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## PROSTITUTION LEGAL REFORM IN BELGIUM: ABANDONING THE ABOLITIONIST MODEL IN FAVOUR OF A NEO-REGULATORY APPROACH

**Abstract.** The Belgian Criminal Code underwent significant reform with regard to sexual offences by the Law of 21 March 2022. Concerning the prostitution of people who are of legal age, the legislator has abandoned the abolitionist model and laid the foundations for a neo-regulatory model. Criminal sanctions are now based on the idea that prostitution should be able to be practised effectively, provided that the person offering his or her sexual services does so entirely voluntarily. Accordingly, the Law of 21 March 2022 enshrines the principle of authorising prostitution procurement – subject to certain conditions that have yet to be defined. It also makes it possible, by way of exception, to advertise prostitution. At the same time, the Criminal Code provides for measures to severely punish activities related to forced prostitution or to limit the commission of such offences. Nevertheless, the transition to the neo-regulatory model is not (yet) complete and some questions remain concerning, among other things, the respect by Belgium of its international obligations and the implementation of the new rules.

**Key words:** Consensual prostitution – Belgium – Neo-regulatory model – Prohibitionist model – Prostitution procurement – Prostitution advertising – Incitement to prostitution – Professional ban – Closure of establishment – Vulnerable population

### INTRODUCTION<sup>1</sup>

The Belgian federal legislator has reformed sexual criminal law. More specifically, the Law of 21 March 2022 introduced significant changes concerning the prostitution of people who are of legal age. The legislator has abandoned the abolitionist model and laid the foundations for a neo-regulatory model. Criminal sanctions are now based on the idea that prostitution should be able to be practised effectively, provided that the person offering his or her services does so entirely

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1 Part of this article was initially published in French (Hausman 2023). This article addresses other points, notably the international legal framework, the aggravating factor of aggravated abuse and ancillary penalties. It also takes into account recent laws and case law decisions.

voluntarily. This approach paves the way for the authorisation of procuring prostitution, subject to certain conditions that have yet to be defined. It also makes it possible, by way of exception, to advertise prostitution. Meanwhile, the Belgian federal legislator intends to punish prostitution-related activities in a context of coercion or exploitation, in particular through the mechanism of aggravating factors. The ancillary penalties are more specifically intended to effectively reduce the occurrence of such situations of abusive prostitution. Regardless of this new regulation, Belgium is bound by international legal instruments that clearly condemn the exploitation of forced or coerced prostitution, but are both indecisive and reserved as to the possible legality of activities linked to freely consented prostitution – whether these be the activities of sex workers or those who profit from their services.

## 1. THE NEW BELGIAN SEXUAL CRIMINAL LAW

The Belgian Law of 21 March 2022 *amending the Criminal Code regarding the sexual criminal law*<sup>2</sup> (hereinafter – the Sexual Criminal Law), which came into force on June 1<sup>st</sup> of the same year, is the culmination of the federal legislator’s efforts to reform sexual criminal law.

The legislation in this field is now based on the concept of consent, defined in Article 417/5 of the Criminal Code. This legal consecration goes hand in hand with the affirmation of a right to sexual self-determination and, at the same time, the criminal punishment of offences against sexual integrity. These changes reflect a desire to break away from an approach that has historically focused on protecting family peace and the tranquillity of the bourgeois family, which are all constituent elements of the patriarchal ideology of contemporary Western societies.

Regulating the prostitution of adults is an essential part of this reform of sexual criminal law<sup>3</sup>. The aforementioned law inserted a chapter IIIbis/1, entitled “The abuse of prostitution”, into Title VIII of Book 2 of the Criminal Code, and repealed Articles 379 to 382*quinquies* of the same Code – which regulated the prostitution prior to the reform.

## 2. THE INTERNATIONAL LEGAL FRAMEWORK

In its efforts to regulate prostitution, the Belgian State is bound to respect its international obligations, particularly arising from the Council of Europe Convention for the *Protection of human rights and fundamental freedoms* – hereinafter the “European Convention”.

