



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 24 March 2005

Interinstitutional File:
2003/0196 (CNS)
2003/0197 (CNS)

7603/05

LIMITE

CRIMORG 29

OUTCOME OF PROCEEDINGS

from : Multidisciplinary group on organised crime

on : 14 March 2005

No. prev. doc. : 5948/04 CRIMORG 8

No. Cion prop. : COM (2003) 512 final

Subject : Proposal for a

- Council Decision on the conclusion, on behalf of the European Community, of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organised Crime
 - Council Decision on the conclusion, on behalf of the European Community, of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women And Children, supplementing the United Nations Convention Against Transnational Organised Crime
-

Chronological background

1. On 22 August 2003 the Commission transmitted the above proposal to the Council.

On 17 October 2003, the Council decided to consult the European Parliament on this proposal and asked the European Parliament for its opinion without delay.

On 13 January 2004, the Parliament approved the conclusion of the United Nations Convention Against Transnational Organised Crime (UNTOC) and the two Protocols.

DK, IRL, NL and UK have entered a parliamentary scrutiny reserve on the draft Council decisions.

IT has a general reservation. As far as the two protocols to the UNTOC are concerned, reference is made to IRL and UK. Those Member States have a scrutiny reservation on the way in which their position has been recorded.

On 29 April 2004 the Council adopted a Decision authorising the Commission to conclude the UN Convention against Organised Crime¹.

No agreement was reached, however, on the draft Council decisions for the conclusion by the Community of two Protocols to UNTOC, the latest version of which is set out in the annex. At the request of the Commission, the issue was tabled again at the meeting of the Multidisciplinary group on organised crime (MDG) of 14 March 2005.

Commission's intervention at the MDG meeting of 14 March 2005

2. At the MDG meeting of 14 March 2005, the Commission representative gave a detailed account of the Commission's serious concerns with the versions of the draft Council Decisions. The Commission's main concerns may be summarised as follows.

General Remarks

2.1. The Commission stated that the Smuggling and Trafficking Protocols overwhelmingly fall under Community competence under Title IV of Part III of the EC Treaty, relating to the control of the Community's external border and immigration policy, including administrative cooperation between Member States in these fields, as well as under the provisions of the EC Treaty on development cooperation and cooperation with third countries.

For this reason, the Commission considered it inappropriate to attempt to enumerate in the competence declaration the provisions of the two Protocols that fall under Community competence. Moreover, given the large number of legislative acts in the field, as well as the rapid evolution of legislation in this field, any competence declaration which adopted such an approach would run a high risk of being incomplete, and would very quickly be outdated. Accordingly, the Commission maintained that the competence declaration should provide a narrative description of Community competence.

¹ Council Decision (2004/579/EC) of 29 April 2004 on the conclusion, on behalf of the European Community, of the United Nations Convention Against Transnational Organised Crime, OJ, L 261 of 6.8.2004, p. 69.

Detailed arguments regarding Community competence

2.2. The Commission also provided the following detailed arguments to support its thesis that the draft declarations of competence as amended by the Council did not correctly reflect the extent of Community competence. In particular, the Commission thought they failed to take account of a number of legislative acts which have been adopted since the Commission made its proposals in August 2003. The Commission indicated that its explanations on the Smuggling Protocol, as rendered hereafter, were, in its view, also valid - *mutatis mutandis* - for the Trafficking Protocol.

2.2.1. Similarly to what was agreed on UNTOC, the Commission deemed that a reference to the general and final provisions of the Protocol (Articles 1-4 and 19-25) which comprise provisions on the scope of application of the Protocol, definitions, signature, entry into force etc., is indispensable. Since these provisions apply to the substantive provisions of the Protocol falling under Community competence, they must be regarded as equally falling under Community competence.

