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Committee on Civil Liberties, Justice and Home Affairs
Committee on Women's Rights and Gender Equality

A7-0348/2010

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*****I**

REPORT

on the proposal for a directive of the European Parliament and of the Council on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA (COM(2010)0095 – C7-0087/2010 – 2010/0065(COD))

Committee on Civil Liberties, Justice and Home Affairs
Committee on Women's Rights and Gender Equality

Rapporteur: Edit Bauer, Anna Hedh

(Joint Committee meetings - Rule 51)

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United in diversity

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Symbols for procedures

- * Consultation procedure
- *** Consent procedure
- ***I Ordinary legislative procedure (first reading)
- ***II Ordinary legislative procedure (second reading)
- ***III Ordinary legislative procedure (third reading)

(The type of procedure depends on the legal basis proposed by the draft act.)

Amendments to a draft act

In amendments by Parliament, amendments to draft acts are highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the draft act which may require correction when the final text is prepared – for instance, obvious errors or omissions in a language version. Suggested corrections of this kind are subject to the agreement of the departments concerned.

The heading for any amendment to an existing act that the draft act seeks to amend includes a third line identifying the existing act and a fourth line identifying the provision in that act that Parliament wishes to amend. Passages in an existing act that Parliament wishes to amend, but that the draft act has left unchanged, are highlighted in **bold**. Any deletions that Parliament wishes to make in such passages are indicated thus: [...].

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DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

on the proposal for a directive of the European Parliament and of the Council on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA (COM(2010)0095 – C7-0087/2010 – 2010/0065(COD))

(Ordinary legislative procedure: first reading)

The European Parliament,

- having regard to the Commission proposal to Parliament and the Council (COM(2010)0095),
 - having regard to Article 294(2) and Articles 82(2) and 83(1) of the Treaty on the Functioning of the EU, pursuant to which the Commission submitted the proposal to Parliament (C7-0087/2010),
 - having regard to Article 294(3) of the Treaty on the Functioning of the EU,
 - having regard to the contributions submitted by national parliaments on the draft legislative act,
 - having regard to the opinion of the Committee on Legal Affairs on the proposed legal basis,
 - having regard to the opinion of the European Economic and Social Committee¹,
 - After consulting the Committee of the Regions,
 - having regard to the undertaking given by the Council representative by letter of 25 November 2010 to approve Parliament's position, in accordance with Article 294(4) of the Treaty on the Functioning of the European Union,
 - having regard to Rules 55 and 37 of its Rules of Procedure,
 - having regard to the joint deliberations of the Committee on Civil Liberties, Justice and Home Affairs and the Committee on Women's Rights and Gender Equality pursuant to Rule 51 of the Rules of procedure,
 - having regard to the report of the Committee on Civil Liberties, Justice and Home Affairs and of the Committee on Women's Rights and Gender Equality (A7-0348/2010),
1. Adopts its position at first reading hereinafter set out;
 2. Calls on the Commission to refer the matter to Parliament again if it intends to amend its proposal substantially or replace it with another text;

¹ Opinion of 21.10.2010.

3. Instructs its President to forward its position to the Council, the Commission and to national parliaments.

POSITION OF THE EUROPEAN PARLIAMENT*

AT FIRST READING

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

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty on the Functioning of the European Union, and in particular
Article 82(2) and Article 83(1) thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Economic and Social Committee¹,

After consulting the Committee of the Regions,

After transmission of the draft legislative act to the national parliaments,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Trafficking in human beings is a serious crime, often committed within the framework of organised crime, a gross violation of fundamental rights and explicitly prohibited by the Charter of Fundamental Rights of the European Union. ***Preventing and combating***

* Amendments: new or amended text is highlighted in bold italics; deletions are indicated by the symbol ■ .

¹ Opinion of 21 October 2010.

trafficking in human beings is a priority for the Union and the Member States.

(1a) This Directive is part of global action against trafficking in human beings which includes action involving third countries as stated in the “Action-Oriented Paper on strengthening the Union external dimension on action against trafficking in human beings; Towards Global EU Action against Trafficking in Human Beings”. In this context action should be pursued in third countries of origin and transfer of victims, with a view to raising awareness, reducing vulnerability, supporting and assisting victims, fighting the root causes of trafficking and supporting countries in developing appropriate anti-trafficking legislation.

(1b) This Directive recognises the gender-specific phenomenon of trafficking and that women and men are often trafficked for different purposes. For this reason, assistance and support measures should also be gender specific where appropriate. The "push" and "pull" factors may be different depending on the sectors concerned, such as trafficking in human beings into the sex industry or for labour exploitation in, for example, construction work, the agricultural sector or domestic servitude.

(2) The European Union is committed to the prevention of and fight against trafficking in human beings, and to the protection of the rights of trafficked persons. For this purpose, Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings¹, and an EU Plan on best practices, standards and procedures for combating and preventing trafficking in human beings² were adopted. *Moreover, the Stockholm Programme, adopted by the European Council, gives a clear priority to the fight against trafficking in human beings. Other measures should be envisaged, such as support for the development of general Union common indicators for the identification of victims of trafficking, through the exchange of best practice between all the relevant actors, particularly public and private social services.*

(2a) Law enforcement authorities of the Member States should continue to cooperate in

¹ OJ L 203, 1.8.2002, p. 1.

² OJ C 311, 9.12.2005, p. 1.

*order to strengthen the fight against trafficking in human beings. In this regard, close cross-border cooperation, including sharing of information and sharing of best practice, as well as continued open dialogue between police, judicial and financial authorities of the Member States is essential. The coordination of investigations and prosecutions of cases of trafficking in human beings should be facilitated by enhanced cooperation with Europol and Eurojust, the setting up of joint investigation teams as well as by the implementation of Council Framework Decision 2009/948/JHA on prevention and settlement of conflict of jurisdiction in criminal proceedings.*¹

(2b) Member States should encourage and work closely with civil society organisations, including recognized and active non-governmental organisations in this field working with trafficked persons, in particular in policymaking initiatives, information and awareness raising campaigns, research and education programmes and in training as well as in monitoring and evaluating the impact of anti-trafficking measures.

(3) This Directive adopts an integrated, **holistic, and human rights** approach to the fight against trafficking in human beings *and when implementing it, Council Directive 2004/81/EC of 29 April 2004 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*² *and Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals*³ *should be taken into consideration.* More rigorous prevention, prosecution and protection of victims' rights, are major objectives of this Directive. *This Directive also adopts contextual understandings of the different forms of trafficking and aims at ensuring that each form is tackled with the most efficient measures.*

¹ OJ L 328, 15.12.2009, p. 42.

² OJ L 261, 6.8.2004, p. 19

³ OJ L 168, 30.6.2009, p. 24.

