



**COUNCIL OF
THE EUROPEAN UNION**

**Brussels, 13 February 2003 (17.02)
(OR. el,en)**

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COVER NOTE

from : Aristides AGATHOCLES, Permanent Representative of Greece

date of receipt : 13 February 2003

to : Javier SOLANA, Secretary-General/High Representative

Subject: Communication from the Hellenic Republic:
Initiative of the Hellenic Republic for the adoption by the Council of a draft
Framework Decision on the prevention and control of trafficking in human organs
and tissues

Sir,

In accordance with Article 31(e) and Article 34(2)(b) of the Treaty on European Union, I enclose a proposal by the Hellenic Republic concerning the adoption by the Council of a draft Framework Decision on the prevention and control of trafficking in human organs and tissues ¹.

¹ The explanatory note on this initiative is contained in Addendum 1 to this document.

I should be grateful if you would arrange for the publication of this initiative in the Official Journal of the EU, in accordance with Article 17 of the Council's Rules of Procedure, and for it to be forwarded to the European Parliament under the consultation procedure.

(Complimentary close).

(s.) Aristides Agathocles,

**INITIATIVE OF THE HELLENIC REPUBLIC FOR THE ADOPTION
BY THE COUNCIL OF A DRAFT FRAMEWORK DECISION
ON THE PREVENTION AND CONTROL OF TRAFFICKING
IN HUMAN ORGANS AND TISSUES**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Articles 29, 31(e) and 34(2)(b) thereof,

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Parliament,

Whereas:

- (1) The Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, the Tampere European Council on 15 and 16 October 1999 and the Santa Maria da Feira European Council on 19 and 20 June 2000, as listed in the scoreboard, indicate or call for legislative action against trafficking in human beings, including common definitions, incriminations and sanctions.
- (2) Trafficking in human organs and tissues is a form of trafficking in human beings, which comprises serious violations of fundamental human rights and, in particular, of human dignity and physical integrity. Such trafficking is an area of activity of organised criminal groups who often have recourse to inadmissible practices such as the abuse of vulnerable persons and the use of violence and threats. In addition it gives rise to serious risks to public health and infringes on the right of citizens to equal access to health services. Finally, it undermines citizens' confidence in the legitimate transplantation system.

- (3) Opposition to the sale of the human body and its parts has been addressed repeatedly by many international organisations and has been the subject of regulation by international conventions. As early as 1978, the Council of Europe in its Decision (78)29 on harmonisation of legislation of Member States relating to removal, grafting and transplantation of human substances, which was adopted by the Committee of Ministers of the Council of Europe on 11 May 1978, declared that no human substance may be offered for profit. This declaration was confirmed at the 3rd Conference of European Health Ministers, which was held in Paris on 16 and 17 November 1987, the final statement of which stressed that a human organ may not be offered for profit by any organ exchange body, organ storage centre or any other organisation or private individual.
- (4) An important step in the attempt to combat trafficking in human organs and tissues and, more generally, the commercialisation of the human body is the Convention of the Council of Europe on Human Rights and Biomedicine which was signed in Oviedo on 4 April 1997 and came into force on 1 December 1999. Article 21 of this Convention contains a prohibition on drawing financial gain from the human body and its parts. Article 25 requires the signatory States to make provision for sanctions – not necessarily of a penal nature – against anyone who infringes the provisions of the Convention. To this Convention was annexed an Additional Protocol concerning Transplantation of Organs and Tissues of Human Origin, which was drawn up on 24 January 2002, but has not entered into force to date. In Article 21 of the Protocol it is specified that the human body and its parts may not give rise to financial gain or comparable advantage. It also prohibits any advertising of the need for, or availability of, organs or tissues, with a view to offering or seeking financial gain or comparable advantage. Article 22 lays down the obligation to prohibit organ and tissue trafficking.

- (5) Trafficking in human organs and tissues has also been condemned repeatedly by the World Health Organisation. It was first condemned in Resolution WHA 40.13 of May 1997. Furthermore, Resolution WHA 42.5 of May 1989 condemned the purchase and sale of human organs and, pointing to the lack of success in preventing the phenomenon, called on the national legislators to intensify their efforts. Resolution WHA 44.25 of May 1991 declared that no organ should be removed from the bodies of minors save in exceptional cases, considered the advertising of human organs against payment to be prohibited and introduced the principle of equality as regards organ donations.
- (6) The Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organised Crime, includes the removal of human organs in the definition of exploitation, which characterises "trafficking in persons". This Protocol represents a decisive step towards international cooperation to combat trafficking in human organs.
- (7) Nevertheless, the recent Council Framework Decision of 19 June 2002 on combating trafficking in human beings did not include in its legislation trafficking in human organs.
- (8) The important work performed by international organisations, especially the UN, the World Health Organisation and the Council of Europe, must be complemented by that of the European Union.

- (9) It is necessary that the serious criminal offence of trafficking in human organs and tissues be addressed not only through individual action by each Member State but by a comprehensive approach, of which the definition of elements of a crime, common to all the Member States, and effective, proportionate and dissuasive penalties must form an integral part. In accordance with the principles of subsidiarity and proportionality, this Framework Decision confines itself to the minimum required in order to achieve those objectives at European level and does not go beyond what is necessary for that purpose.
- (10) It is necessary to introduce sanctions on perpetrators sufficiently severe to allow for trafficking in human beings to be included within the scope of instruments already adopted for the purpose of combating organised crime, such as Council Joint Action 98/699/JHA of 3 December 1998 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime and Council Joint Action 98/733/JHA of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union.

