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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**

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

1.1. Grounds for and objectives of the proposal

Trafficking in human beings is considered one of the most serious crimes worldwide, a gross violation of human rights, a modern form of slavery, and an extremely profitable business for organised crime. It consists of the recruitment, transfer or receipt of persons, carried out with coercive, deceptive or abusive means, for the purpose of exploitation including sexual or labour exploitation, forced labour, domestic servitude or other forms of exploitation including the removal of organs.

Therefore the response to trafficking must be robust, and aimed at preventing and prosecuting the crime, and protecting its victims.

1.2. General context

Several EU Member States are major destinations for trafficking in human beings from non-EU countries. In addition, there is evidence of flows of trafficking within the EU. It is reasonable to estimate from the available figures that every year several hundred thousand people are trafficked into the EU or within the EU area.

Social vulnerability is arguably the principal root cause of trafficking in human beings. Vulnerability derives from economic and social factors such as poverty, gender discrimination, armed conflicts, domestic violence, dysfunctional families, and personal circumstances such as age or health conditions or disabilities. Such vulnerability is used by international organised crime networks to facilitate migration and subsequently severely exploit people by use of force, threat, coercion, or various forms of abuse such as debt bondage. In fact the high level of profits generated is a major underlying driver. The demand for sexual services and cheap labour is a concurrent driver.

1.3. Existing provisions in the area of the proposal

The UN Convention on the Rights of the Child, adopted in 1989 seeks to protect children from all forms of sexual exploitation and sexual abuse. This obligation extends to sexual exploitation and abuse of children connected to trafficking in human beings.

In 2000, the UN adopted a Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the UN Convention against Transnational Organized Crime. The Protocol was the first comprehensive international instrument dealing with trafficking in human beings. As of March 2009, the Protocol has been ratified by 24 EU Member States, and the remaining 3 have signed it. The European Community signed and approved the Protocol.

The Council of Europe Convention on Action against Trafficking in Human Beings provides a comprehensive and coherent framework covering prevention, cooperation between different actors, protection of and assistance to victims, and an obligation to criminalise trafficking in human beings. Implementing such measures would lead to significant improvements. The Convention has been ratified by 16 EU Member States. Another 10 have signed it and are going through the ratification process.

The Framework Decision (FD) on combating trafficking in human beings was adopted on 19 July 2002 as a response to a generally perceived need to address the serious criminal offence of trafficking in human beings at EU level. A report on the implementation of the FD was adopted by the Commission in May 2006.

Directive 2004/81/EC provides for assistance and residence status for victims who are third-country nationals. The Commission will report on the implementation of Directive 2004/81/EC in 2010 and will consider appropriate measures to further reinforce the protection offered to victims by Member States.

1.4. Consistency with the other policies and objectives of the Union

The fight against all forms of gender-based violence including trafficking in human beings is an integral part of the commitment undertaken by the Commission in the Roadmap on Gender equality.¹ The fight against child trafficking is also included in the strategy on the rights of the child.² The objective of fighting trafficking in human beings and assisting victims is consistent with the provisions contained in Council Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings,³ and Council Directive 2004/81/EC on residence permit,⁴ which deals with immigration issues and only applies to third country nationals. All the provisions included in this Directive apply in so far as the issue is not covered by the above mentioned Directive. The objective of fighting trafficking in human beings is also consistent with Council Directive 2004/80/EC relating to compensation for crime victims which aims at facilitating access to compensation in cross-border situations,⁵ and with Council Framework Decision 2008/841/JHA on the fight against organised crime.⁶ Trafficking in human beings is included in the list of crimes which give rise to surrender pursuant a European arrest warrant in accordance with Council Framework Decision 2002/584/JHA on the European arrest warrant.⁷ The objectives stated above are fully consistent with these instruments, as well as with the Council of Europe Convention on action against Trafficking in Human beings and with the mandates of Europol and Eurojust.

Any action of the EU in this field must respect fundamental rights and observe the principles recognised in particular by the Charter of Fundamental Rights of the European Union (EU Charter) and the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Member States, when implementing Union law, must do so in accordance with these rights and principles.

¹ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, A roadmap for equality between women and men 2006-2010 - SEC(2006) 275, COM(2006) 92.

² Communication from the Commission Towards an EU Strategy on the Rights of the Child - SEC(2006) 888, SEC(2006) 889, COM(2006) 367.

³ Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA) (OJ L 82, 22.3.2001, p.1).

⁴ 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 competent authorities (OJ L 261, 6.8.2004, p. 85).