- (3a) Children are more vulnerable and therefore at greater risk of becoming victims of trafficking in human beings. In the application of the provisions of this Directive, the child's best interests must be a primary consideration, in accordance with the Charter of Fundamental Rights of the European Union and the 1989 United Nations Convention on the Rights of the Child.
- (4) The 2000 United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children supplementing the United Nations Convention against Transnational Organized Crime and the 2005 Council of Europe Convention on Action against Trafficking in Human Beings are crucial steps in the process of enhancing international cooperation against trafficking in human beings. ***It should be noted that the Council of Europe Convention contains an evaluation mechanism, composed of the Group of experts on action against trafficking in human beings (GRETA) and the Committee of the Parties. Co-ordination between international organisations with competence with regard to action against trafficking in human beings should be supported in order to avoid duplication of efforts.***
- (4a) ***This Directive is without prejudice to the principle of non-refoulement in accordance with the Convention relating to the Status of Refugees of 28 July 1951 (Geneva Convention) and in line with Article 4 and Article 19(2) of the Charter of Fundamental Rights of the European Union.***
- (5) In order to tackle recent developments in the phenomenon of trafficking in human beings, this Directive adopts a broader concept of what should be considered trafficking in human beings than under Framework Decision 2002/629/JHA and therefore includes additional forms of exploitation. Within the context of this Directive, forced begging should be understood as a form of forced labour or service as defined in the 1930 ILO Convention No. 29 concerning Forced or Compulsory Labour. Therefore, exploitation of begging, ***including the use of a trafficked dependent person for begging***, falls within the scope of the definition of trafficking in human beings only when all the elements of forced labour or services occur. In the light of the relevant case-law, the validity of any possible consent to perform such a service should be evaluated on a case-by-case basis.

However, when a child is concerned, any possible consent should never be considered valid. The expression “exploitation of criminal activities” should be understood as the exploitation of a person to commit, inter alia, pick-pocketing, shop-lifting, **drug trafficking** and other similar activities which are subject to penalties and imply financial gain. The definition also covers trafficking in human beings for the purpose of the removal of organs, which ■ constitutes a serious violation of human dignity and physical integrity, *as well as, for instance, other behaviour such as illegal adoption or forced marriage insofar as they fulfil the constitutive elements of trafficking in human beings.*

- (6) The levels of penalties in this Directive reflect the growing concern among Member States *regarding the development in the phenomenon of* trafficking in human beings. *For this reason this Directive uses as basis the Council conclusions of 24 - 25 April 2002 on the approach to apply regarding approximation of penalties, levels 3 and 4.* When the offence is committed in certain circumstances, for example against a particularly vulnerable victim, the penalty should be more severe. In the context of this Directive, particularly vulnerable persons should include at least all children ■. *Other factors that may be taken into account when assessing the vulnerability of a victim include, for example, gender, pregnancy, state of health and disability.* When the offence is particularly grave, for example when the life of the victim has been endangered or the offence has involved serious violence *such as torture, forced drug/medication usage, rape or other serious forms of psychological, physical or sexual violence, or otherwise* has caused particularly serious harm to the victim, this should be reflected in a particularly severe penalty. When, under this Directive, a reference is made to surrender, such reference should be interpreted in accordance with Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States¹. *The gravity of the offence committed may be taken into account within the framework of the execution of the sentence.*

(6a) Full use should be made in combating trafficking in human beings of existing

instruments on seizure and confiscation of the proceeds of crime, such as the UN Convention against Transnational Organized Crime and its Protocols, the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime², Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property¹. The use of seized and confiscated instrumentalities and proceeds from the offences referred to in this Directive to support victim's assistance and protection, including compensation of victims and Union trans-border law enforcement counter trafficking activities, should be encouraged.

- (7) Victims of trafficking in human beings should, in accordance with the basic principles of the legal systems of the relevant Member States, be protected from prosecution or punishment for criminal activities such as the use of false documents, or offences under legislation on prostitution or immigration, that they have been compelled to commit as a direct consequence of being subject to trafficking. The aim of such protection is to safeguard the human rights of victims, to avoid further victimisation and to encourage them to act as witnesses in criminal proceedings against the perpetrators. This safeguard should not exclude prosecution or punishment for offences that a person has wilfully committed or participated in.
- (8) To ensure that investigations and prosecutions of human trafficking offences *are* successful, their initiation should not depend, *in principle*, on reporting or accusation by the victim. *Where the nature of the act calls for it*, prosecution should be allowed for a sufficient period of time after the victim has reached the age of majority. *The length of the sufficient period of time for prosecution should be determined in accordance with respective national law.* Law enforcement officials and prosecutors should be adequately trained, also with a view to enhancing international law enforcement and

¹ OJ L 190, 18.7.2002, p. 1.

² OJ L 182, 5.7.2001, p.1.

judicial cooperation. Those responsible for investigating and prosecuting such offences should also have access to the investigative tools used against organised crime or other serious crime **■** ; *such tools may include* interception of communications, covert surveillance including electronic surveillance, monitoring of bank accounts and other financial investigations.

- (9) In order to ensure effective prosecution of international criminal groups whose centre of activity is in a Member State and which carry out trafficking in human beings in third countries, jurisdiction should be established over the offence of trafficking in human beings where the offender is a national **■** of *that* Member State, and the offence is committed outside the territory of that Member State. Similarly, jurisdiction *may* also be established where *the offender is a habitual resident*, the victim is a national or an habitual resident of a Member State, or the offence is committed for the benefit of a legal person established in the territory of a Member State, and the offence is committed outside the territory of that *Member* State.
- (10) While Directive 2004/81/EC provides for the issue of a resident permit to victims of trafficking in human beings who are third-country nationals, and Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the rights of the citizens of the Union and their family members to move and reside freely within the territory of the Member States² regulates the exercise of the right to move and reside freely in the territory of the Member States by citizens of the Union and their families, including protection from expulsion, this Directive establishes specific protective measures for any victim of trafficking in human beings. Consequently, this Directive does not deal with the conditions of their residence in the territory of the Member States.
- (11) Victims of trafficking in human beings need to be able to exercise their rights effectively. Therefore assistance and support should be available to victims before, during and for an appropriate time after criminal proceedings. ***Member States should provide for resources to support victim assistance, support and protection.*** The

¹ OJ L 68, 15.3.2005, p. 49.

² OJ L 158, 30.4.2004, p. 77.

assistance and support provided should include at least a minimum set of measures that are necessary to enable the victim to recover and escape from their traffickers. The practical implementation of such measures should, on the basis of an individual assessment carried out in accordance with national procedures, take into account the conditions, *cultural context* and needs of the person concerned. A person should be provided with assistance and support as soon as there *are reasonable grounds for believing* that he or she might have been trafficked and irrespective of his/her willingness to act as a witness. *In cases where the victim does not reside lawfully in the Member State concerned, assistance and support* should be provided unconditionally at least *during* the reflection period **■** . If, after completion of the identification process or expiry of the reflection period, the victim is not considered eligible for a residence permit or does not otherwise have lawful residence in that Member State, *or if the victims has left the territory of that Member State*, the Member State concerned is not obliged to continue providing assistance and support to that person on the basis of this Directive. Where necessary, assistance and support should continue for an appropriate period after the criminal proceedings have ended, for example if medical treatment is ongoing due to the severe physical or psychological consequences of the crime, or if the victim's safety is at risk due to his/her statements in those criminal proceedings.

