothels was shut down, for the purpose of combatting ‘perceived criminal infrastructure’.¹⁹⁴ The reduced number of brothels has created barriers for sex workers in renting a licensed venue in order to work at an independent capacity, or to start their own business. Even though working independently as a licensed sex worker is believed to be the most preferable, the existence of barriers, created under the aim of combatting criminal activity related to trafficking, has instead pushed sex workers towards the unregulated sector.¹⁹⁵ In a similar vein, in the Hague sex workers are prohibited from working independently.¹⁹⁶ While in the Hague brothel owners are encouraged to control the passports of sex workers and conduct intake interviews, the ‘chain approach’ (ketenaanpak), implemented in many Dutch cities and aimed at identifying possible victims of trafficking, meant the collection and exchange of personal data, which raised concerns for the compatibility of this practice with privacy law.¹⁹⁷ Wijers points out that this development led many, including not only migrants but also national sex workers, to work anonymously and outside the frame of the law, leading to what she concretely calls: ‘the undermining of the aims of regulating voluntary sex work and combatting trafficking.’¹⁹⁸ Another example of this is the conclusion drawn from the study ‘Assessing Prostitution Policies in Europe’, in the outline of the status of sex work in Austria, where the policy making discourse, as well as the public’s opinion is dominated

¹⁹¹ Ibid, 213.

¹⁹² Synnove Okland Jahnsen, Hendrik Wagenaar, *Assessing Prostitution Policies in Europe*, 86.

¹⁹³ Ibid, 86.

¹⁹⁴ Jane Pitcher and Marjan Wijers, ‘The Impact of Different Regulatory Models on the Labour Conditions, Safety and Welfare of Indoor-Based Sex Workers’, *Criminology & Criminal Justice* 14, no. 5 (November 2014): 559, <https://doi.org/10.1177/1748895814531967>.

¹⁹⁵ Ibid, 560.

¹⁹⁶ Synnove Okland Jahnsen, Hendrik Wagenaar, *Assessing Prostitution Policies in Europe*, 86.

¹⁹⁷ Ibid, 86.

¹⁹⁸ Jane Pitcher and Marjan Wijers, ‘The Impact of Different Regulatory Models on the Labour Conditions, Safety and Welfare of Indoor-Based Sex Workers’, 560.

by a victimization portrayal of migrant sex workers, blurring the distinctions between forced and voluntary prostitution.¹⁹⁹

The conflation between sex-trafficking and migrant sexual labor,²⁰⁰ that leads to the delegitimization of migrant sex workers in neo-abolitionist terms, is further sustained by the 'victim of trafficking' narrative, which automatically denies the agency and violates the right to self-determination of migrant sex workers, who are seen as victims, yet treated as delinquents, especially when they mobilize themselves to fight for the improvement of their working conditions.²⁰¹ Laura Maria Augustin argues that the denial of agency of working-class migrants is closely linked to social class dynamics, and aims towards their perception and depiction as involuntary victims.²⁰² This 'victim' narrative allows for the actors that impose the 'victim' label, or what she calls "social helpers [to be] disturbingly important figures" in the lives of migrant sex workers.²⁰³ In the meantime, the sex work of migrant women in the EU is excluded by government regulation, but addressed only in the context of "a victimising discourse, known as 'trafficking'".²⁰⁴ While historically linking the birth of the victimising narrative with the 'concomitant assumption of importance by middle class women' (who had to fight their way into the employment sector and now aim to rescue and control the working-class), Augustin questions the feminist character of this project she calls 'rescuing'.²⁰⁵ The relation of the anti-trafficking regime and the 'class' analysis is also explored by Giulia Garofalo, who is also drawing attention to the 'gendered social division' that the current European discourse on sex work entails.²⁰⁶

The idea that the mobility of sex workers is not distinct to sex trafficking is, according to Gabriella and Roberto Scaramuzzino, what led to the establishment of what they call 'anti-trafficking regime', that is highly influential in the formation and implementation of sex work policies.²⁰⁷ Niina Vuolajarvi speaks in the context of feminized migration (based on the different sectors of occupation that male and female migrants are usually involved in) about this conflation, in conjunction with the victim

¹⁹⁹ Synnove Okland Jahnsen, Hendrik Wagenaar, *Assessing Prostitution Policies in Europe*, 143.

²⁰⁰ Bernstein, 'Carceral Politics as Gender Justice?', 236.

²⁰¹ Calderaro and Giametta, "'The Problem of Prostitution'", 168.

²⁰² Augustin, Laura María, *Sex at the Margins: Migration, Labour Markets and the Rescue Industry*, 8.

²⁰³ *Ibid*, 8, para 1.

²⁰⁴ *Ibid*, 117.

²⁰⁵ *Ibid*, 117-118.

²⁰⁶ Garofalo, G. (2010) *The Political Economy of Sex Work in Europe*, PhD Thesis (London: University of East London School of Law and Social Sciences, 'EU-Prostitution-Laws.Pdf'.

²⁰⁷ Johansson and Kalm, *EU Civil Society*, 2015, 131.

narrative.²⁰⁸ Analyzing the notions of humanitarian governance and institutional care that are condensed in the neo-abolitionism regime, she elaborates on how the politics of migration and race have become intertwined with the politics of sex work and trafficking.²⁰⁹ She refers to the Nordic Model as one that is depicting a feminist-humanitarian practice of intervention in the name of enhancing the welfare of the victimized, vulnerable population.²¹⁰ However, according to Vuolajarvi, the result is the punitive and racialized policing of sex work, putting migrant sex workers at risk of denial of entry or deportation, hence at risk of criminalization.²¹¹ In the meantime, migrant sex workers constitute the very same population that the Nordic model itself aims to treat as victims of trafficking. While ‘humanitarianism’, she argues, does not cease to constitute a form of governance, it is portrayed as a progressive means ‘to protect the weak and oppressed’.²¹²

Amongst the critiques of the neo-abolitionist regime lies the argument that reliance on anti-trafficking trafficking policies has led to the rise of what has been termed by Elizabeth Bernstein as ‘carceral feminism’.²¹³ This term stands for feminism that is heavily based on the state-deriving forms of power, such as law enforcement mechanisms and legal institutions, under the aim of combatting patriarchy. Elizabeth Bernstein uses the terms ‘carceral’ to discuss the link between contemporary sex and anti-trafficking policies and the exercise of control over women’s bodies through a governance model based on ‘fear of crime’.²¹⁴ Therefore, ‘carceral feminism’ emphasizes the fear of criminal consequences, over models of social justice, in the domain of feminist activism.²¹⁵ This approach she describes as: “a cultural and political formation in which previous generations’ justice and liberation struggles are recast in carceral terms”.²¹⁶ Furthermore, she suggests that the expansion and legitimization of carceral politics in the gender, race and class dimensions of anti-trafficking policies, an example of which she traces in the Nordic Model,²¹⁷ are facilitated by the human rights

²⁰⁸ Niina Vuolajarvi, ‘Governing in the Name of Caring: Migration, Sex Work and the “Nordic Model”’, 25.

²⁰⁹ *Ibid.*, 2.

²¹⁰ *Ibid.*, 135.

²¹¹ *Ibid.*, 289.

²¹² *Ibid.*, 7.

²¹³ *Ibid.*, 8.

²¹⁴ Bernstein, ‘Carceral Politics as Gender Justice?’, 234.

²¹⁵ Bernstein, 235.

²¹⁶ *Ibid.*, 236, para 2.

²¹⁷ *Ibid.*, 249.

discourse. More specifically, she highlights that the impact of carceral feminism in anti-trafficking policies lies in the understanding of ‘women’s human rights’ as issues relative solely to sexual violence and bodily integrity, but not to the gendered dimension of social or economic issues.²¹⁸ In that sense, she argues, this way of framing ‘women’s human rights’ aims at mainstreaming the carceral politics through anti-trafficking measures, under the guise of a benevolent feminism.²¹⁹

The link becomes evident when examined under the Swedish legislation’s aim, which is to stigmatize the purchasers of sexual services for engaging in criminal behavior.²²⁰ Proponents of neo-abolitionism argue that criminalizing the purchase of sex reduces demand, due to stigma and criminal consequences, which in turn decreases human trafficking and exploitation.²²¹ In the same line of reasoning, relying on the end-demand approach, or in other words, the criminalization and the pathologizing of sex workers’ clients, will effectively reduce sex-trafficking.²²² Notably though, the methodology and the data applied in empirical studies that examine the effectiveness of this approach have been widely contested.²²³ Interestingly, particularly in relation to France’s turn towards neo-abolitionism, it has been argued that the phenomenon of carceral feminism in connection to anti-trafficking policies has acquired a nationalistic underlining that racially targets migrant minorities, based on the notion that they mistreat and disrespect women, thus finding its legitimization in the name of gender equality and the preservation of the national identity.²²⁴

From a different perspective than the one suggested by the Nordic Model, recognizing migrant sex workers as agents, could in fact turn them into important actors in the fight against trafficking, as they are aware of the existence of persons held against their will among them.²²⁵ Jackie Pollock argues that by eliminating the ‘culture of tolerance’ towards migrant sex workers, and opting instead for a policy that would keep

²¹⁸ Ibid, 251.

²¹⁹ Ibid, 233.

²²⁰ Charlotta Holmström and May-Len Skilbrei, ‘The Swedish Sex Purchase Act: Where Does It Stand?’, *Oslo Law Review* 4, no. 2 (25 August 2017): 99, <https://doi.org/10.18261/issn.2387-3299-2017-02-02>.

²²¹ Crowhurst and Skilbrei, ‘Swedish, Nordic, European’.

²²² Calderaro and Giametta, “‘The Problem of Prostitution’”, 160.

²²³ Bridget Anderson and Julia O’Connell Davidson, *Is Trafficking in Human Beings Demand Driven? A Multi-Country Pilot Study (Geneva 2003)*.; Holmström and Skilbrei, ‘The Swedish Sex Purchase Act’.

²²⁴ Calderaro and Giametta, “‘The Problem of Prostitution’”, 161.

