COUNCIL OF EUROPE CONSEIL DE L'EUROPE

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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

Draft Explanatory Report to the

draft Council of Europe Convention against Trafficking in Human Organs

with comments by delegations appearing in track changes

Document prepared by the CDPC Secretariat
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1. The Committee of Ministers of the Council of Europe took note of this Explanatory Report at its meeting held at its Deputies' level, on…

2. The text of this Explanatory Report does not constitute an instrument providing an authoritative interpretation of the Convention, although it might be of such a nature as to facilitate the application of the provisions contained therein.

Introduction

3. The existence of a world-wide illicit trade in human organs for the purposes of transplantation is a well-established fact, and various means have been adopted, both at national and international levels, to counter this criminal activity, which presents a clear danger to both individual and public health and is in breach of human rights and fundamental freedoms and an affront to the very notion of human dignity and personal liberty.

4. Hence, both the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime (2000) and the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197) of 16 May 2005 contain provisions criminalising the trafficking in human beings for the purpose of the removal of organs.

5. Furthermore, the Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (CETS No.164) of 4 April 1997 prohibits, in its Article 21, that the human body and its parts, as such, give rise to financial gain. This prohibition is developed in the Additional Protocol to the Convention on Human Rights and Biomedicine concerning the Transplantation of Organs and Tissues of Human Origin (CETS No. 186) of 24 January 2002 which explicitly prohibits organ trafficking in its Article 22. In accordance with Article 26 of the aforesaid Additional Protocol, States Parties should provide for appropriate sanctions to be applied in the event of infringement of the prohibition.

6. In 2008, the Council of Europe and the United Nations agreed to prepare a “Joint Study on trafficking in organs, tissues and cells (OTC) and trafficking in human beings for the purpose of the removal of organs”. This Joint Study, which was published in 2009, identified a number of issues related to the trafficking in human organs, tissues and cells which deserved further consideration, in particular the need to distinguish clearly between trafficking in human beings for the purpose of the removal of organs and the trafficking in human organs *per se*; the need to uphold the principle of prohibition of making financial gains with the human body or its parts; the need to promote organ donation; the need to collect reliable data on

trafficking in organs, tissues and cells, as well as the need for an internationally agreed definition of trafficking in organs, tissues and cells.

7. Most importantly, the Joint Study contained a recommendation to elaborate an international legal instrument setting out a definition of trafficking in organs, tissues and cells (OTC) and the measures to prevent such trafficking and protect the victims, as well as the criminal law measures to punish the crime.

8. Against this background, the Committee of Ministers on 16 November 2010 decided to invite the European Committee on Crime Problems (CDPC), the Steering Committee on Bioethics (CDBI) and the European Committee on Transplantation of Organs (CD-P-TO) to identify the main elements that could form part of an international binding legal instrument and report back to the Committee of Ministers by April 2011.

9. In their report of 20 April 2011, the three aforesaid Steering Committees underlined that "trafficking in human organs, tissues and cells is a problem of global proportions that violates basic human rights and fundamental freedoms and constitutes a direct threat to individual and public health". The above mentioned three Committees further pointed out that "despite the existence of two international legal binding instruments *[namely the aforesaid UN Trafficking Protocol and the CoE Trafficking Convention]*, important loopholes, that are not sufficiently addressed by these instruments, continue to exist in the international legal framework".

10. In particular, the three Steering Committees came to the conclusion that existing international legal instruments "only address the scenario where recourse is had to various coercive or fraudulent measures to exploit a person in the context of the removal of organs, but do not sufficiently cover scenarios, in which the donor has – adequately – consented to the removal of organs or – for other reasons – is not considered to be a victim of trafficking in terms of the [….] conventions".

11. The three Steering Committees therefore proposed for the Council of Europe to elaborate a binding international criminal law convention against trafficking in human organs, possibly also covering tissues and cells, to fill the gaps in existing international law.

12. By decisions of 6 July 2011, and 22–23 February 2012, respectively, the Committee of Ministers established the ad-hoc Committee of Experts on Trafficking in Human Organs, Tissues and Cells (PC-TO) and tasked it with the elaboration of a draft criminal law convention against trafficking in human organs, and, if appropriate, a draft additional protocol to the aforesaid draft criminal law convention against trafficking in human tissues and cells.

13. The PC-TO held a total of four meetings in Strasbourg, on 13–16 December 2011, on 6–9 March, on 26–29 June, and on 15–19 October 2012 and elaborated a preliminary draft Convention against Trafficking in

Human Organs. **It decided not to proceed with the drafting of an additional protocol on Tissues and Cells and recommended these issues be dealt in the future.**

Portugal:

Portugal agrees with this.

Switzerland:

~~It decided not to proceed with the drafting of an additional protocol on Tissues and Cells and recommended these issues be dealt in the future.~~

Rationale:

We would suggest to delete the last phrase of this para. We are not aware of a clear and specific decision of the PC-TO about dealing with the issue of tissues and cells at a later stage. By omitting such language now, the CoE and its member states remain free to come back to this issue later on.

~~13.~~14. The draft text of the Convention was finalised by the European Committee on Crime Problems (CDPC), **which adopted it** at its plenary meeting, 4 – 7 December 2012.

Belgium:

~~13.~~ 14.The draft text of the Convention was finalised **(traduit en FR par "mise au point"; mieux de dire "finalisé" en FR aussi)** by the European Committee on Crime Problems (CDPC), **which adopted it** at its plenary meeting, 4 – 7 December 2012.

Preamble

Commentary to the preamble:

~~14.~~15. The preamble describes the purpose of the Convention, namely to contribute in a significant manner to the eradication of trafficking in human organs by preventing and combating this crime, in particular through the introduction of new offences supplementing the existing international legal instruments in the field of trafficking of human beings for the purpose of the removal of organs.

~~15.~~16. The preamble underlines that in the application of the provisions of the Convention covering substantive criminal law, due consideration should be given to the purpose of the Convention and to the principle of proportionality.

~~16.~~17. Specific reference is made in the preamble to the following legal acts of the United Nations and the Council of Europe:

- The Universal Declaration of Human Rights (1948);
- The Convention for the Protection of Human Rights and Fundamental Freedoms (1950);
- The Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (1997);
- The Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin (2002);
- The Protocol to Prevent, Suppress and Punish Trafficking in Person, especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime (2000);
- The Council of Europe Convention on Action against Trafficking in Human Beings (2005).

Belgium:

NB : On a oublié de citer les directives UE teh et organes, dans le préambule, à l'instar de la Convention de Varsovie de 2005 !
(on reprend pourtant ici la définition d'organes de la directive de 2010)

Chapter I – Purpose, scope and use of terms

Article 1 – Purpose

~~17.~~18. Paragraph 1 sets out the purposes of the Convention, which are to prevent and combat the trafficking in human organs, to protect the rights of victims and to facilitate co-operation at both national and international levels on action against trafficking in human organs.

~~18.~~19. Paragraph 2 provides for the establishment of a specific follow-up mechanism (Articles 23–25) in order to ensure an effective implementation of the Convention.

Article 2 – Scope and use of terms

~~19.~~20. Article 2, paragraph 1, defines the scope of the Convention as applying to the illicit removal and trafficking in human organs for purposes of transplantation or other purposes.

Belgium:

20. Article 2, paragraph 1, defines the scope of the Convention as applying to the illicit removal and trafficking in human organs for purposes of transplantation or other purposes, **and to other forms of illicit removal and of illicit implantation.**

Rationale:

The negotiators decided that the notion of trafficking in organs covers all the conducts (and their attempt) of illicit removal provided in Article 4(1), of implantation/use of illicitly removed organs provided in Article 5, and the other conducts (and their attempt) provided in Articles 7 and 8. For further explanation on the concept of TO, see point….[=the point on the definition of TO]. The expression "other forms of illicit removal and of illicit implantation" refers only to actions covered by Article 4(4) and Article 6. These conducts must not per se be qualified as trafficking in organs.

Denmark:

The wording of this paragraph should be adjusted to the new wording of article 2, para. 1

Germany

Article 2, paragraph 1, defines the scope of the Convention as applying to the illicit removal and trafficking in human organs for purposes of transplantation or other purposes. **The legal trade with medicinal products, manufactured from human organs or parts of human organs (such as advanced therapy medicinal products), is not covered by the the Convention and shall not be restricted by it.**

Belgium:

Belgium agrees to the German proposal.

Ireland:

Ireland supports Germany's proposal:

Rationale:

"… because of the existence of the Regulation (EC) No 1394/2007 of the European Parliament and of the Council of 13 November 2007 on advanced therapy medicinal products."

Poland :

Article 2, paragraph 1, defines the scope of the Convention as applying to the illicit removal and trafficking in human organs for purposes of transplantation or other purposes. ~~**The legal trade with medicinal products, manufactured from human organs or parts of human organs (such as advanced therapy medicinal products), is not covered by the the Convention and shall not be restricted by it.**~~

Rationale:

Poland if of the opinion that wording of art. 1, para. 1. clearly indicates that provisions of the convention should apply to removal and trafficking in human organs until those organs are processed into other products (e.g. Advanced Therapy Medicinal Products). Therefore, there is no need for further clarification

Portugal:

Portugal supports Germany's proposal.

21. The negotiators of the Convention decided to use the term "other purposes" as a general reference to any purpose other than transplantation, for which organs illicitly removed from a donor could now, or in the future, be used.

Belgium, France and Italy

The negotiators of the Convention decided to use the term "other purposes" **to include in the scope of the Convention** to any purpose other than transplantation, for which organs illicitly removed from a donor could now, or in the future, be used. **Concerning what constitutes the term "other purposes", the negotiators identified, in particular, scientific research and the use of organs to collect tissue and cells, such as the use of heart valves from a heart illicitly removed, or the use of cells from a organ illicitly removed organ for cell therapy. But taking into account, inter alia, the progress of scientific research and the future developments in the use of organs for purposes other than implantation, the negotiators decided to leave this open. Consequently, this list of examples is not exhaustive.**

Belgium:

This insertion is very important for Belgium.

Germany:

Germany does not support the additional comments made by Belgium, France and Italy in respect of the term "other purposes". If according to these comments "other purposes" also constitute the use of tissues and cells derived from organs, this no longer falls under the scope of the convention. The scope of the convention is confined to human organs as defined in Article 2 para. 2, second indent. It is necessary to have a clear distinction between organs on the one hand and tissues and cells on the other hand as is also reflected in the two EU-Directives on Organs (2010/53/EU) and on Tissues and Cells (2004/23/EC).

~~**Denmark:**~~

~~**The negotiators decided that "other forms of illicit removal and of illicit implantation" refers only to actions covered by Articl 4(4) and Article 6.**~~

Denmark:

The negotiators decided that "other forms of illicit removal and of illicit implantation" refers only to actions covered by Article 4(4) and Article 6.

Rationale:

The abovementioned reach of the wording "other forms of illicit removal and of illicit implantation" was stated by the Secretariat during the Plenary.

Denmark finds that the reach of the wording "other forms of illicit removal and of illicit implantation" in itself can be unclear. Denmark therefore finds the suggested wording important as it will enhance the clarity of the scope of the Convention.

Belgium:

~~**Denmark:**~~

~~**The negotiators decided that "other forms of illicit removal and of illicit implantation" refers only to actions covered by Articl 4(4) and Article 6.**~~

Rationale:

Proposal of Denmark put in point 20 and slightly changed

Germany:

The clarification made by Denmark may need further elaboration in the text of the convention itself.

Finland:

Finland would prefer the text by the secretariat in comparison to the Belgian, French and Italian proposals and can support Danish proposal.

Portugal:

Portugal strongly supports this clarification.

Sweden:

Sweden supports Danish amendment.

Added after the CDPC Plenary

~~20.~~22. **Article 2, paragraph 2, provides two definitions which are applicable throughout the Convention.**

Definition of "trafficking in human organs"

~~21.~~23. Given the complexity of the criminal actions comprising "trafficking in human organs", involving different actors and different criminal acts, the negotiators of the Convention considered it less useful to attempt to formulate an all-encompassing definition of the crime to serve as a basis for specifying the description of the offences in Chapter II of the Convention. Instead, the various provisions contained in Chapter II of the Convention, on "Substantive Criminal Law", enumerate one or more criminal acts which, whether committed on their own or in conjunction with one another, all constitute trafficking in human organs. Nevertheless, the negotiators considered it necessary to refer to "trafficking in human organs" as a comprehensive phenomenon in other parts of the Convention. Accordingly, Article 2, paragraph 2, contains such a definition of "trafficking in human organs", which essentially consists of a reference to the substantive criminal law provisions setting out the different criminal acts constituting "trafficking in human organs".

Belgium:

~~21~~.23. Given the complexity of the criminal actions comprising "trafficking in human organs", involving different actors and different criminal acts, the negotiators of the Convention considered it less useful to attempt to formulate an all-encompassing definition of the crime to serve as a basis for specifying the description of the offences in Chapter II of the Convention. Instead, ~~the various~~ the mandatory (**in FR, "les dispositions contraignantes")** provisions contained in Chapter II of the Convention, on "Substantive Criminal Law", enumerate ~~**one or more**~~ **the** criminal acts which, whether committed on their own or in conjunction with one another, all constitute trafficking in human organs. Accordingly, Article 2, paragraph 2, contains such a definition of "trafficking in human organs", which ~~essentially~~ consists of a reference to the substantive criminal law provisions setting out the different criminal acts constituting "trafficking in human organs". Nevertheless, the negotiators considered it necessary to refer to "trafficking in human organs" as a comprehensive phenomenon in other parts of the Convention in Articles 21 and 22 on prevention measures. **Accordingly, ~~Article 2, paragraph 2, contains such a definition of "trafficking in human organs", which essentially consists of a reference to the substantive criminal law provisions setting out the different criminal acts constituting "trafficking in human organs".~~**

Rationale:

Passage du Secretariat déplacé et légèrement modifié.