- (12) Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings¹ establishes a set of victims' rights in criminal proceedings, including the right to protection and compensation. In addition victims of trafficking in human beings should be given access *without delay* to legal counselling and, *in accordance with the role of victims in the relevant justice systems* to legal representation, including for the purpose of claiming compensation. *Such legal help could also be provided by the competent authorities for the purpose of claiming compensation from the State.* The purpose of legal counselling is to enable victims to be informed and receive advice about the various possibilities open to them. *Legal counselling should be provided by a person having received appropriate legal training without necessarily being a lawyer.* Legal counselling and, *in accordance with the role of victims in the relevant justice systems*, legal representation should be provided free

of charge at least when the victim does not have sufficient financial resources in a manner consistent with the internal procedures of Member States. As child victims in particular are unlikely to have such resources, legal counselling and legal representation would in practice be free of charge for them. Furthermore, on the basis of an individual risk assessment carried out in accordance with national procedures, victims should be protected from retaliation, from intimidation, and from the risk of being re-trafficked.

- (13) Victims of trafficking who have already suffered the abuse and degrading treatment which trafficking commonly entails, such as sexual exploitation, *sexual abuse*, rape, slavery-like practices and the removal of organs, should be protected from secondary victimisation and further trauma during the criminal proceedings. *Unnecessary repetition of interviews during investigation, prosecution and trial should be avoided, for instance, where appropriate, through the production, as soon as possible in the proceedings, of video recording of those interviews.* To this end victims of trafficking should during criminal investigations and proceedings receive treatment that is appropriate to their individual needs. The individual needs assessment should take into consideration circumstances such as age, pregnancy, health, disability and other personal conditions, as well as the physical and psychological consequences of the criminal activity to which the victim was subjected. Whether and how the treatment is applied is to be decided in accordance with grounds defined by national legislation, rules of judicial discretion, practice and guidance, on a case-by-case basis.

(13a) Assistance and support measures should be provided to victims on a consensual and informed basis. Victims should therefore be informed of the important aspects of those measures and they should not be imposed on the victims. A victims' refusal to assistance or support measures should not entail obligations for the competent authorities of the Member State concerned to provide the victim with alternative measures.

- (14) In addition to measures available to all victims of trafficking in human beings, Member States should ensure that specific assistance, support and protective measures are

¹ OJ L 82, 22.3.2001, p. 1.

available to child victims. Those measures should be provided in the best interests of the child and in accordance with the UN Convention on the Rights of the Child. Where the age of a person subject to trafficking is uncertain, and there are reasons to believe he/she is below the age of 18 years, that person should be presumed to be a child and receive immediate assistance, support and protection. Assistance and support measures for child victims should focus on their physical and psycho-social recovery and on a durable solution for the person in question. *Access to education would help children to* be reintegrated into society. Given that child victims of trafficking are particularly vulnerable, additional protective measures should be available to protect them during interviews forming part of criminal investigations and proceedings.

(14a) Special attention should be paid to unaccompanied child victims of trafficking in human beings as they need specific assistance and support due to their situation of particular vulnerability. From the moment an unaccompanied child victim of trafficking in human beings is identified and until a durable solution is found, Member States should apply reception measures appropriate to the needs of the child and should ensure that relevant procedural safeguards apply. The necessary measures should be taken to ensure that, where appropriate, a guardian and/or a representative are appointed in order to safeguard the minor's best interests. A decision on the future of each unaccompanied child victim should be taken within the shortest possible period of time with a view to finding durable solutions based on an individual assessment of the best interests of the child, which should be a primary consideration. A durable solution could be return and reintegration in the country of origin or the country of return, integration in the host society, granting of international protection status or granting of other status according to national law of the Member States.

(14b) When, in accordance with this Directive, a guardian and/or a representative are be appointed for a child, those roles may be performed by the same person or by a legal person, an institution or an authority.

(15) Member States should establish and/or strengthen policies to prevent trafficking in human beings including measures to discourage ***and reduce*** the demand that fosters all

forms of exploitation, and measures to reduce the risk of people becoming victims of trafficking in human beings, by means of research, **including research into new forms of trafficking in human beings**, information, awareness raising, and education. In such initiatives Member States should adopt a gender perspective and a child rights approach. Any officials likely to come into contact with victims or potential victims of trafficking in human beings should be adequately trained to identify and deal with such victims. That training obligation **should be promoted for members of the following different categories when they are likely to come into contact with victims**: police officers, border guards, **immigration officials, public prosecutors, lawyers, members of the judiciary and court officials**, labour inspectors, **social, child and** health care personnel and consular staff, but could depending on local circumstances also involve other groups of public officials who are likely to encounter trafficking victims in their work.

- (16) Directive 2009/52/EC provides for penalties for employers of illegally staying third-country nationals who, while not having been charged with or convicted of trafficking in human beings, use work or services exacted from a person with the knowledge that he/she is a victim of such trafficking. In addition, Member States should take into consideration the possibility of imposing sanctions on the users of any service exacted from a victim, with the knowledge that he/she has been trafficked. Such further criminalisation could include employers of legally staying third-country nationals and Union citizens, as well as buyers of sexual services from any trafficked person, irrespective of their nationality.
- (17) National monitoring systems such as National Rapporteurs or equivalent mechanisms should be established by Member States, in the way in which they consider appropriate according to their internal organisation, and taking into account the need for a minimum structure with identified tasks, in order to carry out assessments of trends in trafficking in human beings, **gather statistics**, measure the results of anti-trafficking actions, and produce regular reports **■**. **Such National Rapporteurs or equivalent mechanisms are already constituted in an informal Union Network established by the Council Conclusions of 4 June 2009. An Anti-Trafficking Coordinator would take part in the works of that Network, which provides the Union and the Member States with**

objective, reliable, comparable and up-to-date strategic information in the field of trafficking in human beings and exchanges experience and best practices in the field of preventing and combating trafficking in human beings at Union level. The European Parliament should be entitled to participate in the joint activities of the National Rapporteurs or equivalent mechanisms.

(17a) In order to evaluate the results of anti-trafficking action, the Union should continue to develop its work on methodologies and data collection methods to produce comparable statistics.

(17b) In the light of the Stockholm Programme and with a view to developing a consolidated Union strategy against trafficking aimed at further strengthening the commitment of, and efforts made, by the Union and the Member States to prevent and combat trafficking, Member States should facilitate the tasks of an Anti-Trafficking Coordinator, which may include for example improving coordination and coherence, avoiding duplication of effort, between Union institutions and agencies as well as between Member States and international actors, contributing to the development of existing or new Union policies and strategies relevant to the fight against trafficking in human beings or reporting to the EU institutions.

(17c) This Directive aims to amend and expand the provisions of Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings¹. Since the amendments to be made are of substantial number and nature,, the Framework Decision should in the interests of clarity be replaced in its entirety.

(18) In accordance with point 34 of the Interinstitutional agreement on better law-making, Member States are encouraged to draw up, for themselves and in the interest of the Union, their own tables, which will, as far as possible, illustrate the correlation between this Directive and the transposition measures and to make them public.

(19) Since the objective of this Directive, namely to fight against trafficking in human

beings, cannot be sufficiently achieved by the Member States alone and can therefore, by reasons of the scale and effects of the action be better achieved at European Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary to achieve that objective.