HAS ADOPTED THIS FRAMEWORK DECISION:

Article 1

Definitions

For the purposes of this Framework Decision:

- 1) "transplantation" shall mean the whole procedure of removing an organ or a tissue from one person and implanting it in another, including preparatory, preservation and storage procedures;
- 2) "tissues" shall also include cells, including blood-producing blastocytes;
- 3) "human organs and tissues" shall not include:
 - (a) reproductive tissues and organs,
 - (b) embryonic tissues and organs,
 - (c) blood and its derivatives;
- 4) "minor" shall mean anyone of less than eighteen years of age.

Article 2

Crimes relating to trafficking in human organs

Each Member State shall take the necessary measures to ensure that the following acts are treated as criminal offences:

- 1) the recruitment, transport, transfer, harbouring or receipt of a person, including any change or transfer of control over such person, where
 - (a) force or threats are used, including abduction, or
 - (b) fraudulent means are used, or
 - (c) there is an abuse of power or of a vulnerable position such that the person concerned has no real or reasonable possibility of avoiding such abuse, or
 - (d) money or other advantages are granted or received in order to obtain the consent of a person exercising control over another person with the aim of removal of an organ or tissues from the latter;

- 2)
 - (a) the removal of an organ from a living donor effected using force, threats or fraud;
 - (b) the removal of an organ from a donor who has consented thereto further to the payment or promise of a financial consideration.
 - (c) The payment, offer or promise of payment of a financial consideration, directly or via third parties, to a donor in order to obtain his consent to the removal of an organ.
 - (d) The receipt of or demand for financial consideration by a donor or a third party so that he (the donor) will agree to the removal of an organ.
 - (e) Action as an intermediary in carrying out any of the above acts (points (a) to (d)).
 - (f) The demand for, receipt, payment, offer or promise of financial consideration with the aim of offering or acquiring or, more generally, trafficking in human organs and tissues.

3. (a) The purchase, possession, storage, transport, import, export or transfer of possession of human organs removed by means of one of the abovementioned acts (paragraphs 1 and 2).
- (b) Participation by medical or nursing staff in the transplantation of an organ in the knowledge that it has been the object of one of the abovementioned acts.

Article 3

Each State shall take the necessary measures to ensure that the instigation of, or aiding and abetting in the commission of a crime referred to in Article 1 or any attempt to commit such a crime constitutes a criminal offence.

Article 4

Penalties

1. Each Member State shall take the necessary measures to ensure that the crimes referred to in Articles 2 and 3 are punished by sanctions which are effective, proportionate and dissuasive and which may constitute the basis for extradition.

2. Each Member State shall take the necessary measures to ensure that the crimes referred to in Article 2 are punishable by deprivation of liberty the maximum duration of which is not less than ten years.

- (a) the crime, either intentionally or as the result of severe negligence, placed the victim's life in danger,
- (b) the crime was committed against a minor,
- (c) the crime caused further serious physical harm to the victim,
- (d) the crime was committed within the framework of a criminal organisation as defined in Joint Action 98/733/JHA, irrespective of the penalties referred to therein.

Article 5

Liability of legal persons

1. Each Member State shall take the necessary measures to ensure that legal persons may be held liable for a criminal offence referred to in Articles 1 and 2, committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:
 - (a) a power of representation of the legal person,
 - (b) an authority to take decisions on behalf of the legal person, or
 - (c) an authority to exercise control within the legal person.
2. Apart from the cases provided for in paragraph 1, each Member State shall take the necessary measures to ensure that legal persons may be held liable where the lack of supervision or control by a person referred to in paragraph 1 have rendered possible the commission of an offence referred to in Articles 1 and 2 for the benefit of that legal person by a person under its authority.
3. Liability of legal persons under paragraphs 1 and 2 shall not exclude the punishment of persons who are perpetrators, instigators or accessories in a crime referred to in Articles 1 and 2.
4. For the purposes of this Framework Decision, "legal person" shall mean any entity recognised as such under the legislation in force, apart from States and other bodies under public law in the exercise of State authority and public international organisations.

Article 6

Sanctions against legal persons

Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 5 is punishable by effective, proportionate and dissuasive sanctions, which shall include financial penalties or fines, and may include other sanctions such as:

- (a) exclusion from entitlement to public benefits or aid;
- (b) temporary or permanent disqualification from the practice of commercial activities;
- (c) placing under judicial supervision;
- (d) a judicial winding-up order, or
- (e) temporary or permanent closure of establishments which have been used for committing the offence.

Article 7

Jurisdiction and prosecution

Each Member State shall take the necessary measures to establish its jurisdiction over the offences referred to in Articles 1 and 2 where:

- (a) the offence is committed in whole or in part within its territory;
- (b) the perpetrator is one of its nationals; or
- (c) the crime is committed for the benefit of a legal person established in its territory

Article 8

Geographical scope

This Framework Decision shall apply to Gibraltar.

Article 9

Implementation

1. Member States shall take the necessary measures to comply with this Framework Decision by [...] at the latest.
2. By the date referred to in paragraph 1, the Member States shall transmit to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national legislation the obligations imposed on them under this Framework Decision. By [...] at the latest, on the basis of a report drawn up on the basis of this information and a written report from the Commission, the Council shall assess whether Member States have taken the necessary measures in order to comply with this Framework Decision.

Article 10

Entry into force

This Framework Decision shall enter into force on the day of its publication in the Official Journal of the European Communities

Done at Brussels,

For the Council
The President