



COMMISSION OF THE EUROPEAN COMMUNITIES

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**REPORT FROM THE COMMISSION
TO THE COUNCIL AND THE EUROPEAN PARLIAMENT**

**Based on Article 10 of the Council Framework Decision of 19 July 2002 on combating
trafficking in human beings**

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1. INTRODUCTION

1.1. Background

Under Article 10 (2) of the Council Framework Decision of 19 July 2002 on combating trafficking in human beings (hereafter “the Framework Decision”) the Commission has to provide a written report on the measures taken by the Member States to comply with the Framework Decision¹.

Paragraph (1) of that Article obliges the Member States to take the necessary measures to comply with the provisions of the Framework Decision by 1 August 2004. According to paragraph (2), Member States should forward to the General Secretariat of the Council and to the Commission by the same day the text of the provisions transposing into their national law the obligations arising from the Framework Decision. On the basis of this information, and a written report by the Commission, the Council should, by the 1 August 2005, have assessed the extent to which Member States have taken the necessary measures to comply with the Framework Decision.

The value and punctuality of this report therefore largely depends upon the quality and punctuality of the information received by the Commission from the Member States. The Commission reminded Member States of their obligation to provide the relevant information by means of a letter sent on 29 July 2004.

By 1 August 2004, however, only four Member States (France, Finland, Cyprus and Austria) had notified the Commission of the measures taken to implement the Framework Decision. By February 2005, fifteen Member States (the aforementioned plus Germany, Estonia, Czech Republic, Malta, Spain, Greece, Latvia, Hungary, Slovak Republic, Sweden and the United Kingdom) had provided the Commission with the relevant information. Italy, the Netherlands and Slovenia replied before May 2005, Denmark on 13 July 2005 and Belgium provided the final reply on 29 September 2005. Although Poland provided the information on 4 January 2006, the Report contains only limited information on Polish implementation of the Framework Decision.

Finally, by the end of 2005, the Commission had received no or only preliminary information regarding the implementation of the Framework Decision from four Member States: Portugal, Luxembourg, Ireland and Lithuania. As a result, when analysing implementation measures, the Report will not refer to these Member States.

Therefore, although the deadline for forwarding the text of implementing provisions was 1 August 2004, information provided until the end of January 2006 has been taken into account in the Report as far as is possible.

This Report thus takes stock of the national transposing legislation that has been forwarded to the Commission by the end of January 2006. A Commission staff working paper attached to this Report contains a detailed analysis of the national measures taken by Member States in order to comply with the Framework Decision.

¹ OJ L 203 – 1 August 2002

2. METHOD AND CRITERIA FOR THE EVALUATION OF THIS FRAMEWORK DECISION

2.1. Framework-Decisions according to Article 34, paragraph (2), point b) of the Treaty on European Union

This Framework Decision is based on the Treaty of the European Union (TEU), and in particular Article 29, Article 31 (e) and Article 34(2) (b) thereof.

Framework decisions can best be compared with the legal instrument of a Directive². Both instruments are binding upon Member States as to the result to be achieved, but leave to the national authorities the choice of form and method for implementation. Framework decisions do not have direct effect however. The Commission has no legal action before the Court of Justice - at least in the current state of development of European Law - to enforce the transposition at Member States level of a Framework Decision. Nonetheless, the Court of Justice can rule on any dispute between Member States regarding the interpretation or the application (including the transposition) of the Framework Decision. The possible exercise of this right requires a solid factual basis, which the Commission's Report can help to establish.

2.2. Evaluation criteria

In order to be able to evaluate on an objective basis whether a framework decision has been fully implemented by a Member State, some general criteria have been developed with respect to Directives which should be applied *mutatis mutandis* to Framework Decisions:

1. The form and methods of implementation of the result to be achieved must be chosen in a manner which ensures that the Directive functions effectively with account being taken of its aims³;
2. Each Member State is obliged to implement Directives in a manner which satisfies the requirements of clarity and legal certainty, and thus to transpose the provisions of the Directive into national provisions which have binding force⁴,
3. Transposition need not necessarily require enactment in precisely the same words used in a Directive. Thus, for example, appropriate and pre-existing national measures may be sufficient, as long as the full application of the Directive is assured in a sufficiently clear and precise manner⁵;
4. Directives must be implemented within the period prescribed therein.⁶

² Article 249 EC Treaty.

