

2. Member States shall transmit by the date referred to in paragraph 1 at the latest to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision.

3. On the basis of this information the Commission shall submit before [...] a report to the European Parliament and the Council on the application of this Framework Decision, accompanied where necessary by legislative proposals.

4. The Council shall assess before [...] the measures adopted by the Member States in order to comply with the provisions of this Framework Decision.

Article 9

Repeal

Articles 54 to 58 of the 1990 Schengen Convention shall be repealed upon the entry into force of this Framework Decision.

Where a Member State transposes this Framework Decision before that date, pursuant to Article 8(1), the provisions in question shall cease to apply to the Member State concerned from the date of transposition.

Article 10

Entry into force

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

Done at Brussels, ...

For the Council

The President

...

Initiative of the Hellenic Republic with a view to adopting a Council Framework Decision concerning the prevention and control of trafficking in human organs and tissues

(2003/C 100/13)

THE COUNCIL OF THE EUROPEAN UNION,

in human beings, including common definitions, incriminations and sanctions.

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

Having regard to the initiative of the Hellenic Republic ⁽¹⁾,

Having regard to the opinion of the European Parliament ⁽²⁾,

Whereas:

- (1) The Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice ⁽³⁾, the Tampere European Council on 15 and 16 October 1999 and the Santa Maria da Feira European Council on 19 and 20 June 2000, as listed in the scoreboard, indicate or call for legislative action against trafficking

- (2) Trafficking in human organs and tissues is a form of trafficking in human beings, which comprises serious violations of fundamental human rights and, in particular, of human dignity and physical integrity. Such trafficking is an area of activity of organised criminal groups who often have recourse to inadmissible practices such as the abuse of vulnerable persons and the use of violence and threats. In addition, it gives rise to serious risks to public health and infringes on the right of citizens to equal access to health services. Finally, it undermines citizens' confidence in the legitimate transplantation system.

- (3) Opposition to the sale of the human body and its parts has been addressed repeatedly by many international organisations and has been the subject of regulation by international conventions. As early as 1978, the Council of Europe in its Decision (78)29 on harmonisation of legislation of Member States relating to removal, grafting and transplantation of human substances, which was adopted by the Committee of Ministers of the Council of Europe on 11 May 1978, declared that no human substance may be offered for profit. This declaration was confirmed at the third Conference of European Health Ministers, which was held in Paris on 16 and 17 November 1987, the final statement of which stressed that a human organ may not be offered for profit by any organ exchange body, organ storage centre or any other organisation or private individual.

⁽¹⁾ OJ C ...

⁽²⁾ OJ C ...

⁽³⁾ OJ C 19, 23.1.1999, p. 1.

- (4) An important step in the attempt to combat trafficking in human organs and tissues and, more generally, as regards opposition to the sale of the human body and its parts is the Convention of the Council of Europe on human rights and biomedicine which was signed in Oviedo on 4 April 1997 and came into force on 1 December 1999. Article 21 of this Convention contains a prohibition on drawing financial gain from the human body and its parts. Article 25 requires the signatory States to make provision for sanctions, not necessarily of a penal nature, against anyone who infringes the provisions of the Convention. To this Convention was annexed an Additional Protocol concerning transplantation of organs and tissues of human origin, which was drawn up on 24 January 2002, but has not entered into force to date. In Article 21 of the Additional Protocol it is specified that the human body and its parts may not give rise to financial gain or comparable advantage. It also prohibits any advertising of the need for, or availability of, organs or tissues, with a view to offering or seeking financial gain or comparable advantage. Article 22 of the Additional Protocol lays down the obligation to prohibit organ and tissue trafficking.
- (5) Trafficking in human organs and tissues has also been condemned repeatedly by the World Health Organisation (WHO). It was first condemned in Resolution WHA 40.13 of May 1987. Furthermore, Resolution WHA 42.5 of May 1989 condemned the purchase and sale of human organs and, pointing to the lack of success in preventing the phenomenon, called on the national legislators to intensify their efforts. Resolution WHA 44.25 of May 1991 declared that no organ should be removed from the bodies of minors save in exceptional cases, considered the advertising of human organs against payment to be prohibited and introduced the principle of equality as regards organ donations.
- (6) The Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organised Crime, includes the removal of human organs in the definition of exploitation, which characterises trafficking in persons. This Protocol represents a decisive step towards international cooperation to combat trafficking in human organs.
- (7) Nevertheless, the recent Council Framework Decision 2002/629/EC of 19 July 2002 on combating trafficking in human beings ⁽¹⁾ did not include trafficking in human organs.
- (8) The important work performed by international organisations, especially the UN, the World Health Organisation and the Council of Europe, should be complemented by that of the European Union.
- (9) It is necessary that the serious criminal offence of trafficking in human organs and tissues be addressed not only through individual action by each Member State but by a comprehensive approach, of which the definition of the elements of the offence, common to all the Member States, and effective, proportionate and dissuasive penalties should form an integral part.
- (10) Since the above objectives of the Framework Decision cannot be sufficiently achieved by the Member States and can therefore be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity. In accordance with the principle of proportionality, this Framework Decision does not go beyond what is necessary in order to achieve those objectives.
- (11) It is necessary to introduce penalties on perpetrators sufficiently severe to allow for trafficking in human organs and tissues to be included within the scope of instruments already adopted for the purpose of combating organised crime, such as Council Joint Action 98/699/JHA of 3 December 1998 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime ⁽²⁾ and Council Joint Action 98/733/JHA of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union ⁽³⁾,