2.2.2. The Commission referred to the following relevant Community legislation (enacted or in preparation) as regards the other Articles of the Smuggling Protocol:

Articles 5 and 6 – criminalisation of smuggling: Council Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence includes a provision on sanctions. The transposition deadline of this directive expired on 5 December 2004, which means that it is now fully applicable in practice.

Article 10 – information: information exchange is a key aspect of

- Regulation 377/2004 on the creation of a network of immigration officers in third countries that was adopted on 19.2.2004 (Regulation based on Article 63 (3) b, 66 TEC);
- Council Decision 2004/512 of 8 June 2004 establishing the Visa Information System. In addition, the Schengen Information System may also contain information falling under Article 10.
- Proposal for a Council Decision establishing secure web-based Information and Coordination Network of Member States' Migration Management Services (Iconnet). There is political agreement on this proposal, and its adoption would therefore seem only a question of time.

- The Commission did not develop arguments regarding Community competence for **Articles 11, 12 and 13** as they are included in the latest text that the Presidency had submitted to the Article 36 Committee (CATS) in 2004¹ and therefore considered *aquis*.

Article 14 – training and technical cooperation:

- the ARGO programme (cf. Council Decision 2002/463/EC of 13 June 2002) is a Community programme for administrative cooperation at European Union level in the fields of asylum, visas, immigration and external border;

- Council Regulation 2007/2004 of 26 October 2004 establishing the European External Borders Management Agency, comprises a provision giving the Agency responsibilities in the field of training;

- Regulation 491/2004 of 10 March 2004 (Aeneas) which is based on Articles 179 und 181a TEC. Article 14 of the Protocol does not only cover cooperation between Member States, but also cooperation with third countries. Some of the actions covered by Aeneas precisely target the measures envisaged in Article 14

Moreover, to the extent that Article 14 makes reference to security and quality of travel documents, it should be noted that the EC has adopted a number of harmonising measures in this field (Council Regulation 2252/2004 on standards for security features and biometrics in passports and travel documents issued by Member States; Council Regulation 1683/95 laying down a uniform format for visas; and Council Regulation 1030/2002 laying down a uniform format for residence permits for third-country nationals)

Article 15 – other prevention measures: activities mentioned in this article are undertaken by the Community in the framework of its ARGO (cf. Council Decision 2002/463/EC) and the AENEAS programme (cf. Regulation 491/2004) regarding cooperation with third countries in the field of migration;

Article 16 - Protection and assistance measures: The Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to 3rd country nationals who are victims of THB or subject of an action to facilitate illegal immigration covers measures envisaged in this article, e.g. subsistence, medical and psychological assistance as well as safety measures.

¹ 5948/04 CRIMORG 8.

Article 17 – agreements and arrangements: this provision calls upon the parties to “enhance the provisions of the Protocol among themselves”, which is what the Community has done through the various legislative acts it has adopted in the areas covered by the Protocol. As regards third countries, the Aeneas programme contributes to the implementation of Article 17.

Article 18 – return of smuggled migrants: the Community has explicit first pillar competences in this field (see Article 63 (3) (b) TEC), which it has already exercised repeatedly (Community readmission agreement with Hong Kong and Macao entered into force in 2004; the one with Sri Lanka was concluded by the Council on 3 March 2005; as regards Albania: Council authorised in March this year the signature of the agreement); many more are under negotiation or the Commission has a mandate to open negotiations. In addition, the Commission referred to the following internal measures, as relevant legislation:

- Council Decision 2004/573 of 29 April 2004 on the organisation of joint flights for removals;
- Article 23 of the Schengen Implementing Convention, which also concerns return of illegal immigrants;
- The European External Borders Management Agency has competence to provide support in organising joint return operations (Article 2 (1) (f) of Regulation 2007/2004)
- A proposal for a Council Decision on a common Return Fund and a proposal for a Council act on return procedures, which the Commission is planning to adopt in April.

