



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 17.10.2005
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2003/0196 (CNS)
2003/0197 (CNS)

Amended 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

Amended proposal for a

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

(presented by the Commission pursuant to Article 250 (2) of the EC Treaty)

EXPLANATORY MEMORANDUM

1) CONTEXT OF THE PROPOSAL

- **Grounds for and objectives of the proposal**

The present proposals amend the proposals 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 (Smuggling Protocol) and of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol), both supplementing the United Nations Convention against transnational organised crime (UNTOC), [COM(2003) 512 final] in light of a number of Community legislative acts that have been adopted since the Commission made its original proposals in August 2003.

- **General context**

Since the Commission proposed the conclusion of the UNTOC, Smuggling Protocol and Trafficking Protocol on behalf of the European Community in August 2003, only the proposal regarding the UNTOC was adopted by the Council on 27 April 2004 [OJ L 261 of 6.8.2004, p.69]. The proposals regarding the Smuggling Protocol and the Trafficking Protocol are still awaiting adoption because of ongoing discussion between the Council and the Commission on the extent of Community competence with regard to these protocols.

In light of the adoption of the legislative instruments listed below which relate to the areas covered by the two Protocols and were adopted in 2004, it is proposed a) to add Articles 66, 179 and 181a TEC to the legal bases for the conclusion of the Smuggling and Trafficking Protocols and b) to make the relevant adjustments to the textual description of Community competence in the declaration of competence, annexed to the draft Council Decisions.

Article 66 TEC:

- Council Regulation No 377/2004 of 19.2.2004 on the creation of an immigration liaison officers network [OJ L 64 of 2.3.2004, p. 1] (relates to Article 10 of the Smuggling Protocol and Article 10 of the Trafficking Protocol)
- Council Decision 2004/512 of 8.6.2004 establishing the Visa Information System (VIS) [OJ L 213 of 15.6.2004, p. 5] (relates to Article 10 of the Smuggling Protocol and Articles 10 and 11 of the Trafficking Protocol)
- Council Regulation No 2007/2004 of 26.10.2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU [OJ L 349 of 25.11.2004, p. 1] (relates to Articles 10, 14 and 18 of the Smuggling Protocol and Articles 8 and 10 of the Trafficking Protocol)

Articles 179 and 181a TEC:

- Regulation No 491/2004 of the European Parliament and of the Council of 10.3.2004 establishing a programme for financial and technical assistance to third countries in the

areas of migration and asylum (AENEAS) [OJ L 80 of 18.3.2003, p. 1] (relates to Articles 14 and 15 of the Smuggling Protocol and Articles 9 and 10 of the Trafficking Protocol)

- **Existing provisions in the area of the proposal**

There are no existing provisions in the area of the proposal.

- **Consistency with other policies and objectives of the Union**

Not applicable.

2) CONSULTATION OF INTERESTED PARTIES AND IMPACT ASSESSMENT

- **Consultation of interested parties**

Consultation of interested parties is not appropriate for a proposal for a Council Decision on the conclusion of an international instrument on behalf of the European Community.

- **Collection and use of expertise**

There was no need for external expertise.

- **Impact assessment**

An impact assessment was not done.

The proposals for conclusion of the two Protocols follow from the fact that the Community has signed the Protocols [OJ L 280 of 24.10.2001, p.5] and should therefore undertake all the necessary steps to be able to ratify them.

3) LEGAL ELEMENTS OF THE PROPOSAL

- **Summary of the proposed action**

Articles 66, 179 and 181a TEC are added to the legal bases of the proposals for a Council Decision on the conclusion of the Smuggling Protocol and the Trafficking Protocol and the relevant adjustments to the textual description of Community competence are made in the declaration of competence which is annexed to the Decisions.

- **Legal basis**

Articles 62 point 2, 63 point 3, 66, 179, 181a and 300 TEC

- **Subsidiarity principle**

The proposal falls under the exclusive competence of the Community. The subsidiarity principle therefore does not apply.

- **Proportionality principle**

The proposal complies with the proportionality principle for the following reason(s).

It is only by adoption of a Council Decision on the conclusion of the Smuggling Protocol and the Trafficking Protocol that the European Community can become a party to these international agreements.