²²⁵ Jackie Pollock, ‘What’s in a Label?’ *Forced Migration Review*, 37 (March 2011): 46.

them protected in regards to their legal status and safe from deportation would signify the end of exploitation and pave the way for dignified conditions for all workers.²²⁶ With a legally recognized leverage as such, the absence of fear can lead to the unhindered reporting of exploitation and abuse and render migrant sex workers allies in combatting sex-trafficking, instead of scapegoats in the wrong battle.²²⁷

In the context of the Nordic model, the victim label is further enforced in national discourses, when the issue of sex work is portrayed within the frame of immigration and, thus, directly linked to human trafficking.²²⁸ However, human trafficking and sex work remain distinct in the view of sex workers, academics and civil societies,²²⁹ who argue that grouping the two issues together under the term ‘modern slavery’ seems to be an overly simplistic way of avoiding dealing with them individually.²³⁰ Even though the situation of sex work within Member States demonstrates that labor exploitation -due to the lack of sufficient regulations in place- is one of the imminent risks associated with sex work,²³¹ the disregard of the socioeconomic rights of sex workers is legitimized under the aim of fighting sex-trafficking. The misplaced focus that anti-trafficking policies set disproportionately affects sex workers, whilst arguably failing to address the issues at their very core: the structural socio-economic inequalities that lead to and perpetuate human trafficking.²³²

As it appears, from these findings, the victim narrative is not succeeding in concealing the fact that the ones targeted by the neo- abolitionist model are not the buyers of sexual services, but migrant sex workers themselves.²³³ Although this phenomenon is especially prominent in countries that subscribe to the neo-abolitionist regime in the name of gender equality, it is on-going in most EU Member States.²³⁴ The multidimensionality of sex work is often obscured by simplistic solutions that ignore the perplexity of the issue, leaving sex workers exposed to discrimination, violence,

²²⁶ Ibid, 46.

²²⁷ Ibid, 47.

²²⁸ Synnove Okland Jahnsen, Hendrik Wagenaar, *Assessing Prostitution Policies in Europe*, 281.

²²⁹ Ibid, 101.

²³⁰ Niina Vuolajarvi, ‘Governing in the Name of Caring: Migration, Sex Work and the “Nordic Model”’, 7.

²³¹ Synnove Okland Jahnsen, Hendrik Wagenaar, 23.

²³² Calderaro and Giametta, ““The Problem of Prostitution””, 171.

²³³ Niina Vuolajarvi, ‘Governing in the Name of Caring: Migration, Sex Work and the “Nordic Model”’, 96.

²³⁴ Calderaro and Giametta, ““The Problem of Prostitution””, 161, 167.

and legal insecurity while depriving them of their socioeconomic rights all together.²³⁵ The portrayal of migrant and especially irregular migrant sex workers as both victims and a public nuisance before the eyes of society,²³⁶ is further sustained by the social stigma attached to them due to the depiction of sex work as an inherent violation of gender equality in the media.²³⁷ It is argued here that the institutionalized gender discrimination, the exposure to violence and risk and the disregard of sex workers' right to self-determination and personal autonomy are the often-legitimized factors that perpetuate gender inequality, not the recognition of labor rights and the establishment of legal safeguards for the human rights of sex workers.

Chapter III

Sex Work and the EU

The idea of sex work entering the EU agenda for the formation of a common policy re-emerged in the 21st century, however the controversies between the Member-States legal orders on the issue led to harmonization in the form of hard law being unsuccessful.²³⁸ Sex work or 'prostitution' is considered to be a matter pertaining to the Member State's jurisdiction, and as such, the EU does not bear competences to regulate the issue in a binding manner. Trafficking for the purpose of sexual exploitation on the other hand, as a cross-border activity that calls for the collaboration of Member States, does fall under EU's the agenda, after the adoption of the Lisbon Treaty.²³⁹ Some scholars have argued that the EU's competence spectrum is dynamic, and may be expanded, should the issue be framed and conformed in such a way that it aligns with the EU's priorities and its agenda.²⁴⁰ For the purpose of attaching an interpretive frame to 'prostitution' in order to bring it under EU jurisdiction, its link to trafficking has been

²³⁵ Synnove Okland Jahnsen, Hendrik Wagenaar, *Assessing Prostitution Policies in Europe*, 313.

²³⁶ Calderaro and Giametta, "The Problem of Prostitution", 160.

²³⁷ *Ibid*, 29.

²³⁸ Crowhurst and Skilbrei, 'Swedish, Nordic, European', 97.

²³⁹ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, (2007/C 306/01) Signed at Lisbon, 13 December 2007, Entered into Force 1 December 2009, Chapter 3, Art 63A; Chapter 4, Art 69B, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:12007L/TXT>.

²⁴⁰ Johansson and Kalm, *EU Civil Society*, 2015, 143; Rubio Grundell, 'The Rise of Neo-Abolitionism in Europe', 5; Allwood, 'Agenda Setting, Agenda Blocking and Policy Silence', 131.

extensively pursued by Civil Society Organizations,²⁴¹ as well as political actors.²⁴² However, this pursuit has met criticism from sex work advocates and sex workers themselves.²⁴³

The EU has recognized the gender dimension of ‘prostitution’, adhering to its treaty- based commitment for gender equality, but often while equalizing ‘prostitution’ to human trafficking,²⁴⁴ while in the European Charter of Fundamental Rights there is no link made between the two.²⁴⁵ The gender dimension of sex work appears to be determining in the social and legal framing of the issue both under EU law as well as within the legal orders of Member States.²⁴⁶ At the same time, the landscape of the Member State’s policies on prostitution is significantly diverse.²⁴⁷ Nonetheless, gender is a determining factor in the experiences and vulnerabilities of sex workers and has been recognized as such by all voices involved in the entire spectrum of the sex work legal feminist scholarly, as well as policy, debate.²⁴⁸ Scholars have previously argued that the gender dimension is both a cause and a causation of how the sex work industry has come to be.²⁴⁹ The contrasting opinions within the feminist debate seem to disagree on a number of issues surrounding the element of consent, as demonstrated above. However, that the majority of sex workers are cis and transgender women appears to constitute common knowledge.²⁵⁰ Although the gender dimension element of sex work does not lack controversies either within the feminist debate, as will be further discussed

²⁴¹ Reference is being made to campaigns such as the 2015 ‘Brussels’ call’, or else the ‘Together for Europe free from prostitution’ campaign of the European Women’s Lobby in Lucrecia Rubio Grundell, ‘The EU’s Approach to Prostitution: Explaining the “Why” and “How” of the EP’s Neo-Abolitionist Turn’, *European Journal of Women’s Studies* 28, no. 4 (November 2021): 9–10, <https://doi.org/10.1177/1350506821994611>.

²⁴² Synnove Okland Jahnsen, Hendrik Wagenaar, *Assessing Prostitution Policies in Europe*, 348–49.

²⁴³ Giulia Garofalo, ‘The Political Economy of Sex Work in Europe’, PhD Thesis, London: University of London (2010), 56.

²⁴⁴ 2011/36/EU of the European Parliament and the Council of, ‘Directive on Preventing and Combating Trafficking in Human Beings and Protecting Its Victims, and Replacing Council Framework Decision’.

²⁴⁵ Charter Of Fundamental Rights Of The European Union 2012/C 326/02, Art. 5.3, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012P%2FTXT>.

²⁴⁶ Synnove Okland Jahnsen, Hendrik Wagenaar, *Assessing Prostitution Policies in Europe*, 209.

See for example the national discourse that led to the formation of the national legislation in the case of Finland.

²⁴⁷ Synnove Okland Jahnsen, Hendrik Wagenaar, *Assessing Prostitution Policies in Europe*, 23.

²⁴⁸ Ivana Bacik, ‘Developing an Understanding of “Compromised Consent”: How Reconsideration of Consent as a Legal Concept May Inform a Feminist Theoretical Framework for the Introduction of “Nordic Model” Prostitution Laws and Did Inform the Motivations of Lawmakers in Ireland’ PhD Thesis, no. School of Law, Trinity College, Dublin (2022): 13.

²⁴⁹ Jo Phoenix, ‘Prostitution and Sex Work’ in *Liebling, Alison, Maruna, Shadd and McAra, Lesley*, Oxford Handbook of Criminology (6th ed). Oxford University Press, 2017, 685-703 at 690-1., n.d.

²⁵⁰ Philippe ADAIR1 and and Oksana NEZHIVENKO, ‘Sex Work vs. Sexual Exploitation in the European Union: What Are the Likely Guesstimates for Prostitution?’, 17.

below, it is argued here that the gender dimension of sex work reflects the weight of the intersectional effect of gender roles, societal expectations and inequalities on sex workers.²⁵¹ The connection of the gender dimension of sex work to the EU's treaty-based commitment on gender equality, as enshrined in Article 8 TFEU, will be used as a lens in order to explain the EU's turn towards sex work.²⁵²

For the time being, arguments touching upon the political dynamics that shape the EU's current stance on sex work tend to criticize the EU's systemic silence on the matter.²⁵³ Although expressing concerns about pursuing an 'one-size-fits-all' approach, these arguments point out that the EU's current response towards the diversity of jurisdictions is leaning towards the solutions neo-abolitionist movement suggests.²⁵⁴ However, the EU institutions seem to have different stances on sex work, as will be examined further below. Despite the current neo-abolitionist tendencies of the European Parliament and the Commission, the Court of Justice of the European Union²⁵⁵ has formerly recognized sex work as an economic activity, falling under the scope of protection of the four freedoms of the EU's single market.²⁵⁶

In light of the above, this Chapter will examine the following: 1) the gender dimension of sex work and its relevance under EU law, 1.1.) taking into account the EU's treaty-based commitment on gender equality and the influence of Civil Society Organizations in bringing the issue into EU's competences and 2) sex work as an economic activity, according to the Court.

