



COMMISSION OF THE EUROPEAN COMMUNITIES

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**COMMISSION STAFF WORKING DOCUMENT**

**Annex to the**

**REPORT FROM THE COMMISSION**

**based on Article 9 of the Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence**

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### REPORT FROM THE COMMISSION

**based on Article 9 of the Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence**

#### **1. ANALYSIS OF NATIONAL MEASURES TAKEN TO COMPLY WITH THE FRAMEWORK DECISION**

One of the objectives of the European Union is to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters.

Against this background, this Framework Decision aims at strengthening the penal framework to prevent the *facilitation of unauthorised entry, transit and residence* and supplements other instruments adopted in order to combat illegal immigration, illegal employment, trafficking in human beings and the sexual exploitation of children.

To that end it is essential to approximate existing legal provisions, in particular, on the one hand, the precise definition of the infringement in question and the cases of exemption, which is the subject of Council Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence and, on the other hand, minimum rules for penalties, liability of legal persons and jurisdiction. It must also be noted that some Member States do not clearly distinguish between human trafficking and migrant smuggling.

## 1.1. Article 1: Penalties<sup>1</sup>

This article is one of the key provisions of the Framework Decision, which stipulates that each Member State shall take the measures necessary to ensure that the infringements defined in Directive 2002/90/EC are punishable by effective, proportionate and dissuasive criminal penalties which may entail extradition. In some cases pecuniary sanctions have been provided as alternative penalties. There could be some doubts as to whether, if applied, these would be sufficiently dissuasive but on the other hand this might be justified by the fact that penalties should also be proportionate. With regard to Article 2 of the Council Directive 2002/90/EC very few Member States notified that their existing legal systems provide already for general rules regarding attempt and instigation, which would also apply in the case of migrant smuggling.

Section 218 Act IV of the **Hungarian** Criminal Code of 1978 contains specific provisions regarding people smuggling. Any person who provides aid to another person for crossing the state borders, without authorization or in an unauthorized manner shall be sentenced by imprisonment not exceeding three years. The punishment shall be imprisonment between one to five years for smuggling illegal aliens for financial gain or advantage or if it involves several persons. The maximum penalty for the involvement in people smuggling shall be between two to eight years if the perpetrator has been charged by tormenting the smuggled person or in possession of fire arms or in pattern of criminal profiteering. Expulsion may also be imposed as supplementary punishment against a person engaged in the smuggling of illegal aliens. Section 98 provides a penalty that shall not exceed 20 years imprisonment to whom has knowingly committed a criminal act in affiliation with organized crime.

Article 292 of the Criminal Code of **Lithuania** (adopted on 26 September 2000) has been amended by Law No. X-61 (Official Journal 2004, No. 188-6995). It states that anybody having unlawfully carried an alien not having permanent residence in the Republic or having carried or hidden him or her on its territory shall be punishable by a fine or imprisonment of up to six years. If the acts are committed for a personal gain or in such way as to endanger human life the offender shall be punishable on conviction to imprisonment of up to eight years. Anybody organising the act regarding migrant smuggling shall be punished by

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1 Article 1  
Penalties

1. Each Member State shall take the measures necessary to ensure that the infringements defined in Articles 1 and 2 of Directive 2002/90/EC are punishable by effective, proportionate and dissuasive criminal penalties which may entail extradition. 2. Where appropriate, the criminal penalties covered in paragraph 1 may be accompanied by the following measures: - confiscation of the means of transport used to commit the offence, - a prohibition on practising directly or through an intermediary the occupational activity in the exercise of which the offence was committed, - deportation. 3. Each Member State shall take the measures necessary to ensure that, when committed for financial gain, the infringements defined in Article 1(1)(a) and, to the extent relevant, Article 2(a) of Directive 2002/90/EC are punishable by custodial sentences with a maximum sentence of not less than eight years where they are committed in any of the following circumstances: - the offence was committed as an activity of a criminal organisation as defined in Joint Action 98/733/JHA(8), - the offence was committed while endangering the lives of the persons who are the subject of the offence. 4. If imperative to preserve the coherence of the national penalty system, the actions defined in paragraph 3 shall be punishable by custodial sentences with a maximum sentence of not less than six years, provided that it is among the most severe maximum sentences available for crimes of comparable gravity.

imprisonment of between four and ten years. Confiscation of assets and the deprivation of a special right may be imposed together with penalties<sup>2</sup>.