(20) This Directive respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union and notably human dignity, the prohibition of slavery, forced labour and trafficking in human beings, the prohibition of torture and inhuman or degrading treatment or punishment, the rights of the child, the right to liberty and security, freedom of expression and information, the protection of personal data, the right to an effective remedy and to a fair trial and the principles of the legality and proportionality of criminal offences and penalties. In particular, this Directive seeks to ensure full respect for those rights and principles and must be implemented accordingly.

(21) In accordance with **Article 3 of the** Protocol (N° 21) on the position of United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to **the Treaty on European Union and** the Treaty on the Functioning of the European Union ■ Ireland **has notified its** wish to **take part** in the adoption and application of this Directive. ■

(22) **In accordance with Articles 1 and 2 of** Protocol (N° 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security **and justice**, annexed to **the Treaty on European Union and** to the Treaty on the Functioning of the European Union, **and without prejudice to Article 4 of that Protocol**, the United Kingdom **is not taking part** in the adoption of this Directive and will not be bound by or be subject to its application.

(23) In accordance with Articles 1 and 2 of Protocol (N° 22) on the position of Denmark annexed to **the Treaty on European Union and** to the Treaty on the Functioning of the

¹ OJ L 203 of 1.8.2002, p. 1.

European Union, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Subject matter

This Directive establishes minimum rules concerning the definition of criminal offences and sanctions in the area of trafficking in human beings. It also introduces common provisions, ***taking into account the gender perspective***, to strengthen the prevention of the crime and the protection of its victim.

Article 2

Offences concerning trafficking in human beings

1. Member States shall take the necessary measures to ensure that the following intentional acts are punishable:
The recruitment, transportation, transfer, harbouring or reception of persons, including exchange or transfer of control over that person, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.
2. A position of vulnerability means a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved.
3. Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging,

slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs.

4. The consent of a victim of trafficking in human beings to the exploitation, intended or actual, shall be irrelevant where any of the means set forth in paragraph 1 has been used.
5. When the conduct referred to in paragraph 1 involves a child, it shall be a punishable offence of trafficking in human beings even if none of the means set forth in paragraph 1 has been used.
6. For the purpose of this Directive, "child" shall mean any person below 18 years of age.

Article 3

Inciting, aiding, abetting and attempting

Member States shall take the necessary measures to ensure that inciting, aiding, abetting or attempting to commit an offence referred to in Article 2 is punishable.

Article 4

Penalties

1. Member States shall take the necessary measures to ensure that an offence referred to in Article 2 is punishable by penalties of a maximum of at least five years of imprisonment.
2. Member States shall take the necessary measures to ensure that an offence referred to in Article 2 is punishable by penalties of a maximum of at least ten years of imprisonment where it has been committed in any of the following circumstances:

(a) **I**

- the offence was committed against a victim who was particularly vulnerable, which, in the context of this Directive, shall include at least child victims **■** ;
- (b) the offence was committed within the framework of a criminal organisation within the meaning of Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime¹.
 - (c) the offence deliberately or by gross negligence endangered the life of the victim;
 - (d) the offence was committed by use of serious violence or has caused particularly serious harm to the victim.
3. ***Member States shall take the necessary measures to ensure that the fact that an offence referred to in article 2 was committed by a public official in the performance of her or his duties is regarded as an aggravating circumstance.***
4. Member States shall take the necessary measures to ensure that an offence referred to in Article 3 is punishable by effective, proportionate and dissuasive penalties, which may entail surrender.

Article 5

Liability of legal persons

1. Member States shall take the necessary measures to ensure that legal persons can be held liable for an offence referred to in Articles 2 and 3 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, or
 - (b) an authority to take decisions on behalf of the legal person, or
 - (c) an authority to exercise control within the legal person.
2. Member States shall also ensure that a legal person can be held liable where the lack of supervision or control, by a person referred to in paragraph 1, has made possible the

¹ OJ L 300, 11.11.2008, p. 42.

commission of the criminal offences referred to in Articles 2 and 3 for the benefit of that legal person by a person under its authority.

3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, inciters or accessories in the offences referred to in Articles 2 and 3.
4. For the purpose of this Directive 'legal person' shall mean any entity having legal personality under the applicable law, except for States or public bodies in the exercise of State authority and for public international organisations.

Article 6

Sanctions on legal persons

Member States shall take the necessary measures to ensure that a legal person held liable pursuant to Article 5(1) and (2) is subject to effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal 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) judicial winding-up;
- (e) temporary or permanent closure of establishments which have been used for committing the offence.

Article 6a

Seizure and Confiscation

Member States shall take the necessary measures to ensure that their competent authorities are entitled to seize and confiscate instrumentalities and proceeds from the offences referred to in this Directive.

Article 7

Non-prosecution or non-application of penalties to the victim

Member States shall, in accordance with the basic principles of *their* legal systems, ***take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose*** penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 2.

Article 8

Investigation and prosecution

1. Member States shall ensure that investigation into or prosecution of offences referred to in Articles 2 and 3 is not dependent on reporting or accusation by a victim and that criminal proceedings may continue even if the victim has withdrawn his or her statement.
2. Member States shall take the necessary measures to enable, ***where the nature of the act calls for it***, the prosecution of an offence referred to in Articles 2 and 3 for a sufficient period of time after the victim has reached the age of majority.
3. Member States shall take the necessary measures to ensure that persons, units or services responsible for investigating or prosecuting the offences referred to in Articles 2 and 3 are trained accordingly.
4. Member States shall take the necessary measures to ensure that effective investigative tools, such as those which are used against organised crime or other serious crime are

available to persons, units or services responsible for investigating or prosecuting the offences referred to in Articles 2 and 3.

Article 9

Jurisdiction

1. Member States shall take the necessary measures to establish **their** jurisdiction over an offence referred to in Articles 2 and 3 where:
 - (a) the offence is committed in whole or in part within their territory; or
 - (b) the offender is one of their nationals

2. **Member States shall inform the Commission where they decide to establish further jurisdiction over an offence referred to in Articles 2 and 3 committed outside of their territory e.g. where:**
 - a) the offence is committed against one of **their** nationals or a person who has his or her habitual residence in the territory **of that Member State**; or
 - b) the offence is committed for the benefit of a legal person established in the territory of that Member State; **or**.

 - c) the offender has his or her habitual residence in the territory of that Member State.

3. For the prosecution of an offence referred to in Articles 2 and 3 committed outside the territory of the Member State concerned **each Member State shall, in those cases mentioned in point 1(b)**, **and may, in those cases referred to in paragraph 2**, take the necessary measures to ensure that its jurisdiction is not subordinated to the condition:
 - (a) that the acts are a criminal offence at the place where they were performed or

- (b) that the prosecution can be initiated **only** following a report made by the victim in the place where the offence was committed, or a denunciation from the State of the place where the offence was committed.



