

**Explanatory Memorandum (EM) on European Community Document**

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND THE COUNCIL on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA**

Submitted by the Home Office on ..... MAY 25 ..... 2010

**Subject matter**

1. The EM relates to the European Commission proposal for a European Parliament and Council Directive on preventing and combating human trafficking. Human trafficking is considered to be a serious crime undertaken worldwide for profit and is akin to a modern form of slavery. A robust response to trafficking, aimed at preventing the crime, prosecuting criminals and protecting victims, is called for. To ensure effectiveness, co-ordination is desired across EU member states, which comprise source, transit and destination countries.
2. The Directive seeks to establish minimum rules concerning the definition of criminal offences and sanctions on trafficking. It also aims to introduce common provisions to strengthen prevention and victim protection arrangements.
3. The proposed Directive seeks to replace the current Framework Decision 2002/629/JHA on combating trafficking in human beings, which was agreed in 2002 and bring it up to date with more recent legal, policy and practice developments in this area. The UK is compliant with the 2002 Framework Decision.

**Scrutiny history**

4. The text of an earlier version of the Directive was deposited on 30 March (COM (10) 95). A factual EM was deposited on 8 April. This is the first full EM and contains a more updated version of the Directive (un-numbered).
5. The Directive is based on the 2009 proposal for a Council Framework Decision on preventing and combating human trafficking and protecting victims. The 2009 draft Framework Decision was deposited for scrutiny on 14 April 2009. The original document reference was 8151/09. The Commons Committee published a report of its views on 29 April, and decided to keep the document under scrutiny and asked the Minister for further information (Reference (HC19 – xv (2008-09) (chapter 4) 29 April

2008)). The Minister replied on 12 May. A further comprehensive update on the negotiations was sent on 24 August. The Commons Committee wrote again on 10 September, to which a reply was sent on 28 September.

6. The Lords Committee initially wrote on 8 May 2009 retaining the document under scrutiny and requesting further information. This letter was replied to on 22 May 2009. The Lords Committee wrote with further queries on 19 June 2009. A reply and update were sent on 24 August 2009.
7. A second, unnumbered EM was submitted on 14 October 2009, addressing the most up to date version of the text. The draft Framework Decision was cleared from scrutiny in the Commons on 14 October, and the Lords on 21 October, on the understanding that the Government would not agree if there were further changes of substance. The Government wrote to both Committees (separately) on 02 November 2009 noting the FD had cleared scrutiny and replying to points they had raised previously.
8. The draft Framework Decision was presented to the Justice and Home Affairs Council on 23 October, and 1 December 2009. However, it was not possible to secure official agreement and adoption before the entry into force of the Lisbon Treaty on 1 December, and so the Framework Decision fell and has now been re-tabled as this Directive.

### **Ministerial responsibility**

9. The Secretary of State for the Home Department has responsibility for policy on organised immigration crime including trafficking in human beings. The Devolved Administrations have responsibility over certain policy areas. In Scotland and Northern Ireland the criminal law relating to human trafficking is generally devolved and responsibility rests with the respective administrations. These proposals are also of interest to the Justice Secretary and the Attorney-General as they deal with criminal law provisions.

### **Interest of the Devolved Administrations**

10. Human trafficking is a devolved matter in Scotland and Northern Ireland. The Scottish Government and the Department of Justice in Northern Ireland have been consulted in preparing this EM.