Section 25 of the Immigration Act 1971 of the **United Kingdom** (as substituted by section 143 of the Nationality, Immigration and Asylum Act 2002) sets out the offences of assisting unlawful immigration to the Member States. A person found guilty of the offence may be liable on conviction to a term of imprisonment of up to 14 years, to a fine or to both. The 1962 Ordinance, as amended by the Gibraltar Immigration Control Ordinance 2005, provide sanction for persons who assist a non-EU national to enter, transit or reside within the territory of a Member State, including where this is done for financial gain. According to Article 63A(1)(a)(b), 63A(2)(a)(b)(c) and 63A(4) assisting illegal immigration into another state is punishable by a fine or by imprisonment between 6 months and 8 years.

In **Italy** the Article 12 of Legislative Decree Nr. 286/1998 (residence and social protection) states that whoever performs acts aimed to bring about illegal entry of a foreigner shall be punished with imprisonment of up to 12 years and a fine of up to €15,000 for each smuggled person. Imprisonment is increased from 12 to 15 years if e.g. victims are minors or their life has been endangered or the victim is destined for sexual exploitation. Furthermore, up to 15 years if the smuggled migrant has suffered an inhuman treatment or degrading situations. Article 12(4) regulates the confiscation that is applicable to any means of transportation used to carry out the crime. Article 15 and 16 regulate the expulsions of the persons involved that should be declared by the judge.

5. Under Chapter 17, Sections 8 and 8 bis of the **Finnish** Penal Act people smuggling is punishable with a fine or custodial sentence of up to 2 years.

The Act No. 140/1961 (as amended by act No 557/1991 and Act No 290/1993) of the **Czech Republic** Criminal Code Section 171 (a) lists certain categories that deal with unauthorised crossing of State borders. According to Section 171 (a), 10, 171 (c) and under Act No. 326/1999(Coll.)<sup>3</sup> Sections 99, 100, 102, 156 (1)(b) and (4)-(8), migrant smuggling is punished with a fine or a custodial sentence from six month to three years imprisonment if the perpetrator commits the offence with the intent to conceal or facilitate another criminal offence or commits the offence for payment, or he/she is a member of an organized group. Section 49 of Act 140/1961 provides that the Court may impose the penalty for between one year to ten years where the perpetrator committed an offence in connection with the activity in question.

Article 311 of the **Slovenian** Criminal Code determinates criminal offences of unlawful crossing of the State border or state territory. A foreign person who does not have a permit to reside in the Republic of Slovenia (Article 311-2) shall be given a prison sentence of between three months and three years, or a fine. Whoever is engaged in unlawfully bringing foreign persons (Article 311-3) who do not have permits to enter or reside in the Republic of Slovenia to the Republic of Slovenia, transporting them to said territory, helping them to hide or unlawfully bringing a group of such foreign persons over the border or territory of the state for payment shall be given a prison sentence of up to five years and a fine.

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2 Article 67(5) "Confiscation of assets" - Lithuanian Criminal Code.

3 Act 326/199 (Coll.)"On the stay of foreigners on the Territory of the Czech Republic and on the amendments to certain acts".

In Belgium Article 1 of the Framework Decision has been implemented by Articles 77, 77 bis and 77 quater of the law of 15 December 1980 as amended by the law of the 10 August 2005. The latter modified several dispositions on the fight against human trafficking and migrant smuggling of the **Belgium** Criminal Code. People smuggling people is a crime that shall be punished by a fine or imprisonment of up to five years (Article 77 bis). Article 77 quater covers seven aggravating alternatives and provides for penalties from 10 to 15 years plus a fine, if the offence has been committed, for example, against a minor or by endangering the life of the smuggled person. Article 77 quinquies provides for penalties of up to 20 years imprisonment if the offence has caused the death of the person concerned or if it has been committed within a criminal organisation.