Article 10

Assistance and support for victims of trafficking in human beings

1. Member States shall take the necessary measures to ensure that assistance and support are provided to victims before, during and for an appropriate period of time after the conclusion of criminal proceedings in order to enable them to exercise the rights set forth in Framework Decision 2001/220/JHA, and in this Directive.
2. Member States shall take the necessary measures to ensure that a person is provided with assistance and support as soon as the competent authorities have **reasonable grounds for believing** that the person might have been subjected to an offence referred to in Articles 2 and 3.
3. Member States shall take the necessary measures to ensure that assistance and support for a victim are not made conditional on the victim's willingness to **cooperate in the criminal investigation, prosecution and trial, without prejudice to Directive 2004/81/EC or similar national rules**.
4. Member States shall take the necessary measures to establish appropriate mechanisms aimed at the early identification of, assistance to and support for victims, in cooperation with relevant support organisations.
5. The assistance and support measures referred to in **paragraphs 1 and 2** shall be provided on a consensual and informed basis, and shall include at least **standards** of living capable of ensuring victims' subsistence through measures such as the provision of appropriate and safe accommodation and material assistance as well as necessary

medical treatment including psychological assistance, counselling and information and, translation and interpretation services where appropriate.

6. The *information referred to in paragraph 5 shall cover, where relevant information on a reflection and recovery period pursuant to Directive 2004/81/EC, and information on the possibility of granting international protection pursuant to Council Directive 2004/83/EC¹ and Council Directive 2005/85/EC² or pursuant to other international instruments or other similar national rules.*
7. Member States shall attend to victims with special needs, *deriving in particular from pregnancy, state of health, disability, mental or psychological disorders, or serious forms of psychological, physical or sexual violence.*

Article 11

Protection of victims of trafficking in human beings in criminal investigation and proceedings

1. The protection measures referred to in this Article shall apply in addition to the rights set forth in Framework Decision 2001/220/JHA.
2. Member States shall ensure that victims of trafficking in human beings have access *without delay* to legal counselling, and, *in accordance with the role of victims in the relevant justice system* to legal representation, including for the purpose of claiming compensation. Legal *counselling and legal* representation shall be free of charge when the victim does not have sufficient financial resources.
- 3.

¹ Council Directive 2004/83/EC¹ of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted

² Council Directive 2005/85/EC² of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

Member States shall ensure that victims of trafficking in human beings receive appropriate protection on the basis of an individual risk assessment, *inter alia* by having access to witness protection programmes or other similar measures, if appropriate and in accordance with the grounds defined by national legislation or procedures.

4. Without prejudice to the rights of the defence, and according to an individual assessment by the competent authorities of the personal circumstances of the victim, Member States shall ensure that victims of trafficking in human beings receive specific treatment aimed at preventing secondary victimisation by avoiding, as far as possible and in accordance with the grounds defined by national legislation as well as with rules of judicial discretion, practice or guidance, the following:
 - (a) unnecessary repetition of interviews during investigation, prosecution and trial
 - (b) visual contact between victims and defendants including during the giving of evidence such as interviews and cross-examination, by appropriate means including the use of appropriate communication technologies;
 - (c) the giving of evidence in open court; and
 - (d) unnecessary questioning concerning private life.

Article 12

General provision on assistance, support and protection measures for child victims of trafficking in human beings

1. Child victims of trafficking in human beings shall be provided with assistance, support and protection **■**. *In the application of this Directive the child's best interests shall be a primary consideration.*
2. Member States shall ensure that, where the age of a person subject to trafficking in human beings is uncertain and there are reasons to believe that the person is a child, the

person is presumed to be a child in order to receive immediate access to assistance, support and protection in accordance with Articles 13 and 14.

Article 13

Assistance and support to child victims

1. Member States shall take the necessary measures to ensure that the specific actions to assist and support child victims of trafficking in human beings, in the short and long term, in their physical and psycho-social recovery, are undertaken following an individual assessment of the special circumstances of each particular child victim, taking due account of the child's views, needs and concerns *with a view to finding a durable solution for the child. Within a reasonable time, Member States shall provide access to education for child victims and children of victims, who are given assistance and support in accordance with Article 10 of this Directive, in accordance with its national law.*
 - 1a. *Members States shall appoint a guardian or a representative for the child victim of trafficking in human beings from the moment he/she is identified by the authorities where, by national law, the holders of parental responsibility are, as a result of a conflict of interests between them and the child victim, precluded from ensuring the child's best interest and/or from representing the child.*
2. Member States shall take measures, where appropriate and possible, to provide assistance and support to the family of the child victim of trafficking in human beings when the family is in the territory of the Member State. In particular, Member States shall, where appropriate and possible, apply Article 4 of Council Framework Decision 2001/220/JHA to the family.
3. This Article shall apply without prejudice to Article 10.

Article 14

Protection of child victims of trafficking in human beings in criminal investigations and proceedings

1. Member States shall take the necessary measures to ensure that in criminal investigations and proceedings, *in accordance with the role of victims in the relevant justice system, competent* authorities appoint a ■ representative for the child victim of trafficking in human beings where, by national law, the holders of parental responsibility are precluded from representing the child as a result of a conflict of interest between them and the child victim ■ .
 - 1a.* Member States shall, *in accordance with the role of victims in the relevant justice system*, ensure that child victims have ■ access *without delay* to free legal counselling and to free legal representation, including for the purpose of claiming compensation, *unless they have sufficient financial resources*.
2. Without prejudice to the rights of the defence, Member States shall take the necessary measures to ensure that in criminal proceedings of any of the offences referred to in Articles 2 and 3:
 - (a) interviews with the child victim take place without unjustified delay after the facts have been reported to the competent authorities;
 - (b) interviews with the child victim take place, where necessary, in premises designed or adapted for this purpose;
 - (c) interviews with the child victim are carried out, where necessary, by or through professionals trained for this purpose;
 - (d) the same persons, if possible and where appropriate, conduct all the interviews with the child victim;
 - (e) the number of interviews is as limited as possible and interviews are only carried out where strictly necessary for the purposes of criminal proceedings;

- (f) the child victim may be accompanied by his or her representative or, where appropriate, an adult of his or her choice, unless a reasoned decision has been made to the contrary in respect of that person.
3. Member States shall take the necessary measures to ensure that in criminal investigations of any of the offences referred to in Articles 2 and 3 all interviews with the child victim or, where appropriate, with a child witness, may be videotaped and that such videotaped interviews may be used as evidence in criminal court proceedings, according to the rules under their national law.
4. Member States shall take the necessary measures to ensure that in criminal court proceedings relating to any of the offences referred to in Articles 2 and 3, it may be ordered that
- (a) the hearing shall take place without the presence of the public; and
 - (b) the child victim may be heard in the courtroom without being present, notably through the use of appropriate communication technologies.
5. ***This Article*** shall apply without prejudice to Article 11.