The European Court of Human Rights – hereinafter the “European Court” – has essentially examined the issue of prostitution in the context of coercion or exploitation, in the light of Article 4 of the European Convention. This provision

2 Pub. L. 21 March 2022, M.B. 25.785 (30 March 2022).

3 For the more technical legal aspects of the prostitution regulation in Belgium, see Hausman, de Nanteuil 2023; /Clesse 2022/.

explicitly prohibits slavery, servitude and forced or compulsory labour. Since its *Siliadin v. France* judgement of 26 July 2005<sup>4</sup>, the European Court has considered that the trafficking of human beings – which covers their sexual exploitation – falls within the material scope of this article, and that the same probably applies, since the *S.M. v. Croatia* judgement of 25 June 2020, to the exploitation of the prostitution of others<sup>5</sup>. Using the definition given in international law<sup>6</sup>, human trafficking is defined as “the treatment of human beings as commodities, close surveillance, the circumscription of movement, the use of violence and threats, poor living and working conditions, and little or no payment”<sup>7</sup>. It should be emphasised that the European Court states that the consent of workers is not sufficient to exclude all forms of trafficking in human beings<sup>8</sup>. As far as the exploitation of prostitution is concerned, the European Court does not define the contours of the concept, but seems to consider that it must present a certain degree of seriousness<sup>9</sup>.

The importance of Article 4 of the European Convention in terms of regulating prostitution is linked to the positive obligations it places on the States Parties: “to put in place a legislative and administrative framework to prohibit and punish trafficking”, “to take operational measures to protect victims, or potential victims, of trafficking”, and “to investigate situations of potential trafficking”<sup>10</sup>, and to enable the victims to claim compensation for lost earnings from their traffickers<sup>11</sup>.

Another angle of approach is that of the possible recognition of a right to prostitute oneself based on Article 8 of the European Convention, which enshrines the right to respect for private and family life. The European Court has yet to rule on this issue. However, in its *Norris v Ireland* judgement of 26 October 1988, it ruled that the criminalisation of homosexuality violated the aforementioned provision when the acts in question involved consenting adults. It particularly stressed the disproportionate nature of such a legislative measure given its harmful consequences on the lives of the persons concerned. The issue of morality is also raised in this

4 ECtHR (Judgment) 26 July 2005, Case n° 73316/01, *Siliadin v. France*.

5 The consistency of the European Court’s case law on the material scope of Article 4 of the European Convention is not easy to grasp. One of the main difficulties lies in the way in which the concepts of “forced or compulsory labour”, “human trafficking”, and “exploitation of prostitution” are interrelated. See more particularly /Plouffe-Malette, 2020/.

6 See, for example, ECtHR (Judgment) 7 January 2010, Case n° 25965/04, *Rantsev v. Cyprus and Russia*, § 282; ECtHR (Judgment) 25 June 2020, Case n° 60561/14, *S.M. v. Croatia*, § 285. The two international instruments which serve as the primary references for interpreting the concept of “trafficking in human beings” are the United Nations Protocol of 15 November 2000 to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against transnational organized crime, and the Council of Europe Convention on action against trafficking in human beings.

7 ECtHR (Judgment) 25 June 2020, Case n° 60561/14, *S.M. v. Croatia*, § 291.

8 Concerning human trafficking, see ECtHR (Judgment) 28 November 2023, Case n° 18269/18, *Krachinova v. Bulgaria*, § 153; about forced labour, see ECtHR (Judgment) 25 June 2020, Case n° 60561/14, *S.M. v. Croatia*, § 285.

9 ECtHR (Judgment) 25 June 2020, Case n° 60561/14, *S.M. v. Croatia*, § 300; P. Vilanova, concordant opinion under ECtHR (Judgment) 25 June 2020, Case n° 60561/14, *S.M. v. Croatia*, § 2.

10 ECtHR (Judgment) 25 June 2020, Case n° 60561/14, *S.M. v. Croatia*, § 306.

11 ECtHR (Judgment) 28 November 2023, Case n° 18269/18, *Krachinova v. Bulgaria*, § 177.

ruling. According to the European Court, recourse to penal sanctions cannot be justified on the sole ground that certain people are offended, shocked or disturbed by acts that they consider to be immoral<sup>12</sup>. However, this does not necessarily mean that prostitution between consenting adults constitutes a fundamental right, especially in view of the venal aspect of this activity<sup>13</sup>. Even if this were the case, it is reasonable to assume that the States Parties to the European Convention have a wide margin of appreciation, which entitles them to justify greater or lesser limits on the right to prostitute oneself<sup>14</sup>. It should also be reiterated that the consensual nature of prostitution does not in itself preclude a possible violation of Article 4 of the European Convention.