The Commission was convinced that that this list of instruments had shown, since the Commission had made its proposals for conclusion of the two Protocols on behalf of the European Community in August 2003, a large number of Community acts have been adopted which fall within the area covered by the Protocols, that is Community competence has been exercised extensively. This served to illustrate the highly dynamic character of Community law in this field, which precludes an overly restrictive drafting of the competence declaration.

The Commission therefore thought a complete re-examination of the question of competence was necessary. The legal bases for the conclusion of the Protocols should be extended in light of the Community acts that were adopted since. Therefore the Commission proposed to add Articles 66, 179 and 181a TEC to the legal bases for the conclusion of the Protocols.

Concern with increasing number of MS that ratified the Protocols

2.2.3. The Commission also expressed its deep concern with the growing number of Member States that have ratified the UN Trafficking and Smuggling Protocols. Currently, 13 Member States ratified the Trafficking Protocol and 12 Member States ratified the Smuggling Protocol.¹ The Commission considered that Member States that have ratified the Protocols, have acted in an area under exclusive EC competence. Given that it is undisputed that these UN Protocols fall under Community competence – the dispute only concerns the question of the extent of Community competence – the Commission stated that there is a clear case of infringement of Community legislation as EU Member States do not have the powers to ratify these Protocols in their entirety in their own name. The Commission thought that a swift accession of the Community to the Protocols was needed in order to rectify the situation as it was of the opinion that Member States were encroaching on exclusive Community competence.

The Commission urged all Member States to refrain from depositing their instrument of ratification regarding these UN Protocols before the Community is in a position to do so. The Commission also expressed its wishes to cooperate closely with the Council in order to rectify this situation as quickly as possible.

¹ Some States have ratified before becoming a Member State to the EU.

ANNEXES

COUNCIL DECISION

of

on the conclusion, on behalf of the European Community, of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organised Crime

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 62 point 2 and 63 point 3, in conjunction with the first subparagraph of Article 300(2) and first subparagraph of Article 300(3) thereof;

Having regard to the proposal from the Commission,¹

Having regard to the opinion of the European Parliament²,

Whereas:

- (1) The elements of the Protocol which are subject to Community competence were negotiated by the Commission, with the approval of the Council, on behalf of the Community,
- (2) The Council instructed the Commission to negotiate the accession of the Community to the international agreement in question,
- (3) Negotiations were successfully concluded and the resulting instrument has been signed by the Community on 12 December 2000 in accordance with Council Decision (2001/87/EC) of 8 December 2000³,

¹ OJ, p.

² OJ, p.

³ OJ L 30 of 1.2.2001, p. 44.

- (4) Some Member States are parties to the Protocol while the ratification process is under way in other Member States,
- (5) The provisions of the Protocol, which are subject to Community competence, fall within the scope of Part III, Title IV of the Treaty establishing the European Community,
- (6) The United Kingdom [and Ireland] [are] participating in the adoption and the application of this decision and will be bound by the provisions of the Protocol, which are subject to Community competence, as part of the Community, as set out in the declaration of competence,
- (7) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark will not be bound by the provisions of the Protocol, which are subject to Community competence, as part of the Community,
- (8) The conclusion of the Convention was approved on behalf of the European Community by Council Decision Council Decision (2004/579/EC) of 29 April 2004¹ which is a condition for the European Community to become a Party to the Protocol, pursuant to Article 37 (2) of the Convention,
- (9) The other conditions permitting the Community to deposit the instrument of approval provided for in Article 36 (3) of the Convention and Article 21 (3) of the Protocol have been fulfilled,
- (10) The Protocol should be approved to enable the Community to become a party to it within the limits of its competence,
- (11) The Community must, when depositing the instrument of approval, also deposit a declaration on the extent of the European Community's competence with respect to matters governed by the Protocol under Article 21 (3) of the Smuggling Protocol,

¹ OJ L 261 of 6.8.2004, p. 69.