Article 14a

Assistance, support and protection for unaccompanied child victims of trafficking in human beings

1. ***Member States shall take the necessary measures to ensure that the specific actions to assist and support child victims of trafficking in human beings, as referred to in Article 13 (1), take due account of the personal and special circumstances of the unaccompanied child victim.***
2. ***Member States shall take the necessary measures with a view to finding a durable solution based on an individual assessment of the best interests of the child.***

3. *Member States shall take the necessary measures to ensure that, where appropriate, a guardian is appointed to unaccompanied child victims of trafficking in human beings.*
4. *Member States shall take the necessary measures to ensure that, in criminal investigations and proceedings, in accordance with the role of victims in the relevant justice system competent authorities appoint a representative where the child is unaccompanied or separated from his or her family.*
5. *This Article shall apply without prejudice to Articles 13 and 14.*

Article 14b

Compensation to victims

Member States shall ensure that victims of trafficking in human beings have access to existing schemes of compensation to victims of violent crimes of intent.

Article 15

Prevention

1. Member States shall take appropriate measures *such as education and training* to discourage *and reduce* the demand that fosters all forms of exploitation related to trafficking in human beings.
2. Member States shall take appropriate actions *including through the internet* such as information and awareness raising campaigns, research and education programmes, where appropriate in cooperation with *relevant* civil society organisations *and other stakeholders*, aimed at raising awareness and reducing the risk of people, especially children, becoming victims of trafficking in human beings.
3. Member States shall promote regular training for officials likely to come into contact with victims and potential victims *of trafficking in human beings*, including front-line

police officers ■ aimed at enabling them to identify and deal with victims and potential victims of trafficking in human beings.

4. ***In order to make the preventing and combating of trafficking in human beings more effective by discouraging the demand***, Member States shall consider taking measures to establish as a criminal offence the use of services which are the objects of exploitation as referred to in Article 2 with the knowledge that the person is a victim of an offence referred to in Article 2.

Article 16

National Rapporteurs or equivalent mechanisms

Member States shall take the necessary measures to establish National Rapporteurs or equivalent mechanisms. The tasks of such mechanisms shall include the carrying out of assessments on trends in trafficking in human beings, the measuring of results of anti-trafficking actions, ***including the gathering of statistics in close cooperation with relevant civil society organisations active in this field***, and producing reports ■ .

Article 16a

Coordination of the Union strategy on trafficking in human beings

In order to contribute to a coordinated and consolidated strategy of the European Union against trafficking in human beings, Member States shall facilitate the tasks of an Anti-Trafficking Coordinator (ATC). In particular Member States shall transmit to the ATC the information referred to in Article 16, on the basis of which the ATC shall contribute to a report by the Commission every two years on the progress made in the fight against trafficking in human beings.

Article 17

Replacement of Framework Decision 2002/629/JHA

Framework Decision 2002/629/JHA on combating trafficking in human beings is

hereby *replaced in relation to Member States participating in the adoption of this Directive*, without prejudice to the obligations of the Member States relating to the time-limit for transposition into national law.

In relation to Member States participating in the adoption of this Directive, references to the Framework Decision shall be construed as references to this Directive.

Article 18

Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by two years from adoption at the latest. █
2. *Member States shall transmit to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Directive.*
3. When Member States adopt those *measures*, they shall contain a reference to this Directive or *shall* be accompanied by such a reference on the occasion of their official publication. █ The methods of making such reference shall be laid down by the Member States.

█

Article 19

Reporting

1. █ The Commission shall, *by two years from the deadline set in Article 18*, submit a report to the European Parliament and the Council █, *assessing the extent to which the Member States have taken the necessary measures in order to comply with this Directive, including a description of action taken under Article 15(4), accompanied, if necessary, by legislative proposals.*

2. *The Commission shall, by three years from the deadline set in Article 18, submit a report to the European Parliament and the Council, assessing the impact of existing national law criminalising the users of services which are the objects of exploitation of trafficking in human beings on the prevention of trafficking in human beings, accompanied, if necessary, by adequate proposals.*

Article 20

Entry into force

This Directive shall enter into force on the **█** day *of* its publication in the *Official Journal of the European Union*.

Article 21

Addressees

This Directive is addressed to the Member States in accordance with the Treaties.

Done at ,

For the European Parliament

The President

For the Council

The President

EXPLANATORY STATEMENT

Trafficking in human beings is a modern form of slavery, a serious crime and a severe violation of fundamental human rights and reduces people to a state of dependency via threats, violence and humiliation.

Trafficking in human beings is also an extremely profitable business for organised crime, with high profit possibilities and limited risk-taking and may take many forms, relating for example to sexual exploitation, forced labour, illegal trade in human organs, begging, including the use of a dependent person for begging, illegal adoptions and domestic work.

The importance of this phenomenon is impressive but certainly not exactly known.

The Treaty of Lisbon has strengthened EU action in the field of judicial and police cooperation in criminal matters, including in combating trafficking in human beings, and the European Parliament, becoming co-legislator, has a full role to play.

The Treaty of Lisbon contains multiple references to the fight against trafficking in human beings: Article 82 and 83 sets the legal basis for establishing minimum rules concerning the definition of criminal offences and sanctions in the area of trafficking in human beings and sexual exploitation of women and children. However, Article 79 needs to be taken into consideration as well since it sets a legal basis under the common immigration policy, including the issue of trafficking in human beings.

The EU legal framework on trafficking in human being is currently mainly based on:

- Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings which aims at a minimum harmonisation of national legislation;
- Directive 2004/81/EC of 29 April 2004 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;

Experience has shown that this legal framework is not effective enough and that the EU has to do more. With this perspective, in 2009 the European Commission presented a proposal for a new Framework Decision. Due to the entry into force of the Lisbon Treaty, which interrupted all ongoing legislative procedures, negotiation at Council could not lead to the formal adoption of the Framework Decision and the European Commission has tabled a new proposal for a Directive on Preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA(COM(2010)95 final).

The European Parliament, as a co-legislator is deeply committed in cooperating with the Commission and the Council in enhancing an effective EU policy against trafficking in human beings.

In the Resolution adopted on 10 February 2010(P7_TA(2010)0018) the European Parliament expressed, inter alia, the position that:

- a) action against trafficking in human beings should be developed on the basis of a holistic approach centred on human rights and focusing on combating trafficking, prevention and protection of victims;
- b) a victim-focused approach should be adopted, meaning that all potential categories of victims must be identified, targeted and protected, with special attention being given to children and other at-risk groups;
- c) an EU anti-trafficking coordinator to coordinate EU action and policies in this field – including the activities of the network of national rapporteurs – and reporting to both the EP and the Standing Committee on Operational Cooperation on Internal Security (COSI) should be established;
- d) policies on trafficking in human beings should cover aspects linked to social affairs and social inclusion including appropriate programmes and effective methods of ensuring social rehabilitation of victims, including measures relating to the labour market and the social security system;
- e) due attention should be given to the external relations dimension of trafficking in human beings and the dimensions of immigration, asylum and reintegration policies;
- f) information and awareness campaigns should be run through the education and school system in the countries of origin, transit and destination for trafficking;

The European Parliament is of the view that the penalties of traffickers needs to be increased on the level of the 2009 proposal and confiscation of assets should also be applied.

In addition, the European Parliament is convinced that assistance to victims, in particular to child victims should be further developed. In the case of child victims the best interest of the child should be of a primary consideration.

Furthermore, the EU as well as the Member States should do more in order to discourage demand, including by awareness raising campaigns, education, training and so on and this all shall fully integrate a gender perspective. Member States also shall establish as an offence to knowingly use services of victims of trafficking. This criminalisation is in consistence with other EU policies, where legislation already sanctions employers who use trafficked labour and will have a strong preventive effect.