In addition, legal writers are questioning the compliance of the new regulations on prostitution with international obligations of Belgium under the *Convention for the suppression of the traffic in persons and of the exploitation of the prostitution of others*, signed in New York on 21 March 1950. The provisions of the Belgian Criminal Code that raise questions are, above all, those that pave the way for “legal procurement” – without making this possibility for now real. Obviously subscribing to an abolitionist logic, the aforementioned international instrument requires States Parties to “punish any person who, to gratify the passions of another, procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person” or “exploits the prostitution of another person, even with the consent of that person”, as well as “any person who keeps or manages, or knowingly finances or takes part in financing of a brothel” or “knowingly lets or rents a building or other place or any part thereof for the purpose of the prostitution of others”<sup>15</sup>. However, this does not mean that Belgium breaches its international obligations. Trafficking in human beings, as understood in international law, requires a priori exploitation of a certain degree of seriousness – a threshold below which the forms of “legal procurement” organised by the Belgian legislator could fall. In addition, the United Nations Protocol of 15 November 2000 *to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against transnational organized crime*, does not define the terms “exploitation of the prostitution of others” and “other forms of sexual exploitation”, which makes it possible to give a more or less restrictive interpretation and, in this way, leave the States Parties some room for manoeuvre in regulating prostitution, at least between consenting adults.

12 ECtHR (Judgment) 26 October 1988, Case n° 10581/83, *Norris v. Ireland*, § 46.

13 P. Vilanova seems to accept the idea of “free and informed” prostitution, albeit with many reservations, but in a clear and affirmed manner (concordant opinion under ECtHR (Judgment) 25 June 2020, Case n° 60561/14, *S.M. v. Croatia*, §§ 8 and 9). See also /Radačić, Antić, 2022:1377/.

14 ECtHR (Judgment) 25 June 2020, Case n° 60561/14, *S.M. v. Croatia*, §§ 298 and 299. The European Court noted, without taking a position on the issue, that there were two distinct approaches, one necessarily seeing prostitution as a “coercive form of exploitation” and the other accepting the idea that prostitution could be genuinely consensual. In addition, it notes “substantial differences” between legal systems concerning the approach to prostitution.

15 Convention of 21 March 1950 *for the suppression of the traffic in persons and of the exploitation of the prostitution of others*, Art. 1 and 2.

### 3. A SHIFT OF MODELS

Having abandoned the abolitionist approach to the prostitution of adults, the Belgian legislator has opted for a resolutely neo-regulatory model – although its plan has yet to be finalised.

#### 3.1 *Abolitionism: The limits of the previous model*

Until the reform of sexual criminal law, Belgium was usually listed among the abolitionist states since the enactment of the Law of 21 August 1948 *abolishing the official regulation of prostitution*<sup>16</sup>. On 6 May 1965, it ratified the United Nations Convention of 21 March 1950 *for the suppression of traffic in persons and the exploitation of the prostitution of others*. Based on the idea that prostitution was both contrary to human dignity and dangerous for the individual, the family and the community<sup>17</sup>, the legal system at the time was characterised by the activity's lawful nature and, simultaneously, by the criminal repression of all forms of exploitation, promotion and public incitement.

However, in practice, the public authorities were generally very tolerant of offences related to prostitution. Through its reform, the legislator intends to put an end to this form of “hypocrisy”<sup>18</sup>. He believes that such a situation is likely to benefit a number of individuals who exploit the prostitution of others. Meanwhile, the legislator aims to guarantee the latter a legal framework that, on the one hand, enables them to exercise their activity legally and freely and, on the other, offers them a level of protection, particularly in civil and social terms.

#### 3.2 *Neo-regulation: The new model and its guiding principles*

The model underlying the new penal provisions is of the neo-regulatory type. Prostitution is not in itself a criminal offence, and, at the same time, a set of activities related to it are authorised and regulated – particularly concerning procuring and advertising. This model is based on a set of legal principles, political choices and representations of the realities on the ground, which need to be clarified to fully understand the rules established by the Law of 21 March 2022.

In general terms, the legislator intends to move away from any moral approach and set the limits of legality on the basis of whether or not behaviour is harmful<sup>19</sup>. From this perspective, prostitution is not considered problematic. It is, above all, a matter of personal freedom and, as such, is not contrary to human dignity. There is, therefore, no reason why prostitution should be punishable as such.

Furthermore, for the legislator, the freedom to engage in prostitution must be effective. It must, in other words, correspond to the genuine willingness of the

16 Pub. L. 21 August 1948, M.B. 7.352 (13 September 1948). On the Belgian model, before the reform of sexual criminal law, in theory, and in practice, see /André, 2017/.