³ See relevant case law on the implementation of directives: Case 48/75 Royer [1976 ECR 497 at 518

⁴ See relevant case law on the implementation of directives: Case 239/85 Commission v. Belgium [1986] ECR 3645 at 3659. See also Case 300/81 Commission v. Italy [1983] ECR 449 at 456.

⁵ See relevant case law on the implementation of directives for instance Case 29/84 Commission v. Germany [1985] ECR 1661 at 1673.

⁶ See substantial case law on the implementation of directives, for example : Case 52/75 Commission v. Italy [1976] ECR 277 at 284, See, generally, the Commission annual reports on monitoring the application of Community law, for instance COM (2001) 309 final.

Both types of instruments are binding 'as to the results to be achieved'. That may be defined as a legal or factual situation which does justice to the envisaged result that the Treaty instrument in question was intended to ensure⁷.

The general assessment provided of the extent to which the Member States have complied with the Framework Decision is -where possible- based on the criteria outlined above.

2.3. Context of evaluation

A preliminary observation concerns the legal context and follow up of the evaluation report. As already mentioned, within the first pillar, the Commission has the ability to start infringement procedures against Member States. Since this possibility does not exist within the TEU, the nature and purpose of this report differs from a report on the implementation of a first pillar Directive by Member States. Nevertheless, as the Commission fully participates in third pillar matters⁸, it is coherent to confer on it the task of carrying out a factual evaluation of the implementation measures. This, in turn, will enable the Council to assess the extent to which Member States have taken the necessary measures in order to comply with the Framework Decision.

A second preliminary observation concerns the specific nature of the field being regulated. The Framework Decision is aimed at combating trafficking in human beings, and introducing a minimum harmonisation of penalties.

Since the 1997 adoption of a joint action by the Council concerning measures to combat trafficking in human beings and the sexual exploitation of children⁹, the number of initiatives has increased considerably at both national and regional levels. Both the Vienna Action Plan¹⁰ and the Tampere European Council¹¹ called for additional provisions in order to further regulate certain aspects of criminal law and criminal procedure.

This Framework Decision was intended to complement the existing instruments used to combat trafficking in human beings.

Though the evaluation can and will refer to each Article, these cannot necessarily be contemplated in isolation from one another. Partial or non-implementation of an Article or part of an Article will also reflect on linked provisions, which considered independently might seem to comply with the requirements of the Framework Decision - it will affect the system as a whole. The evaluation shall take account, as far as appropriate, of the general criminal legal background of the Member States.

3. ASSESSMENT

The objective of the Framework Decision is to approximate the laws of the Member States in the area of police and judicial cooperation in criminal matters relating to the fight against trafficking in human beings. Furthermore, it introduces a common framework of provisions at

⁷ See PJG Kapteyn and P. Verloren van Themaat 'Introduction to the Law of the European Communities', third edition, 1998, p. 328.

⁸ Article 36 (2) Treaty on European Union.

⁹ OJ L 63,4.3.1997, p. 2.

¹⁰ OJ C 19, 23.1.1999, p. 1.

¹¹ http://europa.eu.int/council/off/conclu/oct99/oct99_en.htm

European level in order to address certain issues such as criminalisation, penalties and other sanctions, aggravating circumstances, jurisdiction, prosecution as well as protection of and assistance to victims.

In this respect, not all Member States have sent the Commission all relevant texts of their implementing provisions. The factual assessment and subsequent conclusions are therefore sometimes based on incomplete information. The Commission, for example, received no information pertaining to the implementation of the Framework Decision from Ireland, Luxembourg, Portugal and Lithuania.

It should likewise be noted that Member State legal systems can vary greatly, and that in many cases legal concepts and expressions cannot always be easily compared to one another. Furthermore, the existence of legislation does not always guarantee full implementation – this is also a matter of the degree to which national courts and/or administrations enforce such legislation, and in what spirit. Given the nature of the information submitted, the Commission does not necessarily have the information to evaluate such enforcement.

Article 1

Article 1 defines trafficking in human beings as being for the purpose of labour or sexual exploitation. The Member States must incriminate any form of recruitment, transportation, transfer or harbouring and any other treatment of a person covered by this definition. Thus, in particular all criminal conduct which abuses the physical or mental vulnerability of a person should be punishable.