3.1.1. The Gender dimension of Sex Work

Despite the silent consensus that sex work is a gendered issue affecting mostly women, it is surprisingly rare that surveys focusing on depicting precisely the gender dimension of the involvement of sex workers in the industry are conducted. Even though the engagement of men and other groups of the LGBTQI community in sex

²⁵¹ Synnove Okland Jahnsen, Hendrik Wagenaar, *Assessing Prostitution Policies in Europe*, 74–75.

²⁵² Treaty on the Functioning of the European Union, OJ C 326/47, 2012, Art 8

²⁵³ Allwood, 'Agenda Setting, Agenda Blocking and Policy Silence', 129.

²⁵⁴ Crowhurst and Skilbrei, 'Swedish, Nordic, European', 97.

²⁵⁵ Hereafter: 'CJEU' or 'Court'

²⁵⁶ Case C-268/99, *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie*, Judgment of the Court of 20 November 2001. -Freedom of Establishment- "Economic Activities- Whether or Not They Include the Activity of Prostitution, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61999CJ0268>.

work is prevalent,²⁵⁷ it is common knowledge that cis and transgender women are the main actors that engage in the business as the service providers.²⁵⁸ It must be noted, however, that it is arguably difficult to produce accurate statistics on the gender distribution regarding sex work, due to the usually gray legal framework that sex work operates in, and the stigmatization that inherently characterizes the industry.²⁵⁹ The most recent survey conducted by the European Parliament examines participation in ‘prostitution’ under the same light as human trafficking.²⁶⁰ Estimating the gender representation amongst sex workers, or in other words, guaranteeing that the numbers produced reflect voluntary involvement in the industry can also be a challenging and long-lasting process. Based on these findings, the most recent survey taking into account the gender dimension of sex work was conducted in 2009.²⁶¹ According to this survey, the sex worker population in Europe according to TAMPEP’s estimation, is disproportionately female, with 86% of European sex workers being women.²⁶² This research, whilst not intending to ignore the participation of sex workers across the gender spectrum, draws focus to cis-gendered and transgender women. Trans women in particular are more likely to engage in sex work due to discrimination creating a lack of other occupational options, while sex work may carry the potential to be their only profitable endeavor.²⁶³

Gender plays a fundamental role in the way societies are shaped, and according to some opinions, sex work is a ‘gender regime’.²⁶⁴ In sociological terms, the gendered dimension of sex work has been examined under the concept of risk or ‘risk behavior’, which can be understood as an organized social phenomenon relating to the individual

²⁵⁷ Oliveira, 2013 as cited in Synnove Okland Jahnsen, Hendrik Wagenaar, *Assessing Prostitution Policies in Europe*, 298. In the example of Portugal, an investigation carried out by the HOSHO project concluded that the percentage of male and transgender sex workers working indoors represented half or more of the total number of sex workers, with women sex workers representing 39.8 percent of the total sample of 121 sex workers.

²⁵⁸ Philippe ADAIR1 and Oksana NEZHVENKO, ‘Sex Work vs. Sexual Exploitation in the European Union: What Are the Likely Guesstimates for Prostitution?’, para. 3.3, 10.

²⁵⁹ Philippe ADAIR1 and Oksana NEZHVENKO, 4, part 3.

²⁶⁰ ‘European Parliament Resolution of 26 February 2014 on Sexual Exploitation and Prostitution and Its Impact on Gender Equality (2013/2103(INI))’.

²⁶¹ TAMPEP International Foundation, ‘Sex Work in Europe- A Mapping of the Prostitution Scene in 25 European Countries’, 14.

²⁶² *Ibid*, 14.

²⁶³ Yasin and Namoco, ‘Prostitution: A New Dynamic of Discrimination’, 7.

²⁶⁴ “The gender regime of sex work” as mentioned in: Bacik, ‘Developing an Understanding of “Compromised Consent”: How Reconsideration of Consent as a Legal Concept May Inform a Feminist Theoretical Framework for the Introduction of “Nordic Model” Prostitution Laws and Did Inform the Motivations of Lawmakers in Ireland’, 64.

and the social circumstances under which it unravels.²⁶⁵ The social structures influence the definitions of risks and define them according to gender roles.²⁶⁶ Risk behavior is, therefore, differently interpreted for women, who are socially encouraged to avoid risk taking, either because what is perceived as risky in societies is always filtered through a 'masculine lens', or because the avoidance of danger is related to established perceptions of femininity.²⁶⁷ Even though, according to some scholars, the current notions of femininity portray women as passive victims of the risk, rather than active risk takers, Chan and Rigakos assert that women do engage in risk-taking, while raising the issue that activities related to the expression of women's sexuality may also be considered to be danger-seeking.²⁶⁸ Consequently, female sex workers are socially considered to be engaging in 'exceptionally risky behavior' that is conflated with 'amorality' and 'promiscuity'.²⁶⁹ This kind of behavior not only falls outside the predefined social norm of femininity, but also places sex workers outside the protection that is offered to other citizens, who abide by the socially imposed notions of responsibility.²⁷⁰

Acknowledging the gender factor in sex work is therefore, the first step towards realizing that the stigma, systemic marginalization and denial of access to sex workers in regards to their socioeconomic rights is not coincidental. More so, it is argued here that it is directly linked. Despite efforts to prevent and abolish sex work, there is no doubt that it continues to be part of the substantial reality, and undeniably an issue of gender.²⁷¹ The theory of risk behavior aims to logically explain the stigmatization of those who voluntarily engage in sex work, based on existing societal presumptions about gender. However, notions of amorality or promiscuity are subjective, and as such they have been acknowledged as legally irrelevant by the Court of Justice of the

²⁶⁵ Teela Sanders, 'A Continuum of Risk? The Management of Health, Physical and Emotional Risks by Female Sex Workers', 29 July 2004, 571, <https://doi.org/10.1111/j.0141-9889.2004.00405.x>.

²⁶⁶ Rachael McCrosky, 'Experiences of Stigma During Sexual Healthcare Visits: A Qualitative Study of Non-Monogamous Women', *University of Central Florida*, 2015, 6–8, <https://stars.library.ucf.edu/etd/1150/>.

²⁶⁷ Teela Sanders, 'A Continuum of Risk? The Management of Health, Physical and Emotional Risks by Female Sex Workers', 558.

²⁶⁸ Chan, 'Risk, Crime and Gender', 748.

²⁶⁹ *Ibid*, 749.

²⁷⁰ Teela Sanders, 'A Continuum of Risk? The Management of Health, Physical and Emotional Risks by Female Sex Workers', 559.

²⁷¹ See for example, the implementation of the neo-abolitionist model in Norway, which according to Amnesty International has only driven sex work under the radar of the law: Amnesty International, 'Norway: The Human Cost of "crushing" the Market: Criminalisation of Sex Work in Norway', Index Number: EUR 36/4034/2016, 26 December 2026, <https://www.amnesty.org/en/documents/eur36/4034/2016/en/>.

European Union.²⁷² Similarly, the position that dismisses the possibility of sex work being an autonomous choice, framing it instead as a form of control by individuals and structural forces - a narrative that aligns with the interpretation of the risk behavior theory as outlined above- has hardly been an ally to sex worker's rights.²⁷³

According to the Nordic model, sex work is directly linked to gender inequality, in that it perpetuates it. Even though the letter of the Swedish law is formed in gender neutral terms, the proposed models of intervention are explicitly gendered,²⁷⁴ and the legislation itself aims to stigmatize the purchasers of sexual services,²⁷⁵ or in other words, men.²⁷⁶ However, a criminalization model leaves sex work outside the rule of law, carrying adverse impacts for sex workers as it increases the risk of sex workers facing exploitation and gender based violence.²⁷⁷ The reason behind this lies, as already outlined, amongst other policy implementation gaps, in the collapse of trust that sex workers have in the police, in order to report cases of harassment and abuse.²⁷⁸ This lack of trust inevitably drives sex workers to the margins of society and the rule of law, increasing the risk of being abused.²⁷⁹ According to Beyrer and Decker, female sex workers are at disproportionate risk of gender-based violence and HIV infection.²⁸⁰ Consequently, ad Ine Vanwesenbeeck notes, decriminalization of the sale of sexual services would have the greatest effect on reducing female sex workers HIV rates, while it has been estimated that it would also lead to a reduction in client-inflicted violence and police harassment.²⁸¹ Criminalization of sex workers places them at a higher risk of exposure to violence and obtaining HIV as explicitly stated in the UNAIDS 2021

²⁷² 'Case C-268/99, Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie, Judgment of the Court of 20 November 2001. -Freedom of Establishment- "Economic Activities- Whether or Not They Include the Activity of Prostitution', para. 52.; Rigotti, 'When the Law Meets Feminisms', 6.

²⁷³ Foret and Rubio Grundell, 'European Morality Politics in the European Union', 1807.

²⁷⁴ Holmström and Skilbrei, 'The Swedish Sex Purchase Act', 83.

²⁷⁵ Ibid, 99.

²⁷⁶ Ibid, 102.

²⁷⁷ Amnesty International, 'Ireland: Laws Criminalizing Sex Work Are Facilitating the Targeting and Abuse of Sex Workers'.

⁶⁰ Synnove Okland Jahnsen, Hendrik Wagenaar, *Assessing Prostitution Policies in Europe*. Havelkova, on the example of the Czech Republic reports that: "Some municipalities have even hired private security agencies for the purpose of providing 'low key harassment' "; p. 280; "[Sex workers] testimonies are considered unreliable in criminal proceedings and the stereotype of 'prostitute as a bad mother' is used against women by family courts" p. 281

²⁷⁹ Synnove Okland Jahnsen, Hendrik Wagenaar, 42.

²⁸⁰ Beyrer, C., A. L. Crago, L. G. Bekker, J. Butler, K. Shannon, D. Kerrigan, M. R. Decker, et al., 'An Action Agenda for HIV and Sex Workers.', *Lancet (London, England)* 385 (9964), 2015, 287-301, [https://doi.org/10.1016/S0140-6736\(14\)60933-8](https://doi.org/10.1016/S0140-6736(14)60933-8).