17 See the preamble to the Convention, Recital 1.

18 A.o. H.R. [BE], 2021b, pp. 28, 34 and 42.

19 H.R. [BE], 2021b, p. 43.

people offering their services. Also, as a particular vulnerability or marginalisation often characterises their situation, the legislator provides for a series of rules to guarantee the effective nature of this freedom. The law establishing the aggravating factor of aggravated abuse of prostitution, among other things, is a logical step in this direction<sup>20</sup>.

In addition to being effective, this freedom has to be able to be exercised efficiently. The legislator intends to provide a legal framework that enables prostitutes to offer their services, to solicit services from third parties or to call on other service providers so that they can exercise their activity fully and legally. Sexual services, for example, have to be able to be covered by a valid contract. In the same vein, the individual offering these services must be able to call on the services of an accountant who complies with the law, or must be covered by employment and social protection<sup>21</sup>.

This freedom to engage in prostitution, which is characterised by both its effectiveness and its efficient exercise, stems from the requirement of a form of substantive equality in the relationship between prostitutes and certain third parties. This is evidenced in particular by the criminal penalties imposed for taking unfair advantage of the prostitution of others<sup>22</sup>. This requirement is based on the idea that a manifest imbalance in a set of transactions is a priori the reflection of an asymmetric relationship between the individuals concerned, which enables those in a position of power to impose their will on the other and deprive him or her of his or her freedom – in this case, the prostitute.

The legislator's desire to free itself from a moral approach to prostitution does, however, have some important limits. These concern the position and status of prostitution in society. The stakes are twofold. It is a question of concealing the phenomenon of prostitution from the community to a certain extent, by strictly controlling its visibility in the material and virtual world. It is also a question of containing it, by preventing anyone from being encouraged to take part in this activity and by ensuring that people who wish to give it up can do so. This concern to keep prostitution out of the community is mainly reflected in the rules on advertising and public incitement.

Similarly, the law criminalises all activities related to prostitution when it is not carried out with the full consent of adults. While severe in certain respects, this repression is a counterbalance to the legal recognition of the freedom to prostitute oneself. This is reflected in particular in the aggravating factor common to prostitution offences, when committed to the detriment of people in vulnerable situations. The legislator also intends to take effective measures to prevent and combat the abuse of prostitution. The ancillary penalties of closure of the establishment and professional ban, in particular, bear witness to the legislator's desire to reduce the risk of prostitution activities that are not freely exercised.

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20 Criminal Code [BE], Art. 433quater/4.

21 See, for example, the Law of 21 February 2022 concerning the unenforceability of the nullity of the employment contract of persons who prostitute themselves [BE] (M.B. 21.928 [21 March 2022]).

22 Criminal Code [BE], Art. 433quater/1, al. 1.

## 4. THE LEGALITY OF PROSTITUTION AND ITS DEFINITION

As prostitution is not a criminal offence, there is no need to specify its meaning and scope other than to determine the scope of offences relating to this activity. This is the case for procuring and public incitement. As for the criminalisation of advertising, this is defined based on the concept of sexual services. This being the case, it would seem that sexual services are only covered insofar as they are offered in the context of prostitution<sup>23</sup>.

In the absence of a definition in the text of the law, the notion of prostitution must be understood in its usual sense. It combines three characteristics identified by case law and legal writers since before the reform.

Prostitution involves the satisfaction by one person of the sexual expectations or needs of one or more others, which covers a wide range of behaviour not limited to acts of penetration. Human sexuality is of a protean nature, encompassing other practices such as masturbation and fetishism.

The second characteristic of prostitution is that it is paid for. The consideration for sexual services may take the form of the payment of a sum of money, but not exclusively. Remuneration is more broadly understood to mean any transfer of assets for the benefit of the person offering such services, for example, by providing a place to live or donating valuables.

Finally, prostitution presupposes physical proximity between the persons directly involved. This characteristic presupposes that these individuals are in the same physical location, which leads, among other things, to excluding services provided via a webcam. One question remains unanswered here. It is not known whether or not this proximity requirement necessarily implies physical contact between the individuals, as suggested by a ruling of the Mons Court of Appeal dated 3 March 1989<sup>24</sup>. Depending on the answer, services such as those offered in strip-tease establishments or peep shows may or may not be considered prostitution.

## 5. PROSTITUTION-RELATED OFFENCES

The transition to a neo-regulatory model is reflected, among other things, in the offences of procurement, advertising and public incitement to prostitution, some of which overlap.

