



Statewatch Analysis

The new Directive on trafficking in persons

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Introduction

The European Parliament (EP) and the Council have agreed on the first substantive criminal law measure to be adopted by the EU after the entry into force of the Lisbon Treaty – a Directive on trafficking in persons. The following analysis examines the content of the new measure, the negotiations of the new measure, and the particular position of the UK, which has opted out of the negotiations but could opt in to the Directive at any time after its formal adoption.

Background

Due to increasing public concern about trafficking in persons, there has been escalating action in recent years at national, EU and international levels. At EU level, there was first of all a 'Joint Action' on this issue (along with the issue of sexual exploitation of women and children) in 1997. There was then a 'Framework Decision' adopted in 2002.

In the meantime, at UN level there was a Protocol on trafficking in persons attached to the UN Convention on organized crime in 2000, and the Council of Europe drew up a Convention on trafficking in persons in 2005. Both measures have been ratified by a majority of Member States.

In 2009, the Commission proposed a new Framework Decision on this issue, which would repeal the measure adopted in 2002. The Council (the Member States' interior ministers) largely agreed on this Framework Decision just before the Treaty of Lisbon entered into force on 1 December 2009, but it was not possible to adopt the text formally before that point.

Discussions therefore had to restart, and the Commission tabled a proposal for a Directive on this topic in March 2010. The JHA Council agreed a 'general approach' (ie political consensus among national ministers) in June 2010, but since the entry into force of the Treaty of Lisbon, the European Parliament (EP) has joint decision-

making powers (known as the ‘ordinary legislative procedure’, formerly as ‘co-decision’) over most criminal law matters. The EP and Council negotiated a jointly agreeable text between September and November 2010. This text still has to be formally agreed by the two institutions, and then undergo legal-linguistic editing, before final adoption.

The agreement is a ‘first-reading’ deal between the two institutions in the ordinary legislative procedure. This process has been greatly criticized for its lack of transparency – see the link to the Statewatch analysis below.

The position of the UK

Before the entry into force of the Treaty of Lisbon, all Member States usually participated in ‘third-reading’ measures (ie EU acts concerning policing and criminal law). The UK (along with all other Member States) therefore participated in the previous Joint Action and Framework Decision on this issue.

Following the entry into force of the Treaty of Lisbon, the UK and Ireland now have the capacity to decide whether or not to opt in to proposals in this area, within three months of each proposal being made. Denmark cannot opt in to post-Lisbon measures at all, until and unless it decides to change its special Protocol on JHA matters, which is dependent on support for such a change in a referendum.

In this case, the UK opted out of the proposal, while Ireland opted in. It is still possible for the UK to opt in at any point after the formal adoption of the proposal. Even before that point, the UK could decide in principle to opt in. The UK’s participation only needs the approval of the Commission, which has never before objected to the UK or Ireland joining in to EU JHA measures after they have been adopted (this has happened already on five occasions – two for the UK, and three for Ireland).

It should be noted that this is the *only* criminal law measure which the UK has opted out of to date. During its term of office, the current UK government has to date opted in to three out of the four proposals in this area (ie it has opted in to proposals on sexual exploitation of women and children, the right to information in criminal proceedings and the European investigation order. A decision on whether to opt in to a proposal on cyber-crime must be made by the end of December).

The reasons for the government’s decision to opt out of the original proposal were explained by the immigration minister, Damian Green. The question of whether the UK should now opt in is discussed further below.

As for the UK’s position if it does not opt in, there are now special rules after the Treaty of Lisbon governing the position whether the UK or Ireland does not opt in to a measure amending a JHA measure which either State is already bound by. In that case, the Commission has the option to propose to the Council that the UK or Ireland must cease participation in the pre-existing measure, if the non-participation of the

UK or Ireland in the amending measure makes the situation 'inoperable' for other Member States. The Council has the option, by a qualified majority vote, to approve this proposal, if it believes that the criteria for 'inoperability' are met.