Germany:

Germany does not support the definition of "trafficking in human beings" as has been proposed because it is not a definition of the term

itself. Germany therefore proposes following wording for the last sentence:
"Accordingly, Article 2, paragraph 2, contains such a definition of "trafficking in human organs", which essentially consists of a reference to the substantive criminal law provisions setting out the different criminal acts constituting "trafficking in human organs".

Definition of "human organ"

~~22.~~24. As regards the definition of "human organ", the negotiators decided to take over the internationally recognised definition used by the European Union in Article 3, letter (h), of its "Directive 2010/53/EU of the European Parliament and of the Council of 7 July 2010 on standards of quality and safety of human organs intended for transplantation".

Article 3 – Principle of non-discrimination

~~23.~~25. This article prohibits discrimination in Parties' implementation of the Convention and in particular in enjoyment of measures to protect and promote victims' rights. The meaning of discrimination in Article 3 is identical to that given to it under Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

~~24.~~26. The concept of discrimination has been interpreted consistently by the European Court of Human Rights in its case law concerning Article 14 ECHR. In particular, this case law has made clear that not every distinction or difference of treatment amounts to discrimination. As the Court has stated, for example in the *Abdulaziz, Cabales and Balkandali v. the United Kingdom* judgment, "a difference of treatment is discriminatory if it 'has no objective and reasonable justification', that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised".

~~25.~~27. The list of non-discrimination grounds in Article 3 is based on that in Article 14 ECHR and the list contained in Article 1 of Protocol No. 12 to the ECHR. However, the negotiators wished to include also the non-discrimination grounds of age, sexual orientation, state of health and disability. "State of health" includes in particular HIV status. The list of non-discrimination grounds is not exhaustive, but indicative, and should not give rise to unwarranted a contrario interpretations as regards discrimination based on grounds not so included. It is worth pointing out that the European Court of Human Rights has applied Article 14 to discrimination grounds not explicitly mentioned in that provision (see, for example, as concerns the ground of sexual orientation, the judgment of 21 December 1999 in *Salgueiro da Silva Mouta v. Portugal*). The reference to "or other status" could refer, for example, to members of refugee or immigrant populations

~~**Denmark:**~~

~~The list of non-discrimination grounds in Article 3 is based on that in Article 14 ECHR and the list contained in Article 1 of Protocol No. 12 to the ECHR. However, the negotiators wished to include also the non-discrimination grounds of age, sexual orientation, state of health and disability. "State of health" includes in particular HIV status. The list of non-discrimination grounds is not exhaustive, but indicative, and should not give rise to unwarranted a contrario interpretations as regards discrimination based on grounds not so included. It is worth pointing out that the European Court of Human Rights has applied Article 14 to discrimination grounds not explicitly mentioned in that provision (see, for example, as concerns the ground of sexual orientation, the judgment of 21 December 1999 in *Salgueiro da Silva Mouta v. Portugal*). The reference to "or other status" could refer, for example, to members of refugee or immigrant populations~~ **present in the territory of the Contracting Party ~~in question.~~**

Rationale:

Denmark withdraws the proposal (but can support it if other countries express a wish for it).

Belgium :

Belgium agrees with this proposal.

Portugal:

Portugal supports Danish proposal.

Chapter II – Substantive Criminal Law

28. Chapter II contains the substantive criminal law provisions of the Convention. It should be noted that each of the criminal acts set out in Articles 4–9, on their own or in conjunction with one another, all constitute "trafficking in human organs", cf. Article 2, paragraph 2. It is clear from the wording of the provisions, that Parties are only obliged to criminalise the acts set out in them, if they are committed intentionally. The interpretation of the word "intentionally" is left to domestic law, but the requirement for intentional conduct relates to all the elements of the offence. As always in criminal law conventions of the Council of Europe, this does not mean that Parties would not be allowed to go beyond this minimum requirement by also criminalising non-intentional acts. The negotiators decided to leave it open for Parties to decide whether to apply Article 4, paragraphs 1 and 3, Articles 5, 6, 7 and 9 to the donor or the recipient or both. There is thus no legal obligation to apply these provisions to the donor and the recipient, whereas e.g. the surgeon carrying out the transplantation will always be covered by the criminalisation obligation.

Belgium :

Chapter II contains the substantive criminal law provisions of the Convention. **Most of the criminal acts set out in Articles 4 to9 constitute "trafficking in organs" as already explained about Article 2, paragraph 2. ~~It should be noted that each of the criminal acts set out in Articles 4–9, on their own or in conjunction with one another, all constitute "trafficking in human organs", cf. Article 2, paragraph 2.~~** It is clear from the wording of the provisions, that Parties are only obliged to criminalise the acts set out in them, if they are committed intentionally. The interpretation of the word "intentionally" is left to domestic law, but the requirement for intentional conduct relates to all the elements of the offence. As always in criminal law conventions of the Council of Europe, this does not mean that Parties would not be allowed to go beyond this minimum requirement by also criminalising non-intentional acts.

Belgium:

The negotiators decided to leave it open for Parties to decide whether to apply Article 4, paragraphs 1 and ~~**34**~~, Articles 5, 6, 7 and 9 to the donor or the recipient or both. There is thus no legal obligation **for the States** to apply these provisions to the donor and the recipient, whereas e.g. the surgeon carrying out the removal ~~**transplantation**~~ will always be covered by the criminalisation obligation.

Rationale:

J'en ferais un point à part pour attirer l'attention dessus car ça ne vise pas l'élément intentionnel de l'infraction dont on vient juste de parler.

Secretariat :

Belgium means that the para 28 should be split in 2 parts, the second starting at "The negociators…"

Denmark:

Chapter II contains the substantive criminal law provisions of the Convention. It should be noted that each of the criminal acts set out in Articles 4–9, on their own or in conjunction with one another, all constitute "trafficking in human organs", cf. Article 2, paragraph 2. It is clear from the wording of the provisions, that Parties are only obliged to criminalise the acts set out in them, if they are committed intentionally. The interpretation of the word "intentionally" is left to domestic law, but the requirement for intentional conduct relates to all the elements of the offence. As always in criminal law conventions of the Council of Europe, this does not mean that Parties would not be allowed to go beyond this minimum requirement by also criminalising non-intentional acts. The negotiators decided to leave it open for Parties to decide whether to apply Article 4, paragraphs 1 and 3, Articles 5, 6, 7 and 9 to the donor **and/**or the recipient or **neither one of them**. There is thus no legal obligation to apply these provisions to the donor and the recipient, whereas

e.g. the surgeon carrying out the transplantation will always be covered by the criminalisation obligation

Rationale:

The articles need to be adjusted in the light of the new definition of trafficking in article 2, para. 2. The amendment is to ensure consistency with the sentence following and to enhance clarity by mentioning all the possible variations.

Finland:

Shouldn't this exclude references to articles 4.4 and 6?

Sweden:

Articles 4(4) and 6 were excluded from the definition of trafficking in human organs, so this needs to be changed.

"…The negotiators decided to leave it open for Parties to decide whether to apply Article 4, paragraphs 1 and 3, Articles 5, 6, 7 and 9 to the donor or the recipient or both…"

Finland:

This should be 4?

Sweden:

Should this be para 3?

United Kingdom:

Chapter II contains the substantive criminal law provisions of the Convention. [It should be noted that each of the criminal acts set out in Articles 4–9, on their own or in conjunction with one another, all constitute "trafficking in human organs", cf. Article 2, paragraph 2.] It is clear from the wording of the provisions, that Parties are only obliged to criminalise the acts set out in them, if they are committed intentionally. "**Intentionally" means that the person commits the act with the knowledge that that act is illegal and commits the act intentionally.** The interpretation of the word "intentionally" **and the degree of knowledge** is left to domestic law, but the requirement for intentional conduct **with knowledge** relates to all the elements of the offence. As always in criminal law conventions of the Council of Europe, this does not mean that Parties would not be allowed to go beyond this minimum requirement by also criminalising non-intentional acts.

Belgium:

OK for Belgium (*sous réserve* des adaptations proposées par la BE au point 28 et au (nouveau) point 29).

Denmark:

Denmark cannot support the UK text suggestions which qualify "intentionally".

As mentioned in the draft text the interpretation of the word "intentionally" is left to domestic law. Because of that Denmark sees no need for the suggested definition (which may collide with domestic law). When implementing the Convention, UK can uphold the suggested interpretation of "intentionally", even without the suggested amendments to the Explanatory Report.

Finland:

Finland cannot accept this proposal. The contents of the word "intentional" should be left to be defined in domestic legislation as already said in the text of the Secretariat.

Ireland:
Ireland supports UK's proposed amendment of paragraph 28 on the basis of advice from our Attorney General's Office.

Poland:

Poland:

Poland is of the opinion that it is not appropriate to refer to the issue of intentionality in the report.

Wording of criminal provisions of the Convention dose not depart from other CoE conventions.

Portugal:

Portugal supprts UK'propseal, especially suppression of the comment in brackets.

Sweden:

Sweden cannot accept UK's proposal.

Rationale:

Intent has different meaning in different legal systems, and the proposed definition conflicts with our notion of intent. We should not attempt to define the term.

Switzerland:

~~United Kingdom:~~

~~Chapter II contains the substantive criminal law provisions of the Convention. [It should be noted that each of the criminal acts set out in Articles 4–9, on their own or in conjunction with one another, all constitute "trafficking in human organs", cf. Article 2, paragraph 2.] It is clear from the wording of the provisions, that Parties are only obliged to criminalise the acts set out in them, if they are committed intentionally. "Intentionally" means that the person commits the act with the knowledge that that act is illegal and commits the act intentionally. The interpretation of the word "intentionally" and the degree of knowledge is left to domestic law, but the requirement for intentional conduct with knowledge relates to all the elements of the offence. As always in criminal law conventions of the Council of Europe, this does not mean that Parties would not be allowed to go beyond this minimum requirement by also criminalising non-intentional acts.~~

Rationale:

This Para should be deleted, because it seems to be self-evident and superfluous.

~~26.~~29. The negotiators took note that a number of States would – under any circumstances – refrain from prosecuting organ donors for committing these offences. Other States have indicated that organ donors could under their domestic law, under certain conditions, also be considered as having participated in, or even instigated, the trafficking in human organs. As the provisions are formulated, it is left to the discretion of Parties, in accordance with their domestic law, to decide whether or not, organ donors should be subject to prosecution.

Belgium:

To add the following precision in point 29 of the explanatory report:

The negotiators have chosen not to include the purpose of implantation or other purposes as an element of the offence, to avoid the proof of the purpose of the removal.

Comments:
A precision on the elements of the offence of removal of art.4 §1, is also added in the ER to reflect the discussions.

~~**Belgium:**~~

~~To add the following precision in point 29 of the explanatory report:~~

~~**The negotiators have chosen not to include the purpose of implantation or other purposes as an element of the offence, to avoid the proof of the purpose of the removal.**~~

~~Comments:~~
~~A precision on the elements of the offence of removal of art.4 §1, is also added in the ER to reflect the discussions.~~

~~**Poland:**~~

~~To include the following paragraph after point 29:~~

~~**The wording "removal being authorised under its domestic system" set out in Article 4 paragraph 1 letter a. covers inter alia those legal solutions as provided for under national law where they are based on implicit consent of the deceased person or they entitle the relatives of the deceased person to take the decision thereof.**~~

Rationale:

Proposition BE et Proposition POL déplacées sous l'art.4

Germany:

Germany does not support this additional commentary proposed by Belgium taking into account the possibility of making a reservation according to Article 30 para. 3.

Finland:

Finland objects this proposal. The idea is ok, but for a person who has not been participating in the negotiations this text will most likely just create confusion.

Ireland:

Ireland is not in favour of this proposal though it would not strongly oppose it.

Portugal:

Portugal agrees to this insertion.

Poland:

To include the following paragraph after point 29:

The wording "removal being authorised under its domestic system" set out in Article 4 paragraph 1 letter a. covers inter alia those legal solutions as provided for under national law where they are based on

implicit consent of the deceased person or they entitle the relatives of the deceased person to take the decision thereof.

Rationale:

Poland proposes to place this remark (with some minor changes) as point 34 – as it refers to the definition of the authorised removal.

Ireland:

Ireland is not in favour of this proposal though it would not strongly oppose it.

Portugal:

Portugal agrees to this insertion.

Switzerland:

Shouldn't the proposal of Poland be included under article 4?

~~27.~~30. The negotiators wished to stress that the obligations contained in this Convention do not require Parties to take measures that run counter to constitutional rules or fundamental principles relating to the freedom of the press and the freedom of expression in other media.

Article 4 – Illicit removal of human organs

~~28.~~31. Article 4, paragraph 1, letters a – c, obliges Parties to the Convention to establish as a criminal offence the removal of human organs from living or deceased donors in the following cases: lack of a free, informed and specific consent by the donor or of authorisation by the domestic law of the Party in question (letter a); a financial gain or comparable advantage has been offered or received in exchange for the removal of organs from a living donor (letter b), or a deceased donor (letter c). Though the illicit removal of human organs may in practice involve elements of all the acts described in letters a – c, it is enough that one of the three conditions are fulfilled to establish that the crime described in Article 4, paragraph 1, has been committed.

Belgium:

To add the following precision in point 29 of the explanatory report:

The negotiators have chosen not to include the purpose of implantation or other purposes as an element of the offence, to avoid the proof of the purpose of the removal.

Comments:

A precision on the elements of the offence of removal of art.4 §1, is also added in the ER to reflect the discussions.

Rationale:

VERY IMPORTANT FOR BE. (Proposal of Belgium has to be put here).

Added after the CDPC Plenary

32. **The negotiators considered that, as a general principle, the concept of consent included in the present Convention should be identical as the one expressed in the *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine* (CETS No. 164). The Explanatory Report of that Convention described the consent as following: "The donor's consent is considered to be free and informed if it is given on the basis of objective information from the responsible health care professional as to the nature and the potential consequences of the planned intervention or of its alternatives, in the absence of any pressure from anyone.**

Belgium:

The donor's consent is considered to be free and informed if it is given on the basis of objective information from the responsible health care professional as to the nature and the potential consequences of the planned intervention or of its alternatives, in the absence of any pressure from anyone.