### 5.1 *The criminalisation of procuring*

As a general principle, procuring is prohibited. Article 433quater/1, paragraph 1 of the Criminal Code, distinguishes three types of procurement. The primary one is the organisation of the prostitution of others, which implies a form of authority

<sup>23</sup> Hausman, de Nanteuil, 2023: 921.

<sup>24</sup> Mons [BE], 3 November 1989; Hausman, de Nanteuil 2023: 919.

or hierarchical relationship with the individual offering his or her services. This is typically the case when the individual's working hours are imposed by a third party. Whilst the notion of organisation is broadly understood, it does not extend to situations of cooperation with other people – provided that this is “standard” or “normal”. For example, it is not considered procuring if an accountant completes the tax return of a prostitute under the same conditions as other clients. This is also the case when several individuals rent the same premises to offer their respective sexual services without any of them exercising a position of authority. Organising the prostitution of others is only punishable if the perpetrator is motivated by a specific intent, namely to “obtain an advantage” of some kind – which is almost always the case in practice.

However, there is an exception to this incrimination, which is one of the major contributions of the Law of 21 March 2002. More precisely, Article 433quater/1, paragraph 1 of the Criminal Code expressly introduces the possibility of “authorisations of the law”. Although the legislature has not yet established any such authorisations, this exception underpins an ambitious and progressive political project. The aim is to provide a “specific, tailor-made social status” for prostitutes, to put an end to their “precarious situation”<sup>25</sup>. The aim is to guarantee them “strong protection”, adapted to the “specific characteristics” of their activity<sup>26</sup>. Involving changes to social legislation, the new legal framework will enable prostitutes to exercise their freedom to engage in prostitution, particularly as salaried workers. It will also be supposed to guarantee the effectiveness of their will, which will involve preventing situations of extreme vulnerability and certain asymmetrical relationships to the detriment of the prostitute that can undermine it. Pending the implementation of this political project, the legislator has already taken steps to offer sex workers a minimum level of protection under social legislation<sup>27</sup>.

The second type of procuring referred to in Article 433quater/1, paragraph 1 of the Criminal Code consists of “promoting, inciting, encouraging or facilitating prostitution”. The moral element is a specific intent, which consists of deriving some kind of advantage from the activity, but this time the advantage must be “anomalous”. This incrimination reflects the idea that prostitution is legally permissible only if it is exercised entirely freely, which implies, in particular, that a third party can only derive a substantially equivalent benefit – or, at the very least, not out of all proportion. The offence covers, among other things, pimping of real estate and the activities of third-party facilitators acting on behalf of criminal networks. It also concerns other situations of abuse, such as accountants demanding excessive amounts of money or sexual services as remuneration.

25 H.R. [BE], 2021b, p. 14.

26 H.R. [BE], 2021a, p. 14.

27 The House of Representatives passed the Law of 21 February 2022 on the *unenforceability of the nullity of the employment contract of persons engaged in prostitution* [BE] (M.B. 21.928 [21 March 2022]), which came into effect on 31 March 2022. As a result of this enactment, for example, an employer may not refuse to pay a sex worker he has hired on the grounds that the employment contract between them is contrary to public order. See *Law on the protection of workers' remuneration* [BE], Pub. L. 12 April 1965, M.B. 4.710 (30 April 1965), Art. 47.



The adoption of “measures to prevent or render more difficult the abandonment of prostitution” is the last form of procuring listed in Article 433quater/1, paragraph 1 of the Criminal Code – the moral element here also being particular intent, as the wording of the law emphasises. Other examples include the confiscation of the prostitute’s passport or the obligation imposed on the prostitute to continue working until all her or his debts have been repaid<sup>28</sup>. This offence is underpinned by the idea that prostitution can only be practised entirely freely. It may also be tempting to see it as part of a more moralistic approach, according to which this activity is intended to have only a restricted (and discreet) place within the community – nothing should prevent a person from giving it up.

The penalty for procuring is imprisonment for one to five years and a fine of five hundred to twenty-five thousand euros. In the case of an attempt, the penalty is reduced to six months’ to three years’ imprisonment and a fine of one hundred to five thousand euros. These amounts are increased by the additional decimals and must, therefore, be multiplied by eight<sup>29</sup>. The fine is applied as many times as there are victims.