However, the previous UK government questioned what the position would be in the event that a later EU measure *repealed* a prior EU measure. In that case it is arguable that if the UK did not participate in the later measure, it was automatically no longer bound by the prior measure, because that prior measure had been repealed. This issue is important not just to the recent trafficking proposal, but to other criminal law proposals (cf the Irish opt-out from the proposal on the European investigation order) and in particular to asylum proposals, where the UK and Ireland participated in most of the first phase of EU asylum legislation but have opted out of most of the second phase of measures, which would repeal the first phase measures, according to the proposals from the Commission. There are no provisions in the Protocol concerning the British and Irish JHA opt-out which deal expressly with this issue.

The alternative argument is that a repeal of a prior measure is just another form of amendment of that prior measure, and so the rules set out expressly in relation to amendments also apply to repeals. So in that case, the UK will remain bound by prior measures if it opts out of amendments to those measures or repeals of those measures, unless the Commission and Council decide to apply the optional process to terminate the UK's participation in the prior measure – assuming that the criteria for 'inoperability' are in fact met.

In fact, the Council legal service is understood to have argued that normally these criteria for 'inoperability' *cannot* be met where the legislation concerned does not establish either a system of cooperation between national administrations (ie the European Arrest Warrant) or concern the functioning or establishment of an EU body (ie Europol or Eurojust). This argument is very convincing (see further the Statewatch updated analysis of the proposed European investigation order). If correct, it obviously means that the UK's non-participation in the anti-trafficking Directive does not create an 'inoperable' position for other Member States or the EU, and so the Commission and Council could not decide, even if they wished to, to terminate the UK's participation in the prior Framework Decision on this issue.

There is also a particular issue which would be raised if the UK's obligations under the Framework Decision were terminated, one way or another. Since the Framework Decision replaced the earlier Joint Action dealing with this issue, would the Joint Action then be considered as back in force for the UK, since the later act repealing it had itself been terminated without any replacement for the UK? This point arises by analogy to a number of other EU criminal law measures, as regards the position of the UK and Ireland if they opt out of replacement measures.

If the UK indeed remains bound by the prior Framework Decision (or Joint Action) on this issue, it should be noted that the UK has the option to decide by 1 June 2014 that it will no longer be bound by all of the third pillar measures (including the prior

anti-trafficking Framework Decision or Joint Action) adopted before the entry into force of the Treaty of Lisbon which still apply to the UK as of that date. If the UK decides to do this, the Framework Decision (or Joint Action) would cease to apply to it as of 1 December 2014 – although the UK could apply to opt back in to the Framework Decision (or the Directive or Joint Action) at any point after its decision on this issue. If the UK opted back in, or if it did not decide to terminate its involvement in prior third pillar measures at this point, then the Court of Justice would have jurisdiction as from 1 December 2014 as regards the Framework Decision (or Joint Action) in the UK.

It should be noted that the Council legal service is understood to have argued that the Council has an option to repeal an EU act either as regards *all* the prior participants in that legislation (ie including the UK, Ireland and Denmark), or only as regards the Member States participating in the new legislation (so that the prior act would still apply to the UK in this case). If it is correct to say that the Council has this option, this would also impact on the UK's position. However, the correctness of this position may be seriously questioned, in light of the wording of the relevant Protocols that the UK, Ireland and Denmark simply *cannot* be bound by legislation they have not opted into (see further the comments in the Statewatch updated analysis of the European Investigation order). If they are not bound by such legislation, it must obviously be concluded that they cannot be bound by a rule in such legislation which repeals prior legislation – so the Council does *not* have an option whether or not to leave that prior legislation in force as regards Member States which do not participate in the later legislation. The Council *must* leave that prior legislation in force as regards those non-participating Member States, unless the special process to force a Member State out of its participation in the prior measure due to 'inoperability' is validly triggered.

The approach which the Council finally took as regards the trafficking proposal is to clarify in the preamble and Article 17 that this measure *amends* the prior Framework Decision, but takes the form of a *replacement* (not a repeal) of that prior legislation only for those Member States which participate in the new legislation. The prior Framework Decision therefore will remain in force for the UK and Ireland - assuming that the Council's approach to this issue is legally correct, and that the Commission and Council do not opt to trigger the process of forcing the UK's non-participation in the prior measure. If the argument set out above concerning the interpretation of the 'inoperability' threshold is correct, the Commission and Council do not have the legal grounds to do this.