²⁸¹ Ine Vanwesenbeeck, 'Sex Work Criminalization Is Barking Up the Wrong Tree', *Archives of Sexual Behavior* 46, no. 6 (August 2017): 1633, <https://doi.org/10.1007/s10508-017-1008-3>.

Global AIDS strategy.²⁸² The right to health, social security and safe working conditions are internationally acknowledged socioeconomic rights,²⁸³ and so is the right to enjoy them without discrimination.²⁸⁴ However, when it comes to access to health care, Ursula Probst underscores that the moral interpretations of female sex workers' health care needs render accessing health care insurance a challenging endeavor (especially for migrant sex workers), while drawing attention to the impact of racialized, classist and gendered pre-assumptions.²⁸⁵

Taking into account the gender dimension of sex work, and its direct link to socioeconomic rights, it is argued that the issue is highly relevant under EU law, based on the EU's treaty-based commitment on gender equality. The commitment to guarantee gender equality finds its legal basis in the Treaty of the Function of the European Union (TFEU), in Article 8.²⁸⁶ It is one of the European Union's founding values to ensure gender equality in all its policies and actions. The EU has acknowledged the need to ensure equal access to social rights also through the European Pillar of Social Rights²⁸⁷ In this context, addressing the specific needs of sex workers can contribute to greater gender equality, considering the gender dimension of sex work. In the following section of this Chapter, this research will examine the ways that the EU has dealt with the issue of sex-work, indirectly or directly, while adhering to its obligation for gender equality.

3.1.2. EU and Sex Work as an issue of Gender Equality

Scholars argue that the EU's stance on sex work is displaying adherence to the neo-abolitionist movement.²⁸⁸ The European Parliament in particular leans towards a neo-abolitionist approach, defining sex work as both a direct form of violence (physical and sexual) and a structural form of violence (gender inequality and discrimination)

¹⁴³The UNAIDS Global AIDS Strategy, 'About Decriminalisation'
<https://decriminalise.unaids.org/about/>.

²⁸³ Council of Europe, 'The right to safe and healthy working conditions', Social Rights,
<https://coe.int/en/web/european-social-charter/article-3>.

²⁸⁴ TAMPEP International Foundation, 'Survey: Migrant Sex Workers and the Covid-19 Crisis'.

²⁸⁵ Ursula Probst, 'Health Insurance for the Good European Citizen? Migrant Sex Workers' Quests for Health Insurance and the Moral Economy of Health Care', *Social Science & Medicine* 319 (February 2023): 115190, <https://doi.org/10.1016/j.socscimed.2022.115190>.

²⁸⁶Treaty on the Functioning of the European Union (consolidated version), [2012] OJ C 326/47, Art 8

²⁸⁷ European Commission, 'The European Pillar of Social Rights Action Plan', Publications Office of the European Union, Principles (2021): pt. Principles, <https://op.europa.eu/webpub/empl/european-pillar-of-social-rights/en/#annex3>.

²⁸⁸ Foret and Rubio Grundell, 'European Morality Politics in the European Union', 101–3.

against women.²⁸⁹ Instrumental in the prevalence of neo-abolitionism was also the EU's adoption of a dual conception of violence against women (including both physical violence and sexual exploitation) as part of its gender equality agenda, which progressively identified gender equality as a fundamental value.²⁹⁰ This dual conception, Rubio Grundell argues, has reinforced the neo-abolitionist approach within EU institutions.²⁹¹ While there is an ongoing debate about the effectiveness of neo-abolitionist policies, part of which debate has been outlined, framing sex work as violation of gender equality has been influential in shaping the EU's approach under the aim of fulfilling its commitment at the European level.²⁹²

Just like neo-abolitionism blurs the line between 'prostitution' and forced prostitution, initially the European Parliament's 2000 Framework Resolution maintained that 'prostitution' and forced prostitution are the same.²⁹³ The same Resolution however, underlined that the prohibition of 'prostitution' creates a 'black market' outside of the law, that facilitates organized crime and by consequence human trafficking.²⁹⁴ The European Commission's proposal for the definition of trafficking followed the Resolution,²⁹⁵ aiming at achieving a more concrete definition of trafficking, one that aligns with the definition enshrined in the UN Protocol of 2000.²⁹⁶ In this context, the development of a common policy against human trafficking was called for, while the European Commission did not deal specifically with the issue of 'prostitution' in its proposal, thus underscoring the distinction between the two.²⁹⁷ The result was the Council's Framework Resolution of 2002.²⁹⁸ Regulation and control of

²⁸⁹ Committee on Women's Rights and Gender Equality, Rapporteur: Mary Honeyball, 'Report on Sexual Exploitation and Prostitution and Its Impact on Gender Equality' (2013/1203 (INI), n.d.), https://www.europarl.europa.eu/doceo/document/A-7-2014-0071_EN.html#_section6.

²⁹⁰ Sheetal Sharma, 'The European Union's Commitment to Gender Equality and Empowerment of Women: An Analysis', *The European Union*, no. 3 (2015).

²⁹¹ Rubio Grundell, 'The EU's Approach to Prostitution', 11.

²⁹² *Ibid.*, 7.

²⁹³ Synnove Okland Jahnsen, Hendrik Wagenaar, *Assessing Prostitution Policies in Europe*, 347.

²⁹⁴ European Parliament, 'Resolution of the European Parliament on Trafficking in Women, A5-0127/2000 (May 19, 2000).', n.d., https://www.europarl.europa.eu/doceo/document/TA-5-2000-0247_EN.html.

²⁹⁵ 'Sørensen Report (2000) Report on the Communication From the Commission to the Council and the European Parliament to Further Action on the Fight Against Trafficking in Women, 2 May 2000. Final A5-0127/2000.'

²⁹⁶ United Nations Office of the High Commissioner, 'Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime',.

²⁹⁷ Synnove Okland Jahnsen, Hendrik Wagenaar, *Assessing Prostitution Policies in Europe*, 347.

²⁹⁸ '2002/629/JHA: Council Framework Decision of 19 July 2002 on Combating Trafficking in Human Beings', <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002F0629:EN:HTML>.

illegal migration constituted the main focus of the policy. Notably, the prevalence of the issue of illegal migration in EU's policy on human trafficking has been criticized for shifting the focus away from the actual issue of human trafficking, nonetheless preserving the distinction between the latter and 'prostitution'.²⁹⁹

The link between 'prostitution' and trafficking however, was re-established in the contemporary debate within the European Parliament with the 2003 report of Swedish Marianne Eriksson,³⁰⁰ in the Committee for the Rights of Women and Gender Equality (FEMM Committee) of the European Parliament. Sex trafficking was presented as a consequence of 'prostitution', while the latter was portrayed as a violation of dignity and women's rights.³⁰¹ Although this report did not lead to action in terms of hard law, the issue of prostitution re-emerged multiple times in the discussions within the FEMM Committee of the European Parliament.³⁰² At the same time, the Swedish neo-abolitionist regime started to expand to the Nordic region,³⁰³ while the Swedish model was promoted internationally as the most effective one, both in the reduction of individuals in the sex industry and in the battle against trafficking.³⁰⁴

The 2011 EU Directive on trafficking replaced the Framework Resolution of 2002,³⁰⁵ although maintaining the definition of trafficking set forth by the Framework, the issue was now brought upon Member States in the form of binding law, thanks to the Lisbon Treaty of 2009, which expanded the EU's competences.³⁰⁶ The issue of trafficking was recognized as gender specific.³⁰⁷ According to the European Implementation Assessment of the Directive 2011/36/EU on Trafficking in Human Beings, the majority of the reported victims of trafficking for the purpose of sexual

²⁹⁹ Marjan Wijers, *European Union Policies on Trafficking in Women*. In M. Rossili (ed.), *Gender Policies in the European Union*. New York: Peter Lang, (2001) .

³⁰⁰ Eriksson Report, Draft Report on the Consequences of the Sex Industry in the European Union (2003/2107). Committee on Women's Rights and Equal Opportunities. European Parliament 1999–2004, Provisional 2003/2017 (INI).

³⁰¹ Synnove Okland Jahnsen, Hendrik Wagenaar, *Assessing Prostitution Policies in Europe*, 348.

³⁰² Ibid, 348.

³⁰³ Ibid, 349.

³⁰⁴ Ibid, 348.

³⁰⁵ 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, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32011L0036>.

³⁰⁶ The Member States, 'Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Signed at Lisbon, (2007/C 306/01), Signed 13 December 2007, Entered into Force 1 December 2009'.

³⁰⁷ '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', para. 3.

exploitation were female.³⁰⁸ Two years after the Directive,³⁰⁹ the FEMM Committee's report by Mary Honeyball on Sexual Exploitation and Prostitution framed 'prostitution' as a form of violence, driven by gender inequality and inherently equated to sexual exploitation.³¹⁰ Furthermore, the same report criticized the regulationist approach and clearly defended the so-called Nordic Model³¹¹. While the accompanying Resolution of the Committee passed, it received a significant backlash by a very large number of Non-Governmental Organizations (NGOs) and academics, who condemned the report on account of its lack of evidence and ideological bias.³¹² According to Joyce Outshoorn that number included 560 NGO's and 94 academic experts who pointed out that the adverse impacts of client criminalization weigh disproportionately on sex workers, who face increased vulnerability.³¹³

The emergence and rise of neo-abolitionism as the current default approach regarding sex work can be traced back to several interrelated factors and influences. One significant factor is the influence of Swedish feminist politicians within the European Commission and Parliament, who were pivotal in promoting Sweden's approach to sex work within the EU.³¹⁴ In addition, both the European Commission and Parliament have collaborated closely with feminist politicians, experts and Civil Society Organizations (CSO). A CSO with significant influence in that respect has been the European Women's Lobby (EWL).³¹⁵ The EWL is focused on the field of gender equality and represents a large number of national organizations enclosed into 30 national coordinations.³¹⁶ It is supported by the European Commission as part of the latter's obligation to promote gender equality,³¹⁷ and has taken the lead in the opposing to the legalization 'prostitution' as early as 1998, when at the General Assembly of the

³⁰⁸ European Parliament. Directorate General for Parliamentary Research Services., *Trafficking in Human Beings from a Gender Perspective Directive 2011/36/EU: European Implementation Assessment*. (LU: Publications Office, 2016), 7, <https://data.europa.eu/doi/10.2861/15880>.