⁵ Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims (OJ L 261, 6.8.2004, p. 15).

⁶ Council Framework Decision 2008/841/JHA on the fight against organised crime (OJ L 300, 11.11.2008, p. 42).

⁷ Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190, 18.7.2002).

This proposal was made subject to in-depth scrutiny to make sure that its provisions are in full compatibility with fundamental rights and notably human dignity, prohibition of torture and inhuman or degrading treatment or punishment, prohibition of slavery and forced labour, the rights of the child, right to liberty and security, freedom of expression and information, protection of personal data, the right to an effective remedy and to a fair trial and the principles of legality and proportionality of criminal offences and penalties.

Particular attention was paid to Article 5(3) of the EU Charter which explicitly prohibits trafficking in human beings. In addition, Article 24 of the EU Charter was of importance, since many of the victims of trafficking in human beings are children. Provisions on protection and assistance to victims have a positive impact on fundamental rights. The right to be protected from slavery, forced labour and servitude has been acknowledged by the European Court of Human Rights. The right of the victim to accurate, impartial, effective, and quick investigation is also relevant here; it would be made effective by an increased recognition of the role of the victim in criminal proceedings.

A possible negative impact deriving from the increased role of the victim in criminal proceedings could accrue, if this strengthened role were to endanger the defendant's procedural rights, in particular the right to a fair trial (Article 47 EU Charter) and the right of defence (Article 48 of EU Charter). However, the European Court of Human Rights has established clear principles to reconcile the respective rights of the defendant and the victim. Therefore full compatibility with defence rights has been ensured by a careful drafting of the legislative text, which is the basis for appropriate implementation by Member States.

Where necessary, appropriate use may be made of funding possibilities available at the level of the European Union to support Member States' efforts to comply with the requirements of this directive.

2. CONSULTATION OF INTERESTED PARTIES AND IMPACT ASSESSMENT

2.1. Consultation of interested parties

2.1.1. Consultation methods, main sectors targeted and general profile of consulted parties

Following the Council's request to evaluate the implementation of the EU Plan⁸, the Commission sent a questionnaire to the Member States (MS) in December 2007. 23 MS, plus Norway, replied. The results fed into the Commission Working Document adopted on 17 October 2008⁹.

Three consultative meetings were held with a view to drafting the impact assessment. The Group of Experts on Trafficking in Human Beings met on 2 and 3 October 2008, and after extensive discussion issued a written opinion. A consultative meeting with experts from different backgrounds including governments, law enforcement agencies, NGOs, international organisations and universities was held on 7 October 2008. The participants were

⁸ EU Plan on best practices, standards and procedures for combating and preventing trafficking in human beings of the Council (OJ C 311, 9.12.2005, p. 1).

⁹ Evaluation and monitoring of the implementation of the EU Plan on best practices, standards and procedures for combating and preventing trafficking in human beings - COM(2008) 657.

subsequently invited to transmit written comments, and several experts did so. A meeting with Member States' representatives was held on 17 October 2008.

2.1.2. Summary of views and how they have been taken into account

- In its written opinion, the European Commission's Group of Experts on Trafficking in Human Beings stated that the guiding principles were the need for an appropriate legal framework in each country, the need to make human rights a paramount issue, to take a holistic, coordinated and integrated approach linking government policies on trafficking in human beings with migration policies, to respect children's rights, to promote research about trafficking in human beings and to monitor the impact of anti-trafficking policies.
- Many stakeholders agreed on the need for specific provisions aimed at strengthening investigation and prosecution. The crucial role of assistance measures was generally emphasised.
- The issue of introducing a specific obligation to criminalise clients who knowingly use sexual services from a trafficked person was controversial among stakeholders. Several MS pointed out that in any case such a provision should not be binding.

2.2. Collection and use of expertise

There was no need for external expertise.

2.3. Impact assessment SEC(2009) 358 and Impact assessment summary SEC(2009) 359

Various policy options were examined in connection with the previous Proposal for a Framework Decision of 25 March 2009 with a view to preventing and combating trafficking in human beings more effectively, and better protecting victims.

- Policy option (1): No new EU action

The EU would take no action to combat trafficking in human beings, while Member States may continue the process of signature and ratification of the Council of Europe Convention on Action against Trafficking in Human Beings.

- Policy Option (2): Non legislative measures

FD 2004/629/JHA would not be amended. Non-legislative measures could be put in place in the areas of victim support schemes, monitoring, prevention measures in countries of destination, prevention measures in countries of origin, training, and law enforcement cooperation.