Finland:

(Referring to the word "donor") Should this be changed to "patient" as this is a direct quotation?

Sweden:

Since this is a direct quotation, "donor's" should be changed to "patient's" for full correspondence with the quoted text.

33. **Consent may take various forms. It may be express or implied. Express consent may be either verbal or written. Article 4, paragraph 1, letter a, which is general and covers very different situations, does not require any particular form. The latter will largely depend on the nature of the intervention. It is agreed that express consent would be inappropriate as regards many routine medical acts. The consent is therefore often implicit, as long as the person concerned is sufficiently informed. In some cases, however, for example invasive diagnostic acts or treatments, express consent may be required.**

Belgium:

~~Consent may take various forms. It may be express or implied. Express consent may be either verbal or written. Article 4, paragraph 1, letter a, which is general and covers very different situations, does not require any particular form. The latter will largely depend on the nature of the intervention. It is agreed that express consent would be inappropriate as regards many routine medical acts. The consent is therefore often implicit, as long as the person concerned is sufficiently informed. In some cases, however, for example invasive diagnostic acts or treatments, express consent may be required.~~

Rationale:

Here we are speaking about removal of organs! Better not to mention the explanation on implied consent of Oviedo.

Germany:

This commentary does not seem consistent with the idea of a "specific consent" as referred to under point 35. Both aspects should be merged with emphasis being made on the term "specific". The third, fourth and fifth sentences should be deleted.

Poland:

Poland supports the remarks in pp 32, 33 added after the CDPC plenary.

Point 33. refers to implicit consent, but it is utmost important to emphasise that removal of an organ from deceased person can be authorised also solely on the basis of implied consent of that person – as he/she didn't oppose the removal of those organs after his/her death (having that possibility under domestic regulations).

Sweden:

Perhaps Article 19 of the Oviedo Convention and Article 13 of its Protocol on Transplantation would be a better point of departure for this paragraph and the following?

34. Freedom of consent implies that consent may be withdrawn at any time and that the decision of the person concerned shall be respected once he or she has been fully informed of the consequences.

Belgium:

Freedom of consent implies that consent may be withdrawn at any time and that the decision of the person concerned shall be respected once he or she has been fully informed of the consequences.

Rationale:

Sur le passage en vert (= la citation d'Oviedo) :
-Il manqué les guillemets de fin (présents dans la version FR).
- la numérotation dans notre rapport explicatif, des passages cités d'Oviedo, induit le lecteur en erreur, faisant penser que c'est nous qui avons rédigé ces passages.
-Plus important : il faut réduire la citation car, dans notre txt, il ne s'agit que d'actes invasifs par définition ; un consentement implicite pour les donneurs vivants est insuffisant. Je bifferais donc le §34.

> ~~29.~~35. **As regards the term "specific", this means that the consent must be clearly given with regard to the removal of a "specific" organ, precisely identified.**

Belgium:

Poland :

To include the following paragraph after point 29:

The wording "removal being authorised under its domestic system" set out in Article 4 paragraph 1 letter a. covers inter alia those legal solutions as provided for under national law where they are based on implicit consent of the deceased person or they entitle the relatives of the deceased person to take the decision thereof.

Rationale:

Comment of Poland has to be put here.

> **Finland:**
>
> **This seems to be quite a limited interpretation especially regarding deceased donors.**
>
> **Ireland:**
>
> **Ireland is not convinced as to the need for these additional paragraphs.**
>
> **Poland supports the remarks in pp 34, 35 added after the CDPC plenary.**
>
> **Sweden:**
>
> **This seems a rather narrow interpretation, as a donor's consent may be specific also in other ways, e.g. by being limited to a specific recipient or a specific purpose (implantation or research). Furthermore, consent by deceased donors given before death is seldom limited to specific organs.**
>
> **Switzerland:**

~~**35. As regards the term "specific", this means that the consent must be clearly given with regard to the removal of a "specific" organ, precisely identified.**~~

Rationale:

A comprehensive donation ("all my organs") must remain legally permitted, that's why Para 35 is to be deleted.

36. Article 4 paragraph 2 provides for a reservation to the general rule of establishing as a criminal offence conducts referred to in paragraph 1 letter a. The reservation is restrictive, limited to living donors and only to exceptional cases. Certain delegations requested to introduce such a reservation to cover exceptional cases in which the person from whom the organ is removed is not capable of providing consent, as established in paragraph 1.a. This is the case for example for children, people with mental disabilities, or any other person under a tutorship. These states wanted to foresee that in such exceptional cases, consent may be given by other authorised persons or even, by other competent institutions (e.g. courts of law), for the person concerned, in accordance with the safeguards and provisions of internal law.

Germany:

Germany does not support the possibility of making a reservation with respect to an exemption from the consent rule.

Ireland:

The continued inclusion of this paragraph is very important for Ireland.

Sweden:

Sweden proposes that the following changes to the beginning of the last sentence: "These states wanted to foresee that in such exceptional cases, consent may be given by other authorised persons or even, by other competent institutions (e.g. courts of law) and/or authorised persons), […]"

Rationale:

The amended text makes clear that the fact that a donor is unable to consent does not in itself make the case an exceptional one. It also gives a more faithful description of the procedures used, which, as far as we know, always involve a competent institution (with possible additional requirements of consent being given by an authorised person etc.).

United Kingdom

Article 4 paragraph 2 provides for a reservation to the general rule of establishing as a criminal offence conduct referred to in paragraph 1 letter a. The reservation is restrictive, limited to living donors and only to exceptional cases. Certain delegations requested such a reservation to cover exceptional cases in which the person from whom the organ is removed is not capable of providing consent, as established in paragraph 1.a. This is the case for example for children **and people who lack mental capacity at the relevant time.** These States wanted to **provide** that in such exceptional cases, consent may be given by other authorised persons **or provided for** by other competent institutions (e.g. courts of law), for the person concerned, in accordance with the safeguards and provisions of internal law.

Rationale:

As drafted, the text refers to 'people with mental disabilities.' Such people may not necessarily lack mental capacity. In addition, we would seek inclusion of the words, 'people who lack mental capacity at the relevant time' in order to capture situations where a person may not necessarily lack mental capacity permanently but rather at a particular point in time.

~~30.~~37. Article 4, paragraph 3, specifies that the expression of "financial gain or comparable advantage" as used in in paragraphs 1, b and c does not include compensation for loss of earnings and any other justifiable expenses caused by the removal of an organ or the related medical examinations, or compensation in case of damage which is not inherent to the removal or organs. The negotiators considered it necessary to include this wording, which is taken from the Additional Protocol (CETS No. 186) to the Oviedo Convention (CETS No. 164) concerning Transplantation of Organs and Tissues of Human Origin, in order to clearly distinguish the lawful compensation to organ donors in certain cases from the prohibited practice of making financial gains with the human body or its parts.

38. The financial gain or comparable advantage should be understood in a broad context. The gain can be offered to the donor or third person, directly or through intermediaries. Nevertheless, an organ received in a context of pooled or chain donations, if foreseen in domestic law, does not constitute a comparable advantage.

United Kingdom:

…The financial gain or comparable advantage should be understood in a broad context. The gain can be offered to the donor or third person, directly or through intermediaries. ~~**Nevertheless, an organ received in a context of pooled or chain donations, if foreseen in domestic law, does not constitute a comparable advantage.**~~ **The expression "financial gain or comparable advantage" does not apply to an arrangement that is authorised under domestic law such as arrangements for paired or pooled donation.**

Belgium:

We preferred the current version (proposed by Belgium to meet the concern of UK on paired or pooled donation).

The proposal of UK used the words "arrangements authorised (…) such as" (which are the other cases?UK only mentioned the paired or pooled donation during the discussions); it could lead to wrong interpretation on an substantial point of the convention (prohibition of removal against remuneration). Formulation too dangerous to us

Ireland:

Ireland supports this proposal.

Portugal:

Portugal supports this proposal.

~~31.~~39. Paragraph 4, obliges Parties to the Convention to consider establishing as a criminal offence the removal of human organs from living or deceased donors, where the removal is performed outside the framework of its domestic transplantation system, or in breach of essential principles of national transplantation laws or rules.

Added after the CDPC Plenary

40. The last sentence of paragraph 4 clarifies that while it is left to each Party to decide whether or not - and if so in which respect - it will establish criminal offences covering the conduct described in this paragraph, and while a Party which decides to establish any such criminal offences is not legally obliged to apply also Articles 9 to 22 to such criminal offences, the Party is called upon to endeavour to do so.

Belgium:

Belgium supports this addition.

Finland:

Finland supports this addition.

Ireland:

Ireland supports this addition.

Secretariat:

This paragraph should go after paragraph 43.

~~32.~~41. The negotiators were not in agreement over the question whether or not it would be appropriate to require Parties to sanction organ removal or implantation, if it is performed "outside of the framework of the domestic transplantation systems", i.e. outside of the system for procurement and transplantation of organs authorised by the competent authorities of the Party in question, and/or in breach of its national transplantation rules or laws. Some States considered that normally any organ removal or transplantation that may be considered to be performed outside of the system (or in breach of transplantation law) would also constitute one of the criminal offences under paragraph 1 of Article 4. Other states did not share this position. Negotiators agreed that it would be appropriate to specifically address these situations in paragraph 4 of Article 4 of the Convention, while recognising that States currently have very different domestic transplantation systems in place, and that the aim of the present Convention is not to harmonise domestic transplantation systems.

~~33.~~42. Similarly, the negotiators recognised that in some States, removal of organs performed outside of the framework of the domestic transplantation system would *per se* not necessarily be considered as more than a regulatory or minor offence, i.e. if the same act does not also fall under paragraph 1 of Article 4.

~~34.~~43. Because of the aforesaid differences in the various domestic transplantation systems and domestic legal systems of States, the negotiators decided to leave a certain margin of appreciation to Parties with regard to whether or not to establish as a criminal offence the removal of organs from living or deceased donors under the conditions described in Article 4, paragraph 4.

Article 5 – Use of illicitly removed organs for purposes of implantation or other purposes than implantation

~~35.~~44. Article 5 obliges the Parties to the Convention to establish as a criminal offence under its domestic law the use of illicitly removed organs – either for implantation or for any other purpose.

~~36.~~45. Concerning what constitutes use of an illicitly removed organ for other purposes than implantation, the negotiators primarily identified scientific research as such a purpose, but taking into account, inter alia, the possibility of future developments in the use of organs for therapeutic purposes other than implantation, decided to leave this open. As in the case of implantation, the obligation for Parties to criminalise the subsequent use of the illicitly removed organ is limited to those situations where the perpetrator acts intentionally.

Germany

Alternative 2 of Article 5 (use of the organ for other purposes) should not apply in cases where an organ has been lawfully removed after the

donor's death for medical purposes but is then used for other (e.g. teaching and research) purposes (for example because the organ turns out to be unsuitable for transplantation) although the expressed consent did not or not fully cover this use.

The same applies to use for other purposes of an organ removed after the donor's death (e.g. for research purposes) where consent was expressed but its scope not clearly specified, for example with regard to the type of research project.

Article 5 is not sufficiently clear in these cases as to whether removal is illicit within the meaning of this Article where consent was expressed for the removal but use is not or not explicitly covered by such consent.
The above cases do not necessitate criminal sanctions.

France, Belgium, Italy

~~**Concerning what constitutes use of an illicitly removed organ for other purposes than implantation, the negotiators primarily identified scientific research as such a purpose, but taking into account, inter alia, the possibility of future developments in the use of organs for therapeutic purposes other than implantation, decided to leave this open**~~. As in the case of implantation, the obligation for Parties to criminalise the subsequent use of the illicitly removed organ is limited to those situations where the perpetrator acts intentionally.

Belgium:

No comment of BE (this change is linked to the proposal of FR, BE and IT under Article 2).

Finland:

Finland prefers Secretariat's version

Added after the CDPC Plenary

~~37.~~46. **In accordance with Article 30, paragraph 3, of the Convention, a Party may decide to limit the application of Article 5 to use for implantation only, or for other uses as specified by that Party.**

Belgium:

Belgium supports this addition.

Belgium:

In accordance with Article 30, paragraph 3, of the Convention, a Party may decide to limit the application of Article 5 to use of illegally removed organs for implantation only, or for other uses as specified by that Party.

Poland:

Poland supports the remark added after the CDPC Plenary.

Article 6 – Implantation of organs outside of the domestic transplantation system or in breach of essential principles of national transplantation law

~~38.~~47. Article 6 obliges Parties to consider establishing as a criminal offence the implantation of organs performed outside of the framework of their domestic transplantation systems, or where the implantation is performed in breach of essential principles of national transplantation laws or rules.

~~39.~~48. As in the case of Article 4, paragraph 4, and for the same reasons, the negotiators preferred to leave a certain margin of appreciation to Parties with regard to whether or not to establish as a criminal offence the implantation of organs from living or deceased donors under the conditions described in Article 6.

Added after the CDPC Plenary

49. The last sentence of Article 6 clarifies that while it is left to each Party to decide whether or not - and if so in which respect - it will establish criminal offences covering the conduct described in this article, and while a Party which decides to establish any such criminal offences is not legally obliged to apply also Articles 9 to 22 to such criminal offences, the Party is called upon to endeavour to do so.

Belgium:

Belgium supports this addition.

Finland:

Finland supports this change in the text.

Ireland:

Ireland supports this change in the text.

Portugal:

Portugal supports this proposal.

Article 7 – Illicit solicitation, recruitment, offering and requesting of undue advantages

Added after the CDPC Plenary

50. Article 7, paragraph 1, applies to the types of illicit conduct described in Article 4, paragraph 1, and Article 6 respectively. The provision does not apply to the type of illicit conduct described in Article 5.