## 5.2 *Criminalisation of advertising and public incitement*

Advertising prostitution is, in theory, also punishable under criminal law<sup>30</sup>. This prohibition is based, above all, on moral considerations, even if the legislator does not openly admit it. The aim is to protect the community from prostitution or, more precisely, to exempt it from its “spectacle” or “proximity”. This is an attempt to conceal the phenomenon, especially about two categories of the population. One is minors whose “morality” must be safeguarded – their protection against sexual abuse is, moreover, reinforced by the Law of 21 March 2022. The other category comprises adults who do not wish to be exposed to this type of content – their expectations and concerns being recognised as legitimate by the legislator through this ban.

The prohibition is broadly defined in Article 433quater/2, § 1, of the Criminal Code. It covers two sets of hypotheses that partly overlap. The first is where, “by any means of publicity”, the prostitution of a person of legal age is facilitated, or the fact that she or he is engaged in this activity is made known – even implicitly. The second set of offences covers the act of “making”, “publishing”, “distributing”, or “disseminating” advertisements for an offer of sexual services – even if concealed “by language devices”. It should be noted here that this rule seems to apply only to services linked to prostitution.

This ban on advertising covers, at least to some extent, the offence of public incitement to prostitution referred to in Article 433quater/3 of the Criminal Code. This is the case in that this provision makes it an offence to “incite” a person of legal age “by any means of publicity” to engage in such an activity. This article includes a second offence, that, in some respects, probably falls outside the scope of the afore-

28 Clesse 2022: 278

29 Law on additional decimals on criminal fines [BE], Pub. L. 5 March 1952, M.B. 2.606 (3 April 1952), Art. 1.

30 Criminal Code [BE], Art. 433quater/2, § 2, al. 1.

mentioned Article 433quater/2. This is the “public” incitement of a person of legal age to engage in prostitution. This expression is given a comprehensive meaning when it refers to slander and defamation, as provided for in Article 444 of the Criminal Code<sup>31</sup>. This does not apply to incitement in the context of a strictly private conversation with the person who is the subject of the incitement.

Both advertising and public incitement are punishable by a prison sentence of one month to one year and a fine of one hundred to one thousand euros – amounts to be increased by the additional decimals<sup>32</sup>.

That said, there are exceptions to the ban on advertising in Article 433quater/2, § 2, of the Criminal Code. This freedom of speech restriction does not apply to prostitutes who provide their own sexual services. In this case, advertising may be done “behind a shop window” in a place specifically intended for prostitution – which leaves the answer to the question of the legality of active soliciting uncertain<sup>33</sup>. This exception also concerns advertising on a medium intended, at least in part, specifically for this purpose – the King being empowered to clarify this point by royal decree. This can be, for example, a specialised magazine, a separate section in any newspaper, or an internet platform.

In the second case, in order to allow the freedom of prostitution to be exercised efficiently, the Criminal Code extends this exception to the provider of the medium. The advertising may then relate to sexual services but also to a “place dedicated to offering [such services]”. Additional conditions are imposed on the providers. They must take a series of measures to protect people offering their sexual services and to avoid situations of abuse of prostitution and trafficking in human beings – the King being empowered to specify these rules by royal decree. In particular, this means that any cases of abuse or exploitation must be reported immediately to the police or judicial authorities. Relying on the cooperation of potential customers of sexual services as the recipients of the advertising, this system of control and repression also aims to guarantee the effective nature of the freedom to prostitute oneself and to prevent situations that are too asymmetrical, often conducive to the commission of offences against prostitutes.

## 6. THE AGGRAVATING FACTOR OF AGGRAVATED ABUSE

Under Article 433quater/4 of the Criminal Code, aggravated abuse of prostitution is the aggravating factor common to all the offences directly linked to this activity: procurement, advertising and public incitement. The offence must have been committed to the detriment of an adult in a vulnerable situation. This vulnerability must be the result of one of the circumstances listed in this provision, namely: “illegal or precarious administrative situation, [...] precarious social situation, [...]

31 Hausman 2022: 976.

32 Law on additional decimals on criminal fines [BE], Art. 1.

33 Hausman, de Nanteuil 2023: 936–940.

age, [...] state of pregnancy or [...] illness, [...] infirmity or [...] physical or mental deficiency”<sup>34</sup>. Whilst this list covers a wide range of situations, it is exhaustive.

In the case of aggravated abuse of prostitution, the penalty is ten to fifteen years’ imprisonment and a fine of five hundred to fifty thousand euros<sup>35</sup>. These sums must be multiplied by eight – to take account of the additional decimals<sup>36</sup>. Furthermore, in the case of procurement offences, the fine is applied as many times as there are victims<sup>37</sup>.