In **Germany** migrant smuggling ("Einschleusen von Ausländern") is incriminated according to Articles 96 and 97 of the Residence Act ("Aufenthaltsgesetz"). Article 96 (1) provides for a maximum penalty of five years imprisonment if the offence is committed for financial gain, repeatedly or for the benefit of several smuggled persons. The maximum penalty is 10 years imprisonment if, inter alia, the offender acted as a member of a criminal organisation or the life of the smuggled has been endangered or/and by a gang, the delinquent faces sentences of imprisonment of up to 10 years, as well as deprivation of assets in some cases.

**Spain** approved on 29 September 2003 the Organic Law No. 11/2003 in which are contained a series of legislative modifications to comply with Framework Decision 2002/946. Article 313 and 318 bis of the Spanish Penal Code provides for penalties from four to eight year imprisonment for people guilty of smuggling migrants.

**France** implemented the provision through the Act 2003-1119 of 26 November 2003 concerning the immigration and residence of foreigners to/in France. In this context Articles 21 and 21ter of the decree of 2 November 1945 concerning conditions of entering into and residing in France were modified and replaced. The new Article 21 stipulates that a person who facilitates the irregular entry or residence into/in France or an EU Member State shall be punished by a fine or imprisonment of up to 5 years. Article 21bis provides for penalties of up to 10 years imprisonment if, inter alia, the offence was committed by criminal organisation or the life of the persons concerned has been endangered.

**Latvian** Criminal Law under Sections 285 (Unlawful Conveyance of a Person Across the State Border), 285(1) (Ensuring the possibility of residing illegally in the Republic of Latvia) provides for the incrimination of persons guilty of smuggling people. For whom commits unlawfully conveying of a person across the State border the applicable sentence is deprivation of liberty for a term not exceeding five years or seven year imprisonment (involving State officials utilizing his or her official position). Article 285 (3), 5 years up to 10 years imprisonment, with confiscation of property, for a person who commits unlawfully conveying a large number of persons, that is, more than five persons at one time, across a State border. Section 285(3) covers the situation in which the commission of the act involves more than five migrants or the perpetrator is part of a criminal group; in these cases the offenders are punished by a prison sentence of not more 10 years. For a person who knowingly commits ensuring persons the possibility of residing illegally in the State the applicable sentence is a fine or deprivation of liberty for a term not exceeding two years; not more than five years imprisonment or a fine or a community service if the offender involves two or more persons. Confiscation of property is regulated.

Chapter 10 Sections 2(a) and 3(a) of the Act (SFS 2004:206 amending the Aliens Act (1989:529) adopted on 7 April 2004 of the **Swedish** Aliens Act provides for penalties to the

perpetrator guilty of smuggling migrants. In Sweden this crime is punishable with a fine or on conviction to imprisonment. Any person who deliberately helps an alien to enter or pass through Sweden, a Member State of the EU, Norway or Iceland illegally, shall be sentenced up to two years in prison. If the offence is regarded as serious, offenders shall be sentenced to between six months and six years of prison for aggravated people smuggling. In establishing whether the offences was aggravated particular attention should be paid to whether it was committed e.g. in return for payment or involving a large number of persons, or putting in danger the health of the persons involved. If the offence is regarded as minor, the offender shall be sentenced to a fine or imprisonment for a period of up to six months. Any person who intentionally helps aliens or reside unlawfully and does so for financial gain, shall be sentenced to up to two years in prison or, if are mitigating circumstances, to a fine.