Belgium:

~~**50. Article 7, paragraph 1, applies to the types of illicit conduct described in Article 4, paragraph 1, and Article 6 respectively. The provision does not apply to the type of illicit conduct described in Article 5.**~~

Rationale:

This paragraph has to be deleted. The offence of Art.7, **para.1**, is **autonomous**. **No link is done with the other offences of the Convention.** The conduct of soliciting/recruiting for a benefit (for the broker) has to be criminalised, **even if later, the removal of the implantation is not done.**
If it is done, the removal or the implantation can be illicit (art.4§1, art.4§4, art.5, art.6). **But they can also be licit** (the removal was legal: no remuneration against the removal, the consent of the donor was given, no removal/implantation in violation of the rules of transplantation).

If it should be maintained, the Explanatory Report would not be in conformity to the Convention.

Denmark:

It is not clear what is meant by this paragraph. What is the connection between Article 4 (1) and Article 6? And is Article 7 (1) applicable to Article 4(4) as well?

Ireland:

Perhaps this should read Article 4, paragraph 1 and Article 5.

Portugal:

~~**50.Article 7, paragraph 1, applies to the types of illicit conduct described in Article 4, paragraph 1, and Article 6 respectively. The provision does not apply to the type of illicit conduct described in Article 5.**~~

Rationale:

Portugal defends suppression of this paragraph, which seems to be in contradiction with Article 7, paragraphs 2 and 3.

~~40.~~51. Article 7, paragraph 1, obliges Parties to criminalise the illicit solicitation and recruitment of organ donors and recipients for financial gain or comparable advantage, either for the person soliciting or recruiting or for a

third party. The aim of the provision is thus to criminalise the activities of persons operating as an interface between and bringing together donors, recipients and medical staff. These activities constitute an essential element of the trafficking in human organs. The negotiators considered that advertising is a form of solicitation and therefore decided not to include a specific provision on advertising in Article 7. Instead they decided to introduce in Article 21, paragraph 3 an explicit obligation for States Parties to prohibit the advertising of the need for, or availability of human organs, with a view to offering or seeking financial gain or comparable advantage.

Finland:

(Referring to the expression "advertising is a form of solicitation")
Finland prefers Swedish proposal below (after UK) because it seems more logical).

Belgium:

To replace the previous text by :

Article 7, paragraph 1, obliges Parties to criminalise the illicit solicitation and recruitment of organ donors and recipients for financial gain or comparable advantage, either for the person soliciting or recruiting or for a third party. ~~**The aim of the provision is thus to criminalise the activities of persons operating as an interface between and bringing together donors, recipients and medical staff.**~~ These activities constitute an essential element of the trafficking in human organs. The negotiators considered that advertising is a form of solicitation and therefore decided not to include a specific provision on advertising in Article 7. Instead they decided to introduce in Article 21, paragraph 3 an explicit obligation for States Parties to prohibit the advertising of the need for, or availability of human organs, with a view to offering or seeking financial gain or comparable advantage.

Moreover, the negotiators~~drafters~~ considered that the other activities of persons operating as an interface between and bringing together donors, recipients and medical staff are covered by ~~a~~Article ~~.~~9, paragraph ~~.~~1, (aiding or abetting) combined with the other offences provided by the Convention.

Denmark:

Denmark cannot support the Belgian suggestion.

It is the opinion of Denmark that the text concludes in a way that cannot be done. The question of whether or not an activity will be covered by Article 9 (1) will in each and every case be an individual assessment.

Finland:

Finland can not accept this proposed deletion or the added text at the end. Article 7 was intended to target " the brokers" and this should be clearly stated in the ER. The last sentence would seem to widen the scope of article 9 in a way that it would be impossible to say what sort of acts would be criminalised.

Ireland:

Ireland is not in favour of this proposal.

Sweden:

Sweden cannot accept the proposed deletion, as it is important to point out that the provision was intended to target mainly "brokers". We also oppose the proposed addition, as it is difficult to say for certain that the Convention covers all acts of the type mentioned.

United Kingdom:

Article 7, paragraph 1, obliges Parties to criminalise the illicit solicitation and recruitment of organ donors and recipients for financial gain or comparable advantage, either for the person soliciting or recruiting or for a third party. The aim of the provision is thus to criminalise the activities of persons operating as an interface between and bringing together donors, recipients and medical staff. These activities constitute an essential element of the trafficking in human organs. The negotiators considered that advertising is a form of solicitation and therefore decided not to include a specific provision on advertising in Article 7. Instead they decided to introduce in Article 21, paragraph 3 an explicit obligation for States Parties to prohibit the advertising of and the need for, or availability of human organs, with a view to offering or seeking financial gain or comparable advantage. **However this measure does not prevent activities to recruit donors which are authorised under domestic law**]

Belgium:

Belgium supports this addition.

Ireland:

Ireland is in favour of this proposal as it makes it clear that legitimate campaigns of recruitment are excluded.

Switzerland:

We are in favour of the UK proposal.

Sweden:

[Article 7, paragraph 1, obliges Parties to criminalise the illicit solicitation and recruitment of organ donors and recipients for financial gain or comparable advantage, either for the person soliciting or recruiting or for a third party. The aim of the provision is thus to criminalise the activities of persons operating as an interface between and bringing together donors, recipients and medical staff. These activities constitute an essential element of the trafficking in human organs. ~~**The negotiators considered that advertising is a form of solicitation and therefore decided not to include a specific provision on advertising in Article 7. Instead they decided to introduce in Article 21, paragraph 3 an explicit obligation for States Parties to prohibit the advertising of and the need for, or availability of human organs, with a view to offering or seeking financial gain or comparable advantage**~~.] **It is left to the discretion of Parties, in accordance with their domestic law, to decide whether or not organ donors should be subject to prosecution under this Article (cf paragraph 28). As the purchase of an organ does not give rise to financial gain or comparable advantage on the part of the buyer, this provision is not applicable to acts performed by a potential organ receiver. The same holds true for somebody acting on behalf of the potential organ receiver, e.g. a family member, in so far as this does not give rise to any financial gain or comparable advantage on his or her part.**

Belgium:

Belgium supports this addition.

Finland:

Finland supports this proposal. The deletion of the mention on advertising seems rational as we ended up adding a new paragraph on the prohibition of advertisement to article 21. If advertising would be (in all countries) considered to be a form of solicitation we would not need article 21.3 in the first place. Leaving the text as it is would only create confusion between the scope of article 7 and article 21.3.

Ireland:

Ireland supports the Swedish proposal.

Poland:

Poland is of the opinion that wording of article 7 para. 1 provides no base to define terms "financial gain" and "comparable advantage", as it was proposed in Swedish remark.

~~41.~~52. Article 7, paragraphs 2 and 3, obliges Parties to criminalise active and passive corruption, respectively, of healthcare professionals, public officials or persons working for private sector entities with a view to having a removal or implantation of a human organ performed under the

circumstances described in Article 4, paragraph 1, or Article 5 and where appropriate Article 4, paragraph 4 or Article 6.

Austria:

"Article 7, paragraphs 2 and 3, obliges Parties to criminalise active and passive corruption, respectively, of healthcare professionals, public officials or persons working for private sector entities with a view to having a removal or implantation of a human organ performed under the circumstances described in Article 4, paragraph 1, or Article 5 and where appropriate Article 4, paragraph 4 or Article 6. **In this context, it should be noted that Articles 4, paragraph 4 and Article 6 leave States Parties a margin to decide on whether to establish the offences described therein as criminal offences. Hence, the use of the wording "where appropriate" means that when considering establishing the offences contained in Article 4, paragraph 4 and Article 6 as criminal offences, a State Party should also consider including them in Article 7 paragraphs 2 and 3.**"

Belgium:

Belgium supports this addition.

Germany:

Germany supports the Austrian proposal. The last phrase of the last sentence should read as follows: "a State Party ~~should~~ may also consider including them in Article 7 paragraphs 2 and 3."

Portugal:

Portugal agrees to Austrian insertion.

~~42.~~53. The wording of Article 7, paragraphs 2 and 3 is inspired by Articles 2 and 7 of the Criminal Law Convention on Corruption (CETS No. 173). The negotiators considered it useful to include these provisions in the present Convention, as not all Parties to the Convention will necessarily be Parties to the Criminal Law Convention on Corruption.

Article 8 – Preparation, preservation, storage, transportation, transfer, receipt, import and export of illicitly removed human organs

~~43.~~54. Article 8 obliges Parties to establish the preparation, preservation, storage, transportation, transfer, receipt, import and export of organs removed under the conditions described in Article 4, paragraph 1 and, where appropriate, in Article 4, paragraph 4, when committed intentionally, as a criminal offence.

Austria:

"Article 8 obliges Parties to establish the preparation, preservation, storage, transportation, transfer, receipt, import and export of organs removed under the conditions described in Article 4, paragraph 1 and, where appropriate, in Article 4, paragraph 3, when committed intentionally, as a criminal offence. **In this context, it should be noted that Article 4, paragraph 3 leaves States Parties a margin to decide on whether to establish the offence described therein as criminal offences. Hence, the use of the wording "where appropriate" means that when considering establishing the offence contained in Article 4, paragraph 3 as criminal offences, a State Party should also consider including it in Article 8.**"

Germany:

Germany supports the Austrian proposal. The last phrase of the last sentence should read as follows: "a State Party shouldmay also consider including it in Article 8."

~~44.~~55. Due to differences in the legal systems of member States, some States Parties may, when transposing the Convention into their domestic law, choose to establish the offences **under the Convention** enumerated in Article 8 as a separate criminal offence, or alternatively consider them as aiding **or abetting or attempt** under Article 9.

Finland:

Finland fully supports this idea. However as it was discussed in the meetings this is a general rule and applies to all offences. For this reason it would be good to clarify this in some way by moving this under the heading "Chapter II" and formulating it in a more general way. Alternatively something could be added here to imply that this is mentioned in connection with article 8 as it includes offences that easily would fall under aiding and abetting etc.

Sweden:

The paragraph should perhaps end by a sentence explaining why this text, which is rather general, is included under Article 8. One might for instance say: This may be of particular relevance in respect of the offences enumerated in Article 8. Alternatively, the text could be moved to the introduction to Chapter II.

Added after the CDPC Plenary

~~45.~~56. **In so far as a Party makes use of the reservation possibility in Article 30, paragraph 3, with regard to Article 5, it will affect the extent to which that Party is obliged to criminalise the conduct described in Article 8.**

Belgium:

Belgium can agree to the proposal of the Secretariat (for Belgium, art.8 could be added in Art.30, paragraph3, of the convention.)
We propose to add the following sentence: "In some States, even in case of making the reservation, the acts mentioned in Article 8 could be punished on the ground of receiving ("recel" in French) in some circumstances.

Article 9 – Aiding or abetting and attempt

~~46.~~57. Paragraph 1 requires Parties to establish as offences aiding or abetting the commission of the offences established in accordance with this Convention. Liability arises for aiding or abetting where the person who commits a crime is aided by another person who also intends the crime to be committed.

~~47.~~58. Paragraph 2 provides for the criminalisation of an attempt to commit the offences established in accordance with this Convention.

~~48.~~59. The interpretation of the word "attempt" is left to domestic law. The principle of proportionality, as referred to in the Preamble of the Convention, should be taken into account by Parties when distinguishing between the concept of attempt and mere preparatory acts which do not warrant criminalisation.

~~49.~~60. Paragraph 3 allows for the Parties to declare reservations with regard to the application of paragraph 1 (aiding or abetting) and paragraph 2 (attempt) to offences established in accordance with Articles 7 and 8. , due to differences in the criminal law systems of member States of the Council of Europe.[1]

~~50.~~61. As with all the offences established under the Convention, it requires the criminalisation of aiding or abetting and attempt only if committed intentionally.

Article 10 – Jurisdiction

~~51.~~62. This article lays down various requirements whereby Parties must establish jurisdiction over the offences with which the Convention is concerned.

Added after the CDPC Plenary

63. The obligation contained in Article 10 to establish jurisdiction is not only applicable as far as natural persons are concerned, but also applies to legal persons.

Germany:

Germany strongly rejects that amendment.

[1] The Russian Federation is against this wording.

Finland:

Finland objects this addition. This view was not supported by all negotiators. If this would be the case there should be a clear mention on this in the article.

Sweden:

Sweden objects to this paragraph, which should deleted. The obligation imposed by Article 10 is to establish jurisdiction over offences established in accordance with the Convention, i.e. criminal offences. This entails that, in the many states where legal persons cannot be subject to criminal liability, there is no obligation to apply the jurisdiction rules contained in the Article to legal persons. It is furthermore clear from the wording ("nationals", "habitual residence") that this standard text was drafted with natural but not legal persons in mind.

Switzerland:

~~64. The obligation contained in Article 10 to establish jurisdiction is not only applicable as far as natural persons are concerned, but also applies to legal persons.~~

Rationale:

The responsibility of legal persons is regulated in the following article 11; it can be criminal, civil or administrative. We have some doubts on the sense of Para 64 and prefer to delete it.

Secretariat:

Switzerland refers to para 63 and not to para 64.

~~52.~~64. Paragraph, 1 letter a. is based on the territoriality principle. Each Party is required to punish the offences established under the Convention when they are committed on its territory.

~~53.~~65. Paragraph 1, letters b. and c. are based on a variant of the territoriality principle. These sub-paragraphs require each Party to establish jurisdiction over offences committed on ships flying its flag or aircraft registered under its laws. This obligation is already in force in the law of many countries, ships and aircraft being frequently under the jurisdiction of the State in which they are registered. This type of jurisdiction is extremely useful when the ship or aircraft is not located in the country's territory at the time of commission of the crime, as a result of which paragraph 1, letter a. would not be available as a basis for asserting jurisdiction. In the case of a crime committed on a ship or aircraft outside the territory of the flag or registry Party, it might be that without this rule there would not be

any country able to exercise jurisdiction. In addition, if a crime is committed on board a ship or aircraft which is merely passing through the waters or airspace of another State, there may be significant practical impediments to the latter State's exercising its jurisdiction and it is therefore useful for the registry State to also have jurisdiction.