### **Legal and procedural lines**

#### **(i) Legal basis**

11. Articles 82(2) and 83(1) of the Treaty on the Functioning of the European Union

#### **(ii) European Parliament procedure**

12. Co-decision

### **(iii) Voting procedure in the Council**

13. QMV

### **(iv) Impact on UK law**

14. UK opt-in (under Protocol 21 to the Treaties) applies. If the UK opts in, the Directive will be binding on the UK. The proposed Directive repeals and replaces the current Framework Decision (2002) on combating human trafficking. The UK is compliant with that earlier instrument. Further, the UK ratified the Council of Europe Convention on Action against Trafficking in Human Beings on 17 December 2008. The UK is compliant with the provisions of that Convention.
15. Our initial view is that since many of the provisions incorporate provisions from the earlier Framework Decision and reflect those in the Council of Europe Convention, with which the UK already complies, significant new legislation is unlikely to be necessary. Conduct which constitutes human trafficking is already a criminal offence for both sexual and non-sexual exploitation in England, Wales and Northern Ireland (sections 57 – 60 Sexual Offences Act 2003 and section 4 Asylum and Immigration (Treatment of Claimants, etc) Act 2004) and measures are in place concerning protection of victims of trafficking (equivalent offences exist in Scotland).
16. However, some legislation would be required to give effect to the directive. We would, in particular, need to legislate to comply with Article 9 by expanding our extra-territorial jurisdiction to cover UK nationals who commit trafficking offences abroad. The Government is considering this issue. The Scottish Parliament will legislate to extend its extra-territorial jurisdiction and special measures for child victims of trafficking to ensure compliance through the Criminal Justice and Licensing (Scotland) Bill.
17. Furthermore, there are a number of areas in the Directive where the UK complies in practice, but the measures may need to be transposed into domestic legislation to demonstrate implementation to the Commission's standards. This relates to Article 10 on assistance and support for victims of trafficking, Article 11 on protection of victims in criminal investigations and proceedings, Articles 12 to 14, special measures for child victims.

### **(v) Application to Gibraltar**

18. The Directive would be binding on Gibraltar if the UK opts in. The Government of Gibraltar has been consulted. The existing 2002 Framework Decision applied to Gibraltar.

### **(vi) Fundamental Rights Analysis (FRA)**

19. Commission's Explanatory Memorandum to the proposal states that an in-depth scrutiny was undertaken to ensure full compatibility of the provisions

in with fundamental rights. As set out there, particular regard was had to ensure the protection of potential victims from inhuman and degrading treatment (Art 3 European Convention on Human Rights, the ECHR) and the prohibition of slavery and forced labour (Art 4 ECHR). Further, the provisions seek to ensure an appropriate balance between the rights of those victims in the criminal justice process and the rights of defendants, subject to alleged human trafficking offences, to a fair trial under Art 6 ECHR as well as the rights to private and family life under Art 8 ECHR. The proposal broadly reflects existing obligations arising from the 2002 Framework Decision and the Council of Europe Convention both of which are already in force and with which the UK complies with due regard to compatibility with relevant fundamental rights. Accordingly, in the opinion of the minister the proposal should be regarded as respecting fundamental rights.

### **Application to the European Economic Area**

20. Not applicable. This instrument applies only to the EU Member States.

### **Subsidiarity**

21. The Commission considers that since the instrument deals with crime of a cross-border nature, the objectives proposed under the proposal cannot be sufficiently achieved by the Member States acting alone. It is therefore appropriate for action to be taken in this area at the level of the Union.

### **Policy implications**

22. The measures contained in the Directive are broadly in-line with existing UK practice and legislation on human trafficking and safeguarding victims. Combating human trafficking through enforcement, investigation and prosecution is a priority for law enforcement and criminal justice agencies for whom guidance and training is available. The National Referral Mechanism continues to function as a system to help identify victims and refer them to appropriate support. More broadly, we comply with the Council of Europe Convention on Trafficking in Human Beings, which covers many of the areas in the Directive.

### **Differences between the Framework Decision and the Directive**

23. Much of the text of the Directive is identical to the draft Framework Decision that cleared scrutiny in both Houses in October 2009, although the numbering of the articles has changed due to the insertion of a new Article 1 describing subject matter. **The main changes to the text are as follows:**

24. **Article 4** sets out proposals for penalties, including maximum lengths of imprisonment, for trafficking offences. There has been one change to the penalty length in Article 4 (1) which is now '*a maximum of at least five years*' instead of '*between five and ten years*'.