In order to have a better and more precise picture of the phenomenon, it is necessary to collect harmonised data that should at least include data on number of people trafficked, including data on gender, age, nationality of the victims as well as the form of trafficking; type of services victims were addressed to, number of traffickers arrested, prosecuted and convicted and the referral mechanisms to the national asylum authorities.

Finally, the Anti-Trafficking Coordinator should be set through a clear legislative framework.

OPINION OF THE COMMITTEE ON LEGAL AFFAIRS ON THE LEGAL BASIS

22.9.2010

Mr Juan Fernando López Aguilar,
Chair
Committee on Civil Liberties, Justice and Home Affairs
BRUSSELS
and
Ms Eva-Britt Svensson,
Chair
Committee on Women's Rights and Gender Equality
BRUSSELS

Subject: Opinion on the legal basis of the proposal for a Directive of the European Parliament and of the Council on preventing and combating trafficking in human beings (repeal of Framework Decision 2002/629/JHA) (COM(2010)0095 – C7-0087/2010 – 2010/0065(COD))

Dear Mr López Aguilar and Ms Svensson,

By letter of 7 September 2010, the Committee on Women's Rights and Gender Equality and the Committee on Civil Liberties, Justice and Home Affairs asked the Legal Affairs Committee to consider the legal basis of a proposal for a directive on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA, pursuant to Article 37 of the Rules of Procedure.

The legal basis proposed by the Commission is Article 82(2) TFEU combined with Article 83(1) TFEU.

The committee considered the above question at its meeting of 20 September 2010.

I. Background

The present legal framework on trafficking in human beings consists, at EU level, of Council Framework Decision 2002/629/JHA¹, Council Directive 2004/81/EC², and, at the international level, of the UN Convention on the Rights of the Child, the UN Convention against Transnational Organised Crime, in particular the Protocol thereto to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, and the Council of Europe Convention on Action against Trafficking in Human Beings.

In 2009 the Commission presented a proposal for a new Framework Decision, which was withdrawn after the entry into force of the Lisbon Treaty. As we know, the Lisbon Treaty did

¹ Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings (OJ L 203, 1.8.2002, p. 1).

² Council Directive 2004/81/EC of 29 April 2004 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 (OJ L 261, 6.8.2004, p. 19).

away with the former pillar system and now virtually all legislation coming within what is now the Area of Freedom, Security and Justice, including Articles 82 and 83 TFEU on cooperation in criminal matters in Chapter 4 of Title V, has to be adopted under the ordinary legislative procedure.

On 29 March 2010, the Commission presented the proposal for a directive (COM(2010)0095), which is intended to repeal Framework Decision 2002/629/JHA.

During the joint committee meeting held on 2 September 2010, the Committee on Women's Rights and Gender Equality and the Committee on Civil Liberties, Justice and Home Affairs cooperating under the procedure provided by Rule 51 of the Rules of Procedure proposed adding a reference in the preamble of the proposed directive to Article 79(2) as an additional legal basis.

Article 79 TFEU, under Chapter 2 in Title V, contains provisions on immigration policy, which had already been transferred to the "Community Pillar" before the entry into force of the Lisbon Treaty.

According to the report, the justification for adding a reference to Article 79 TFEU is the need to be consistent with the treaties; the ideas that the holistic approach of the proposed directive must result also in consistency with other linked legal instruments; that the directive cannot generally prejudice rules on asylum policy and the need to enhance a consistent approach with asylum policies. Reference is also made to the growing phenomenon of trafficking and labour exploitation and the aim of protecting victims in the widest way.

II. The relevant articles of the TFEU

The Commission proposes using Articles 82 and 83 as the legal basis. These articles provide as follows:

Article 82¹

1. Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to:

(a) ...;

(b) ...;

(c) ...;

(d)

¹ Emphasis supplied.

2. *To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.*

They shall concern

(a) ...;

(b) the rights of individuals in criminal procedure;

(c) the rights of victims of crime;

(d)

3. *Where a member of the Council considers that a draft directive as referred to in paragraph 2 would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure.*

...

Article 83 (ex Article 31 TEU)

1. *The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.*

These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

...

2. ...

3. *Where a member of the Council considers that a draft directive as referred to in paragraph 1 or 2 would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council,*

which shall terminate the suspension of the ordinary legislative procedure.

Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft directive concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply

The competent committees propose adding the following provision as an additional legal basis:

Article 79

1. The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas:

(a) the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification;

(b) the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States;

(c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation;

(d) combating trafficking in persons, in particular women and children.

3.

4. ...

5. ...

III. Case law on legal basis¹

If the measure has a twofold purpose or if it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, the legal basis must be

¹ The following passage is based on *Constitutional Law of the European Union*, Lenaerts and Van Nuffel, Sweet & Maxwell, London. Emphasis supplied.

determined on the basis of the Treaty article corresponding to the main purpose or the main component of the act. Where, for example, harmonisation of national legislation is only an incidental effect of a measure which primarily pursues another objective, the measure must be adopted only on the basis of the specific Treaty article which corresponds to its main or predominant purpose or component¹. This criterion is often referred to as the “centre of gravity” criterion.

Conversely, a general Treaty article constitutes a sufficient legal basis where a measure aims to harmonise national measures, even if that measure also seeks, in a subordinate manner, to attain an aim sought by specific Treaty articles². It is settled case-law that the choice of legal basis for a Community measure must rest on objective factors amenable to judicial review, which include in particular the aim and content of the measure³.

In principle, a measure is to be founded on only one legal basis. If examination of the aim and the content of a Community measure reveals that it pursues a twofold purpose or that it has a twofold component, falling within the scope of different legal bases, and if one is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the measure must be based on a single legal basis, namely that required by the main or predominant purpose or component⁴.

Only if, exceptionally, it is established that the measure simultaneously pursues a number of objectives or has several components that are indissociably linked, without one being secondary and indirect in relation to the other, will that measure have to be founded on the various corresponding legal bases, insofar as their procedures are compatible⁵.

In principle, recourse to a dual legal basis is not possible where the procedures laid down for each legal basis are incompatible with each other⁶.

IV. Choice of legal basis by the Commission

The Commission justifies its recourse to a dual legal basis in the following terms:

In the fight against trafficking in human beings, the approximation of the criminal laws and regulations of the Member States is necessary to improve cooperation in criminal matters. To this end, the Treaty specifically envisages the adoption of directives only.

¹Case 68/86 *United Kingdom v Council* [1988] E.C.R. 855, paras 14-16; Case C-70/88 *European Parliament v Council* [1991] E.C.R. I-4529, paras 16-18; ECJ, Case C-155/91 *Commission v Council* [1993] E.C.R. I-939, paras 18-20; Case C-187/93 *European Parliament v Council* [1994] E.C.R. I-2857, paras 23-26; Case C-426/93 *Germany v Council* [1995] E.C.R. I-3723, para. 33; Case C-271/94 *European Parliament v Council* [1996] E.C.R. I-1689, paras 28-32; Case C-84/94 *United Kingdom v Council* [1996] E.C.R. I-5755, paras 11-12 and 22; Joined Cases C-164-165/97 *European Parliament v Council* [1999] E.C.R. I-1339, para. 16; Case C-36/98 *Spain v Council* [2001] E.C.R. I-779, para. 59; Case C-281/01 *Commission v Council* [2002] E.C.R. I-12649, paras 33-49; Case C-338/01 *Commission v Council* [2004] E.C.R. I-4829, para. 55.