³⁰⁹ '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'.

³¹⁰ Committee on Women's Rights and Gender Equality, Rapporteur: Mary Honeyball, 'Report on Sexual Exploitation and Prostitution and Its Impact on Gender Equality'.

³¹¹ The 2013 Honeyball Report as cited in Synnove Okland Jahnsen, Hendrik Wagenaar, *Assessing Prostitution Policies in Europe*, 350.

³¹² Synnove Okland Jahnsen, Hendrik Wagenaar, 350.

³¹³ *Ibid*, 350.

³¹⁴ Foret and Rubio Grundell, 'European Morality Politics in the European Union', 1808.

³¹⁵ 'European Women's Lobby / Lobby Europeen Des Femmes', <https://womenlobby.org/>.

³¹⁶ Johansson and Kalm, *EU Civil Society*, 2015, 5.

³¹⁷ *Ibid*, 131.

EWL, ‘prostitution’ was framed as a human rights violation.³¹⁸ After joining the Coalition Against Trafficking in Women (CATW),³¹⁹ the EWL called for the members of their organization to advocate for putting an end to trafficking, which required lobbying with national governments for criminalization of clients, as a necessary step towards the goal of eliminating trafficking for sexual exploitation.³²⁰ In that context, sex work and its legal recognition as a form of work was presented as a step towards facilitating trafficking, which led to the EWL’s call in Brussels for ‘a prostitution free Europe’ in 2013.³²¹

The influence of the EWL, like every other CSO, is based on lobbying and campaigns. However, in the field of gender equality, the EWL holds a dominant position in comparison to other organizations.³²² It has established a close communication with members of the FEMM Committee who oppose to the legalization regimes of ‘prostitution’.³²³ Meetings between members of the EWL and the chair of the FEMM Committee of the European Parliament were held on a regular basis, according to Ylva Stubbergaard’s report on the impact of EU policies on relationships and interactions.³²⁴ This kind of close communication on the part of the EU is aimed at inserting the outlook and expert knowledge of the members into the decision-making processes, while adhering to its obligation to gender equality. The EWL is funded by the EU through grants that are followed up by the submission of regular reports on where they were allocated,³²⁵ while it has been noted that members of the EWL organizations have aimed for the exclusion of grants for those organizations that advocate for the legalization of ‘prostitution’, as well as researchers that adhere to a pro sex-work position.³²⁶ The EU’s collaboration with the EWL is often referred to as the

³¹⁸ Synnove Okland Jahnsen, Hendrik Wagenaar, *Assessing Prostitution Policies in Europe*, 347.

³¹⁹ ‘Coalition Against Trafficking in Women (CATW)’, <https://catwinternational.org/>.

³²⁰ Synnove Okland Jahnsen, Hendrik Wagenaar, *Assessing Prostitution Policies in Europe*, 348.

³²¹ European Women’s Lobby, ‘The Brussels’ Call ‘Together for a Europe Free from Prostitution’’, <https://www.womenlobby.org/The-Brussels-Call-Together-for-a-Europe-free-from-prostitution>.

³²² Ylva Stubbergaard in Johansson and Kalm, *EU Civil Society*, 2015, pt. Conflict and Cooperation: Interactions among EU-Level Civil Society Organisations in the Field of Gender Equality, 133.

³²³ Synnove Okland Jahnsen, Hendrik Wagenaar, *Assessing Prostitution Policies in Europe*, 348.

³²⁴ *EU Civil Society*, 2015, 132.

³²⁵ *Ibid*, 132.

³²⁶ Synnove Okland Jahnsen, Hendrik Wagenaar, *Assessing Prostitution Policies in Europe*, 348; Joyce Outshoorn, ‘The Political Debates on Prostitution and Trafficking of Women’.

“velvet triangle”,³²⁷ which according to Rubio Grundell, has been effective in promoting the neo-abolitionist approach to sex work in EU institutions.³²⁸

The counter movement, and main challenger of the EWL is the International Committee on the Rights of Sex Workers in Europe (ICRSE). The ICRSE was renamed in September of 2021 to ‘European Sex Workers Rights Alliance (ESWA)’ and is a sex worker-led network, formed by the mobilization of sex workers across Europe,³²⁹ that today represents more than 100 organizations across Europe and Asia.³³⁰ Registered as a foundation in 2004 in Amsterdam, the former ISRSE addressed the EU and its institutions.³³¹ Actively advocating for the rights of sex workers since its foundation, the then ISRSE presented before the European Parliament the Declaration of the Rights of Sex Workers in Europe, formed and endorsed in the European Conference on Sex Work, Human Rights, Labour and Migration in Brussels.³³² Condemning the EU’s neo-abolitionist turn, the ESWA argued that the 2014 Resolution conflates sex trafficking with sex work and represents a dismissal of sex worker’s voices.³³³ The Resolution of 2014 signified a success for the abolitionists, who perceive the eradication of prostitution as the eradication of human trafficking. In line with the 2013 EWL’s call for a total ban on ‘prostitution’ and the latter’s link to sex trafficking, this development has been interpreted as bringing the issue of ‘prostitution’ into the EU competences.³³⁴ Opposing to the EWL’s call for a ‘prostitution-free Europe’, the former ICRSE, questioned the true feminist character of the EWL, while arguing that the latter dismisses the lived experience of individuals working in the sex industry and speaks on their behalf, labeling them as victims and disregarding their right to self-determination.³³⁵

³²⁷ Rubio Grundell, ‘The EU’s Approach to Prostitution’, 8.

³²⁸ Ibid, 10.

³²⁹ Johansson and Kalm, *EU Civil Society*, 2015, 147.

³³⁰ ‘European Sex Worker’s Rights Alliance (ESWA)’, https://www.eswalliance.org/about_eswa.

³³¹ Johansson and Kalm, *EU Civil Society*, 2015, 141.

³³² International Committee on the Rights of Sex Workers in Europe (ICRSE) (current ESWA), ‘The Declaration on the Rights of Sex Workers in Europe’ (European Conference on Sex Work, Human Rights, Labour and Migration, Brussels, Belgium, 15 October 2005), <https://nswp.org/resource/member-publications/the-declaration-the-rights-sex-workers-europe>.

³³³ ICRSE (2014) Statement to the European Parliament’s Women’s Rights and Gender Equality Committee, as cited in Johansson and Kalm, *EU Civil Society*, 2015.

³³⁴ Allwood, ‘Agenda Setting, Agenda Blocking and Policy Silence’, 130; Synnove Okland Jahnsen, Hendrik Wagenaar, *Assessing Prostitution Policies in Europe*, 359.

³³⁵ Johansson and Kalm, *EU Civil Society*, 2015, 145.

However, the counter movement that aims to put sex work on the EU agenda under the definition of economic activity, and as an issue of labor, has not succeeded in entering the so-called “velvet triangle”.³³⁶ The fact that the sex work movement has not succeeded in forming an alliance of the same political influence has allowed for the symbolic hegemony of neo-abolitionist positions to persist both in the European Commission and the European Parliament.³³⁷ While still part of the conversation, the movement to recognize sex work as work under EU law is not the dominant approach within EU institutions.³³⁸ Gill Allwood highlights that the fact that they lack a ‘seat at the table’ is clashing with the strong and organized representation of those in support of the socioeconomic rights of sex workers, calling out on the silencing of the voices that advocate for the decriminalization of sex work and its recognition as matter of economic activity.³³⁹ Meanwhile, she notes that the lack of opposing voices in the currently formed European political discourse on the issue of sex work is not due to absence, but deliberate systemic silencing.³⁴⁰

3.1.3. The connection between Gender Equality and Sex work as Work:

While the silencing persists, the advocates of the Nordic Model recognize that systemic marginalization and the lack of other opportunities drive sex workers into this domain.³⁴¹ Though, the same rationale does not acknowledge that gender equality is also a matter of equal access to social protection, health benefits and economic independence, which can only be achieved through the eradication of stereotypes, gender discrimination and segregation in the labor market.³⁴² Access to social protection, healthcare, and employment opportunities are crucial aspects of gender equality.³⁴³ As the issue of sex work is on-going,³⁴⁴ recognizing and respecting the agency and autonomy of sex workers, and viewing sex work as a form of work is also crucial in promoting gender equality in the socioeconomic sphere. While, the main

³³⁶ Allwood, ‘Agenda Setting, Agenda Blocking and Policy Silence’, 131, Finding 4.

³³⁷ Foret and Rubio Grundell, ‘European Morality Politics in the European Union’, 1810.

³³⁸ Allwood, ‘Agenda Setting, Agenda Blocking and Policy Silence’, 130.

³³⁹ Ibid, 131.

³⁴⁰ Ibid, 130.

³⁴¹ Crowhurst and Skilbrei, ‘Swedish, Nordic, European’, 103.

³⁴² Sheetal Sharma, ‘The European Union’s Commitment to Gender Equality and Empowerment of Women: An Analysis’, *The European Union*, no. 3 (2015): 24, para 1.

³⁴³ McMillan, Worth, and Rawstorne, ‘Usage of the Terms Prostitution, Sex Work, Transactional Sex, and Survival Sex’, 1525.

³⁴⁴ Synnove Okland Jahnsen, Hendrik Wagenaar, *Assessing Prostitution Policies in Europe*, 41. The study concludes that ‘Perhaps the most obvious conclusion from the two comparative studies is that all countries under study have—and throughout history, have had—a prostitution market.’

argument of the abolitionist movement lies in the absence of the ability to consent (as outlined above), due to coerced circumstances, namely poverty and the lack of other alternatives, the EU does not seem to address sex work with measures that aim to amend a consequence of economic and social inequality.³⁴⁵ According to Foret and Garrel, the neo-abolitionist point of view has been framed as a way to uphold gender equality and women's rights.³⁴⁶ This connection to European values, even in the form of soft-law, is being challenged.

