

# **Opinion No. 1/2008 of the Experts Group on Trafficking in Human Beings of the European Commission**

## **On the revision of the Council Framework Decision of 19 July 2002 on Combating Trafficking in Human Beings**

### **Background**

The Council Framework Decision on Combating THB (2002/629/JHA) affirms in art. 3 that (3) 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 (UNCTOC).

On 21 May 2004 the European Community acceded to the UNCTOC, and on 6 September 2006 the EC joined its supplementing Protocol to Prevent, Suppress and Punish Trafficking in Persons, particularly 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 [state of play, 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).

The Report of the European Commission's "Experts Group on Trafficking in Human Beings" of 22 December 2004 is based on and defines guiding principles, which call for a human rights, holistic and integrated approach in the normative framework, policies and measures against trafficking in human beings.

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

On 2-3 October 2008 the European Commission convened a meeting of the second Expert Group (established according to European Commission's Decision 2007/675/EC) to consult the group on the revision of Council Framework Decision on Combating Trafficking in Human Beings.

The Group reaffirmed its intention to fulfill 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.

All this considered, the Experts Group on Trafficking in Human Beings issues the following opinion to the Commission on the revising of the Council Framework Decision on Combating Trafficking in Human Beings (2002/629/JHA) of 19 July 2002.

The Group of Experts will evaluate the opportunity to produce a specific and more detailed opinion once the draft of revised Framework Decision is made available.

# Opinion

## Guiding principles and general proposals

According to the international and European documents and instruments recalled above, and as specifically stated in the Council Framework Decision on Combating Trafficking in Human Beings (2002/629/JHA), “Trafficking in human beings comprises serious violations of fundamental human rights and human dignity of victims”, and it is a complex phenomenon that needs to be tackled with a global, comprehensive approach.

Therefore, the Experts Group underlines that while specific measures are needed to prevent trafficking in human beings, to protect and assist people who have been trafficked and to prosecute traffickers, they are unlikely to be effective, unless these have solid and coherent foundation stones. These foundation stones are represented by the guiding principles identified by the Experts Group and presented in their Report of 22 December 2004, and they are complementary and interdependent.

Before presenting the proposals for the revision of the Framework Decision, it is appropriate to summarize all six guiding principles together:

1. Ensure that each country has an adequate legal framework and adequate definition of trafficking in human beings;
2. Make human rights a paramount issue;
3. Take a holistic, coordinated and integrated approach;
4. Make government policies linked to migration, the economy and the informalisation of the workplace consistent with efforts to stop trafficking in human beings;
5. Respect the rights of children and affirm the State’s duty to protect them in anti-trafficking actions;
6. Promote research about trafficking in human beings and monitor and evaluate the impact of all anti-trafficking measures.

As a consequence, the revised Framework Decision should take into consideration the necessary links with migration policies and the regulation of the labour market, while specifically it should contain the following binding provisions:

- reaffirm and strengthen the human rights approach in the criminal law framework;
- revise the criminal definition of trafficking in human beings to bring it in line with international standards;
- enhance provisions related to protection of victims’ rights in investigations and criminal proceedings;
- include an obligation to establish national referral mechanisms to harmonize the protection of the rights of and the identification and assistance to (presumed) trafficked persons with investigative and crime prosecution efforts;
- include a provision on enhancing coordinated investigations and prosecutions domestically and internationally;
- include provisions addressing prevention of the crime in particular dealing with awareness raising, training and monitoring of the supply chains, and other measures to address demand.

## Specific proposals

### ***A human rights based approach as an obligation and a paramount issue***

Trafficking in Human Beings constitutes a serious violation of human rights and an offence to the dignity and integrity of the individual. In dealing with trafficked persons<sup>1</sup>, Member States must act in awareness of their international obligations, including their international protection obligations.<sup>2</sup> Member States should furthermore take the necessary steps to inform (presumed) trafficked persons of their rights, in a language understandable to them, from the very first contact with competent authorities and during all stages of administrative and criminal proceedings. Special attention should be paid to child victims, i.e. persons below the age of 18, and their best interests should be a primary consideration in all policies and procedures involving them.