~~54.~~66. Paragraph 1, letter d. is based on the nationality principle. The nationality theory is most frequently applied by countries with a civil-law tradition. Under it, nationals of a country are obliged to comply with its law even when they are outside its territory. Under sub-paragraph d, if one of its nationals commits an offence abroad, a Party is obliged to be able to prosecute him/her. The negotiators considered that this was a particularly important provision in the context of combating trafficking in human organs. Indeed, certain States in which trafficking in human organs takes place either do not have the will or the necessary resources to successfully carry out investigations or lack the appropriate legal framework. Paragraph 4 enables these cases to be tried even where they are not criminalised in the State in which the offence was committed.

Finland:

Referring to: "Paragraph 4 enables these cases to be tried even where they are not criminalised in the State in which the offence was committed." Shouldn't this be deleted? It seems to be referring to the old paragraph 4 about dual criminality which was deleted from the article. See also Austria's and Denmark*s proposal below.

Austria and Denmark:

"Paragraph 1, letter d. is based on the nationality principle. The nationality theory is most frequently applied by countries with a civil-law tradition. Under it, nationals of a country are obliged to comply with its law even when they are outside its territory. Under sub-paragraph d, if one of its nationals commits an offence abroad, a Party is obliged to be able to prosecute him/her. The negotiators considered that this was a particularly important provision in the context of combating trafficking in human organs. Indeed, certain States in which trafficking in human organs takes place either do not have the will or the necessary resources to successfully carry out investigations or lack the appropriate legal framework. ~~**Paragraph 4 enables these cases to be tried even where they are not criminalised in the State in which the offence was committed."**~~

Rationale:
The deletion aims at aligning the Explanatory Report to the recent changes in the text of Article 10 paragraph 4 of the draft Convention.

Finland:

Finland supports this proposed deletion.

Portugal:

Portugal agrees to this deletion.

Sweden:

Sweden supports the Austrian and Danish proposals.

~~55.~~67. Paragraph 1, letter e. applies to persons having their habitual residence in the territory of the Party. It provides that Parties shall establish jurisdiction to investigate acts committed abroad by persons having their habitual residence in their territory, and thus contribute to the punishment trafficking in human organs. However, the criteria of attachment to the State of the person concerned being less strong than the criteria of nationality, paragraph 3 allows Parties not to implement this jurisdiction or only to do it in specific cases or conditions.

Belgium:

Traduction de "less strong" par le mot « déborde » en FR est bizarre. Une traduction littérale serait meilleure.

Austria and Denmark:

Paragraph 1, letter e. applies to persons having their habitual residence in the territory of the Party. It provides that Parties shall establish jurisdiction to investigate acts committed abroad by persons having their habitual residence in their territory, and thus contribute to the punishment of trafficking in human organs. ~~**However, the criteria of attachment to the State of the person concerned being less strong than the criteria of nationality, paragraph 3 allows Parties not to implement this jurisdiction or only to do it in specific cases or conditions.**~~

Rationale:

The deletion aims at aligning the Explanatory Report to the recent changes in the text of Article 14 paragraph 3 of the draft Convention.

Belgium:

I haven't understood the proposed deletion; a reservation is possible.

~~**Denmark:**~~

~~Paragraph 1, letter e. applies to persons having their habitual residence in the territory of the Party. It provides that Parties shall establish jurisdiction **regarding** to investigate acts committed abroad by persons having their habitual residence in their territory, and thus contribute to the punishment trafficking in human organs. **However, the criteria of attachment to the State of the person concerned being less strong than the criteria of**~~

~~nationality, paragraph 3 allows Parties not to implement this jurisdiction or only to do it in specific cases or conditions.~~

Denmark withdraws the first part of the proposal (but can support it if other countries express a wish for it).

The second part of the proposal is an equivalent to the Austrian suggestion just above. Denmark supports the Austrian suggestion.

Finland:

Finland agrees also with Denmark that the words "to investigate" should be changed "regarding".

Ireland:

Ireland supports the Austrian and Danish proposals.

Portugal:

Portugal prefers Danish proposal.

Sweden:

Sweden supports the Austrian and Danish proposals.

Added after the CDPC Plenary

68. Paragraph 2 is linked to the nationality or residence status of the victim. It is based on the premise that the particular interests of national victims overlap with the general interest of the state to prosecute crimes committed against its nationals or residents. Hence, if a national or person having habitual residence is a victim of an offence abroad, the Party shall endeavour to establish jurisdiction in order to start proceedings. However, there is no obligation imposed on Parties, as demonstrated by the use of the expression "endeavour".

Denmark:

68a. Jurisdiction in cases covered by paragraph 1, letters d and e, and paragraph 2, can be subordinate to dual criminality (meaning that an act must be a criminal offence in the place where it is performed as well as in the territory of the Party).

Rationale:

During the plenary, the Secretariat informed the Danish delegation of the abovementioned. Denmark suggests adding this paragraph as a mean of clarification.

Ireland:

It is very important for Ireland that the highlighted text in this paragraph is retained.

Portugal:

Portugal agrees to this insertion.

Sweden:

In the second sentence, Sweden proposes a change from "the premise" to "a view", as there are many states that do not apply the passive nationality principle. The third sentence implies that jurisdiction should be established on an ad hoc basis. SE proposes a change to the following: "Hence, a Party shall endeavour to establish jurisdiction over any offence committed abroad where the victim is a national or person having habitual residence in its territory."

~~56.~~69. Paragraph 3 provides for Parties to enter reservations on the application of the jurisdiction rules laid down in paragraph 1, d and e.

~~57.~~70. Paragraph 4 prohibits the subordination of the initiation of proceedings, which is based on the jurisdiction provided for in paragraphs 1 d. and 1 e. to the conditions usually required of a complaint of the victim or a denunciation from the authorities of the State in which the offence took place. Indeed, certain States in which trafficking in human organs take place do not always have the necessary will or resources to carry out investigations. In these conditions, the requirement of an official denunciation or of a complaint of the victim often constitutes an impediment to the prosecution. This paragraph applies to all the offences defined in Chapter II (Substantive Criminal Law).

~~58.~~71. In paragraph 5 the negotiators wished to introduce the possibility for Parties to limit the application of paragraph 4 by entering a reservation. Parties making use of this possibility may thus subordinate the initiation of prosecution of alleged trafficking in human organs to cases where a report has been filed by a victim, or the State Party has received a denunciation from the State of the place where the offence was committed.

~~59.~~72. Paragraph 6 concerns the principle of *aut dedere aut judicare* (extradite or prosecute). Jurisdiction established on the basis of paragraph 6 is necessary to ensure that Parties that refuse to extradite a national have the legal ability to undertake investigations and proceedings domestically instead, if asked to do so by the Party that requested extradition under the terms of the relevant international instruments.

~~60.~~73. In certain cases of trafficking in human organs, it may happen that more than one Party has jurisdiction over some or all of the participants in

an offence. For example, an organ donor may be recruited in one country and have the organ in question removed in another. In order to avoid duplication of procedures and unnecessary inconvenience for witnesses or to otherwise facilitate the efficiency or fairness of proceedings, the affected Parties are required to consult in order to determine the proper venue for prosecution. In some cases it will be most effective for them to choose a single venue for prosecution; in others it may be best for one country to prosecute some alleged perpetrators, while one or more other countries prosecute others. Either method is permitted under paragraph 7. Finally, the obligation to consult is not absolute; consultation is to take place "where appropriate". Thus, for example, if one of the Parties knows that consultation is not necessary (e.g. it has received confirmation that the other Party is not planning to take action), or if a Party is of the view that consultation may impair its investigation or proceeding, it may delay or decline consultation.

~~61.~~74. The bases of jurisdiction set out in paragraph 1 are not exclusive. Paragraph 8 of this article permits Parties to establish other types of criminal jurisdiction according to their domestic law.

Article 11 – Corporate liability

~~62.~~75. Article 11 is consistent with the current legal trend towards recognising corporate liability. The negotiators were of the opinion that due to the gravity of offences related to trafficking in human organs, it is appropriate to include corporate liability in the Convention. The intention is to make commercial companies, associations and similar legal entities ("legal persons") liable for criminal actions performed on their behalf by anyone in a leading position in them. Article 11 also contemplates liability where someone in a leading position fails to supervise or check on an employee or agent of the entity, thus enabling them to commit any of the offences established in the Convention **for the benefit of the entity**.

~~63.~~76. Under paragraph 1, four conditions need to be met for liability to attach. First, one of the offences described in the Convention must have been committed. Second, the offence must have been committed for the entity's benefit. Third, a person in a leading position must have committed the offence (including aiding and abetting). The term "person who has a leading position" refers to someone who is organisationally senior, such as a director. Fourth, the person in a leading position must have acted on the basis of one of his or her powers (whether to represent the entity or take decisions or perform supervision), demonstrating that that person acted under his or her authority to incur liability of the entity. In short, paragraph 1 requires Parties to be able to impose liability on legal entities solely for offences committed by such persons in leading positions.

~~64.~~77. In addition, paragraph 2 requires Parties to be able to impose liability on a legal entity ("legal person") where the crime is committed not by the

leading person described in paragraph 1 but by another person acting on the entity's authority, i.e. one of its employees or agents acting within their powers. The conditions that must be fulfilled before liability can attach are: 1) the offence was committed by an employee or agent of the legal entity; 2) the offence was committed for the entity's benefit; and 3) commission of the offence was made possible by the leading person's failure to supervise the employee or agent. In this context failure to supervise should be interpreted to include not taking appropriate and reasonable steps to prevent employees or agents from engaging in criminal activities on the entity's behalf. Such appropriate and reasonable steps could be determined by various factors, such as the type of business, its size, and the rules and good practices in force.

~~65.~~78. Liability under this article may be criminal, civil or administrative. It is open to each Party to provide, according to its legal principles, for any or all of these forms of liability as long as the requirements of Article 12 paragraph 2 are met, namely that the sanction or measure be "effective, proportionate and dissuasive" and include monetary sanctions.

~~66.~~79. Paragraph 4 makes it clear that corporate liability does not exclude individual liability. In a particular case there may be liability at several levels simultaneously – for example, liability of one of the legal entity's organs, liability of the legal entity as a whole and individual liability in connection with one or other.

Article 12 – Sanctions and measures

~~67.~~80. This article is closely linked to Articles 4 to 8, which define the various offences that should be made punishable under domestic law. In accordance with the obligations imposed by those articles, Article 12 requires Parties to match their action to the seriousness of the offences and lay down sanctions which are "effective, proportionate and dissuasive". In the case of an individual committing an offence established under Article 4, paragraph 1, **-always- and** Article 5, Articles 7, 8 and 9, **- where appropriate-** Parties must provide for prison sentences that can give rise to extradition. It should be noted that, under Article 2 of the European Convention on Extradition (CETS No. 24), extradition is to be granted in respect of offences punishable under the laws of the requesting and requested Parties by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty. Offences under Article 4, paragraph 3 and Article 6 may, depending on the legal system of Parties and the seriousness of the infraction not always necessitate criminal sanctions. Fines of a non-criminal (i.e. regulatory or administrative) nature may therefore be considered sufficient in view of the overall context and structure of domestic law and penal sanctions. As stated above, Parties are only obliged to consider establishing these offences as criminal offences.

Finland:

~~**Offences under Article 4, paragraph 3 and Article 6 may, depending on the legal system of Parties and the seriousness of the infraction not always necessitate criminal sanctions. Fines of a non-criminal (i.e. regulatory or administrative) nature may therefore be considered sufficient in view of the overall context and structure of domestic law and penal sanctions. As stated above, Parties are only obliged to consider establishing these offences as criminal offences.**~~

Finland:

Rationale:

This part should be deleted. There is no longer an obligation to have (any kind of) sanctions for these acts so this text seems to be misleading. The text implies that there should in any case be some sort of sanctions even though criminal sanctions are nor required. This is not in line with the articles.

Sweden:

This implies that there is an obligation for states to introduce either criminal or non-criminal sanctions for offences under Article 4(4) – with the new numbering of paragraphs – and Article 6. As there is no obligation to provide any kind of sanction in these cases, the text is misleading and should be deleted.

~~68.~~81. Legal entities whose liability is to be established under Article 10 are also to be liable to sanctions that are "effective, proportionate and dissuasive", which may be criminal, administrative or civil in character. Paragraph 2 requires Parties to provide for the possibility of imposing monetary sanctions on legal persons.

Ireland:

It would appear that this should refer to Article 11 on corporate liability of legal persons.

~~69.~~82. In addition, paragraph 2 provides for other measures which may be taken in respect of legal persons, with particular examples given: temporary or permanent disqualification from the practice of commercial activities; placing under judicial supervision; or a judicial winding-up order. The list of measures is not mandatory or exhaustive and Parties are free to apply none of these measures or envisage other measures.

~~70.~~83. Paragraph 3 requires Parties to ensure that measures concerning seizure and confiscation of the proceeds derived from criminal offences can be taken. This paragraph has to be read in the light of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (CETS No. 141) as well as the Council of Europe

Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198), which are based on the idea that confiscating the proceeds of crime is an effective anti-crime weapon. As most of the criminal offences related to the trafficking in human organs are undertaken for financial profit, measures depriving offenders of assets linked to or resulting from the offence are clearly needed in this field as well.

~~71.~~84. Paragraph 3 a, provides for the seizure and confiscation of proceeds of the offences, or property whose value corresponds to such proceeds may be seized or confiscated.

~~72.~~85. The Convention does not contain definitions of the terms “confiscation”, “proceeds” and “property”. However, Article 1 of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime provides definitions for these terms which may be used for the purposes of this Convention. By “confiscation” is meant a penalty or measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences, resulting in final deprivation of property. “Proceeds” means any economic advantage or financial saving from a criminal offence. It may consist of any “property” (see the interpretation of that term below). The wording of the paragraph takes into account that there may be differences of national law as regards the type of property which can be confiscated after an offence. It can be possible to confiscate items which are (direct) proceeds of the offence or other property of the offender which, though not directly acquired through the offence, is equivalent in value to its direct proceeds (“substitute assets”). “Property” must therefore be interpreted, in this context, as any property, corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property.