HAS ADOPTED THIS FRAMEWORK DECISION:

Article 1

Definitions

For the purposes of this Framework Decision:

1. the term 'transplantation' covers the complete process of removal of an organ or tissue from one person and implantation of that organ or tissue into another person, including procedures for preparation, preservation and storage;
2. the term 'tissues' also covers cells, including haematopoietic stem cells;
3. the term 'human organs and tissues' does not cover:
 - (a) reproductive organs and tissues;
 - (b) embryonic organs and tissues;
 - (c) blood and blood derivatives;

⁽²⁾ OJ L 333, 9.12.1998, p. 1. Joint Action as last amended by Framework Decision.

⁽³⁾ OJ L 351, 29.12.1998, p. 1.

⁽¹⁾ OJ L 203, 1.8.2002, p. 1.

4. The term 'minor' shall mean anyone of less than 18 years of age.

Article 2

Offences concerning trafficking in human organs

Each Member State shall take the necessary measures to ensure that the following acts are punishable:

1. the recruitment, transportation, transfer, harbouring or reception of a person, including any exchange or transfer of control over that person, where
 - (a) use is made of force or threats, including abduction; or
 - (b) use is made of fraudulent means; or
 - (c) there is an abuse of authority or of a position of vulnerability which is such that the person concerned has no real or reasonable possibility of avoiding such abuse; or
 - (d) payments, or benefits are given or received in order to obtain the consent of a person having control over another person with the aim of removal of an organ or tissues from the latter;
2. (a) the removal of an organ from a living donor effected using force, threats or fraud;
 - (b) the removal of an organ from a donor who has consented thereto further to the payment or promise of financial consideration;
 - (c) the payment, offer or promise of a financial consideration, directly or via third parties, to a donor in order to obtain his consent to the removal of an organ;
 - (d) the receipt of or demand for financial consideration by a donor or a third party so that the donor will agree to the removal of an organ;
 - (e) action as an intermediary in carrying out any of the acts set out in points (a), (b), (c) and (d);
 - (f) the demand for, receipt, payment, offer or promise of financial consideration with the aim of offering or acquiring or, more generally, trafficking in human organs and tissues;
3. (a) the purchase, possession, storage, transport, import, export or transfer of possession of human organs removed by means of one of the acts set out in paragraphs 1 and 2;
 - (b) participation by medical or nursing staff in the transplantation of an organ in the knowledge that it has been the object of one of the abovementioned acts.

Article 3

Instigation, aiding and abetting or attempt

Each State shall take the necessary measures to ensure that the instigation of, aiding and abetting or attempt to commit an offence referred to in Article 2 is punishable.

Article 4

Penalties

Each Member State shall take the necessary measures to ensure that an offence referred to in Articles 2 and 3 is punishable by effective, proportionate and dissuasive criminal penalties, which may entail extradition.

Each Member State shall take the necessary measures to ensure that an offence referred to in Article 2 is punishable by terms of imprisonment with a maximum penalty that is not less than ten years where it has been committed in any of the following circumstances:

- (a) the offence has deliberately or by gross negligence endangered the life of the victim;
- (b) the offence has been committed against a minor;
- (c) the offence has caused further serious physical harm to the victim;
- (d) the offence has been committed within the framework of a criminal organisation as defined in Joint Action 98/733/JHA, apart from the penalty level referred to therein.

Article 5

Liability of legal persons

1. Each Member State 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. Apart from the cases provided for in paragraph 1 of this Article, each Member State shall take the necessary measures to ensure that legal persons can be held liable where the lack of supervision or control by a person referred to in the said paragraph 1 have rendered possible the commission of an offence referred to in Articles 2 and 3 for the benefit of that legal person by a person under its authority.

3. Liability of legal persons under paragraphs 1 and 2 of this Article shall not exclude the punishment of persons who are perpetrators, instigators or accessories in an offence referred to in Articles 2 and 3.

4. For the purposes of this Framework Decision, the term 'legal person' shall mean any entity having such status under the applicable law, except for States or other public bodies in the exercise of State authority and for public international organisations.

Article 6

Penalties against legal persons

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

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

Article 7

Jurisdiction and prosecution

Each Member State shall take the necessary measures to establish its jurisdiction over the offences referred to in Articles 2 and 3 where:

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

Article 8

Implementation

1. Member States shall take the necessary measures to comply with the provisions of this Framework Decision before [. .].
2. Before the date referred to in paragraph 1, the Member States shall transmit to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision.
3. Before [. .], on the basis of a report established on the basis of this information and a written report from the Commission, the Council shall assess the extent to which Member States have complied with the provisions of this Framework Decision.

Article 9

Entry into force

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

Done at Brussels, ...

For the Council

The President

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