- Policy option (3): New legislation on prosecution, victim support, prevention and monitoring

A new legislative act would be adopted, incorporating the provision of the existing FD, along with certain provisions of the CoE Convention and additional elements. In particular, the new FD would contain provisions in the areas of substantive criminal law, jurisdiction and prosecution, victims' rights in criminal proceedings, victim assistance, special protective measures for children, prevention, and monitoring.

- Policy option (4): New legislation (as in option 3) + non legislative measures (as in option 2)

- A new legislative act would be adopted, incorporating the existing FD and including new provisions. The new legislative act would be supplemented by non-legislative measures, and in particular those identified in option 2.
- Following the analysis of economic impacts, social impacts, and impacts on fundamental rights, options 3 and 4 present the best approach to the problem and should fully achieve the identified objectives. The preferred option would be option 4.
- The Commission carried out an impact assessment to accompany the previous Proposal for a Framework Decision of 25 March 2009 on preventing and combating trafficking in human beings, and protecting victims, which is valid *mutatis mutandis* for the present Proposal for a Directive. As the Proposal for a Directive referred to in this memorandum is, to its content, essentially identical to the previous Proposal for a Framework Decision, the existing impact assessment can this be considered to remain valid also for the new proposal. The report on the impact assessment can be accessed at:

http://ec.europa.eu/governance/impact/ia_carried_out/cia_2009_en.htm#jls.

3. LEGAL ELEMENTS OF THE PROPOSAL

3.1. Summary of the proposed action

The new Directive, in addition to provisions in the current FD, would include the following new elements:

3.1.1. Substantive criminal law provisions

- Definition;
- Aggravating circumstances and penalties;
- Non application of penalties to the victim.

3.1.2. Jurisdiction and prosecution

- Broader and more binding extraterritorial jurisdiction rule;
- Investigative tools.

3.1.3. Victim assistance and support

- Establishment of mechanisms for early identification and assistance of victims;
- Standard of assistance including access to necessary medical treatment, counselling, and psychological assistance;
- Special measures for children.

3.1.4. *Protection of victims in criminal proceedings*

- Special treatment aimed at preventing secondary victimisation;
- Protection on the basis of a risk assessment;
- Legal counselling and representation, including for the purpose of claiming compensation.

3.1.5. *Prevention*

- Action aimed at discouraging the demand for sexual services and cheap labour;
- Training;
- Criminalisation of users of services exacted from a person, when the user knows that the person has been trafficked.

3.1.6. *Monitoring*

- Establishment of National Rapporteurs or equivalent mechanisms.

3.2. Added value of the proposal, compared to the 2005 CoE Convention on action against trafficking in human beings

The proposal builds upon the CoE Convention and adopts the same holistic approach including prevention, prosecution, protection of victims, and monitoring. Moreover, the proposal shows the following main elements of added value:

- Precise level of penalties adapted to the severity of the offences (Article 4).
- Broader and more binding extraterritorial jurisdiction rule, obliging Member States to prosecute nationals and habitual residents who have committed the crime of trafficking outside the territory of the Member State (Article 9).
- Broader scope of the provision on non-application of penalties to victims for their involvement in criminal activities, whatever illicit means have been used by traffickers (Article 6).
- Higher standard of assistance to victims, especially concerning medical treatment (Article 10).
- Special protective measures for child victims of trafficking in human beings (Articles 12-14)
- In addition, the integration of provisions which have similar content into the EU *acquis* shows the advantages arising from the stronger constraints imposed by the EU legal order, namely immediate entry into force and monitoring of implementation.

3.3. Legal basis

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

4. SUBSIDIARITY PRINCIPLE

The objectives of the proposal cannot be sufficiently achieved by the Member States alone, for the following reasons.

The fight against trafficking in human beings requires coordinated efforts by Member States, as well as cooperation at an international level in order to achieve the aims. Differences in legal treatment in the different Member States hinder coordinated efforts and hamper international law enforcement and judicial cooperation.

Action by the European Union will better achieve the objectives of the proposal for the following reason.

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. The proposal therefore complies with the subsidiarity principle.

5. PROPORTIONALITY PRINCIPLE

The proposal complies with the proportionality principle in that it is confined to the minimum required in order to achieve the stated objectives at European level and does not go beyond what is necessary for that purpose.

6. CHOICE OF INSTRUMENTS

Proposed instrument: Directive.

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.