25. **Article 10** is about providing assistance and support to victims of trafficking. Article 10 (3) is new. It requires that Member States ensure that assistance and support for victims is not made conditional on the victim's willingness to act as a witness.
26. **Articles 17, 18, 19, 20 & 21** are procedural, and relate to the repeal of the existing Framework Decision, transposition of the proposed Directive, reporting arrangements, entry into force and addressees.

### Detailed analysis of Directive

27. Our initial view is that the UK is broadly compliant with the Directive, although there may be areas where legislation is needed (see paragraphs 16 and 17). Our preliminary analysis of each article is as follows:
28. **Article 1** seeks to establish the subject matter of the Directive, the minimum rules it aims to establish and the common provisions it aims to introduce. The UK is compliant.
29. **Article 2** seeks to define human trafficking and is based on the definition set out in the UN's Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (2000) (which supplemented the UN Convention Against Transnational Organised Crime) known as the "Palermo Protocol", which is the leading international instrument in this regard. The Directive expands on the Palermo definition by including within its scope, begging and exploitation of criminal services (in the context of exploitation) and the exchange or transfer of control over a person (in addition to recruitment, harbouring and receipt etc). It requires Member States to make trafficking, as defined, punishable. The UK is broadly compliant.
30. **Article 3** is unchanged from the current Framework Decision. It requires that Member States take measures to ensure the instigation, aiding, abetting or attempting a trafficking offence is punishable. The UK is compliant.
31. **Article 4** sets out proposals for penalty lengths for trafficking offences. The maximum penalty range for trafficking offences in Article 4(1) is "*a maximum of at least five years*", and in cases with additional factors detailed in Article 4(2) the maximum penalty range is "*a maximum of at least ten years*". Given that our current maximum sentence for trafficking offences is 14 years, the UK is already compliant with this requirement.
32. **Article 5** is broadly unchanged from the current Framework Decision. It sets out the liability of legal persons (non state bodies that have legal personality) for trafficking offences, and the circumstances under which legal persons can be held liable for such offences. The UK is compliant.

33. **Article 6** is broadly unchanged from the current Framework Decision. It outlines sanctions, including criminal or non-criminal fines, against legal persons held liable for trafficking offences. The UK is compliant.
34. **Article 7** requires that Member States ensure there is an option for prosecutors not to pursue victims of trafficking who commit criminal activity as a result of their situation of having been trafficked. This is similar to a Council of Europe Convention provision and the UK is compliant.
35. **Article 8** urges member states to take necessary measures to investigate and prosecute trafficking cases. It seeks to ensure that the investigation into an offence is not dependent upon reporting or accusation by a victim, and that the prosecution of a trafficking offence is enabled for a sufficient period of time after a victim reaches the age of 18. The UK is compliant.
36. **Article 9** sets out requirements for states to establish jurisdiction over prosecutions for offences covered by Articles 2 and 3. It requires Member States to establish extra-territorial jurisdiction where the offender is one of its own nationals. It also gives Member States discretion about whether to establish jurisdiction over cases where the offender is a habitual resident, where the victim is a national or habitual resident or where the offence is committed for the benefit of a legal person established in the territory. The UK already provides some extra-territorial jurisdiction for human trafficking offences, however a limited extension of our offences may still be required to comply with this article. The UK is not currently compliant with this article and this issue is currently under consideration by Ministers.
37. **Article 10** is about the provision of assistance and support for victims of trafficking before, during and after criminal proceedings. It seeks to ensure that a person is provided with assistance and support as soon as competent authorities have reasonable grounds to indicate that the person is a victim of trafficking, and defines minimum standards for those assistance and support measures. In Northern Ireland, legislation defines child victims eligible for "special measures" protection as those under 17 years. The Department of Justice in Northern Ireland is currently consulting on the need to extend this to those under 18 years as well as introduce more flexibility in the statutory provisions to support vulnerable witnesses. The rest of the UK complies in practice but as detailed in paragraph 17, we may need to transpose certain measures into legislation.
38. **Article 11** seeks to ensure the Member States provide assistance to victims in the context of criminal proceedings, and in particular defines access to legal counselling and legal representation. The UK is broadly compliant, but legal counselling and some criminal procedure measures are in current guidance but not in legislation.
39. **Article 12** is about the provision of assistance, support and protection for child victims of trafficking and seeks to ensure that access to assistance and support and protection is provided where there is reason to believe that

the person is under 18 years of age. The UK complies in practice but we may need to transpose certain measures into legislation.