Negotiation of the Directive – and final content

The following analysis of the text of the Directive assesses four issues in turn:

- a) the extent to which the Commission's proposal differs from the current Framework Decision;
- b) the changes made to the Commission proposal by the Council;
- c) the changes made to the Council's position following negotiations between the Council and the EP; and

- d) a summary of the main changes the agreed Directive would make as compared to the Framework Decision.

a) changes in the original proposal, as compared to the Framework Decision

First of all, the Commission proposal includes a new clause setting out the objectives of the Directive (Article 1 of the Directive). Next, the substantive offence of trafficking would be amended to include begging, exploitation of criminal activities or removal of organs (Article 2). This has a knock-on effect on the 'inchoate' offences of aiding and abetting, instigation or attempt to commit the main offence (Article 3).

The penalties for commission of the offence were, in the Framework Decision, a general obligation to establish 'effective, proportionate and dissuasive' criminal sanctions (Article 3(1) of the Framework Decision). The maximum penalty possible had to be at least eight years' imprisonment, where there were one or more of four aggravated circumstances: endangering the life of the victim; an offence against a 'particularly vulnerable' victim, as further defined (the concept must at least include children under the age of consent who were the victims of trafficking for sexual exploitation); the use of 'serious violence' or 'particularly serious harm' to the victim; or the act was committed within an organized crime context, as defined by another EU law.

The Commission proposal for a Directive retained the general obligation to establish 'effective, proportionate and dissuasive' criminal sanctions only for inchoate offences (Article 4(3) of the Directive). For the main offences, the maximum sentence possible should be at least five years (Article 4(1) of the Directive), and in aggravated cases, the maximum sentence possible should be at least ten years, raised from eight years (Article 4(2) of the Directive). Also, the concept of an aggravated case would be widened to include offences committed by a public official, and the concept of a vulnerable victim would be widened to include all child victims (ie all under 18) and all adults who are vulnerable due to pregnancy, health conditions or disability.

Next, the Commission proposal introduced a form of defence for victims as regards criminal charges. Member States would have to provide for the possibility of not prosecuting the victims for acts which they were forced to commit as a consequence of being trafficking victims (Article 7 of the Directive).

A new provision on effective investigation and prosecution of crimes includes such provisions as an extended period of time for prosecution in certain cases (Article 8). As for jurisdiction of crimes, the Framework Decision only obliges Member States to take jurisdiction for acts committed on their territory, but the Commission proposal would oblige them to take jurisdiction over acts committed by their nationals or residents anywhere in the world, and to waive various special conditions that might limit the exercise of their jurisdiction (Article 9).

The Commission also proposed: new general rules on assistance to victims (Articles 10-11); much more specific rules on the particular position of child victims (Articles 12-14 of the Directive; compare to Article 7 of the Framework Decision); a provision on prevention (Article 15); and a provision on national rapporteurs (Article 16).

b) changes to the proposal, made by the Council

First of all, the Council's 'general approach', as agreed in June 2010, altered the wider definition of aggravated circumstances proposed by the Commission. Although the Council retained the idea that an offence against any child victim was an aggravated circumstance, it dropped the idea that offences against adults who were vulnerable due to health, disability or pregnancy would be an aggravated circumstance. While retaining the idea that offences by public officials would be an aggravated circumstance, the Council text did not require a particular minimum sentence to be available in such cases.

Next, the Council dropped the idea of extending jurisdiction to acts committed by each Member State's residents anywhere in the world.