HAS DECIDED AS FOLLOWS:

Article 1

The Protocol against the smuggling of migrants by land, air and sea, supplementing the United Nations Convention against transnational organised crime, as set out in Annex I, is hereby approved on behalf of the European Community.

The Community's instrument of formal confirmation shall comprise a declaration of competence according to Article 21 (3) of the Protocol as set out in Annex II.

Article 2

The President of the Council is authorised to designate the person empowered to deposit the instrument of formal confirmation in order to bind the Community.

This Decision shall be published in the *Official Journal of the European Union*.

Done at Brussels,

For the Council,

The President

ANNEXES

ANNEX A will include the text of the Protocol.

ANNEX B

DECLARATION CONCERNING THE COMPETENCE OF THE EUROPEAN COMMUNITY WITH REGARD TO MATTERS GOVERNED BY THE PROTOCOL AGAINST THE SMUGGLING OF MIGRANTS BY LAND, AIR AND SEA, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANISED CRIME

Article 21 (3) of the Protocol provides that the instrument of accession of a regional economic integration organisation shall contain a declaration on the extent of its competence.

- 1) The Community points out that it has competence with regard to crossing of external borders of the Member States, regulating standards and procedures when carrying out checks on persons at such borders and rules on visas for intended stays of no more than three months. The Community is also competent for measures on immigration policy regarding conditions of entry and residence and measures to counter illegal immigration and illegal residence, including repatriation of illegal residents. Relevant Community legislation is comprised in the Schengen *acquis* on external borders and on travel and identity documents, as integrated into the framework of the European Community, and its further development. Hence in these fields it is for the Community to adopt the relevant rules and regulations and, within its competence, to enter into external undertakings with third States or competent international organisations. This competence relates to Articles 11, 12 and 13.

The scope and the exercise of such Community competence are, by their nature, subject to continuous development, and the Community will complete or amend this declaration, if necessary, in accordance with Article 21 (3) of the Protocol.

- 2) The Protocol against the smuggling of migrants by land, air and sea shall apply, with regard to the competences of the European Community, to the territories in Europe in which the Treaty establishing the European Community is applied and under the conditions laid down in that Treaty, in particular Article 299 thereof and the Protocols annexed to it.

Pursuant to Article 299, this declaration is also not applicable to the territories of the Member States in which the said Treaty does not apply and is without prejudice to such acts or positions as may be adopted under the Protocol by the Member States concerned on behalf of and in the interests of those territories.

Pursuant to the Protocol integrating the Schengen acquis into the framework of the European Union, annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom and Ireland will not be bound by Articles 11(1)(5) and (6), 12(b) and 13 of the Protocol, which are subject to Community competence, as part of the Community.

In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark will not be bound by the provisions of the Protocol, which are subject to Community competence, as part of the Community.

COUNCIL DECISION

of

on the conclusion, on behalf of the European Community, of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women And Children, supplementing the United Nations Convention Against Transnational Organised Crime

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 62 point 2 and 63 point 3, in conjunction with the first subparagraph of Article 300(2) and first subparagraph of Article 300 (3) thereof;

Having regard to the proposal from the Commission,¹

Having regard to the opinion of the European Parliament²,

Whereas:

- (1) The elements of the Protocol which are subject to Community competence were negotiated by the Commission, with the approval of the Council, on behalf of the Community,
- (2) The Council instructed the Commission to negotiate the accession of the Community to the international agreement in question,
- (3) Negotiations were successfully concluded and the resulting instrument has been signed by the Community on 12 December 2000 in accordance with Council Decision (2001/87/EC) of 8 December 2000³,

¹ OJ, p.

² OJ, p.

³ OJ L 30 of 1.2.2001, p. 44.

