

Opinion No. 2/2009 of the Group of Experts on Trafficking in Human Beings set up by the European Commission

On the Commission Proposal for a Council Framework Decision on preventing trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA, COM (2009) 136 final

29 April 2009

Background

The Council Framework Decision on Combating Trafficking in Human Beings (2002/629/JHA) affirms in its Preamble that Trafficking in Human beings comprises serious violations of fundamental human rights and human dignity of victims. It also acknowledges the importance of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children, supplementing the UN Convention against Transnational Organised Crime (UNTOC).

On 21 May 2004 the European Community acceded to the UNTOC, and on 6 September 2006 the EC joined its supplementing Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children.

The follow-up document to the EU Action Plan on best practices, standards and procedures for combating and preventing trafficking in human beings adopted in December 2006 (16633/06) calls on Member States to consider as a priority the signature and ratification of the Council of Europe Convention on Action against Trafficking in Human Beings by the end of 2007, in order to ensure common standards across the EU.

The European Commission's Decision of 25 March 2003 set up a consultative group, to be known as the "Experts Group on Trafficking in Human Beings" (2003/209/EC). Their Report of 22 December 2004 is based on and defines certain guiding principles. These are complementary and interdependent, and are:

1. To ensure that each country has an adequate legal framework and adequate definition of trafficking in human beings;
2. To make human rights a paramount issue;
3. To take a holistic, coordinated and integrated approach;
4. To make government policies linked to migration, the economy and the informalisation of the workplace consistent with efforts to stop trafficking in human beings;
5. To respect the rights of children and affirm the State's duty to protect them in anti-trafficking actions;

6. To promote research about trafficking in human beings and monitor and evaluate the impact of all anti-trafficking measures.

The European Commission's Decision of 17 October 2007 set up a new Group of Experts on Trafficking in Human Beings (according to Commission Decision 2007/675/EC) whose task is, among others, to issue opinions on its own initiative, as set forth in Article 2 para (e).

The Group reaffirmed the intention to fulfil its mandate building on the valuable work carried out by the first Experts Group on Trafficking in Human Beings and on its Report of 22 December 2004.

On 17 October 2008 an opinion on the forthcoming revision of the Council Framework Decision 2002/629/JHA was issued. The main proposals were:

1. *the introduction of granting unconditional assistance* (regardless of whether the trafficked person is able or willing to give evidence as a witness), including a recovery/reflection period of at least three months for all victims (national, EU nationals and third-country nationals) and followed by a temporary residence permit with the possibility of renewal and conversion into a long term or permanent residence permit under the ordinary aliens Law in case of third country nationals;
2. *the introduction of obtaining compensation*, consisting of a specific binding provision stating the right of victims of trafficking to legal redress both for financial losses (or material damages/harms suffered by the victim) and for non-material damages;
3. *the introduction of a non-punishment provision for victims*, regarding crimes for which they were trafficked, and for crimes in which the trafficked person has been involved as a direct consequence of being a victim.

On 25 March 2009 the Commission adopted the proposal for a Council Framework Decision on preventing trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA. It included the following elements:

1. Substantive criminal law provisions;
2. Jurisdiction and prosecution;
3. Victims' rights in criminal proceedings;
4. Victim support;
5. Prevention;
6. Monitoring.

All this considered, having regard to the Opinion of 17 October 2008, of the Experts Group on Trafficking in Human Beings on the revision of the Council Framework Decision of 19 July 2002 on Combating Trafficking in Human Beings, the Experts Group issues the following Opinion to the Commission on the "Proposal for a Council Framework Decision on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA".¹

Opinion

The Group of Experts welcomes the proposal as a positive contribution to a comprehensive

¹ 25 March 2009, COM (2009) 136 final.

anti-trafficking legal regime that in several elements goes beyond the other international standards, such as the UN Palermo Trafficking Protocol and the Council of Europe Convention. In particular the Group of Experts appreciates that the Proposal includes the following elements recommended by the Group of Experts on Trafficking in Human Beings in its Opinion of October 2008:

- The adoption in Article 1 of all elements of crime and aspects of the definition contained in the UN Trafficking Protocol to promote consistency and legal certainty, as well as to strengthen efforts to address trafficking in human beings. Furthermore, the Group underlines the importance of broadening the understanding of the concept of exploitation, and adding new forms such as begging and unlawful activities;;
- The introduction in Article 6 of the “non-punishment clause”, allowing for non-prosecution and non-imposing penalties on victims of trafficking as a direct consequence of being trafficked. This provision not only complies with the obligation to protect the rights of trafficked persons, but also significantly enhances the chance of successful prosecution of the perpetrators by focusing the investigation on the traffickers. This clause clarifies the position of the victim in criminal proceedings, recognising that the victim was not free to choose between committing or participating in unlawful activities that are a direct consequence of being trafficked.

Therefore the Group of Experts strongly approves the use in the same Article of the term “direct consequence” of being subjected to any of the illicit means referred to in Articles 1 and 2, as opposed to the wording by the Council of Europe Convention, since it covers all forms and all victims of trafficking.

All this considered, the Group of Experts underlines the extreme importance that this non-punishment clause be considered as a binding provision.

The Group approves the increased focus in Article 7 on investigation, criminal proceedings and protection of victims’ rights, such as investigation ex officio in order to mandate competent authorities to lead investigations that do not depend on a formal complaint from the victim, the use of proactive means of investigation and the use of joint investigation teams.

Furthermore, the Group of Experts supports the inclusion of the provision delaying the limitation period for prosecution of trafficking offences, when the victim is a minor, for a sufficient period of time after the victim has reached the age of majority.

While the Group of Expert supports the specific provisions for victims in the criminal proceedings, it considers that all the relevant provisions in paragraphs 3, 4, 5 and 6 of Article 9 should apply to all victims, and not only to particularly vulnerable victims.

In particular, the Group stresses the importance of the individual assessment carried out for all victims of human trafficking as the basis for protective measures, such as measures preventing secondary victimisation, non-disclosure of identity of a victim acting as a witness, and access to witness protection programmes.

Victims should be given access to free legal counseling and legal representation on the same grounds envisaged by national legislation for the defendant, as well as for the purpose of claiming compensation.

The Group wishes to emphasise the human rights principle of unconditional access of all trafficked persons to support structures.

The Group is pleased to note the introduction of the provision under Article 10, particularly paragraph 2, as it recognises that a person shall be treated as a victim as soon as there is an indication that he/she has been trafficked. This allows access of victims to protection and assistance measures at the earliest possible stage, which is also recognised as a factor that fosters successful investigations and prosecutions.

The Group of Experts also recommends that in paragraph 4 of the same Article, referring to criminal proceedings, it is specified that assistance is provided regardless of whether the victim is able or willing to cooperate with judicial authorities.

The Group considers that Article 11 should clearly refer to all child victims of trafficking subject to all forms of exploitation as listed in Article 1, paragraph 3.

The Group notes with approval the inclusion of Article 12, dealing with prevention. In relation to paragraph 3 the Group recommends to include the following wording: “The use of services and/or labour”, to clarify and ensure that the criminalization includes all forms of exploitation as set forth in Article 1.

As a substantial added value of the proposal the Group would like to mention Article 13 on the monitoring of the implementation of anti-trafficking measures.

Consequently, the Group recommends that the National Rapporteur or equivalent mechanism is established as an independent structure to carry out monitoring and evaluation at the national level.

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