7. BUDGETARY IMPLICATION

The proposal has no implication for the EU budget.

8. ADDITIONAL INFORMATION

8.1. Repeal of existing legislation

The adoption of the proposal will lead to the repeal of existing legislation.

8.2. Territorial scope

The proposal will be addressed to the Member States. The application of the resulting Directive to the United Kingdom, Ireland and Denmark will be determined in accordance with the provisions of Protocols (No 21) and (No 22) annexed to the Treaty on the Functioning of the European Union.

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**

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 Committee¹⁰,

Having regard to the opinion of the Committee of the Regions¹¹,

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 in the framework of organised crime, a gross violation of fundamental rights and explicitly prohibited by the Charter of Fundamental Rights of the European Union.
- (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 beings,¹² and an EU Plan on best practices, standards and procedures for combating and preventing trafficking in human beings (2005/C 311/01)¹³ were adopted. The EU is in parallel to this also pursuing actions in non-EU countries of origin and transfer of victims, aiming in particular at raising awareness, reducing vulnerability, supporting and assisting victims, fighting the root causes of trafficking and supporting countries to develop appropriate anti-trafficking legislation. Moreover, the coordination of prosecution of cases of trafficking in human beings will be facilitated by the adoption of Council Framework Decision 2009/948/JHA on prevention and settlement of conflict of jurisdiction in criminal proceedings¹⁴.

¹⁰ OJ C , , p. .

¹¹ OJ C , , p. .

¹² OJ L 203, 1.8.2002, p. 1.

¹³ OJ C 311, 9.12.2005, p. 1.

¹⁴ OJ L 328, 15.12.2009, p. 42.

- (3) This Directive adopts an integrated and holistic approach to the fight against trafficking in human beings. More rigorous prevention, prosecution and protection of victims' rights, are major objectives of this Directive. Children are more vulnerable and therefore at greater risk of falling victim to 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 United Nations Convention on the Rights of the Child.¹⁵
- (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 Crime¹⁶ and the 2005 Council of Europe Convention on Action against Trafficking in Human Beings¹⁷ are crucial steps in the process of enhancing international cooperation against trafficking in human beings.
- (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 ILO Convention No. 29 concerning Forced or Compulsory Labour of 29 June 1930. Therefore, exploitation of 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 the eventual consent to perform such a service should be evaluated case by case. However, when a child is concerned, the eventual consent should never be considered valid. The term "exploitation of criminal activities" should be understood as exploitation of a person to commit, inter alia, pick-pocketing, shop-lifting 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 can be linked with organ trafficking and constitutes a serious violation of human dignity and physical integrity.
- (6) The levels of penalties in this Directive reflect the growing concern among Member States about increased trafficking in human beings. Considering the gravity of the crime, this Directive aims to ensure further harmonisation and a higher level of penalties in the EU. 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, and adults who were particularly vulnerable on grounds of pregnancy, health conditions or disability at the time when the crime was committed. When the offence is particularly grave, for example when the life of the victim has been endangered or the offence has involved serious violence or has caused particularly serious harm to the victim, this should be reflected in a particularly severe penalty. When, under this

¹⁵ United Nations Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989.

¹⁶ United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, Palermo, 2000.

¹⁷ Council of Europe Convention on Action against Trafficking in Human Beings, Warsaw, 16.5.2005, Council of Europe Treaty Series N. 197.

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 States¹⁸.

- (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 does 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 were successful, their initiation should not depend on reporting or accusation by the victim. Prosecution should be allowed for a sufficient period of time after the victim has reached the age of majority. Law enforcement officials and prosecutors should be adequately trained, also with a view to enhancing international law enforcement and judicial cooperation. Those responsible for investigating and prosecuting such offences should also have access to the investigative tools used in organised crime or other serious crime cases such as 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 their 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 or an habitual resident of a Member State, and the offence is committed outside the territory of that Member State. Similarly, jurisdiction should also be established where 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 State.
- (10) While 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 cooperation with the competent authorities¹⁹ 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 States²⁰ regulates the exercise of the right to move and reside freely in the territory of 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

¹⁸ OJ L 190, 18.7.2002, p. 1.

¹⁹ OJ L 261, 6.8.2004, p. 19.

²⁰ OJ L 158, 30.4.2004, p. 77.