~~73.~~86. Paragraph 3 b of Article 12 provides for the closure of any establishment used to carry out any of the criminal offences established under the Convention. This measure is almost identical to Article 23, paragraph 4 of the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197) and Article 24, paragraph 3, b of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201). Alternatively, the provision also allows the perpetrator to be banned, temporarily or permanently, in conformity with the relevant provisions of domestic law, from carrying on the professional activity in connection with which the criminal offence was committed. The negotiators considered it necessary to make a reference to the domestic law of States Parties, since differences exist with regard to the exact measures to be applied and procedures to be followed when banning a person from exercising a professional activity. Moreover differences exist as to whether or not certain professions require the issuing of a license or other type of authorisation by public authorities.

Article 13 – Aggravating circumstances

~~74.~~87. Article 13 requires Parties to ensure that certain circumstances (mentioned in letters a. to e.) may be taken into consideration as aggravating circumstances in the determination of the sanction for offences established in this Convention. This obligation does not apply to cases where the aggravating circumstances already form part of the constituent elements of the offence in the national law of the State Party.

~~75.~~88. By the use of the phrase “may be taken into consideration”, the negotiators highlighted that the Convention places an obligation on Parties to ensure that these aggravating circumstances are available for judges to consider when sentencing offenders, although there is no obligation on judges to apply them. The reference to “in conformity with the relevant provisions of domestic law” is intended to reflect the fact that the various legal systems in Europe have different approaches to address those aggravating circumstances and permits Parties to retain their fundamental legal concepts.

~~76.~~89. The first aggravating circumstance (a), is where the offence caused the death of, or serious damage to the physical or mental health of, the victim. Given the fact that any transplantation carries a significant element of danger for the physical health of both the donor and the recipient, it should be up to the national courts of the Parties to assess the causal link between the conducts criminalised under the Convention and any death or injury sustained as a result thereof.

~~77.~~90. The second aggravating circumstance (b) is where the offence was committed by persons abusing the confidence placed in them in their professional capacity. This category of persons is in the first line obviously health professionals, but also public officials (when acting in their official capacity) would be covered. However, the application of the aggravating circumstance is not restricted to health professionals and public officials.

Belgium, France, Italy~~-~~:

(This comment applies only to the French version no the English one)
The second aggravating circumstance (b) is where the offence was committed by persons abusing the confidence placed in them in their **position** ~~**professional capacity**~~. This category of persons is in the first line obviously health professionals, but also public officials (when acting in their official capacity) would be covered. However, the application of the aggravating circumstance is not restricted to health professionals and public officials.

Explanation:
This proposal aims to take into account the last discussion about the word « position », which doesn't only include abuse of professional position.

Ireland:

Ireland supports this proposal.

78.91. The third aggravating circumstance (c) is where the offence involved a criminal organisation. The Convention does not define "criminal organisation". In applying this provision, however, Parties may take their line from other international instruments which define the concept. For example, Article 2(a) of the United Nations Convention against Transnational Organised Crime defines "organised criminal group" as "a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit". Recommendation Rec(2001)11 of the Committee of Ministers to member States concerning guiding principles on the fight against organised crime and the EU Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime give very similar definitions of "organised criminal group" and "criminal organisation".

79.92. The fourth aggravating circumstance (d) is where the perpetrator has previously been convicted of offences established under the Convention. By including this, the negotiators wanted to signal the need to make a concerted effort to combat recidivism in the low risk – high financial gain area of trafficking in human organs.

80.93. The fifth aggravating circumstance (e) is where the offence was committed against a child or any other particularly vulnerable person. The negotiators were of the opinion that most persons who would qualify as victims of trafficking in human organs are by definition vulnerable, e. g. because they are financially severely disadvantaged, which is the case for many persons who agree to have an organ removed against financial gain or comparable advantage, or because they are suffering from severe or even terminal diseases with little chances of survival, which is the case for many recipients of organs. Likewise, children are always particularly vulnerable to crime. Hence the negotiators would reserve the aggravating circumstance set out in letter e. to situations where the victim is a child or otherwise "particularly vulnerable" because of his/her age, mental development or familial or social dependence on the perpetrator(s). The term "child" is not explicitly defined in the Convention, but should be understood as the same as in the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197), namely "any person under the age of 18 years". This definition is ultimately derived from the UN Convention on the Rights of the Child (1989), where it is found in Article 1.

Article 14 – Previous convictions

81.94. Trafficking in human organs is more often than not perpetrated transnationally by criminal organisations or by individual persons, some of whom may have been tried and convicted in more than one country. At domestic level, many legal systems provide for a different, often harsher, penalty where someone has previous convictions. In general, only

conviction by a national court counts as a previous conviction. Traditionally, previous convictions by foreign courts were not taken into account on the grounds that criminal law is a national matter and that there can be differences of national law, and because of a degree of suspicion of decisions by foreign courts.

~~82.~~95. Such arguments have less force today in that internationalisation of criminal law standards – as a pendent to internationalisation of crime – is tending to harmonise different countries' law. In addition, in the space of a few decades, countries have adopted instruments such as the ECHR whose implementation has helped build a solid foundation of common guarantees that inspire greater confidence in the justice systems of all the participating States.

~~83.~~96. The principle of international recidivism is established in a number of international legal instruments. Under Article 36 paragraph 2 (iii) of the New York Convention of 30 March 1961 on Narcotic Drugs, for example, foreign convictions have to be taken into account for the purpose of establishing recidivism, subject to each Party's constitutional provisions, legal system and national law. Under Article 1 of the Council Framework Decision of 6 December 2001 amending Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, European Union Member States must recognise as establishing habitual criminality final decisions handed down in another Member State for counterfeiting of currency.

~~84.~~97. The fact remains that at international level there is no standard concept of recidivism and the law of some countries does not have the concept at all. The fact that foreign convictions are not always brought to the courts' notice for sentencing purposes is an additional practical difficulty. However, in the framework of the European Union, Article 3 of the Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings has established in a general way – without limitation to specific offences – the obligation of taking into account a previous conviction handed down in another (EU Member) State.

~~85.~~98. Therefore Article 14 provides for the possibility to take into account final sentences passed by another Party in assessing a sentence. To comply with the provision Parties may provide in their domestic law that previous convictions by foreign courts may, to the same extent as previous convictions by domestic courts would do so, result in a harsher penalty. They may also provide that, under their general powers to assess the individual's circumstances in setting the sentence, courts should take those convictions into account. This possibility should also include the principle that the offender should not be treated less favourably than he would have been treated if the previous conviction had been a national conviction.

~~86.~~99. This provision does not place any positive obligation on courts or prosecution services to take steps to find out whether persons being prosecuted have received final sentences from another Party's courts. It should nevertheless be noted that, under Article 13 of the European Convention on Mutual Assistance in Criminal Matters (CETS No. 30), a Party's judicial authorities may request from another Party extracts from and information relating to judicial records, if needed in a criminal matter. In the framework of the European Union, the issues related to the exchange of information contained in criminal records between Member States are regulated in two legal acts, namely Council Decision 2005/876/JHA of 21 November 2005 on the exchange of information extracted from the criminal record and Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States.

Denmark:

~~This provision does not place any positive obligation on courts or prosecution services to take steps to find out whether persons being prosecuted have received final sentences from another Party's courts. It should nevertheless be noted that, under~~ Article 13 of the European Convention on Mutual Assistance in Criminal Matters (CETS No. 30), a Party's judicial authorities may request from another Party extracts from and information relating to judicial records, if needed in a criminal matter. In the framework of the European Union, the issues related to the exchange of information contained in criminal records between Member States are regulated in two legal acts, namely Council Decision 2005/876/JHA of 21 November 2005 on the exchange of information extracted from the criminal record and Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States. **However, Article 14 does not place any positive obligation on courts or prosecution services to take steps to find out whether persons being prosecuted have received final sentences from another Party's courts**

Rationale:
Denmark suggests to change the order of paragraph 99 to clarify that the legal instruments mentioned allow – not oblige – courts and prosecution services to take steps to find out whether persons being prosecuted have received final sentences from another Party's courts.

Finland:

Finland supports this: However, Article 14 does not place any positive obligation on courts or prosecution services to take steps to find out whether persons being prosecuted have received final sentences from another Party's courts

Portugal:

Portugal supports this proposal.

Sweden:

Sweden supports the Danish proposal.

Chapter III – Criminal procedural Law

Article 15 – Initiation and continuation of proceedings

~~87.~~100. Article 15 is designed to enable the public authorities to prosecute offences established in accordance with the Convention ex officio, without a victim having to file a complaint. The purpose of this provision is to facilitate prosecution, in particular by ensuring that criminal proceedings may continue regardless of pressure or threats by the perpetrators of offences towards victims.

Article 16 – Criminal investigations

~~88.~~101. Article 16 provides for Parties to ensure the effective investigation and prosecution of offences established under the Convention in accordance with the fundamental principles of their domestic law. The notion of "principles of domestic law" should be understood as also encompassing basic human rights, including those provided under Article 6 of the ECHR. The negotiators noted that conducting effective criminal investigations may imply the use of special investigation techniques in accordance with the domestic law of the Party in question, such as financial investigations, covert operations, and controlled delivery. However, the negotiators also noted that Parties are not legally obliged by the Convention to make use of such techniques.

Austria:

Article 16 provides for Parties to ensure the effective investigation and prosecution of offences established under the Convention in accordance with the fundamental principles of their domestic law. The notion of "principles of domestic law" should be understood as also encompassing basic human rights, including those provided under Article 6 of the ECHR. The negotiators noted that conducting effective criminal investigations may imply the use of special investigation techniques in accordance with the domestic law of the Party in question, such as interception of communications, financial investigations, covert operations, and controlled delivery, taking into account the principle of proportionality. ~~**However, the negotiators also noted that Parties are not legally obliged by the Convention to make use of such techniques**~~

Rationale:

The Austrian delegation is of the opinion that interception of communications is a very important investigation technique in cases of ~~traffcking~~trafficking in human organs.
Secondly Austria would like to insert a reference to the principle of proportionality because in most States the applicability of these investigation techniques in a specific case depends on the gravity of the offence.
Due to the open wording of this paragraph ("may imply the use of" …; "in accordance with the domestic law of the Party in question", "taking into account the principle of proportionality") the last sentence of this paragraph should be deleted.

Portugal:

Portugal supports this proposal.

Article 17 – International co-operation

~~89.~~102. The article sets out the general principles that should govern international co-operation in criminal matters.

~~90.~~103. Paragraph 1 obliges Parties to co-operate, on the basis of relevant international and national law, to the widest extent possible for the purpose of investigations or proceedings of crimes established under the Convention, including for the purpose of carrying out seizure and confiscation measures. In this context, particular reference should be made to the European Convention on Extradition (CETS No. 24), the European Convention on Mutual Assistance in Criminal Matters (CETS No. 30), the European Convention on the Transfer of Sentenced Persons (CETS No. 112), the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (CETS No. 141) and the Council of Europe Convention Laundering, Search, Seizure and Confiscation of the proceeds from Crime and on the Financing of Terrorism (CETS No.198).

~~91.~~104. In the same way as for paragraph 1, paragraph 2 obliges Parties to co-operate, to the widest extent possible and on the basis of relevant international, regional and bilateral legal instruments, on extradition and mutual legal assistance in criminal matters concerning the offences established by the Convention.

~~92.~~105. Paragraph 3 invites a Party that makes mutual assistance in criminal matters or extradition conditional on the existence of a treaty to consider the Convention as the legal basis for judicial co-operation with a Party with which it has not concluded such a treaty. This provision is of interest because of the possibility provided to third States to sign the Convention (cf. Article 28). The requested Party will act on such a request in accordance with the relevant provisions of its domestic law which may provide for conditions or grounds for refusal. Any action taken shall be in

full compliance with its obligations under international law, including obligations under international human rights instruments.

Chapter IV – Protection measures

93.106. The protection of, and assistance to, victims of crime has long been a priority in the work of the Council of Europe.

94.107. The horizontal legal instrument in this field is the European Convention on the Compensation of Victims of Violent Crime (CETS No. 116) from 1983, which has since been supplemented by a series of recommendations, notably Recommendation No. R (85) 11 on the position of the victim in the framework of criminal law and procedure, Recommendation No. R (87) 21 on the assistance to victims and the prevention of victimisation and Recommendation Rec(2006)8 on assistance to crime victims.

95.108. Furthermore, the situation of victims has also been addressed in a number of specialised conventions, including the Council of Europe Convention on the Prevention of Terrorism (CETS No. 196), the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197), both from 2005, and the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201) from 2007.

96.109. Taking into account the potential grave consequences for victims of trafficking in human organs, the negotiators found that it was justified to provide specifically for the protection of such victims, and also to ensure that victims of the crimes established under this Convention have access to information relevant to their case and the protection of their health and other rights from the competent national authorities and that – subject to the domestic law of the Parties – they are being given the possibility to be heard and to supply evidence.

97.110. It is recalled that, the term “victim” is not defined in the Convention, as the negotiators felt that the determination of who could qualify as victims of trafficking in human organs was better left to the Parties to decide in accordance with their domestic law.

Article 18 – Protection of victims

98.111. Article 18 provides for the protection of the rights and interests of victims, in particular by requiring Parties to ensure that victims are given access to information relevant for their case and necessary to protect their health and other rights involved; that victims are assisted in their physical, psychological and social recovery, and that victims are provided with the right to compensation from the perpetrators under the domestic law of the Parties. As regards the right to compensation, the negotiators also noted that in a number of member States of the Council of Europe, national

victim funds are already in existence. However, this provision does not oblige Parties to establish such funds.