The Act No. 403/2004 amended the section 171(a) of the Criminal Code of the **Slovak Republic**, which governs the criminal offences of unauthorised crossing of the State border and human trafficking. In accordance with this law, the migrant is viewed as a victim and is, therefore, not punishable. Only the organiser and the abetter count as criminally liable and even then only if they commit the offence with the intention of gaining financial benefit or some other material benefit either for themselves or a third party, This means that people who assist migrants for family or humanitarian reason are not criminally liable. The main penalty is a custodial sentence: the basic offence of unauthorised crossing of the state border and human trafficking (Section 171a)(1) of the Criminal Code) carries a penalty of between two and eight years, while the aggravated offences (Section 171a(6) of the Criminal Code) carried a penalty of between ten to fifteen years. Where certain conditions laid down in the criminal Code are met, the further penalties that may be imposed are forfeiture of property (or the preventive measures of seizure of property), an operating ban and deportation. If the offence is committed in the form of organised crime (by an organised group or a criminal gang) or in a way likely to endanger the life of health of the persons smuggled, it qualifies as an aggravated offence. The maximum custodial penalty is then from ten to fifteen years imprisonment.

Under Article 32 (Part IV – General) of the **Maltese Immigration Act**<sup>4</sup> the aiding and the assisting of any person to land or attempt to land in Malta will be punished by a fine of up to two years imprisonment or to both such fine and imprisonment “*unless a greater punishment is established for such offence by another law*”.

The **Polish Criminal Penal Code** has been amended by the Act of 16 April 2004<sup>5</sup> . Under Article 264, Paragraph 3, persons who help individuals to cross the Polish border illegally shall be liable to imprisonment ranging from six to eight years. Article 264 (a) (1) contains specific provisions to persons who, for personal or financial gain, help or enable individuals to live in Poland in violation of the law (shall be liable to imprisonment ranging from three months to five years). Paragraph 2 of Article 264 (a) provides that in particular cases, where the offender did not gain financially, the court may, by way of exception, apply a lenient penalty or even refrain from imposing a penalty. Article 258(1) provides that a person who takes part in an organised group or association whose objective is to commit crime or financial crime shall be liable to imprisonment from 3 months to five years.

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4 Immigration Act - Chapter 217 of the Maltese Criminal Code.

5 Act 16/04/2004 “on amendments to the Criminal Code and certain other acts – Legal Gazette, 2004, No 93, Item 889.

There is no clear legislative distinction between smuggling and trafficking in the **Dutch** legal system. Pursuant to Article 197a of the Penal Code a fine or up to 4 years imprisonment (a person who, for motives of pecuniary gain, assists another person in gaining entry to the Netherlands or in remaining in the Netherlands or in gaining entry to or in remaining in any State whose obligation it is to exercise border control also on behalf of The Netherlands). A fine or up to 6 years imprisonment applies where the offence is committed in any official or professional capacity. Article 197(a) and 140 provides for the incrimination of a person guilty of being part of a criminal organization; according to such articles the offender shall be judged with a sentence up to 12 years imprisonment. Article 33 of the Dutch Penal Code provide the cases on which confiscation is available. Article 63 and 67 of the 2000's Foreign Act states the condition of the expulsion of a foreigner.

Pursuant to Section 59(5)(IV) of the Aliens Act, any person who intentionally assists an alien in an unlawful entry or to stay in **Denmark** is liable to a fine or imprisonment for up to two years. The same punishment applies to anyone who, for material advantage, assists an alien in entering Denmark for the purpose of entering from here into another country that will refuse entry to the alien or will return him to Denmark. Assistance under Section 59(5) in an unlawful entry may consist of helping an alien to cross the border by, for instance, hiding him/her in the boot of a car or transporting the person to or from the border area. Assistance may also consist of procuring for the alien false/forged entry documents or of providing the authorities with false information for the purpose of obtaining for that person permission to enter. Assistance in staying unlawfully may, for instance, consist of providing shelter for the alien for a short or long period. In addition, the maximum penalty in Section 125 (a) of the Danish Criminal Code was increased from imprisonment for up to four years to up to eight years, which corresponds to the requirement laid down in the EU Framework Decision. In the light of this and taking into account the gravity by which trafficking in human beings under aggravating circumstances should be judged, there has thus not been found any occasion to apply the exemption provision in Article 1(4) of the Framework Decision according to which the Member States may limit the maximum penalty to six years. It should be noted that a person who smuggles people with a view to sexual abuse of children or exploitation of an adult for prostitution may, according to circumstances, also be punished for complicity, etc. in other criminal offences, including e.g. Section 222 of the Danish Criminal Code concerning sexual abuse of children, Sections 228, 299 concerning procuring and other principal activity in connection with prostitution, Section 230 concerning the use of children as pornographic models or Section 235 concerning dissemination of child pornography.