Directive does not deal with the conditions of their residence in the territory of 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. In order for the assistance and support to be effective, it is necessary that it is provided on an informed and consensual basis, guaranteeing that the victim agrees to for example actions to detect illnesses or other essential support measures. The 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 and needs of the person concerned. A person should be provided with assistance and support as soon as there is an indication that he or she might have been trafficked and irrespective of his/her willingness to act as a witness. Assistance should be provided unconditionally at least until the competent authorities have taken a final decision with regard to the reflection period and the residence permit, or otherwise acknowledge that the person is a victim of trafficking in human beings. If, after the completion of the identification process or expiry of the reflection period, the person is not considered eligible for a residence permit or does not otherwise have lawful residence in the country, 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, for example if medical treatment is ongoing due to severe physical or psychological consequences of the crime, or if the victim's safety is at risk due to his/her statements in criminal proceedings.
- (12) The Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings²¹ 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 to legal counselling and to legal representation, including for the purpose of claiming compensation. The purpose of legal counselling is to enable victims to be informed and receive advice about the various possibilities open to them. Legal counselling and 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 to 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 trafficking commonly entails, such as sexual exploitation, rape, slavery-like practices and the removal of organs, should be protected from secondary victimisation and further trauma during the criminal proceedings. To this end victims of trafficking should during criminal investigations and proceedings receive treatment that is

²¹ OJ L 82, 22.3.2001, p. 1.

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 has been 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.

- (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 available to child victims. These 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. As the child victim should be reintegrated into society as soon as possible, this will by necessity include a right to access to education. 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.
- (15) Member States should establish and/or strengthen policies to prevent trafficking in human beings including measures to discourage the demand that fosters all forms of exploitation, and measures to reduce the risk of people falling victims to trafficking in human beings, by means of research, 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. This training obligation would in particular cover police officers, border guards, labour inspectors, health care personnel and consular staff, but could depending on local circumstances also involve other groups of public officials that are likely to encounter trafficking victims in their work.
- (16) Directive 2009/52/EC of 18 June 2009 providing for minimum standards of sanctions and measures against employers of illegally staying third-country nationals²² 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 to that, 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. This further criminalisation could include employers of legally staying third-country nationals and EU nationals, 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 they consider appropriate according to their internal organisation, and taking into account the need for a

²² OJ L 126, 30.6.2009, p. 24.

minimum structure with identified tasks, in order to carry out assessments of trends in trafficking in human beings trends, measure the results of anti-trafficking actions, and regularly report to the relevant national authorities.

- (18) 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 be better achieved at European Union level, the EU may adopt measures in accordance with the principle of subsidiarity as referred to in Article 3 and Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in the latter Article, this Directive does not go beyond what is necessary to achieve that objective.
- (19) 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, prohibition of slavery, forced labour and trafficking in human beings, 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, protection of personal data, the right to an effective remedy and to a fair trial and the principles of legality and proportionality of criminal offences and penalties. In particular, this Directive seeks to ensure full respect for these rights and principles and has to be implemented accordingly.
- (20) [In accordance with Articles 1, 2, 3 and 4 of Protocol (No 21) on the position of United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on the Functioning of the European Union, the United Kingdom and Ireland have notified their wish to participate in the adoption and application of this Directive] OR [Without prejudice to Article 4 of Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security, annexed to the Treaty on the Functioning of the European Union, and justice, the United Kingdom and Ireland will not participate in the adoption of this Directive and will not be bound by or be subject to its application]. In accordance with Articles 1 and 2 of Protocol (No 22) on the position of Denmark annexed to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Directive and is therefore not bound by it or subject to its application

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Subject matter

This 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

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 receipt 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 occurs when the person 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 trafficking in human beings offence 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

Instigation, aiding, abetting and attempt

Member States shall take the necessary measures to ensure that the instigation of, aiding, abetting or attempt 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) the offence was committed by a public official in relation to the performance of her or his duties;
 - (b) the offence was committed against a victim who was particularly vulnerable, which, in the context of this Directive, shall include at least child victims, and adults who were particularly vulnerable on grounds of pregnancy, health conditions or disability;

- (c) the offence was committed within the framework of a criminal organisation within the meaning of Framework Decision 2008/841/JHA.²³
 - (d) the offence has deliberately or by gross negligence endangered the life of the victim;
 - (e) 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 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 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

1. Member States shall take the necessary measures to ensure that a legal person held liable pursuant to Article 5(1) and (2) is punishable by 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;

²³ OJ L 300, 11.11.2008, p. 42.

- (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 7

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

Member States shall, in accordance with the basic principles of its legal system, provide for the possibility of not prosecuting or imposing penalties on victims of trafficking in human beings for their involvement in criminal activities 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 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 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 in organised crime or other serious crime cases are available to persons, units or services responsible for investigating or prosecuting offences referred to in Articles 2 and 3.