United Kingdom:

Article 18 provides for the protection of the rights and interests of victims, in particular by requiring Parties to ensure that victims are given access to information relevant for their case and necessary to protect their health and other rights involved; that victims are assisted in their physical psychological and social recovery, and that victims are provided with the right to **seek** compensation from the perpetrators under the domestic law of the Parties. As regards the right to compensation, the negotiators noted that in a number of Member States of the Council of Europe, national victim funds are already in existence. However, this provision does not oblige Parties to establish such funds.

Ireland:

Ireland supports this though the new following paragraph goes a long way to addressing our concerns on this issue.

Portugal:

Portugal supports this proposal.

Added after the CDPC Plenary

112. Article 18, letter c, establishes a right of victims to compensation. The compensation is pecuniary and covers both material injury (such as the cost of medical treatment) and non-material damage (the suffering experienced). For the purposes of this article, victims' right to compensation consists in a claim against the perpetrators of the trafficking – it is the traffickers who bear the burden of compensating the victims. If, in the criminal proceedings, the criminal courts are not empowered to determine civil liability towards the victims, it must be possible for the victims to submit their claims to civil courts with jurisdiction in the matter and powers to award damages with interest.

Ireland:

Ireland supports this paragraph.

Portugal:

Portugal supports this proposal.

Article 19 – Standing of victims in criminal proceedings

~~99.~~113. This article contains a non-exhaustive list of procedures designed to victims of crimes established under this Convention during

investigations and proceedings. These general measures of protection apply at all stages of the criminal proceedings, both during the investigations (whether they are carried out by a police service or a judicial authority) and during criminal trial proceedings.

Belgium

To add the following precision under point 113 of the Explanatory Report:

"Special attention shall be paid to the particular vulnerability of children who are more likely to yield to intimidation. Specific measures – for instance not to compel the child to testify in the presence of the perpetrators – could be considered."

Poland :

Poland shares opinions about the need for proper protection of children - victims of crime.

However, the wording of Article 19 does not provide a basis for identifying the specific situation of children, as the main and/or example of protection of victims interests.

Portugal:

Portugal supports this insertion.

Ireland:

"Special attention shall be paid to the particular vulnerability of children who are more likely to yield to intimidation. Specific measures – for instance not to compel the child to testify in the presence of the author by arranging for the child to give evidence through a live television link – can be very useful."

~~100.~~114. First of all, Article 19 sets out the right of victims to be informed of their rights and of the services at their disposal and, upon request, the follow-up given to their complaint, the charges, the state of the criminal proceedings (unless in exceptional cases the proper handing of the case may be adversely affected), their role therein as well as the outcome of their cases.

~~101.~~115. Article 19 goes on to list a number of procedural rules designed to implement the general principles set out in the provision: the possibility, for victims, of being heard, of supplying evidence (in a manner consistent with the procedural rules of the domestic law of a Party), have their views, needs and concerns presented and considered, directly or through an

intermediary, and of being protected against any risk of intimidation and retaliation.

Austria and Denmark:

Article 19 goes on to list a number of procedural rules designed to implement the general principles set out in the provision: the possibility, for victims, **(in a manner consistent with the procedural rules of the domestic law of a Party)** of being heard, of supplying evidence **~~(in a manner consistent with the procedural rules of the domestic law of a Party),~~** as well as having their views, needs and concerns presented and considered, directly or through an intermediary, and **anyway the right** of being protected against any risk of intimidation and retaliation.

Rationale:

It should be made clear that the reference "in a manner consistent with the procedural rules of the domestic law of a Party" applies all to the possibilities mentioned in Art 19 para. 1 (b) , i.e. the possibility of being heard, supplying evidence and having their views presented and considered. However, the right to protection from intimidation and retaliation according to Article 19 para. 1 (d) has no reference to domestic law which should be indicated with the insertion of "anyway the right of".

Finland:

Finland supports this.

Switzerland:

~~Austria:~~

~~Article 19 goes on to list a number of procedural rules designed to implement the general principles set out in the provision: the possibility, for victims, (in a manner consistent with the procedural rules of the domestic law of a Party) of being heard, of supplying evidence (in a manner consistent with the procedural rules of the domestic law of a Party), as well as having their views, needs and concerns presented and considered, directly or through an intermediary, and anyway the right of being protected against any risk of intimidation and retaliation.~~

~~Rationale:~~

~~It should be made clear that the reference "in a manner consistent with the procedural rules of the domestic law of a Party" applies all to the possibilities mentioned in Art 19 para. 1 (b) , i.e. the possibility of being heard, supplying evidence and having their views presented and considered. However, the right to protection from intimidation and retaliation according to Article 19~~

~~para. 1 (d) has no reference to domestic law which should be indicated with the insertion of "anyway the right of".~~

Rationale:

We think this addition is superfluous and should be better deleted.

~~102.~~116. Paragraph 2 also covers administrative proceedings, since procedures for compensating victims are of this type in some States. More generally, there are also situations in which protective measures, even in the context of criminal proceedings, may be delegated to the administrative authorities.

~~103.~~117. Paragraph 3 provides for access, in accordance with domestic law and free of charge, where warranted, to legal aid for victims of trafficking in human organs. Judicial and administrative procedures are often highly complex and victims therefore need the assistance of legal counsel to be able to assert their rights satisfactorily. This provision does not afford victims an automatic right to legal aid. The conditions under which such aid is granted must be determined by each Party to the Convention when the victim is entitled to be a party to the criminal proceedings.

~~104.~~118. In addition to Article 20 paragraph 3, dealing with the status of victims as parties to criminal proceedings, the States Parties must take account of Article 6 of the ECHR. Even though Article 6, paragraph 3.c. of the ECHR provides for the free assistance of an officially assigned defence counsel only in the case of persons charged with criminal offences, the case law of the European Court of Human Rights (Airey v. Ireland judgement, 9 October 1979) also, in certain circumstances, recognises the right to free assistance from an officially assigned defence counsel in civil proceedings, under Article 6, paragraph 1 ECHR, which is interpreted as enshrining the right of access to a court for the purposes of obtaining a decision concerning civil rights and obligations (Golder v. United Kingdom judgment, 21 February 1975). The Court took the view that effective access to a court might necessitate the free assistance of a lawyer. For instance, the Court considered that it was necessary to ascertain whether it would be effective for the person in question to appear in court without the assistance of counsel, i.e. whether he could argue his case adequately and satisfactorily. To this end, the Court took account of the complexity of the proceedings and the passions involved – which might be incompatible with the degree of objectivity needed in order to plead in court – so as to determine whether the person in question was in a position to argue his own case effectively and held that, if not, he should be able to obtain free assistance from an officially assigned defence counsel. Thus, even in the absence of legislation affording access to an officially assigned defence counsel in civil cases, it is up to the court to assess whether, in the interests of justice, a destitute party unable to afford a lawyer's fees must be provided with legal assistance.

Ireland:

It appears that this should refer to Article 19 instead. There is no Article 20, paragraph 3.

~~105.~~119. Paragraph 4 is based on Article 11, paragraphs 2 and 3, of the Framework Decision of 15 March 2001 of the Council of the European Union on the standing of victims in criminal proceedings. It is designed to make it easier for victims to file a complaint by enabling them to lodge it with the competent authorities of the State of residence. A similar provision is also found in Article 38, paragraph 2 of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201) of 25 October 2007 and in the Council of Europe Convention on the Counterfeiting of Medical Products and Similar Crimes involving Threats to Public Health (CETS No. 211) of 28 October 2011.

Denmark:

Hasn't that decision been replaced by Directive 2012/29/EU of the European Parliament and the Council of 25 October 2012?

~~106.~~120. Paragraph 5 provides for the possibility for various organisations to support victims. The reference to conditions provided for by internal law highlights the fact that it is up to the Parties to make provision for assistance or support, but that they are free to do so in accordance with the rules laid down in their national systems, for example by requiring certification or approval of the organisations, foundations, associations and other bodies concerned.

Article 20 – Protection of witnesses

~~107.~~121. Article 20 is inspired by Article 24, paragraph 1, of the United Nations Convention against Transnational Organized Crime (Palermo Convention) from 2000. Paragraph 1 obliges Parties to provide effective protection from potential retaliation or intimidation for witnesses giving testimony in criminal proceedings concerning trafficking in human organs. As appropriate the protection should be extended to relatives and other persons close to the witnesses. Paragraph 2 of Article 20 provides for the protection of victims in so far as they are witnesses, in the same manner as set out in paragraph 1.

~~108.~~122. It should be noted that the extent of this obligation for Parties to protect witnesses is limited by the wording "within its means and in accordance with the conditions provided for by its domestic law".

Chapter V – Prevention measures

~~109.~~123. It is standard for recent criminal law conventions of the Council of Europe to contain provisions aiming at the prevention of criminal activity. The present Convention is no exception, and the negotiators found that such preventive measures should be implemented at both domestic and international levels in order to have effect.

Article 21 – Measures at domestic level

~~110.~~124. The purpose of Article 21 is to prevent trafficking in human organs by obliging Parties to address some of its root causes. Hence Parties shall in accordance with paragraph 1 ensure the existence of a transparent domestic system for the transplantation organs; equitable access to transplantation services for patients, and finally, adequate collection, analysis and exchange of relevant information pertaining to trafficking in human organs between all relevant domestic authorities. Parties may wish to consider the provisions of Articles 3 – 8 of the Additional protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin (CETS No. 186), when reviewing their current transplantation systems in the light of this Article.

~~111.~~125. The issue of “transparency” is important, because it reduces the risk of illicitly removed organs being introduced into the legitimate domestic transplantation system. “Equitable access to transplantation services” not only means that Parties should ensure a “level playing field” in terms of the allocation of organs for all patients awaiting implantation. Ensuring a strong cooperation between the many different competent authorities involved in combatting trafficking in human organs is a prerequisite for achieving any measure of success. In this respect, the negotiators decided to put special emphasis on the collection, analysis and exchange of information between these authorities, thus enabling them to take timely action to prevent the crimes set out in the Convention.

Poland:

Article 21, paragraph 1 sets out only the scope and purpose of measures to be taken by Parties, it is left to each Party to decide on necessary actions it will take.
Therefore, the proposed measures may in particular include the following forms:

a) **regulations on organ donation from foreigners and transplantation of organs to foreigners (in most cases, the organ trade is related to the situation when the donor goes abroad to donate an organ illegally or recipient goes abroad to receive an organ illegally);**
b) **transplant waiting list - it can not come to any transplantation, if the recipient is not on the waiting list; waiting list is managed by competent authority;**

c) **monitoring of organ procurement from the deceased or living donors by the competent authority, to provide the traceability of the donors, recipients and organs at each stage in the chain from donation to transplantation.**

Rationale:

Additional proposal made by Ministry of Health to clarify potential scope of measures taken at domestic level.

~~112.~~126. Paragraph 2, point i. obliges Parties to take measures, as appropriate, with regard to providing information and strengthening training, e. g. on how to detect indications of trafficking in human organs, for healthcare professionals and relevant officials, such as police and customs officers. According to point ii. Parties are furthermore obliged to promote awareness-raising campaigns on the unlawfulness and dangers of trafficking in human organs addressed to the general public.

Denmark:

Paragraph 2, point i. obliges Parties to take measures, as appropriate, with regard to providing information and strengthening training, e. g. on how to detect indications of trafficking in human organs, for healthcare professionals and relevant officials, ~~**such as police and customs officers**~~. According to point ii. Parties are furthermore obliged to promote, **as appropriate**, awareness-raising campaigns on the unlawfulness and dangers of trafficking in human organs addressed to the general public.

Rationale:
The amendments are suggested in order to allow for flexibility for participating States in implementing points i and ii.

Finland:

Finland supports this proposal.
Ireland:

Ireland supports Danish proposal.

Portugal:

Portugal supports Danish proposal.

~~113.~~127. Finally, paragraph 3 obliges Parties to prohibit the advertising of the need for, or availability of, human organs “with a view to offering or seeking financial gain or comparable advantage”. Parties must accordingly take the necessary measures to enforce such prohibition in an efficient manner. The negotiators considered this provision necessary, taking into account the existence of e.g. websites on the internet where human organs are put up for sale. Cf also paragraph 30.

Austria and Finland

Finally, paragraph 3 obliges Parties to prohibit the advertising of the need for, or availability of, human organs "with a view to offering or seeking financial gain or comparable advantage". ~~**Parties must accordingly take the necessary measures to enforce such prohibition in an efficient manner.**~~ The negotiators considered this provision necessary, taking into account the existence of e.g. websites on the internet where human organs are put up for sale. **The implementation of this provision is left to Parties but they must obviously take into account the case-law of the European Court of Human Rights which, based on Article 10 ECHR, guarantees the right to freedom of expression the exercise of which may be subject to certain formalities, conditions, restrictions or penalties as prescribed by law and necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, or for the protection of health or morals.** Cf also paragraph 30.
The prohibition to advertise the need for, or availability of human organs, with a view to offering or seeking financial gain or comparable advantage, is intended to target mainly the persons operating as an interface between donors and recipients.

Finland:

Just to clarify, the inspiration for our joint proposal has been taken from the ER for the Lanzarote Convention which also includes an article on advertisement.

Ireland:

Ireland supports the deletion of the second sentence. We do not like the use of the word "interface" in the last sentence. We think the term "broker" might be more appropriate.

Poland:

Poland supports Austrian and Finnish proposals.

Portugal:

Portugal supports Austrian and Finnish proposals.

Sweden:

Sweden prefers the text proposed by Austria and Finland to the original text. We cannot accept deletion of the reference to paragraph 30 which is crucial to us.

Switzerland:

The proposal is OK, some shortening would be welcomed.

Denmark:

[Finally, paragraph 3 obliges Parties to prohibit the advertising of the need for, or availability of, human organs "with a view to offering or seeking financial gain or comparable advantage". Parties must accordingly take the necessary measures to enforce such prohibition in an efficient manner. The negotiators considered this provision necessary, taking into account the existence of e.g. websites on the internet where human organs are put up for sale. Cf also paragraph 30.]