On this point the legislation of almost all Member States appear to reflect the provisions of the Framework Decision. As such, a large majority of the Member States seem to comply with Article 1 – and so satisfy the Framework’s Decision requirements in this respect. All Member States have established offences specifically related to trafficking in human beings, albeit with some differences due to different methodological traditions. Furthermore, the consent of the victim to the exploitation¹² shall be irrelevant when means such as coercion, deceit, etc. have been used. Some Member States have provisions that comply explicitly with article 1(2) (Germany, Belgium, Italy, Latvia, Sweden, Slovakia, Austria, Malta, France and The Netherlands).

In the document forwarded to the Commission, however, no specific offences as defined in the Framework Decision could be found in Polish and Estonian legislation.

Article 2

According to the information provided to the Commission, most Member States have simply referred to the pre-existing general rules on complicity and inchoate offences under their respective criminal systems. Some Member States did not provide detailed information concerning the provisions on abetting. They mention in their forwarded documents what their provisions were in relation to those who abetted offences (Denmark, Latvia, Slovakia and Estonia). Cyprus and Finland did not provide the Commission of information regarding instigation. Greece and Slovenia did not supply the Commission with information regarding Article 2 of the Framework Decision. In conclusion this requirement of the Framework Decision appears to be satisfied in almost all cases, though only some Member States have

¹² Article 1(2) of the Council Framework Decision 2002/629/JHA

specific provisions on the issue. More commonly, Member States generally have general provisions concerning instigation, aiding, abetting and attempt that also apply to offences concerning trafficking in human beings.

Article 3

Human trafficking is a serious crime, often committed against particularly vulnerable persons, and must be punishable with effective, proportional and dissuasive penalties. It must be addressed not only through individual national action, but by a comprehensive approach in which a common definition of the constituent elements of the offence is established within all Member States. Special attention must be paid to penalties for offences that are committed in aggravating circumstances, for example when the life of the victim has been endangered or where serious violence was used against the victim. The question as to whether or not criminal penalties which can be imposed by Member States are sufficiently effective and dissuasive can be answered in the affirmative. In most cases Member States have provided for severe maximum penalties for offences pertaining to human trafficking; in particular for offences committed in aggravating circumstances, with life imprisonment being the punishment in some cases. According to Article 3 (2) (b) of the Framework Decision Member States have different penalties depending of the age of the victim for offences committed for the purpose of sexual exploitation. However, the question may be raised if all trafficking offences against children (i.e. including trafficking for labour exploitation and covering all persons below the age of eighteen years and not only below the age of sexual consent) should be considered as committed under aggravating circumstances. Such a comprehensive approach seems to ensure more adequate protection for children and to be more consistent with the *Convention on the Rights of the Child of 1989 (CRC)*ⁱ as the most important international child rights instrument, which also includes provisions on child traffickingⁱⁱ and applies to every child under the age of 18 years.

Article 4 and 5

The Framework Decision introduces the concept of liability of legal persons in parallel with that of natural persons. Legal persons will be held liable for offences committed for their benefit by any person acting either individually or as part of the organ of the legal person, or, for example who exercises a power of decision. Sanctions on legal persons will be "*effective, proportionate and dissuasive*"; they shall include criminal or non-criminal fines and may include specific sanctions such as a temporary or definitive ban on commercial activities, a judicial dissolution measure or exclusion from public benefits or advantages. The legislation of most of the Member States provides for the possibility of sanctioning legal persons by means of criminal or administrative measures. It is only under the legislation of the Czech Republic, Latvia and the Slovak Republic that legal persons cannot be held liable for criminal offences. Article 5 of the Framework Decision states that the minimum obligations as far as sanctions on legal persons are concerned is the imposition of criminal or non criminal fines. As such, Articles 4 and 5 appear to have largely been implemented.

Article 6

All Member States will presumably be able to comply with this Article as regards the application of the territoriality principle as set out in Article 6(1)(a). As regards extra-territorial jurisdiction, a majority of Member States have or will have rules which to different extents cover the principles of active and passive personality, as required in Article 6(1)(b) and (c). It seems that the vast majority of the Member States establish jurisdiction over

offences that are committed abroad by their own nationals according by article 6(1)(b). This is particularly important as trafficking in human beings often has a trans-national dimension. The general situation with regard to Article 6(1)(c) of the Council Framework Decision concerning jurisdiction over offences committed for the benefit of a legal person established in the territory of the Member State, is less clear. Some Member States, for example the United Kingdom, implemented the provision. Others, for example Denmark, decided that they will not apply this jurisdiction rule as far as the offence is committed outside its territory and informed the Commission in accordance with Article 6(2) and (4). Also Hungary does not establish its jurisdiction according to Article 6(1)(c) even if the liability of the legal persons is generally regulated by Hungarian law.