Gender equality cannot be fully achieved without taking into account the socioeconomic rights of individuals, due to the indivisibility of human rights. Despite the prior recognition of sex work both as a gendered issue and as an economic activity, the link between those three elements hasn't sufficed so as to put sex work in the EU agenda. Rather, the recognition of sex work as an economic activity has been an item of criticism by opinions questioning the capitalistic effect of the 'free market', that eventually leads to the commodification of women's bodies, linking sex work to exploitative labor.³⁴⁷ Birgit Sauer recognizes that these critiques are aimed at an anti-capitalistic frame, meant to gain the appeal of those identifying as politically leftist and progressive. She underscores that the same arguments view pro-sex work feminists as part of the capitalistic model, rather than advocates of social justice and fundamental rights, while interestingly excluding from the debate.³⁴⁸ On the contrary, for the pro-sex work movement the recognition of sex work as a work, without denying the intrinsic risks and patriarchic roots of the industry or suggesting that one should not be critical about them,³⁴⁹ would pave the way for the establishment of protection mechanisms that safeguard the rights of sex workers to better working conditions that assert their dignity and safety.³⁵⁰ According to Marjam Wijers, acknowledging sex workers' rights as human rights comes hand in hand with acknowledging their right to

³⁴⁵ Allwood, 'Agenda Setting, Agenda Blocking and Policy Silence' 130.

³⁴⁶ Foret and Rubio Grundell, 'European Morality Politics in the European Union', 1811.

³⁴⁷ Moran, R, 'Human Trafficking and Exploitation (Further Provisions and Support for Victims) Bill: SPACE International', *Norther Ireland Assembly, Committee for Justice*, 30 January 2014, <http://www.niassembly.gov.uk/assembly-business/official-report/committee-minutes-of-evidence/session-2013-2014/january-2014/human-trafficking-and-exploitation-further-provisions-and-support-for-victims-bill-space-international/>.

³⁴⁸ Birgit Sauer, 'Mobilizing Shame and Disgust: Abolitionist Affective Frames in Austrian and German Anti-Sex-Work Movements', *Journal of Political Power* 12, no. 3 (2 September 2019): 11, <https://doi.org/10.1080/2158379X.2019.1669262>.

³⁴⁹ Marjam Wijers, 'Sex Workers Rights Are Human Rights: Or Not? The Art of Stealing Back Human Rights', 4.

³⁵⁰ Charter Of Fundamental Rights Of The European Union 2012/C 326/02, art. 3.

self-determination and human dignity which are deeply rooted in the history of human rights.³⁵¹ Under the same light, their classification as workers instead of morally ambiguous individuals or victims in need of salvation, would recognize their inherent dignity and safeguard their socioeconomic rights, which would constitute a significant step towards their recognition as agents. Therefore, the goal of the sex work movement is arguably more emancipatory, than it is commodifying.

To that end, this research argues that the recognition of sex work as an economic activity, falling under the scope of the Treaty on the Functioning of the European Union (TFEU) has been the first step towards recognizing sex work as work under EU law and the sex workers' right to establishment and provision of their services in the internal market. In the next part, this research will provide an overview of the Court's case-law on sex work, followed by an examination of the reasons for which sex work remains a contested issue, despite the Court's rulings.

3.2. Sex Work as an economic activity:

Even though the EU's action towards the elimination of human trafficking has been extensive, the European Union remains silent on the issue of sex work as a form of economic activity. When this silence is broken, the link between sex work and poverty is made by the European Economic and Social Committee (ESEC), or by the European Parliament, but only when reference is made to economic recess leading to the increase of gender-based violence, associating only the latter with sex work.³⁵² In some fringe cases sex work has been acknowledged as an issue linked to work, economic activity and the provision of services under EU law, by the Court of Justice of the European Union (ECJ).³⁵³ As it was established by the Court in 2001 in the case *Jany and Others*, 'prostitution' pursued at a self-employed capacity can be considered a service in exchange for remuneration and therefore falls within the concept of 'economic activities', according to the Treaty on the Functioning of the European

³⁵¹ Marjan Wijers, 'Sex Workers Rights Are Human Rights: Or Not? The Art of Stealing Back Human Rights', 4–5.

³⁵² European Parliament, 'Resolution on the Impact of the Economic Crisis on Gender Equality and Women's Rights, Committee on Women's Rights and Gender Equality', no. (2012/2301(INI)) (28 February 2013): para. 73, https://www.europarl.europa.eu/doceo/document/A-7-2013-0048_EN.html.

³⁵³ Court of Justice of the European Union, Joined Cases C-340/14 and C-341/14, Judgement of the Court (Third Chamber) of 1 October 2015', <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62014CA0340&qid=1683636937852>.

Union.³⁵⁴ Furthermore, in the Court's judgement in the joint cases of *R.L. Trijber v. College van burgemeester en wethouders van Amsterdam and J. Harmsen v. Burgemeester van Amsterdam*, sex work as an economic activity was also separated from forced prostitution and relating crimes.³⁵⁵ Thus, as an economic activity, no discrimination on the grounds of nationality may impose barriers to the enjoyment of the freedom of establishment (Art. 49 TFEU)³⁵⁶, or the freedom to provide services (Art. 56 TFEU).³⁵⁷ According to the latter, the provision of services may be actualized under the same conditions that the Member State imposes on its own nationals, according to the principle of non-discrimination.³⁵⁸ The same applies to the right of establishment, which includes the right to take up and pursue activities as a self-employed person as the Court pointed out in *Adoui and Cornuaille v. Belgium*.³⁵⁹

Although signifying an important step towards the protection of the socio-economic rights of sex workers, these rulings have not led to an established frame through which sex work is considered an economic activity under EU law, and therefore falling under the EU's competences for action, while sex work, or 'prostitution', is left exclusively at the discretion of Member States. While a thorough examination of these cases will follow, it has been argued that the link between sex work and EU's freedoms, namely the freedom of establishment and the freedom to provide services, has not sufficed in order to mainstream the issue of sex work as work within the EU.³⁶⁰ This suggests that the Court has refrained from countering the rise of neo-abolitionism in the EU. However, although, at the EU level, there are no agreed upon provisions on sex work yet, three judgments of the Court of Justice of the EU have set a precedent that should be kept in mind.

³⁵⁴ Court of Justice of the European Union, Case C-268/99, *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie*, Judgment of the Court of 20 November 2001.para. 49, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61999CJ0268>.

³⁵⁵ Joined Cases C-340/14 and C-341/14- Judgment of the Court (Third Chamber) of 1 October 2015.

³⁵⁶ Consolidated Version of the Treaty on the Functioning of the European Union - PART THREE: UNION POLICIES AND INTERNAL ACTIONS - TITLE IV: FREE MOVEMENT OF PERSONS, SERVICES AND CAPITAL - Chapter 2: Right of Establishment - Article 49 (Ex Article 43 TEC), http://data.europa.eu/eli/treaty/tfeu_2008/art_49/oj.

³⁵⁷ Consolidated Version of the Treaty on the Functioning of the European Union - Chapter 3: Services - Article 56 (Ex Article 49 TEC), http://data.europa.eu/eli/treaty/tfeu_2008/art_56/oj.

³⁵⁸ Charter Of Fundamental Rights Of The European Union 2012/C 326/02, art. 21.

³⁵⁹ Court of Justice of the European Union, 'Joined Cases 115 and 116/81, *ADOUI AND CORNUAILLE v BELGIUM*, JUDGMENT OF 18. 5. 1982', n.d., 1708, <https://curia.europa.eu/juris/liste.jsf?num=C-115/81>.

³⁶⁰ Foret and Rubio Grundell, 'European Morality Politics in the European Union', 1808.

The first case, *Adoui and Cornuaille v. Belgium*, dates back to to 1982.³⁶¹ The two applicants were French citizens, whose residence permits applications for their establishment in Belgium were dismissed. The applicants were then expelled from the country on the grounds of suspicion of ‘prostitution’. The Court relying amongst other grounds, on the principle of non-discrimination established that EU citizens who engage in ‘prostitution’ cannot be treated differently than the citizens of the respective Member State, also pursuing the same activity.³⁶² The Court found that article 48 of the Rome Treaty which enshrines the freedom of movement of workers, in force at the time, was applicable in this situation.³⁶³ Furthermore, while examining the refusal to issue a permit on the part of the administrative authority on the grounds of threatening ‘public policy’, the Court clarified that a Member State may not expel a national of another Member State for a conduct that, when attributable to the host Member State’s own nationals, does not enable repressive measures aimed at combatting such conduct.³⁶⁴

On 20 November of 2001, the case *Jany and Others v. Staatssecretaris van Justitie* brought before the Court two Polish and four Czech Nationals who requested the granting of their residence permits in the Netherlands, in order to provide their services at a self-employed capacity, as sex workers. They applied to the commissioner of Amsterdam- Amstelland regional police, while their applications were rejected by the Secretary of State, their objections were declared unfounded ‘on the grounds that prostitution is a prohibited activity or at least not a socially acceptable form of work’, which cannot be considered to constitute a ‘regular job’ or a profession.³⁶⁵ However, at the time in the Netherlands, window sex work, as well as street sex work were permitted and regulated at the communal level.³⁶⁶ The Court, therefore, examined whether Article 44 of the Agreement with Poland and Article 45 of the Agreement with Czech Republic allowed for ‘prostitution’ to be excluded from the scope pertaining to the notion of ‘economic activities as self-employed persons’. The Court took into consideration the

³⁶¹ Court of Justice of the European Union, Joined Cases 115 and 116/81, *ADOUI AND CORNUAILLE v BELGIUM*, JUDGMENT OF 18. 5. 1982, <https://curia.europa.eu/juris/liste.jsf?num=C-115/81>.

³⁶² *Ibid*, 1698.

³⁶³ Daniela Danna, *Report on Prostitution Laws in the European Union*, 3.

³⁶⁴ Court of Justice of the European Union, ‘Joined Cases 115 and 116/81, *ADOUI AND CORNUAILLE v BELGIUM*, JUDGMENT OF 18. 5. 1982’, pt. Court’s Ruling, 1712, para 1–2.