As for the rules on assistance to victims, the Council limited the obligation to give assistance to a presumed victim to cases where there were 'reasonable grounds' to make that assumption (Article 10(2)). The rule on legal assistance for victims was qualified slightly (Article 11(2)), and the proposed rule that victims could remain anonymous (proposed Article 11(3)) was dropped entirely. A qualified right to education for child victims was added (Article 13(1)), but provisions on legal aid for children were dropped (Article 14). Finally, the provision on national rapporteurs was altered by dropping a reference to reporting to national authorities (Article 16); Member States were given two and a half years, instead of two, to apply the Directive (Article 18); and the review of the Directive will take place five years after adoption, not four (Article 19).

c) changes made following negotiations with the EP

The Council's negotiating strategy with the EP is clearly set out in an attached Council document. In particular, the Council was determined to resist four particular demands from the EP: a raising of the maximum sentences for the relevant crimes; wider extraterritorial jurisdiction (ie for residents); the criminalization of the *use* of trafficking victims; and a specific reference to an EU anti-trafficking coordinator. To this end, the Council was willing to give in to the EP's other demands, and ultimately to meet the EP halfway as regards references to the EU anti-trafficking coordinator. It was able to resist the EP's demands on the other three key issues.

Note that the final agreed text, as well as the Council's negotiating document, underlines the provisions which have changed as compared to the Council's general approach.

The changes which the EP convinced the Council to make to the proposal are as follows (leaving aside changes to the preamble):

- a) the objectives of the Directive now include a reference to the 'gender perspective' (Article 1);
- b) there is a new provision on seizure and confiscation of assets (Article 6a; note that the numbering of the Directive will be consolidated before its final adoption);
- c) there are specific references to the possibility of the victims claiming international protection or the right to stay in order to cooperate with a criminal investigation (the latter issue is addressed by separate EU legislation in which the UK and Ireland do not participate, and would not be obliged to sign up to), along with a special extra rule on victims with 'special needs'; (Article 10);
- d) legal counselling must be given to victims 'without delay' (Article 11);
- e) there is a stronger reference to rights of the child (Article 12(2)), a further reference to 'a durable solution' for child victims (Article 13(1)), a right to a guardian for child victims in certain cases (Article 13(1a)), and a restored right to legal aid for child victims in criminal proceedings (Article 14(1a));
- f) there is an entirely new detailed provision on unaccompanied child victims (Article 14a);
- g) there is another entirely new provision on compensation for victims (Article 14b);
- h) there are clarifications to the provisions on prevention of trafficking (Article 15);
- i) national rapporteurs will have the role of gathering statistics (Article 16);
- j) there is a new provision on the EU anti-trafficking coordinator, as noted above (Article 16a);
- k) the Directive will have to be implemented within two years (as the Commission had proposed), not two and a half years (Article 18); and
- l) the review takes place four years after adoption, not five, and there is to be a specific review of the issue of criminalizing users of trafficked persons (Article 19).

To summarize the impact of the EP, in the absence of the three changes (on jurisdiction, criminalization of users and raising of sentences) which the Council rejected, the EP has been able to secure changes as regards victims, particularly child victims, as well as the institutional issues of the role of national rapporteurs and the anti-trafficking coordinator.

d) summary of changes which the Directive would make to the current Framework Decision

The following main changes will result from the adoption of the Directive:

- a) a widening of the substantive criminal law obligations, to include begging, exploitation of criminal activities and removal of organs;

- b) a new maximum criminal sentence of a least five years to be available in ordinary trafficking cases;
- c) an increase in the maximum criminal sentence to be available in aggravated trafficking cases, from at least eight to at least ten years;
- d) a widening of the concept of aggravated trafficking cases, to include all cases of child victims, and (without a specific maximum sentence) corrupt public officials;
- e) the new clause on seizure and confiscation of assets;
- f) the new clause on possible non-prosecution of victims for criminal acts which they were forced to commit as victims of trafficking;
- g) the new clause on specific rules concerning effective investigation and prosecution;
- h) the widening of mandatory jurisdiction to include all acts committed by each Member State's nationals anywhere in the world, and the suppression of various special conditions which might be invoked before that jurisdiction can be asserted;
- i) there are very many new provisions relating to protection of victims, and vastly expanded provisions relating to child victims in particular;
- j) there are specific provisions on prevention;
- k) there is an obligation to establish national rapporteurs, and to cooperate with the EU anti-trafficking coordinator to be set up.