² Case C-377/98 *Netherlands v European Parliament and Council* [2001] E.C.R. I-7079, paras 27-28; Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] E.C.R. I-11453, paras 93-94.

³ Case C-440/05 *Commission v. Council* [2007] E.C.R. I-9097.

⁴ Case C-91/05 *Commission v. Council* [2008] E.C.R. I-3651.

⁵ Case C-338/01 *Commission v. Council* [2004] E.C.R. I-4829.

⁶ Case C-178/03 *Commission v. Parliament and Council* [2006] E.C.R. I-107.

...

The proposal will approximate Member States' substantive criminal law and procedural rules more extensively than the current FD. This will have a positive impact on international law enforcement and judicial cooperation, and on the protection and assistance given to victims.

...

V. Analysis of the aim and content of the proposed directive

In order to establish the aim and content of the proposed directive, it is necessary to examine its provisions.

Article 1 provides that the directive aims to establish minimum rules concerning the definition of criminal offences and sanctions in the area of trafficking in human beings. It also aims to introduce common provisions to strengthen the prevention of the crime and the protection of its victims.

Article 2 provides that Member States are to take the necessary measures to ensure that certain intentional acts are punishable as offences concerning trafficking in human beings.

Article 3 deals with instigation, aiding, abetting and attempts.

Article 4 contains provisions on penalties.

Articles 5 and 6 deal with liability and sanctions as far as legal persons are concerned.

Article 7 treats of non-prosecution or non-application of penalties to the victim.

Article 8 contains provisions on investigation and prosecution.

Article 9 deals with jurisdiction.

Article 10 deals with assistance and support for victims of trafficking in human beings.

Article 11 contains provisions on protection of victims of trafficking in human beings in criminal investigation and proceedings.

Article 12 sets out a general provision on assistance, support and protection measures for child victims of trafficking in human beings.

Article 13 deals with assistance and support to child victims of trafficking in human beings and *Article 14* with protection of child victims of trafficking in human beings in criminal investigations and proceedings.

Article 15 contains provisions on prevention, namely the adoption by Member States of measures to discourage the demand that fosters all forms of exploitation related to trafficking in human beings and of appropriate actions such as information and awareness raising campaigns, research and education programmes and the promotion of regular training for officials likely to come into contact with victims and potential victims, aimed at enabling them to identify and deal with victims and potential victims of trafficking in human beings. It

also provides that Member States are to consider taking measures to establish as a criminal offence the use of services which are the objects of exploitation with the knowledge that the person is a victim of an offence referred to in Article 2 of the directive.

Article 16 provides for national rapporteurs or equivalent measures for carrying out of assessments of trends in the trafficking in human beings, the measurement of results of anti-trafficking actions and reporting to the relevant national authorities.

Article 17 repeals Framework Decision 2002/629/JHA. *Article 18* deals with transposition, *Article 19* with reporting and *Article 20* with entry into force.

VI. Appraisal

It appears from the above analysis of the content of the proposals for a directive that it is concerned virtually exclusively with matters falling within Articles 82 and 83 TFEU, in particular the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension - namely trafficking in human beings, resulting from the nature or impact of such offences or from a special need to combat them on a common basis. This conclusion is not altered by the amendments which have been moved in the two competent committees.

Consequently, having regard to the strictures of the Court of Justice, the proposal for a directive should be based on the provisions of the Treaty which deal with criminal law and the provision on immigration policy has no reason to be cited.

V. Conclusion and recommendation

In the light of the foregoing, it is considered that there is no justification for adding the legal basis of Article 79(2) TFEU.

At its meeting of 20 September 2010 the Committee on Legal Affairs accordingly decided with one abstention¹ to recommend to you as follows: the Proposal for a Directive of the European Parliament and of the Council on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA, should be based on the legal basis of Articles 82(2) and 83(1) of the Treaty on the functioning of the European Union.

Yours sincerely,

Klaus-Heiner Lehne

¹ The following were present for the final vote: Klaus-Heiner Lehne (Chair), Luigi Berlinguer (Vice-Chair), Raffaele Baldassarre (Vice-Chair), Evelyn Regner (Vice-Chair), Sebastian Valentin Bodu (Vice-Chair), Eva Lichtenberger (rapporteur), Françoise Castex, Marielle Gallo, Kurt Lechner, Francesco Enrico Speroni, Dimitar Stoyanov, József Szájer, Alexandra Thein, Cecilia Wikström and Tadeusz Zwiefka.

PROCEDURE

Title	Trafficking in human beings			
References	COM(2010)0095 – C7-0087/2010 – 2010/0065(COD)			
Date submitted to Parliament	29.3.2010			
Committee responsible Date announced in plenary	LIBE-FEMM (Joint Committee meetings- Rule 51) 21.4.2010			
Committee(s) asked for opinion(s) Date announced in plenary				
Rapporteur(s) Date appointed	Anna Hedh 27.4.2010	Edit Bauer 27.4.2010		
Legal basis disputed Date of JURI opinion	JURI 20.9.2010			
Discussed in committee	27.4.2010	13.7.2010	25.11.2010	29.11.2010
Date adopted	29.11.2010			
Result of final vote	+: 51	–: 0	0: 0	
Members present for the final vote	Jan Philipp Albrecht, Regina Bastos, Emine Bozkurt, Simon Busuttil, Andrea Češková, Carlos Coelho, Marije Cornelissen, Silvia Costa, Tadeusz Cymański, Cornelia Ernst, Edite Estrela, Iratxe García Pérez, Ágnes Hankiss, Anna Hedh, Salvatore Iacolino, Sophia in 't Veld, Livia Járóka, Teresa Jiménez-Becerril Barrio, Philippe Juvin, Rodi Kratsa-Tsagaropoulou, Juan Fernando López Aguilar, Astrid Lulling, Claude Moraes, Elisabeth Morin-Chartier, Georgios Papanikolaou, Carmen Romero López, Raúl Romeva i Rueda, Judith Sargentini, Nicole Sinclair, Birgit Sippel, Joanna Katarzyna Skrzydlewska, Eva-Britt Svensson, Britta Thomsen, Wim van de Camp, Axel Voss, Renate Weber, Marina Yannakoudakis, Anna Záborská			
Substitute(s) present for the final vote	Izaskun Bilbao Barandica, Ioan Enciu, Ana Gomes, Franziska Keller, Kartika Tamara Liotard, Rovana Plumb, Kyriacos Triantaphyllides, Cecilia Wikström, Glenis Willmott			
Substitute(s) under Rule 187(2) present for the final vote	Arlene McCarthy, Judith A. Merkies, Peter Skinner, Jutta Steinruck			