This heavier penalty, which applies to all offences, may come as a surprise given that, in the absence of the aggravating factor, procurement is punished much more severely than advertising or public incitement<sup>38</sup>. Some might see this as a lack of proportionality, which raises questions about the principle of equality and non-discrimination. But this severity may also be linked to the legislator’s desire to severely punish any activity linked to forms of prostitution for which there is a priori doubt as to the actual consent of the persons concerned. In this respect, it may be noted that the list of causes of vulnerability in Article 433quater/4 of the Criminal Code is borrowed identically from the rules applicable to trafficking in human beings<sup>39</sup> – “precarious social situation” being added to it.

## 7. ANCILLARY PENALTIES

In addition to these main penalties, there are others that are referred to as ancillary penalties. Some are of general application, in that they are imposed a priori regardless of the offence committed by the convicted person. These include a ban on exercising certain civil and political rights, such as voting or holding public office<sup>40</sup>. The same applies to special confiscation<sup>41</sup>, although in the case of prostitution, this is extended beyond the material scope of the offence<sup>42</sup>.

Other ancillary penalties relate specifically to prostitution-related offences<sup>43</sup>. Already provided for before the reform of sexual criminal law<sup>44</sup>, their primary pur-

34 Criminal Code [BE], Art. 433quater/4.

35 Criminal Code [BE], Art. 433quater/4, al. 2.

36 *Law on additional decimals on criminal fines* [BE], Art. 1.

37 Criminal Code [BE], Art. 433quater/4, al. 3.

38 Acts of procurement are punishable by one to five years’ imprisonment – as well as a fine, whereas the other two offences are punishable by one month’s to one year’s imprisonment – along with a fine.

39 Criminal Code [BE], Art. 433septies, al. 1, 2°.

40 See Criminal Code [BE], Art. 433quater/6, al. 1. See also the same Code, Art. 31 et seq.

41 See Criminal Code [BE], Art. 433quater/8. See also the same Code, Art. 42 et seq.

42 Special confiscation also applies to movable or immovable property that has been used or intended for use in the commission of offences involving prostitution, even if it does not belong to the convicted person – provided that the rights of third parties to such property are not prejudiced. It may also be applied to the equivalent value of these items in the event of their alienation. (Criminal Code [BE], Art. 433quater/8).

43 It should be noted that failure to comply with these prohibitions is itself a separate offence, punishable by one to three years’ imprisonment or a fine of one thousand to five thousand euros – amounts to be increased by the additional decimals (Criminal Code [BE], Art. 433quater/7).

44 Criminal Code [BE], former Art. 382, §§ 2 to 4, and Art. 389, §§ 1 and 2.

pose is to prevent such offences from being committed again. They are largely underpinned by a risk management rationale, to the extent that one is partly freed from the individual approach that characterises criminal liability.

The first of these penalties, set out in Article 433quater/6, paragraphs 2 and 3 of the Criminal Code, is professional ban. It is optional and applies only to those convicted of procuring, advertising or public incitement. They may no longer directly or indirectly operate or be employed in a whole series of establishments or businesses. These are of two kinds. Some are traditionally associated, directly or indirectly, with prostitution, such as pubs or furnished rental agencies. The others concern the care of minors, such as adoption institutions or holiday establishments. The professional ban is imposed for between one and twenty years but is automatically extended for the same length of time as the actual deprivation of liberty. It, therefore, only applies when the person represents a real risk to society.

The closing of the establishment where the offence was committed is the second ancillary penalty. As provided in Article 433quater/5 of the Criminal Code, it may be imposed in the event of a conviction for procurement, advertising or public incitement. It, therefore, relates to a building which, given the events that took place there, is supposed to represent a risk – a risk that the courts limit by closing the establishment. As such, it is not required that the person convicted is operator, owner, tenant or manager of the premises. However, in such a case, the maximum duration of the closure of the establishment is two years rather than three years – the minimum being one month. Moreover, it can only be imposed if the “seriousness of the specific circumstances so requires”, and a particular procedure must be followed to take account of the rights of third parties – namely those of the operator, owner, tenant or manager – who risk having their establishment closed down even though they have committed no offence. The sentence commences on the day the conviction becomes final and is not extended beyond the set period, including when the convicted person is deprived of his or her liberty.