Article 9

Jurisdiction

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

- (c) the offence is committed against one of its nationals or a person who has his or her habitual residence in its territory; or
 - (d) the offence is committed for the benefit of a legal person established in the territory of that Member State.
2. A Member State may decide that it will not apply or that it will apply only in specific cases or circumstances, the jurisdiction rules set out in paragraphs 1(c) and 1(d) as far as the offence is committed outside its territory.
 3. For the prosecution of an offence referred to in Articles 2 and 3 committed outside the territory of the Member State concerned, as regards paragraph 1(b), Member States shall take the necessary measures to ensure that the establishment of 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.
 4. Member States shall inform the Commission accordingly where they decide to apply paragraph 2, where appropriate with an indication of the specific cases or circumstances in which the decision applies.

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 time after criminal proceedings in order to enable them to exercise the rights set forth in Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, 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 an indication 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 act as a witness.
4. Member States shall take the necessary measures to establish appropriate mechanisms aimed at early identification, assistance and support for victims, in cooperation with relevant support organisations.
5. Assistance and support measures referred to in paragraph 2 shall be provided on a consensual and informed basis, and shall include at least standard of living capable of ensuring victims' subsistence through measures such as appropriate and safe accommodation and material assistance as well as necessary medical treatment

including psychological assistance, counselling and information in a language they can understand, translation and interpretation services where appropriate, and access to education for children. Member States shall attend to victims with special needs.

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 to free legal counselling and to legal representation, including for the purpose of claiming compensation. Legal representation shall be free of charge when the victim does not have sufficient financial resources. This paragraph will be without prejudice to the application of Article 14(2) when the victim is a child.
3. Without prejudice to the right of the defence, Member States shall allow, if in accordance with the basic principles of its legal system and where appropriate, that the identity of a victim of trafficking in human beings acting as a witness is not disclosed.
4. 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.
5. 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:
 - (a) unnecessary repetition of interviews during investigation, prosecution and trial;
 - (b) visual contact between victims and offenders 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;
 - (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, taking into account the best interests of the child.
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 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, 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.
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 in addition 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, judicial authorities appoint a special 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, or where the child is unaccompanied or separated from the family.
2. Member States shall ensure that child victims have immediate access to free legal counselling and to free legal representation, including for the purpose of claiming compensation.
3. 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 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 purpose of criminal proceedings;
 - (f) the child victim may be accompanied by his or her legal 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.
4. 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 these videotaped interviews may be used as evidence in criminal court proceedings, according to the rules under its national law.
5. Member States shall take the necessary measures to ensure, in criminal court proceedings relating to any of the offences referred to in Articles 2 and 3, that it may be ordered that
- (a) the hearing shall take place without the presence of the public;
 - (b) the child victim may be heard in the courtroom without being present, notably through the use of appropriate communication technologies.
6. The paragraphs 1, 3, 4 and 5 shall apply in addition to Article 11.

Article 15
Prevention

1. Member States shall take appropriate measures to discourage the demand that fosters all forms of exploitation related to trafficking in human beings.
2. Member States shall take appropriate actions such as information and awareness raising campaigns, research and education programmes, where appropriate in cooperation with civil society organisations, 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, including front-line police officers, border guards, labour inspectors, health care personnel and consular staff, aimed at enabling them to identify and deal with victims and potential victims of trafficking in human beings.

4. 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 trafficking in human beings trends, the measuring of results of anti-trafficking actions and reporting to the relevant national authorities.

Article 17

Repeal of Framework Decision 2002/629/JHA

Framework Decision 2002/629/JHA on combating trafficking in human beings is hereby repealed, without prejudice to the obligations of the Member States relating to the time-limit for transposition into national law.

References to the repealed Framework Decision shall be construed as references to this Directive.

Article 18

Transposition

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. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.
2. When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.
3. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 19

Reporting

1. By [four years from adoption] and every three years thereafter, the Commission shall submit a report to the European Parliament and the Council including any necessary proposal.
2. Member States shall send to the Commission all the information that is appropriate for drawing up the report referred to in paragraph 1. The information shall include a detailed description of measures applied under Articles 8, and Articles 10 to 16, as

well as a description of considerations made on possible measures under Article 15.4.

Article 20
Entry into force

This Directive shall enter into force on the on the 20th day following 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 Brussels,

For the European Parliament
The President

For the Council
The President