40. **Article 13** is about ensuring the necessary assistance and support measures are provided for child victims of trafficking, taking account of their individual needs and concerns, and where possible, providing such measure to the child's family (when the family is in the territory of the Member State). The UK complies in practice but we may need to transpose certain measures into legislation.
41. **Article 14** asks competent authorities in Member States to appoint a special representative for child victims of trafficking in criminal investigations and proceedings when those with parental responsibility are precluded from representing the child. It also sets out the necessary measures for Member States to adopt when dealing with child victims going through criminal proceedings. The provision of support for a child witness by a special representative when the child is being questioned by the police and giving evidence in court is at the discretion of the independent police and judiciary. As such we are not compliant with a mandatory requirement.
42. **Article 15** seeks to encourage prevention measures to discourage the demand for trafficking in human beings. It defines appropriate actions Member States should adopt, in particular training for officials and awareness-raising. It also seeks to encourage Member States to give consideration to further legislation prohibiting the knowing use of services provided by a trafficked person. The UK is compliant.
43. **Article 16** asks states to establish National Rapporteurs or equivalent mechanisms to monitor implementation. The UK is already compliant.
44. **Articles 17, 18, 19, 20 & 21** are procedural, and relate to the repeal of the existing Framework Decision, transposition of the proposed Directive, reporting arrangements, entry into force and addressees.
45. The UK's Opt In Protocol applies. If we opt-in, the Directive will be binding. The deadline for opt-in decision is 29 June 2010. A decision has not yet been taken. The criteria we will use to make this decision will comprise the guidelines set out in the Coalition Agreement of 11 May 2010 (and the final Coalition Agreement as appropriate); consideration of the legislative requirements (as set out in paragraphs 15 and 17); and an assessment of the potential for changes to the Directive tabled by the European Parliament and their likelihood of being accepted by the Council.
46. The coalition agreement states that the Government "will approach forthcoming legislation in the area of criminal justice on a case by case basis, with a view to maximising our country's security, protecting Britain's civil liberties and preserving the integrity of our criminal justice system." We will be consulting the European Parliament Rapporteur for the LIBE

Committee to get a sense of areas where the Parliament will be seeking further changes.

### **Impact Assessment and financial implications**

47. We are largely compliant with the text of the Directive as it stands. As detailed above, many of the proposals incorporate provisions from the original 2002 Framework Decision with which we are compliant in practice. There would be some cost associated with any legislation necessary to implement to the Commission's standards (the Commission had no power to require specifically *legislative* implementation in this area before the Lisbon Treaty came into force). Human Trafficking is already criminalised in England, Wales and Northern Ireland and equivalent offences exist in Scotland. Many of the proposals are also present in the Council of Europe Convention which came into force in the UK in April 2009. The proposed Directive would not require significant changes from measures implemented as part of our ratification of the Council of Europe Convention. Therefore, additional costs will be low overall.

48. There is one exception to this. We will need to legislate to ensure compliance with Article 9 (extra-territorial jurisdiction) as per paragraph 16 above. We have not found any historical cases where we would have needed to exercise extra-territorial jurisdiction over UK nationals. Nor are we aware of any current cases where extra-territorial jurisdiction would have been required. While it is possible that the change in legislation will result in extra prosecutions and related costs, current indications do not suggest that these will be significant.

### **Consultation**

49. HM Government maintains close contact with non-governmental and voluntary organisations concerned with human trafficking and holds regular discussions with them.

### **Timetable**

50. It is anticipated that a common approach to the Directive will be agreed at the Justice and Home Affairs Council scheduled for 3-4 June 2010.



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