Categorical protection of basic rights also serves to raise the trafficked person's confidence in the State and its ability to protect his/her interests. Once recovered, a trafficked person with confidence in the State would be more likely to make an informed decision and to co-operate with the authorities in the prosecution of traffickers.

The Group of Experts particularly highlights the following aspects of categorical protection under a human rights framework, which should lead to consequent binding provisions:

#### **1. Granting unconditional assistance**

Unconditional assistance should be granted to trafficked persons regardless of whether the trafficked person is able or willing to give evidence as a witness. This approach assists Member States in fulfilling their obligation to protect the human rights of trafficked persons and not to treat the trafficked person exclusively as an instrument for the prosecution.<sup>3</sup>

Unconditional assistance should include a recovery/reflection period of at least three months for all victims (national, EU nationals and third-country nationals). In case of third country nationals, such recovery/reflection period should be 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 EU citizens specific mechanisms should be foreseen to regularize their status as appropriate, so that the protection of and access to social, health and economic rights (as referred to in the following paragraph) are guaranteed.

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<sup>1</sup> The European Experts Group stresses the reality of trafficked persons being victims of severe crimes. The term "victims of trafficking" is further related to the Council Directive on the residence permit issued to third-country nationals (...) (14994/03). Nevertheless, Members of the Group share the concern that the use of the word "victim" is controversial because of its emphasis on vulnerability and powerlessness. Therefore, the term "trafficked persons" is being used in the part of the opinion that are not related to criminal justice procedures. The term is in compliance with International Human Rights Documents, such as the UNHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking, Report of the High Commissioner for Human Rights to the Economic and Social Council, 20 May 2002 (E/2002/68/Add.1).

<sup>2</sup> Such as those set out in Council Directive 2004/83/EC 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, as well as those in other international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

<sup>3</sup> International Covenant on Civil and Political Rights (ICCPR), Art. 7; UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Supplementing the United Nations Convention against Transnational Organized Crime, Art. 7. Further reference: Opinion of the Experts Group on Trafficking in Human Beings of the European Commission On reflection period and residence permit for victims of trafficking in human beings. 18 May 2004. [http://ec.europa.eu/justice\\_home/doc\\_centre/crime/trafficking/doc/opinion\\_experts\\_group\\_2004\\_en.pdf](http://ec.europa.eu/justice_home/doc_centre/crime/trafficking/doc/opinion_experts_group_2004_en.pdf)

Unconditional assistance, through adequately funded programs run by public or non profit organizations, should consist, for all trafficked persons, of comprehensive support aimed at their social inclusion; services should include safe and appropriate accommodation, counseling, cultural mediation, health care, free legal assistance, education, vocational and employment opportunities. All services should be provided on a voluntary basis, in a non-discriminatory and non-judgmental manner and in compliance with a number of basic principles derived from international human rights norms, in particular the respect for privacy, confidentiality, self-determination and freedom of movement. Specialized services should be provided to trafficked children to meet their specific needs and protect their rights.

Return to the country of origin of a trafficked person should be considered on a case by case basis and only in terms of voluntary, safe and assisted return, and it should include individually tailored risk assessment, assistance and support to social inclusion.

## **2. Obtaining compensation**

In compliance with international standards and obligations it is recommended to include in the Framework Decision 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.

This should entail a right to obtain compensation from the perpetrator. In addition, victims of trafficking, as victims of violent intentional crime, should be entitled to have a facilitated access to the state-funded compensation schemes set up in accordance with the EU Council Directive on Compensation of Crime Victims of 29 April 2004. Furthermore, in order to enable victims of trafficking to exercise such right it is crucial to guarantee that they receive legal assistance and aid since the beginning of proceedings in a language that they understand, as well as it is necessary that they have the possibility to regularize their status during the whole duration of the criminal and/or civil and other (such as labour courts) proceedings for their claim to compensation.

States should also consider collecting statistic on the numbers of victims of trafficking obtaining and claiming compensation in the criminal proceedings and from the state compensation funds.

## **3. Non-punishment provision**

Member States should adopt legislative and other measures, in accordance with the basic principles of their legal system, stipulating the non punishment of victims for 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.