³⁶⁵ Case C-268/99, *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie*, Judgment of the Court of 20 November 2001. -Freedom of Establishment- Economic Activities- Whether or Not They Include the Activity of Prostitution, para. 18.

³⁶⁶ *Ibid*, para. 20.

invoked reasons for denying the issuing of residence permits for the applicants, relating to the moral nature of the activity and on the grounds that ‘prostitution’ contributes to issues regarding ‘the freedom of action of prostitutes and their independence’.³⁶⁷ The question according to the Court called for the examination of any distinction between the aforementioned provisions and that of Article 52 of the Treaty establishing the European Community, which enshrines the right of establishment.³⁶⁸

While answering the posed question in its preliminary ruling, the Court examined whether prostitution carried at a self-employed capacity, according to the Association Agreements between the Communities and Poland and the equivalent with Czech Republic respectively, fell under the definition of ‘economic activities’.³⁶⁹ According to the Association Agreements, ‘economic activities’ include all activities of an industrial or commercial character, activities of craftsmen and activities of the professions. At the same time, “establishment” was defined as the right to ‘take up and pursue economic activities as self-employed persons and to set up and manage undertakings, in particular companies, which they effectively control’.³⁷⁰ Taking into account that ‘prostitution’ is a provision of services for remuneration,³⁷¹ the Court ruled that it constitutes an economic activity, falling under the scope of economic activities of self-employed persons as the latter is provisioned in Article 52 of the Treaty.³⁷²

While examining the Dutch Government’s argument that frames sex work practices by non-nationals as a threat to public order and public policy, the Court clarified that even though a way of assessing the national values as reflected by national law cannot be imposed by European law on Member States, conduct in itself cannot be considered to suffice for the imposition of disproportionate restrictions on entry or residence of a national of a Member State to another.³⁷³ When the respective conduct

³⁶⁷ Ibid, pt. Question 3.

³⁶⁸ Christina Ratcliff et al., ‘Freedom of Establishment and Freedom to Provide Services’, *Fact Sheets on the European Union, European Parliament*, 2023, 1, <https://www.europarl.europa.eu/factsheets/en/sheet/40/freedom-of-establishment-and-freedom-to-provide-services>.

³⁶⁹ Case C-268/99, *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie*, Judgment of the Court of 20 November 2001, paras 43–47.

³⁷⁰ Ibid, pt: Grounds, para 4.

³⁷¹ Ibid, para 33.

³⁷² Ibid, paras 49–50; Treaty Establishing the European Community (Amsterdam Consolidated Version) - Part Three: Community Policies - Title III: Free Movement of Persons, Services and Capital - Chapter 2: Right of Establishment - Article 43 - Article 52 - EC Treaty (Maastricht Consolidated Version) - Article 52 - EEC Treaty, Official Journal C 340 , 10/11/1997 P. 0195 - Consolidated Version, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:11997E043>.

³⁷³ Case C-268/99, para 60.

is practiced by the nationals of the Member State, as was the case with Dutch sex workers, the same conduct cannot be considered as a threat to public order when practiced by nationals of another Member State (or at the time of the verdict, in the context of the Association Agreement between the Communities and Poland, and the Association Agreement between the Communities and the Czech Republic.)³⁷⁴ The Court further highlighted that reasons that are based on the grounds of public morality and in view of its 'illegal nature', for excluding 'prostitution' from the scope of economic activities, do not suffice, as they are based on 'a false premiss'.³⁷⁵

The Court went on to distinguish the illegality of activities such as soliciting and 'white-slaving', or in other words sex-trafficking, from the permitted and even regulated activity that is 'prostitution'.³⁷⁶ This distinction was made again by the Court in the case *Harmsen v. Burgemeester van Amsterdam* in 2015.³⁷⁷ The case concerned the language requirement that would allow for the communication between sex workers of Hungarian and Bulgarian origin and the owner of a window prostitution business, who requested the granting of licences for two additional windows. The Dutch authorities refused the licensing on the grounds of the general interest that is the prevention of crimes related to prostitution, as the applicant did not speak a language that the respective sex workers understood, making communication impossible. This language barrier, according to the Court, would present a hinderance in providing to sex workers the means to communicate and provide evidence of an offence committed against them.³⁷⁸ While assessing the facts the Court held that there is indeed a distinction between forced prostitution and prostitution.³⁷⁹ According to the Court, the former is regarded a criminal offence, while the latter is an economic activity.

3.2.1 Why is sex work not yet recognised as an economic activity at the EU level, despite the Court's rulings?

However, what is perceived by legal orders as economic activity, and the regulations it falls under, is not a matter pertaining exclusively to Member States, but also includes the conformation of the national laws with the secondary European Law.

³⁷⁴ Ibid, 61.

³⁷⁵ Ibid, para 52.

³⁷⁶ Ibid, para 53.

³⁷⁷ Court of Justice of the European Union, Joined Cases C-340/14 and C-341/14- Judgement of the Court (Third Chamber) of 1 October 2015.

³⁷⁸ Ibid, paras 72-73.

³⁷⁹ Ibid, para 68.

Furthermore, the absence of specific legal provisions under EU law on certain activities, such as sex work, does not mean that they cannot be influenced by the supremacy and direct effect deriving from the Treaties. According to Conant, international Courts are ‘reactive’,³⁸⁰ and as such change in the political and societal sphere cannot be accomplished simply through their rulings.³⁸¹ Furthermore, according to Larsson and Naurin’s findings,³⁸² the CJEU is notably affected by Member States’ preferences, and tendencies without this signifying that its rulings do not have a significant impact, since they have equal constitutional standing as the Treaty itself.³⁸³

However, Susanne K. Schmidt argues that in its preliminary procedures, the CJEU establishes the guidelines for the interpretation of the individual case brought before its jurisdiction.³⁸⁴ The Court’s rulings are erga omnes adding on to the Treaties, and they are meant to be impactful in the EU policy making process, as well as influential in the codification process of secondary EU law into national legislations.³⁸⁵ Nonetheless, the Court examines the specific aspects of that dispute, hence the difficulty of establishing a generalized rule based on the Court’s interpretation, especially when rulings on a particular issue are single. Even though the Court has produced more than one ruling in regards to sex work as an economic activity, the case law on the issue is still sparsely distributed over time, and the last case of the Court that concerned sex work dates back to 2015.³⁸⁶ Although the impact that the Court’s rulings have on EU policy making may require a lengthy process, more so when the goal is political and societal change, what causes concerns is the EU’s neo-abolitionist turn in regards to sex work. Albeit, when it comes to generalizing single rulings at the national level and transforming them into administrative procedures, generalization becomes more perplexed as the interpretations of the Court clash with well-established domestic

³⁸⁰ Cremona, Marise, ed., *Compliance and the Enforcement of EU Law.*, Oxford University Press, USA, (2012): 41.

³⁸¹ Eric A Posner and Alan O Sykes, ‘Efficient Breach of International Law: Optimal Remedies, “Legalized Noncompliance”, and Related Issues’, *Michigan Law Review* 110 (2011): 243–94.

³⁸² Larsson, Olof, and Daniel Naurin, ‘Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU.’, *International Organization* 70, No. 2 (2016): 377-408.

³⁸³ Susanne K. Schmidt, *The European Court of Justice and the Policy Process, The Shadow of Case Law*, Oxford University Press, 2018, 7, <https://library.oapen.org/handle/20.500.12657/49968>.

³⁸⁴ *Ibid*, 11.

³⁸⁵ *Ibid*, 10.

³⁸⁶ ‘Joined Cases C-340/14 and C-341/14- Judgement of the Court (Third Chamber) of 1 October 2015’.

laws.³⁸⁷ In the case of sex work as an economic activity, its recognition was achieved only when the activity is exercised at a self-employed capacity. This also creates difficulty in the generalization of the rulings, as sex workers working in brothels as employees are not covered by the case-law. At the same time the polemic that sex workers face, due to current sex work policies, even in Member States within the regulationist regime, presents substantial barriers in working independently.³⁸⁸

As Schmidt further argues, the increased transborder movement of persons and activities and the implications this creates -such as the conflation of sex work with human trafficking- demands flexibility and compromises when it comes to the interests of national governments, whose policies due to the dynamic situation, cannot be set in stone.³⁸⁹

3.2.2. Can the silence be broken?

Despite the distinction made between sex work and human trafficking, and sex work's link to work as established by the Court in *Jany and Others*, it is still not recognised as an economic activity within all EU Member States, rather the conflation of sex work with human trafficking weakens that link. Maria Gerdt argues that by not addressing the issue, the EU aims towards the preservation of the economic interest which is considered to be the Union's unspoken priority. Therefore, the cause of EU's silence is due to the clash between the economic orientation of the EU and the 'more radical changes necessary to achieve gender equality, which involve more than just market liberalization'.³⁹⁰ However, she notes that EU's competence has expanded previously in order to guarantee and regulate the four freedoms upon which the single market relies.³⁹¹ Consequently, the EU's silence in regards to a uniform regulation of 'prostitution' or sex work is 'an indicator of unwillingness' to engage in a controversial subject that would spark further disparity among the Member States. This unwillingness

³⁸⁷ Susanne K. Schmidt, *The European Court of Justice and the Policy Process, The Shadow of Case Law*, 11.

³⁸⁸ Taking the Dutch example, as already discussed, in the Hague sex workers are prohibited from working independently, whereas the number of licensed brothels has decreased significantly, in Synnove Okland Jahnsen, Hendrik Wagenaar, *Assessing Prostitution Policies in Europe*; Helene Le Bail, Calogero Giametta, Noemie Rassouw, 'What Do Sex Workers Think About the French Prostitution Act?', 37.

³⁸⁹ Susanne K. Schmidt, *The European Court of Justice and the Policy Process, The Shadow of Case Law*, 12.

³⁹⁰ Johansson and Kalm 'Shortcomings of the EU Gender Policy', 30.