## CONCLUSION

With the Law of 21 March 2022, the Belgian federal legislature has embarked on a far-reaching reform of the rules governing the prostitution of adults. It has opted for a neo-regulatory model, which, over and above the freedom and legality of prostitution, aims to enable this activity to be carried out efficiently.

This project is still in its infancy. Two critical milestones are missing. The first is the adoption of a law defining the conditions for legal procuring. The second is the establishment of an *ad hoc* social status for prostitutes. Today, little progress has been made on these two fronts. During the preparatory work for the Law of 21 March 2022, these issues were barely developed, apart from the idea of introducing a procedure for recognising pimps<sup>45</sup>. We might also mention the Law of 21 February 2022 *concerning the unenforceability of the nullity of the employment contract of people who prostitute themselves*<sup>46</sup>.

45 H.R. [BE], 2021a, p. 14.

46 Pub. L. 21 February 2022, M.B. 21.928 (30 March 2022).

Another significant uncertainty is the actual implementation of the legislation. This relates, in particular, to the difficulty of distinguishing between legal prostitution and situations of abuse and exploitation. In this respect, it is doubtful that in practice, this distinction, which was repeated many times during the preparatory work, particularly with regard to trafficking in human beings, will be easy to establish. At the same time, care must be taken to ensure that the authorisations and exceptions set out in the Criminal Code are not misused to make abusive and exploitative practices invisible or to develop them.

We will therefore be eagerly awaiting – but without any great expectations – the first multidisciplinary evaluation of these new provisions and their application, which will take place two years after they come into force – i.e. on 1 June 2024<sup>47</sup>.

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#### Council of Europe

Convention of 16 May 2005 *on action against trafficking in human beings*

#### Belgium

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47 Criminal Code [BE], Art. 433quater/9. This article also stipulates that, by 31 December 2022, the legislator shall determine the terms and conditions of this multidisciplinary evaluation. On 15 July 2022, a bill was submitted to the House of Representatives *to implement Article 433quater/8 of the Criminal Code regarding the evaluation of the legislative framework for prostitution* [BE] (2021–2022, no 55–2839/001). However, the bill has not been adopted by Parliament even though the legal deadline for doing so expired more than a year ago. It is to be feared that the House of Representatives will carry out no evaluation by 1 June 2024.

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## PRAVNA REFORMA PROSTITUCIJE U BELGIJI: NAPUŠTANJE ABOLICIONISTIČKOG MODELA U KORIST NEOREGULATORNOG PRISTUPA

### REZIME

Zakonom od 21. marta 2022. godine belgijsko savezno zakonodavstvo je započelo dalekosežnu reformu pravila kojima se reguliše prostitucija odraslih. Zakonodavac je napustio abolicionistički model i postavio je temelj za usvajanje postavki neoregulatornog modela, koji podrazumeva slobodno vršenje prostitucije, pod uslovom da osoba koja nudi svoje seksualne usluge to čini potpuno dobrovoljno. Novim zakonskim pravilima je izuzetno dozvoljeno i reklamiranje prostitucije, ali je istovremeno predviđeno kažnjavanje radnji u vezi sa prinudavanjem drugoga na bavljenje prostitucijom. Ipak, taj projekat je još uvek u povoju jer mu nedostaju dve važne prekretnice. Prva je preciziranje pravila kojima se bavljenje prostitucijom smatra pravno dopuštenom delatnošću, a druga je uspostavljanje *ad hoc* društvenog statusa lica koja se bave prostitucijom. Trenutno je na ta dva koloseka postignut tek skroman napredak. Tokom pripremnih radova za Zakon od 21. marta 2022. godine, ta pitanja su jedva dobila konkretnije obrise, osim ideje o uvođenju postupka za prepoznavanje lica koja se bave podvođenjem. Slabost novog rešenja je vidljiva i na planu njegove primene. To se posebno odnosi na poteškoće da se napravi razlika između legalne prostitucije i situacija zlostavljanja i eksploatacije, posebno u vezi sa trgovinom ljudima. S tim u vezi, sporno je da li će praksa uspeti da izgradi pouzdane kriterijume za razgraničenje takvih slučajeva. Stoga sa nestrpljenjem očekujemo, iako bez prevelikih nada, prvu multidisciplinarnu evaluaciju novih odredaba i efekte njihove primene, koja će uslediti dve godine nakon stupanja na snagu – odnosno 1. juna 2024. godine.

**Ključne reči:** Belgija, prostitucija, dobrovoljnost, reklamiranje prostitucije, navođenje na prostituciju, osetljive grupe

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