Articles 259 and 134 of the **Estonian** Penal Code contain the provision related to smuggling of persons and illegal immigration. Illegal transportation of an alien across the state border<sup>6</sup> or temporary border line of the Republic of Estonia is punishable by a pecuniary punishment fo up to one year of imprisonment. The same act<sup>7</sup>, if committed by a group, or by using violence, is punishable by a pecuniary punishment of up to 3 years' imprisonment. Article 259(3) if serious health damage is thereby caused, is punishable by 4 to 12 years imprisonment.

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6 Article 259(1) Estonian Penal Code.

7 Article 259(2) Estonia Penal Code.

## 1.2. Article 2 and 3: Liability and sanctions of legal persons<sup>8</sup>.

Article 2, following a standard formula that can be found in other instruments<sup>9</sup>, obliges Member States to ensure that legal persons can be held liable for offences referred to in Article 1 and 3 committed for their benefit by any person with certain leading positions within the legal person. It is not required that such liability be exclusively criminal. The legal systems of the **Czech Republic, Latvia and Slovakia**<sup>10</sup> do not provide for the criminal responsibility of legal persons.

In the **Hungarian** Penal Code the liability of the legal person is regulated by Act CIV 2001. The court may impose compulsory measures against the legal entity (dissolution, limiting activities and imposition of a fine). Act CIV 2001 are applicable in the event of the commission of any voluntary criminal act defined in Act IV of 1978 of the Criminal Code.

In the **Lithuanian** Criminal Code, the amending article 292<sup>11</sup> (4) states that legal persons may be deemed liable for acts referred in point (1) and (2) of the same Article (Unlawful carriage of persons across the State border)<sup>12</sup>. Article 20 of the Criminal Code states that a legal person shall be liable solely for criminal acts the commission of which gives rise to liability on the part of a legal person under special provisions of the Code. A legal person shall be liable for criminal acts committed by a natural person only where the natural person committed the criminal act for the benefit and the interests of the legal person. The documents forwarded to the Commission do not permit to evaluate the sanctions that could be imposed on legal persons.

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8 Article 2 Liability of legal persons

1. Each Member State shall take the measures necessary to ensure that legal persons can be held liable for the infringements referred to in Article 1(1) and which are committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on: a power of representation of the legal person, an authority to take decisions on behalf of the legal person, or an authority to exercise control within the legal person. 2. Apart from the cases already provided for in paragraph 1, each Member State shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission of the infringements referred to in Article 1(1) for the benefit of that legal person by a person under its authority. 3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators or instigators of or accessories in the offences referred to in paragraph 1.

Article 3 Sanctions for legal persons

1. Each Member State shall take the measures necessary to ensure that a legal person held liable pursuant to Article 2(1) is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions such as: (a) exclusion from entitlement to public benefits or aid; (b) temporary or permanent disqualification from the practice of commercial activities; (c) placing under judicial supervision; (d) a judicial winding-up order. 2. Each Member State shall take the measures necessary to ensure that a legal person held liable pursuant to Article 2(2) is punishable by effective, proportionate and dissuasive sanctions or measures.

9 See for example Article 8 of the Council Framework Decision of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro (OJ L 140, 14.06.2000, p.1-3).

10 Slovak law does not yet recognise the criminal liability of legal persons, Article 4(1)(c) of the Framework Decision has not yet been transposed.

11 Criminal Code of the Republic of Lithuania amended by Law No. X-61 – Official Journal 2004, No. 188-6995.

12 See page 4 of this report “Article 1: Penalties”-Lithuania .

Under common law, a legal person (e.g. a body corporate) can be held liable for an offence committed by a senior employee/officer. The state of mind of the senior employer/officer can be regarded as the state of mind of the body corporate. Further section 25(4) of the 1971 Act 1971 (as substituted) states that the offence applies to anything done outside the **United Kingdom** by a body incorporated under the law of a part of the United Kingdom. The liability of the body corporate is in addition to the liability of the natural person. A person found guilty of the offences may be liable up to 14 years of imprisonment Gibraltar law specifies that the offences may be committed by "persons" which may be either legal or natural persons<sup>13</sup>.