It should also be noted that the institutional framework of a Directive is different from that of a Framework Decision. In particular, the Commission can sue Member States for failure to implement a Directive; a Directive is directly applicable (ie individuals can claim to enforce the rights in the Directive in national courts); and all national courts can send questions to the EU Court of Justice about the interpretation of a Directive (only about two-thirds of Member States permit this at present as regards Framework Decisions, although all will have to as from 1 December 2014).

Should the UK opt in to the Directive?

The official reasons for the UK's opt-out, according to a minister, are:

- a) there is not much added value to the UK;
- b) it makes little difference to victim support in practice, or to combating trafficking, as regards the UK;
- c) it does not concern operational measures;
- d) the EP might insist on further support for those not identified as victims yet, or wider extraterritorial jurisdiction;
- e) it would make some discretionary rules mandatory, such as appointing special representatives for children; and
- f) it would require primary legislation to implement.

Points (b) and (e) are contradictory – either the proposal would make a difference to UK practice, or it would not. Objection (c) is neutral – there is no reason to opt out

of a measure just because it does not include measures on operational cooperation, and in any event the UK at the same time opted in to a parallel proposal (on sexual exploitation of children) that did not have provisions on operational cooperation either. As for point (d), the Council's text did not change on either point during negotiations with the EP. As for point (f), the argument is prima facie incorrect – since section 2(2) of the *European Communities Act* allows the government to implement EU law by means of delegated legislation, unless it necessary to change the relevant law on criminal offences. This provision of the *Act* has applied to criminal law issues otherwise, since the entry into force of the Treaty of Lisbon and the amendments made by the *European Union (Amendment) Act 2008*, which brought criminal law issues within the scope of the *European Communities Act*. In any event, it is not a particular burden for the government to add a few provisions to a future criminal law Bill in order to implement the EU measure if necessary – this has been done a number of times in the past. As for point (e), the Directive only requires such appointments where the child is unaccompanied or separated, or where there is a conflict of interest between the child and the parents. Given the serious nature of the crimes involved and the vulnerable situation of child victims, it is hard to understand the objection that implementing this obligation will create undue problems for the UK.

The underlying weakness of the arguments against opting in is that they do not concern a desire to protect the victims, or public safety, or to ensure effective prosecution and punishment, or to ensure fair trials or the protection of other civil liberties, or the preservation of basic elements of the UK's criminal law or criminal justice system, or even the reduction of costs for the public or private sector. In short, the government offers no good reason against opting in.

The broader argument for opting in is that a failure to opt in, for no good reason, sends a signal to potential traffickers that the UK is a 'soft touch' as regards this crime, and to the public and to the wider world (to Member States and non-Member States alike) that the UK is not so concerned about this crime – weakening its efforts to get other countries to ratify and enforce the relevant international treaties.

26 November 2010

Documents

2002 Framework Decision on trafficking in persons:
<http://www.statewatch.org/news/2010/dec/eu-fd-2002-trafficking%20persons.pdf>

2010 proposal for Directive on trafficking in persons
<http://www.statewatch.org/news/2010/dec/eu-com-95-10-trafficking-in-persons.pdf>

Agreed text of first reading deal, Directive on trafficking in persons
<http://www.statewatch.org/news/2010/dec/eu-council-trafficking-dir-16945-10.pdf>

Council negotiating position - document 16156/10
<http://www.statewatch.org/news/2010/dec/eu-council-trafficking-dir-16156-10.pdf>

Agreed 'general approach' of the Council - document 10845/10:
<http://www.statewatch.org/news/2010/dec/eu-council-trafficking-dir-10845-10.pdf>

Reasons for the UK opt-out - letter from UK minister:
<http://www.statewatch.org/news/2010/sep/eu-uk-trafficking-letter.pdf>

Statewatch analysis - first reading deals:
<http://www.statewatch.org/analyses/no-84-ep-first-reading-deals.pdf>

Statewatch updated analysis - European Investigation order:
<http://www.statewatch.org/analyses/no-112-eu-eio-update.pdf>

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