The provisions of the Smuggling Protocol and the Trafficking Protocol are generally consistent with the relevant Community acquis in the fields of immigration and external borders.

- **Choice of instruments**

Proposed instruments: other.

Other means would not be adequate for the following reason(s).

There is no alternative to the proposed Council Decisions in order to achieve the objective of conclusion of these Protocols on behalf of the European Community.

4) BUDGETARY IMPLICATION

The proposal has no implication for the Community budget.

Amended 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

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, **66, 179 and 181a** 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,
- (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)~~ Pursuant to Article 1 [Article 3] of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom and Ireland [are] [are not] participating in the adoption of this decision and, consequently, [will] [will not] be

¹ OJ, p.

² OJ, p.

³ OJ L 30 of 1.2.2001, p. 44

bound by 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,** as part of the Community,

- (76) 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~~ **fall within the scope of Part III, Title IV of the Treaty establishing the European Community,** as part of the Community,
- (87) The conclusion of the Convention was approved on behalf of the European Community by Council Decision (.../.../EC) of ...⁴ which is a condition for the European Community to become a Party to the Protocol, pursuant to Article 37 (2) of the Convention,
- (98) 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,
- (109) The Protocol should be approved to enable the Community to become a party to it within the limits of its competence,
- (110) 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,

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.

⁴ OJ , p.

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 I will include the text of the Protocol.

ANNEX II

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 specifying the matters governed by the Protocol in respect of which competence has been transferred to the organisation by its Member States which are Parties to the Protocol.

The Protocol against the smuggling of migrants by land, air and sea 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 1 [Article 3] of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom and Ireland [will not] [will] be bound by 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,** as part of the Community. Consequently this declaration [is not] [is] applicable to the territories of the United Kingdom and Ireland.

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~~ **fall within the scope of Part III, Title IV of the Treaty establishing the European** Community ~~competence,~~ as part of the Community.

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. In accordance with the provision referred to above, this declaration indicates the competence that the Member States have transferred to the Community under the Treaties in matters governed by the Protocol. 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.

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. **Moreover, it can take measures to ensure cooperation between the relevant departments of the administrations of the Member States, as well as between those departments and the Commission, in the aforementioned areas.** 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 organisation.

In addition, Community policy in the sphere of development cooperation complements policies pursued by Member States and includes provisions to prevent and combat smuggling of migrants.

Amended proposal for a

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

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, **66, 179 and 181a** 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,⁵

Having regard to the opinion of the European Parliament⁶,

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 2000⁷,
- (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)~~ Pursuant to Article 1 [Article 3] of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom and Ireland [are] [are not] participating in the adoption of this decision and, consequently, [will] [will not] be bound by 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**, as part of the Community,

⁵ OJ, p.

⁶ OJ, p.

⁷ OJ L 30 of 1.2.2001, p. 44

- (76) 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~~ **fall within the scope of Part III, Title IV of the Treaty establishing the European Community**, as part of the Community,
- (87) The conclusion of the Convention was approved on behalf of the European Community by Council Decision (.../.../EC) of ...⁸ which is a condition for the European Community to become a Party to the Protocol, pursuant to Article 37 (2) of the Convention,
- (98) 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,
- (109) The Protocol should be approved to enable the Community to become a party to it within the limits of its competence,
- (1110) 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,

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*

⁸ OJ , p.

ANNEXES

ANNEX I will include the text of the Trafficking Protocol.

ANNEX II

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 specifying the matters governed by the Protocol in respect of which competence has been transferred to the organisation by its Member States which are Parties to the Protocol.

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 1 [Article 3] of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom and Ireland [will not] [will] be bound by 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,** as part of the Community. Consequently this declaration [is not] [is] applicable to the territories of the United Kingdom and Ireland.

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~~ **fall within the scope of Part III, Title IV of the Treaty establishing the European** Community ~~competence,~~ as part of the Community.

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. In accordance with the provision referred to above, this declaration indicates the competence that the Member States have transferred to the Community under the Treaties in matters governed by the Protocol. 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.

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. **Moreover, it can take measures to ensure cooperation between the relevant departments of the administrations of the Member States, as well as between those departments and the Commission, in the aforementioned areas.** 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 organisation.

In addition, Community policy in the sphere of development cooperation complements policies pursued by Member States and includes provisions to prevent and combat trafficking in persons.