**Italian** law provides for administrative liability of legal persons where crimes are committed for their benefit or interest, but the document forwarded to the attention of the Commission did not provide any information on the relation between the smuggling migrant and the liability of the legal persons.

Under Chapter 9 (Corporate criminal liability 743/1995) of the **Finnish** Penal Act a corporation, foundation or other legal entity, in whose operations an offence has been committed, may on the demand of the public prosecutor be sentenced to a corporate fine, if such sanction has been provided in the Code. Chapter 9(2) states that the provisions in this chapter do not apply to offences committed in the exercise of public authority. A corporation may be sentenced to a corporate fine, if a person belonging to a statutory body or other management thereof has been an accomplice to an offence or allowed the commission of the offence or if the care and diligence necessary for the prevention of the offence has not been observed (Chapter 17 Offences against public order -Section 24 - *Corporate criminal liability* (142/2003)). The provisions on corporate criminal liability apply to participation in the activity of an organised criminal group, the arrangement of illegal immigration, animal welfare offence, organised gambling, dissemination of depictions of violence, dissemination of obscene material and unlawful marketing of obscene material.

Article 33 of the **Slovenia** Criminal Code determines grounds for the liability of legal persons. It establishes that the liability of a legal person for criminal offences, which the perpetrator commits in its name, on its account or in its favour, is provided for by a separate law, as well as the punishments, admonitory sanctions, safety measures and the legal consequences of the conviction with respect to a legal person. This law determines also criminal offences for the commission of which a legal person may be liable - one of those is also the above-stated criminal offence of unlawful crossing of the state border or state territory from the Article 311 of the Criminal Code. Articles 12 to 21 of the Liability of Legal Persons for Criminal Offences Act determine types of sentences, rules on fixing the sentence, safety measures and legal consequences of the conviction regarding legal persons<sup>14</sup>. Legal consequences of the conviction are the prohibition of activity on the basis of licenses, authorizations or concessions granted by state bodies and prohibition of acquisition of licenses, authorizations or concessions which are granted by state bodies. Legal consequences of a conviction may come into effect even if a fine was imposed on the legal person.

**Belgium** provides for the liability of and sanctions on legal persons in Articles 5, 7bis and 41bis of its Penal Code.

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13 Section 63(6) and 63(A)(6) of the 1962 Ordinance(as amended).

14 Pursuant Articles 12 to 21 of the Slovenian Criminal Offences Act, types of sentences for the legal persons are: fine, expropriation of property and winding-up of legal person. Safety measures are: confiscation of objects, publication of the judgment and prohibition of a specific commercial activity.

In **Germany** the liability of and the possibility of (non-criminal) sanctions on legal persons are ensured in general rules laid down by Articles 30 and 130 of the Infringement Act ("Ordnungswidrigkeiten-Gesetz").

Under **Spanish** law the liability of legal persons are regulated by the amended Article 318 of the Penal Code which includes the possibility that a court impose punishment to legal persons as regulated by article 129 of Spanish Penal Code imposing compulsory dissolution or suspension of the activities.

In **France** criminal liability of legal persons for migrant smuggling is ensured by Article 21ter of the decree of 2 November 1945 concerning conditions of entering into and residing in France. Legal persons can be held liable under the conditions set out in Article 121-2 of the Penal Code.

The **Maltese** Immigration Act<sup>15</sup> does not provide for criminal liability of legal persons. But under Article 248E<sup>16</sup> (3) of the Maltese Criminal Code legal persons may be sentenced by the court.

The **Polish** did not provide the Commission with relevant document from which it is possible to analyse the situation on the liability of legal person. (Article 51 of Polish Law No. 197 of 28 October 2002 regulates the liability of legal persons).

In the **Netherlands** a legal person can be held liable for criminal offences. Article 51 of the Penal Code provides for the criminal prosecution of legal persons. Article 51(2) and 23(7) provide for the imposition of a fine up to the amount of the next highest category.