- (4) Some Member States are parties to the Protocol while the ratification process is under way in other Member States,
- (5) The provisions of the Protocol, which are subject to Community competence, fall within the scope of Part III, Title IV of the Treaty establishing the European Community,
- (6) The United Kingdom [and Ireland] [are] participating in the adoption and the application of this decision and will be bound by the provisions of the Protocol, which are subject to Community competence, as part of the Community, as set out in the declaration of competence,
- (7) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark will not be bound by the provisions of the Protocol, which are subject to Community competence, as part of the Community,
- (8) The conclusion of the Convention was approved on behalf of the European Community by Council Decision (2004/579/EC) of 29 April 2004¹ which is a condition for the European Community to become a Party to the Protocol, pursuant to Article 37 (2) of the Convention,
- (9) The other conditions permitting the Community to deposit the instrument of approval provided for in Article 36 (3) of the Convention and Article 16 (3) of the Protocol have been fulfilled,
- (10) The Protocol should be approved to enable the Community to become a party to it within the limits of its competence,
- (11) The Community must, when depositing the instrument of approval, also deposit a declaration on the extent of the European Community's competence with respect to matters governed by the Protocol under Article 16 (3) of the Trafficking Protocol,

¹ OJ L 261 of 6.8.2004, p. 69.

HAS DECIDED AS FOLLOWS:

Article 1

The Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against transnational organised crime, as set out in Annex I, is hereby approved on behalf of the European Community. The Community's instrument of formal confirmation shall comprise a declaration of competence according to Article 16 (3) of the Protocol as set out in Annex II.

Article 2

The President of the Council is authorised to designate the person empowered to deposit the instrument of formal confirmation in order to bind the Community.

This Decision shall be published in the *Official Journal of the European Union*.

Done at Brussels,

For the Council,
The President

ANNEXES

ANNEX A will include the text of the Trafficking Protocol.

ANNEX B

DECLARATION CONCERNING THE COMPETENCE OF THE EUROPEAN COMMUNITY WITH REGARD TO MATTERS GOVERNED BY THE PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANISED CRIME

Article 16 (3) of the Protocol to prevent, suppress and punish trafficking in persons, especially women and children provides that the instrument of ratification, acceptance or approval of a regional economic integration organisation shall contain a declaration on the extent of its competence.

- 1) The Community points out that it has competence with regard to crossing of external borders of the Member States, regulating standards and procedures when carrying out checks on persons at such borders and rules on visas for intended stays of no more than three months. The Community is also competent for measures on immigration policy regarding conditions of entry and residence and measures to counter illegal immigration and illegal residence, including repatriation of illegal residents. Relevant Community legislation is comprised in the Schengen *acquis* on external borders and on travel and identity documents, as integrated into the framework of the European Community, and its further development. Hence in these fields it is for the Community to adopt the relevant rules and regulations and, within its competence, to enter into external undertakings with third States or competent international organisations. This competence relates to Articles 6, 7, 11, 12 and 13.

The scope and the exercise of such Community competence are, by their nature, subject to continuous development, and the Community will complete or amend this declaration, if necessary, in accordance with Article 16 (3) of the Protocol.

- 2) The Protocol to prevent, suppress and punish trafficking in persons, especially women and children shall apply, with regard to the competences transferred to the European Community, to the territories in which the Treaty establishing the European Community is applied and under the conditions laid down in that Treaty, in particular Article 299 thereof and the Protocols annexed to it.

Pursuant to Article 299, this declaration is also not applicable to the territories of the Member States in which the said Treaty does not apply and is without prejudice to such acts or positions as may be adopted under the Protocol by the Member States concerned on behalf of and in the interests of those territories.

Pursuant to the Protocol on the position of the United Kingdom and Ireland, and to the protocol on the integration of the Schengen acquis into the framework of the European Union, annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom and Ireland will not be bound by the provisions of Article 6, 7, 11(1), (5) and (6), 12(b) and 13 of the Protocol, which are subject to Community competence, as part of the Community.

In accordance with the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark will not be bound by the provisions of the Protocol, which are subject to Community competence, as part of the Community.