Article 7

Article 7 regulates two different issues; firstly, it provides that trafficking offences shall not be dependent upon a report or accusation made by the victim. In general Member States seem to comply with this obligation. Secondly Article 7 obliges the Member States to provide for specific protection of and assistance to victims, in particular children. This mainly concerns the application of Council Framework Decision 2001/220/JHA of 15 March 2001 on victims in criminal proceedings. However, only a few Member States sent relevant information regarding implementation of Article 7 to the Commission. As such, it is difficult to evaluate this aspect of implementation.

Article 8

The Commission has not received specific information on transposition in Gibraltar.

4. CONCLUSION

It should be noted that not all Member States have transmitted to the Commission all relevant texts of their implementing provisions in a timely fashion. The assessments and conclusions of the Report are therefore sometimes based on incomplete information.

On the basis of the information provided, the requirements set out in the Council Framework Decision appear to have been largely met by Member States – either as a result of pre-existing domestic laws, or through the implementation of new and specific legislation. Where it appears that the Council Framework Decision has not been given effect in national provisions, the Commission invites the relevant Member States to correct this situation as soon as possible through the introduction of implementing legislation.

Nonetheless, as a result of the Council Framework Decision Member States generally now dispose of specific criminal law provisions incriminating trafficking in human beings for the purpose of sexual and labour exploitation, and providing for effective proportionate and dissuasive penalties. Moreover particularly severe penalties are foreseen for offences committed in aggravating circumstances. On the other hand, the levels of penalties in the Member States vary considerably and the Commission may have to examine the possibility of further harmonisation in that regard. In general, there was no need for Member States to amend their domestic legislation in order to comply with Article 6 of the Council Framework Decision, as pre-existing measures were already in place. Generally speaking, Member States comply with Article 7(1) of the Framework Decision; however protection and assistance

regimes may be subject to further examination as the Commission received only limited information concerning the implementation of Article 7(2) and (3).

As regards particularly vulnerable victims, the Commission again only received limited information, and thus cannot provide an exhaustive evaluation in this respect. In accordance with the Action Plan adopted by the Council on 1-2 December 2005, the Commission will further develop legislation in respect of vulnerable victims involved in criminal proceedings. In order to do so, the Commission will need further specific information on relevant Member State legislation. Furthermore the Commission may have to gather information reflecting the views of victim support authorities or organizations in order to fully, and as objectively as possible, assess the impact of the Framework Decision on the practice of victim support and assistance. Finally, it should be noted that once a report has been submitted on the Council Framework Decision on combating sexual exploitation and child pornography of 22 December 2003¹³, for which the implementation deadline was 20 January 2006, the Commission will be able to present a fuller picture on the implementation of human trafficking relevant legislation in the Member States. This picture will be further completed by the report on the application of Council Framework Decision 2002/946/JAI on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and evidence, of Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, that the Commission is due to present by 6 August 2008 (Article 16 of the Directive).

ⁱ Hereinafter referred to as CRC. More detailed information concerning contents and status of ratification on the websites of UNHCHR (<http://www.unhcr.ch/html/menu2/6/crc/treaties/crc.htm>) or UNICEF (<http://www.unicef.org/crc/crc.htm>).

ⁱⁱ According to the CRC children are not only (real or potential) victims in need of protection but they also have rights that are clearly set out in the CRC: the promotion of the best interests of the child (Art. 3), the non-discrimination principle (Art. 2), the right to participate (Art. 12), the right to survival and development (Art. 6). The views of the child must be given due weight in accordance with his/her age and maturity in consistence with Article 12 of the CRC. The CRC contains specific provisions (Articles 32, 33, 34, 35, 36) dealing with exploitation, abuse and trafficking. With regard to the definition of “exploitation” the CRC states the right of the child to be protected from “economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development” as well as from all forms of sexual exploitation and sexual abuse, in particular the exploitation of children in prostitution or pornography. Other relevant articles include the right to protection of children deprived of their family (Art. 20) and the non use of detention (Art. 37).

¹³ OJ L 13 20.1.2004, p. 44