³⁹¹ Maria Gerdt, 'Shortcomings of the EU Gender Policy', *National Research University Higher School of Economic, Russian Federation, Methodical International Students' Scientific – Conference Academic Aspirations Of Youth: Insights In Economy, Management, Law And Technologies 2021*, 29.

is characterized as ‘active silencing’.³⁹² It is argued here that the situation as formed, represents a monolithic approach, which raises doubts for the European Union’s commitment to ensure gender equality in the socioeconomic sphere. In contrast, while highlighting that sex trafficking is not a controversial issue amongst Member States, as opposed to sex work, she argues that the development of a common policy at the EU level poses significantly fewer barriers.

On the other hand, Allwood is concretely questioning whether it is the controversy surrounding the issue of sex work that causes the silence, or vice-versa.³⁹³ In the same line, Joyce Outshoorn underlines that the barriers of the strictly economic orientation of the EU stopped being a hinderance in putting sex work in the EU agenda with the framing of ‘prostitution’ as violence against women.³⁹⁴ As it was previously discussed, the link between sex-trafficking and prostitution and the framing of sex work as a violation of gender equality was successful in the mentioning of ‘prostitution’ in the 2014 European Parliament’s Resolution on Gender based violence.³⁹⁵ However, no provisions in form of hard law have yet been adopted at the EU level, addressing specifically the issue of ‘prostitution’.

The rights of sex workers have been in far from a priority of national policies leading to the situation as described above, this research argues that the absence of a legal framework that safeguards the rights of sex workers is incompatible both to the EU’s commitment to gender equality, as well as to the Charter of Fundamental Rights of the European Union. The latter also enshrines the principle of gender equality,³⁹⁶ as well as the fundamental rights of not being subjected to discrimination before the law, choosing one’s profession, having access to health security and safe, dignified working conditions, that according to the findings of this research are at risk in absence of sufficient protection granted to sex workers within Member States. However, the applicability of the Charter is very limited, as it is only invocable when EU law is at stake.³⁹⁷ At the same time, the cross-border movement of sex workers for the exercise of their economic activity is the prerequisite for EU law to apply. Cross-border

³⁹² Maria Gerdt, 29; Allwood, ‘Agenda Setting, Agenda Blocking and Policy Silence’, 130.

³⁹³ Allwood, ‘Agenda Setting, Agenda Blocking and Policy Silence’, 127.

³⁹⁴ Synnove Okland Jahnsen, Hendrik Wagenaar, *Assessing Prostitution Policies in Europe*, 350.

³⁹⁵ ‘European Parliament Resolution of 26 February 2014 on Sexual Exploitation and Prostitution and Its Impact on Gender Equality (2013/2103(INI))’.

³⁹⁶ CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION 2012/C 326/02, art. 21.

³⁹⁷ Allan Rosas, ‘When Is the EU Charter of Fundamental Rights Applicable at National Level?’, 2012, 1272–74.

movement of sex workers, however has also been the excuse for the conflation of sex work with trafficking for the purpose of sexual exploitation, resulting in detrimental consequences for the rights of sex workers. The complexity that the issue of sex work entails, in combination with the absence of a legal framework that recognizes sex work at the EU level creates a vicious cycle of policies with a misplaced focus that perpetuate the risk of sex workers' safety and dignity. As Allwood highlights, the link of sex work to work is the most likely way to put sex work in the EU agenda.³⁹⁸

This research does not forget that Member States bear the prime responsibility to address sex work at the national level and ensure that sex workers are no longer treated, in the words of Agamben Giorgio, as 'figures existing on the threshold of the sovereign state, excluded from the law yet subject to its power'.³⁹⁹ However, the fight for the protection and fulfilment of sex workers' rights requires a collective effort that may be, arguably, faster achieved through a supranational recognition. Under this light, this research argues that the link of sex work to work would enforce the agency of sex workers and give them the space to voice their demands and claim their rights, instead of being disregarded as volitionless victims. Most importantly, that may provide a safeguard for the rights of sex workers at the EU level.

In regards to the political dynamics within the EU institutions, Outshoorn questions the viability of mainstreaming the neo-abolitionist regime in the EU, taking into account also the uncertainty of how the issue will be treated when brought up again in the post-elections European Parliament and the still remaining issue of the EU's competences.¹ In light of the above, Outshoorn spots a window of opportunity for the actors who advocate in favour of sex work as labour and the protection of rights of sex workers, should this campaign continue in full force.⁴⁰⁰ This research shares the same optimistic view, highlighting Outshoorn's words: 'opportunities have to be seized.'⁴⁰¹

³⁹⁸ Allwood, 'Agenda Setting, Agenda Blocking and Policy Silence', 130.

³⁹⁹ Agamben, Giorgio. 1998 as cited in Phil Hubbard, Roger Matthews, and Jane Scoular, 'Regulating Sex Work in the EU: Prostitute Women and the New Spaces of Exclusion', *Gender, Place & Culture* 15, no. 2 (April 2008): 149, <https://doi.org/10.1080/09663690701863232>.

⁴⁰⁰ Synnove Okland Jahnsen, Hendrik Wagenaar, *Assessing Prostitution Policies in Europe*, 351.

⁴⁰¹ *Ibid*, 351.

CONCLUSION

Just like in the case law that was examined, the mobility of sex workers is what has brought the matter of sex work before the EU's judiciary body, calling upon the assertion of the EU's freedoms of the single market, namely the freedom of establishment and the freedom to provide services.⁴⁰² However, since then, the EU's common anti-trafficking regime equates the mobility of sex workers to trafficking for sexual purposes. The harmonization of anti-trafficking policies has, according to Roberto and Gabriella Scaramuzzino, led to the creation of the idea that the mobility of sex workers is not distinct from sex trafficking.⁴⁰³ Based on that notion, the neo-abolitionist discourse is prevailing in the political scene of the EU institutions, and since the EU holds no direct mandate on the regulation of prostitution within Member State's legal orders, making sex work or 'prostitution' part of EU competences seems to be a framing issue, according to Allwood and Rubio Grundell.⁴⁰⁴ Sex trafficking on the other hand, due to its relation to migration policy, the safeguarding of common borders and the requirement of cooperation between Member States, provides the basis of a stronger mandate to the EU.⁴⁰⁵

Migration in the context of sex work often intersects with gender, class and race, creating a unique set of vulnerabilities and needs that are often overlooked by national governments and oversimplified by the neo-abolitionist victim narrative blanket. Though marginalisation and discrimination before the law are prevalent also within the regulationist regime, the criminalization of clients in the neo-abolitionist regime is driving sex work under the radar of the law, leaving them further exposed to violence and abuse, while depriving them of access to their labour and social security rights. Although grounded in the commendable intentions of protecting women's rights, the dominant influence of the neo-abolitionist perspectives that conflate sex work with trafficking for the purpose of sexual exploitation carries significant implications, that cannot be overlooked, or justified, in the 'name of gender equality'. As the pro-sex work movement argues, the viewing of women's rights as relevant, only in regards to their sexual vulnerability and bodily autonomy is problematic, in that such perspectives

⁴⁰² Ratcliff et al., 'Freedom of Establishment and Freedom to Provide Services'.

⁴⁰³ Johansson and Kalm, *EU Civil Society*, 2015, 139.

⁴⁰⁴ Rubio Grundell, 'The EU's Approach to Prostitution', 5; Allwood, 'Agenda Setting, Agenda Blocking and Policy Silence', 127.

⁴⁰⁵ Johansson and Kalm, *EU Civil Society*, 2015, 138.

only perpetuate the harms of gender equality that the neo-abolitionist regime aims to eradicate: the commodification of women's bodies, this time at an institutional, legislative level. While the emphasis on gender equality is necessary, and aligns with the EU's treaty-based commitment, it is crucial to extend this lens so as to recognize the socio-economic rights of individuals in the sex work industry, without reducing them to monolithic portrayals.

Shifting perspectives however, may be a challenging endeavour, as sex work causes contention in regards to its definition, debates on which often end up reducing this complex issue to binary perceptions of victimization and empowerment. Sex work is a multifaceted issue, while the debate surrounding it in the national political arena is occasionally driven by notions of morality, which affect the framing of the issue and result in steering the focus away from the rights of sex workers. The neo-abolitionist victimization narrative fails to recognize the agency, autonomy and right to self-determination of individuals in the sex industry, and especially migrant sex workers, thus silencing their voices. Current sex work policies present gaps, marginalising sex workers and depriving them of substantial access to their rights, while aiding the perpetuation of obsolete societal perceptions on gender roles. However, morality and human rights are separate notions, and should not be interplayed with community law.⁴⁰⁶ When morality, ideology and symbolic positions prevail over facts, expertise and eventually human rights⁴⁰⁷ at the supranational level of the EU, this research argues that a change of perspective is imperative.

For the time being, the recognition of sex work as an economic activity by the Court in *Adoui and Cornuaille v. Belgium* and *Jany and Others v Staatssecretaris van Justitie*, and its distinction from trafficking in *Harmsen v. Burgemeester van Amsterdam* appear to be ignored, as manifested by the EU's neo-abolitionist turn. Nonetheless, according to Allwood's review of the agenda setting literature the link between sex work and work would be the most likely to put sex work in the EU agenda.⁴⁰⁸ Sex worker's organizations and pro-sex work advocates are currently fighting in order to bring the issue into light, have their voices heard and their agency

⁴⁰⁶ 'Case C-268/99, Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie, Judgment of the Court of 20 November 2001. -Freedom of Establishment- "Economic Activities- Whether or Not They Include the Activity of Prostitution', para. 61.

⁴⁰⁷ Foret and Rubio Grundell, 'European Morality Politics in the European Union', 1803.

⁴⁰⁸ Ibid, 130.

recognised, while the systemic silencing of sex workers' rights advocates and sex workers themselves and the problems this silencing causes have started to be addressed extensively in the scholarly debate. By addressing sex work as work under EU law, this research contributes to the same goal: creating space for an EU policy-making process, based on the lived experience of sex workers, rather than on the voices that represent their needs in a distorted way.

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