## **Definition**

The criminal definition of trafficking in human beings in the Council Framework Decision on combating trafficking in human beings of 19 July 2002 does not include all the elements of art 3. of the UN Trafficking Protocol. In particular, the Framework Decision does not include a general purpose of exploitation and does not apply to trafficking in human beings for the purpose of the removal of organs.

In order to promote consistency and legal certainty, as well as to strengthen efforts to address trafficking in human beings, it is therefore recommended, to adopt all elements of crime and aspects of the definition contained in the UN Trafficking Protocol. It is also suggested to consider specifying further the purpose of exploitation to ensure that it includes some of the increasingly identified forms of exploitation, such as trafficking in human beings for the purpose of organized begging, committing petty crimes, drug crimes or other unlawful activities.

It is also suggested to include the definition of a “victim” in compliance with the Council of Europe Convention on Action against Trafficking in Human Beings in order to ensure a joint status definition of victims of trafficking in all EU Member States.

Finally it is recommended that Member States should not adopt a definition of trafficking in human beings, which is more restrictive than the one provided by the Framework Decision itself.

### ***Investigations, criminal proceedings and protection of victims’ rights***

The fight against trafficking in human beings must be clearly defined as a law enforcement priority. Adequate personal and financial resources must be allocated.

It is recommended to include into the Framework Decision the principle that investigation in the area of trafficking in human beings must be *ex officio* in order to mandate the competent authorities to lead investigations that not depend on a formal complaint from the victim, at least when the offence was committed in whole or in part of its territory, or when the victim is a national.

Member States should ensure that, where appropriate, proactive means of investigation are used, in order to prevent that prosecutions rely solely on the testimony of victims. “Intelligence led” approaches, however, should never be used to justify a neglect of the need to identify protect and assist victims of trafficking.

Member States should promote the use of joint investigations teams with a view to improving police cooperation in dealing with transnational forms of Trafficking in human beings.

Furthermore, Member States should ensure that financial investigations are carried out in order to allow the seizing of all assets derived from this criminal activity and that the perpetrators are deprived from them (thus reversing trafficking in human beings from a low risk-high profit criminal activity into a low profit-high risk activity).

These seized assets should be used to contribute to the State fund for compensating victims.

Furthermore, it is recommended to include into the Framework Decision specific binding provisions aimed at avoiding secondary victimization (e.g. avoiding possibly direct confrontation between the victim-witness and the accused, avoiding multiple repetition of testimony by the victim-witness, and making use of video and audio and/or video recording, providing for in camera hearing etc.) of victims of trafficking who are participating in investigation and criminal proceedings; these should also include specific child-friendly measures. Member States should therefore ensure that legal proceedings in which victims of trafficking are involved are not prejudicial to their rights, dignity, physical or psychological well-being<sup>4</sup>.

Under Articles 2 and 3 of the European Convention of Human Rights States have a positive obligation to protect individuals. Victims of trafficking should have access to witness protection schemes, and the protection offered should be afforded on the basis of individual risk assessment and need. It should be offered in consultation with the trafficked person.

### ***National Referral Mechanisms***

Member States should establish National Referral Mechanisms to ensure the proper identification and referral of trafficked persons, including trafficked children, and to ensure that they receive adequate assistance while protecting their human rights.

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<sup>4</sup> UN OH CHR, Recommended Principles and Guidelines on Human Rights and Human Trafficking, E/2002/68/Add.1 of 20 May 2002, Guideline 6.4

Specific mechanisms should be established to harmonize the assistance of trafficked persons with investigative and crime prosecution efforts.

To allow proper identification of trafficked persons and consistent access to assistance and protection measures, all involved actors – government actors, law enforcement, NGOs, local social welfare organisations, local authorities, labour unions, labour inspections and other labour related agencies – should define and agree upon specific procedures to be implemented.

Furthermore, Member States should ensure within the Anti-trafficking Institutional Framework as defined by the NRM concept, that all involved actors are trained on a systematic basis and, where possible, jointly.

## **Addendum**

Finally, the Experts Group strongly recommends the revision of the “Council of the European Union Directive 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”. The revision is strongly needed and it should follow the principles and guidelines which have been recalled and illustrated above and it should comply with the most recent European and international instruments, including the revised Council of the European Union Framework Decision on Combating Trafficking in Human Beings.

Brussels, 17 October 2008