Denamrk withdraws the suggested earlier deletion of this paragraph.

Article 22 – Measures at international level

~~114.~~128. Article 22 obliges Parties to co-operate, to the widest extent possible, with the aim of preventing trafficking in human organs by: (i.) reporting to the Committee of the Parties, on its request, on the number of cases of trafficking in human organs d within their respective jurisdictions; (ii.) designate a national contact point for the exchange of information between Parties pertaining to trafficking in human organs.

Denmark:

Article 22 obliges Parties to co-operate, to the widest extent possible, with the aim of preventing trafficking in human organs by: (i.) reporting to the Committee of the Parties, on its request, on the number of cases of trafficking in human organs d within their respective jurisdictions; (ii.) designate a national contact point for the exchange of information **of general nature** between Parties pertaining to trafficking in human organs. **Member States of the European Union might consider designating as national contact points the competent authorities designated in accordance with Article 19 of the Directive 2010/53/EU of the European Parliament and of the Council of 7 July 2010 on standards of quality and safety of human organs intended for transplantation.**

Rationale:

The addition of "general" and the reference to the competent authorities designated according to the EU Directive is suggested to clarify which type of information is to be shared and possibly by whom thereby to reach a common understanding on the content and scope of Article 22 (ii).

Poland:

Provisions of the article 22 do not preclude other measures of international cooperation aimed at the prevention of trafficking in human organs. Above measures may in particular include exchange of information on:

a) non-residents included on the transplant waiting list within one Party - this information should be communicated to the competent authority of a Party of their residence;

b) cross-border organ transport - this information should be communicated to the competent authorities of the exporting country and importing country;;

c) organ donations or transplantations from living donors who are non-residents - this information should be communicated to the competent authority of a Party of their residence.

Rationale:

Additional proposal made by Ministry of Health to clarify potential scope of international cooperation.

~~115.~~129. These measures were deemed necessary by the negotiators in order to be able to assess the impact of the Convention and to ensure effective international cooperation.

Chapter VI – Follow-up mechanism

~~116.~~130. Chapter VI of the Convention contains provisions which aim at ensuring the effective implementation of the Convention by the Parties. The monitoring system foreseen by the Convention is based essentially on a body, the Committee of the Parties, composed of representatives of the Parties to the Convention.

Article 23 – Committee of the Parties

~~117.~~131. Article 23 provides for the setting-up of a committee under the Convention, the Committee of the Parties, which is a body with the composition described above, responsible for a number of Convention-based follow-up tasks.

~~118.~~132. The Committee of the Parties will be convened the first time by the Secretary General of the Council of Europe, within a year of the entry into force of the Convention by virtue of the 10th ratification. It will then meet at the request of a third of the Parties or of the Secretary General of the Council of Europe.

~~119.~~133. It should be stressed that the negotiators intended to allow the Convention to come into force quickly while deferring the introduction of the follow-up mechanism until such time as the Convention was ratified by a sufficient number of States for it to operate under satisfactory conditions, with a sufficient number of representative Parties to ensure its credibility.

~~120.~~134. The setting-up of this body will ensure equal participation of all the Parties in the decision-making process and in the Convention monitoring procedure and will also strengthen co-operation between the Parties to ensure proper and effective implementation of the Convention.

~~121.~~135. The Committee of the Parties must adopt rules of procedure establishing the way in which the monitoring system of the Convention operates, on the understanding that its rules of procedure must be drafted in such a way that the implementation of the Convention by the Parties, including the European Union, is effectively monitored.

Denmark:

The Committee of the Parties must adopt rules of procedure establishing the way in which the monitoring system of the Convention operates, on the understanding that its rules of procedure must be drafted in such a way that the implementation of the Convention by the Parties, including the European Union, is effectively **and efficiently** monitored **taking into account in that respect the gravity of the problem of trafficking in human organs is actually taking place in the monitored Contracting Party.**

Rationale:

The additions are suggested to underline the need to ensure that the monitoring of the implementation of the Convention is cost-effective, meaning inter alia that it draws on other relevant sources e.g. of the implementation of other international instruments and that the extent of monitoring should match the actual problems of trafficking in organs in the Party in question.

Belgium:

We are not in favour of the proposed addition in the txt. (I don't think such precision can be found in other conventions or explanatory reports).

Switzerland:

The last part of the sentence goes too far; all the parties have to be treated equally.

~~122.~~136. The Committee of Ministers shall decide on the way in which those Parties which are not member States of the Council of Europe are to contribute to the financing of these activities. The Committee of Ministers shall seek the opinion of those Parties which are not member States of the Council of Europe before deciding on the budgetary appropriations to be allocated to the Committee of the Parties.

Article 24 – Other representatives

~~123.~~137. Article 24 contains an important message concerning the participation of bodies other than the Parties themselves in the Convention monitoring mechanism in order to ensure a genuinely multisectoral and multidisciplinary approach. It refers, firstly, to the Parliamentary Assembly and the European Committee on Crime Problems (CDPC), and, secondly, more unspecified, to other relevant intergovernmental or scientific committees of the Council of Europe which, by virtue of their responsibilities would definitely make a worthwhile contribution by taking part in the monitoring of the work on the Convention. These committees are the Committee on Bioethics (DH-BIO) and the European Committee on Transplantation of Organs (CD-P-TO).

~~124.~~138. The importance afforded to involving representatives of relevant international bodies and of relevant official bodies of the Parties, as well as representatives of civil society in the work of the Committee of the Parties is undoubtedly one of the main strengths of the monitoring system provided for by the negotiators. The wording “relevant international bodies” in paragraph 3, is to be understood as inter-governmental bodies active in the field covered by the Convention. The wording “relevant official bodies” in paragraph 4, refers to officially recognised national or international bodies of experts working in an advisory capacity for Parties to the Convention in the field covered by the Convention, in particular as regards bioethics and transplantation of human organs.

~~125.~~139. The possibility of admitting representatives of inter-governmental, governmental and non-governmental organisations and other bodies actively involved in preventing and combating trafficking in human organs as observers was considered to be an important issue, if the monitoring of the application of the Convention was to be truly effective.

~~126.~~140. Paragraph 6 prescribes that when appointing representatives as observers under paragraphs 2 to 5 (Council of Europe bodies, international bodies, official bodies of the Parties and representatives of non-governmental organisations), a balanced representation of the different sectors and disciplines involved (the law enforcement authorities, the judiciary, the health authorities, as well as civil society interest groups) shall be ensured.

Article 25 – Functions of the Committee of the Parties

~~127.~~141. When drafting this provision, the negotiators wanted to base itself on the similar provision of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS. No. 201), creating as simple and flexible a mechanism as possible, centred on a Committee of the Parties with a broader role in the Council of Europe’s legal work on combating the trafficking in human organs. The Committee of the Parties is thus destined to serve as a centre for the collection, analysis and sharing of information, experiences and

good practice between Parties to improve their policies in this field using a multisectoral and multidisciplinary approach.

~~128.~~142. With respect to the Convention, the Committee of the Parties has the traditional follow-up competencies and:

– plays a role in the effective implementation of the Convention, by making proposals to facilitate or improve the effective use and implementation of the Convention, including the identification of any problems and the effects of any declarations made under the Convention;

– plays a general advisory role in respect of the Convention by expressing an opinion on any question concerning the application of the Convention, including by making specific recommendations to Parties in this respect. This activity does not entail mutual evaluation or similar intrusive monitoring;

– serves as a clearing house and facilitates the exchange of information on significant legal, policy or technological developments in relation to the application of the provisions of the Convention. In this context, the Committee of the Parties may avail itself of the expertise of relevant committees and other bodies of the Council of Europe.

~~129.~~143. Paragraph 4 states that the European Committee on Crime Problems (CDPC) should be kept periodically informed of the activities mentioned in paragraphs 1, 2 and 3 of Article 25.

Chapter VII – Relationship with other international instruments

Article 26 – Relationship with other international instruments

~~130.~~144. Article 26 deals with the relationship between the Convention and other international instruments.

~~131.~~145. In accordance with the 1969 Vienna Convention on the Law of Treaties, Article 26 seeks to ensure that the Convention harmoniously coexists with other treaties – whether multilateral or bilateral – or instruments dealing with matters which the Convention also covers. Article 26, paragraph 1 aims at ensuring that this Convention does not prejudice the rights and obligations derived from other international instruments to which the Parties to this Convention are also Parties or will become Parties, and which contain provisions on matters governed by this Convention.

~~132.~~146. Article 26, paragraph 2 states positively that Parties may conclude bilateral or multilateral agreements – or any other legal instrument – relating to the matters which the Convention governs. However, the wording makes clear that Parties are not allowed to conclude any agreement which derogates from this Convention.

~~133.~~147. Following the signature of a Memorandum of Understanding between the Council of Europe and the European Union on 23 May 2007, the CDPC took note that “legal co-operation should be further developed between the Council of Europe and the European Union with a view to ensuring coherence between Community and European Union law and the standards of Council of Europe conventions. This does not prevent Community and European Union law from adopting more far-reaching rules.”

Chapter VIII – Amendments to the Convention

Article 27 – Amendments

~~134.~~148. Amendments to the provisions of the Convention may be proposed by the Parties. They must be communicated to all Council of Europe member States, to any signatory, to any Party, to the non-member States having participated in the elaboration of the Convention, to States enjoying observer status with the Council of Europe, to the European Union and to any State invited to sign the Convention.

~~135.~~149. The CDPC and other relevant Council of Europe intergovernmental or scientific committees will prepare opinions on the proposed amendment, which will be submitted to the Committee of the Parties. After considering the proposed amendment and the opinion submitted by the Committee of the Parties, the Committee of Ministers can adopt the amendment by the majority provided for in Article 20.d of the Statute of the Council of Europe. Before deciding on the amendment, the Committee of Ministers shall consult and obtain the unanimous consent of all Parties. Such a requirement recognises that all Parties to the Convention should be able to participate in the decision-making process concerning amendments and are on an equal footing.

Chapter IX – Final clauses

~~136.~~150. With some exceptions, Articles 28 to 33 are essentially based on the Model Final Clauses for Conventions and Agreements concluded within the Council of Europe, which the Committee of Ministers approved at the Deputies' 315th meeting, in February 1980.

Article 28 – Signature and entry into force

~~137.~~151. The Convention is open for signature by Council of Europe member States, the European Union, and States not members of the Council of Europe which took part in drawing it up (the Holy See, Japan and Mexico) and States enjoying observer status with the Council of Europe. In addition, with a view to encouraging the participation of the largest possible non-member States to the Convention, this article

provides them with the possibility, subject to an invitation by the Committee of Ministers, to sign and ratify the Convention even before its entry into force. By doing so, this Convention departs from previous Council of Europe treaty practice according to which non-member States which have not participated in the elaboration of a Council of Europe Convention usually accede to it after its entry into force.

~~138.~~152. Article 28 paragraph 3 sets the number of ratifications, acceptances or approvals required for the Convention's entry into force at five. This number is not very high in order not to delay unnecessarily the entry into force of the Convention but reflects nevertheless the belief that a minimum group of Parties is needed to successfully set about addressing the major challenge of combating trafficking in human organs. Of the five Parties which will make the Convention enter into force, at least three must be Council of Europe members.

Article 29 – Territorial application

~~139.~~153. This provision is only concerned with territories having a special status, such as overseas territories, the Faroe Islands or Greenland in the case of Denmark, or Gibraltar, the Isle of Man, Jersey or Guernsey in the case of the United Kingdom.

~~140.~~154. It is well understood, however, that it would be contrary to the object and purpose of this Convention for any contracting Party to exclude parts of its main territory from the Convention's scope and that it was unnecessary to make this point explicit in the Convention.

Article 30 – Reservations

~~141.~~155. Article 30 specifies that the Parties may make use of the reservations expressly authorised by the Convention. No other reservation may be made. The negotiators wished to underline the fact that reservations can be withdrawn at any moment.

Article 30, paragraph 3 allows Parties to enter a reservation limiting the scope of application to the illicit removal and trafficking in human organs for purposes of transplantation only, thereby excluding its application to "other purposes".

Belgium:

The last sentence must be adapted to the adopted Convention. We propose the following sentence:

"Article 30, paragraph 3 allows Parties to enter a reservation limiting ~~the scope of application to the illicit removal and trafficking in human organs for purposes of transplantation only, thereby excluding its application to "other purposes the~~ application of article 5 and article 7, paragraphs 2 and 3, only

when the offences are committed for purposes of implantation, or for purposed of implantation or other purposes the Party would like to precise

Germany:

Germany supports the wording chosen in point 155 regarding the wide scope of the reservations possible under Article 30 para. 3. This wording does not restrict the reservation to specific articles as has been done in the current draft of the convention itself (PC-TO (2012) 1 – rev 6). Germany opposes any restrictions to a reservation with regard to the applicability for "other purposes" as foreseen in the current draft of Article 30 para. 3 of the convention.

Switzerland:

Concerning the possible reservations there is an inconsistency in our view: in article 30 not all the reservation possibilities are mentioned (art. 4 Para 2, Art. 10 Para 3 for example are missing). Either one puts all the reservation possibilities into Art. 30 or Art. 30 is formulated generally and the reservation possibilities are mentioned in the articles concerned. Otherwise we risk a confusion of those, who are not familiar with this convention.

Article 31 – Dispute settlement

~~142.~~156. Article 31 provides that the Committee of the Parties, in close co-operation with the European Committee on Crime Problems (CDPC) and other relevant Council of Europe intergovernmental or scientific committees, shall follow the application of the Convention and facilitate the solution of all disputes related thereto between the Parties. Coordination with the CDPC will normally be ensured through the participation of a representative of the CDPC in the Committee of the Parties.

Article 32 – Denunciation

~~143.~~157. Article 32 allows any Party to denounce the Convention.

Article 33 – Notification

~~144.~~158. Article 33 lists the notifications that, as the depositary of the Convention, the Secretary General of the Council of Europe is required to make, and designates the recipients of these notifications (States and the European Union).