Provisions on the liability of legal persons are contained in Part 5 of the **Danish** Criminal Code. Under Section 25 of the Criminal Code, a legal person may be punished with a fine if such punishment is authorised by law or by rules pursuant to law.

Under Section 27, it is a requirement for imposing criminal liability on a legal person that a criminal offence committed within the establishment of the legal person can be attributed to one or more persons associated with the legal person or the legal person as such. In extension of this provision, it follows from Section 306 of the Danish Criminal Code that criminal liability may be imposed on legal persons under the rules of Part 5 applying to the violation of the Criminal Code, also including the provisions set out in Section 125 (a) of the Code dealing with trafficking in human beings.

According to the **Estonian** legislation, the court may sentence a legal entity imposing compulsory dissolution or a pecuniary punishment.

According to **Swedish** law, only natural persons can commit crimes. However, Swedish legislation<sup>17</sup> provide a kind of criminal responsibility of legal persons through the institute of corporate fine.

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15 Immigration Act - Chapter 217 of the Maltese Criminal Code.

16 Article 248E(3) which relates to human trafficking and make references to Article 121D (abuse of Public Authority and Unlawful Exaction, of Extortion and of Bribery).

17 Chapter 36, Section 7-10 of the Swedish Penal Code.

### 1.3. Article 4: Jurisdiction<sup>18</sup>

Article 4 sets up the cases in which Member States are obliged to take jurisdiction over the offences referred to Article 1(1) of the Framework Decision. The starting point is the territoriality principle in Article 4(1)(a) according to which each Member States must establish its jurisdiction over offences related to migrant smuggling committed in whole or in part in its territory. Additionally, Member States must take extra-territorial jurisdiction over offences referred to in Article 1, where the offender is one of its nationals. The rules that regulated the jurisdiction of the Member States generally seem to meet what has been required by the Framework Decision

Act IV of 1978 Section 3 of the **Hungarian** Penal Code provides that Hungarian law shall be applied to crimes committed in the country, as well as to acts committed by Hungarian citizens abroad, which are crimes in accordance with Hungarian law. The Hungarian law shall also be applied to criminal acts committed on Hungarian aircraft or ships situated outside the border of the Republic of Hungary.

**The applicability of criminal law to persons having committed a criminal act on the territory of the Lithuanian State or on vessels flying or aircraft bearing the Lithuanian State flag or symbols is regulated by Article 4 of the Lithuania Criminal Code. Persons who have committed criminal acts on the territory of the Lithuanian State, or on vessels flying or aircraft bearing the Lithuanian State flag or symbols, shall be liable under Lithuania Law. The place at which a criminal act is committed shall be the place at which the person acted or should or could have acted, or the place at which the consequences occur as provided for by criminal law. The place at which a criminal act is committed by accomplices shall be the place at which the act was committed or, where one of the accomplices acted at a different place, at that place.. Where the same criminal act is committed on both Lithuanian State territory and abroad, the act shall be deemed to have been committed on Lithuanian State territory if it began, ended or was terminated on that territory. Where persons who enjoy immunity from criminal jurisdiction under international law have committed a criminal act on Lithuanian State territory, the question of their criminal liability shall be determined in accordance with the international agreements concluded by the Republic of Lithuania and this Code.**

**The offence in section 25 for the 1971 Act applies [by virtue of section 25(4)] to anything done in the United Kingdom, outside the UK by any individual to whom section 25(5)<sup>19</sup> applies, outside the UK by a body incorporated under the law of a part of the UK. In Gibraltar the offences in Section 63 and 63A of the 1962 Ordinance (as amended) apply**

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18 Article 4 Jurisdiction

1. Each Member State shall take the measures necessary to establish its jurisdiction with regard to the infringements referred to in Article 1(1) and committed (a) in whole or in part within its territory; (b) by one of its nationals, or (c) for the benefit of a legal person established in the territory of that Member State. 2. Subject to the provisions of Article 5, any Member State may decide that it will not apply, or that it will apply only in specific cases or circumstances, the jurisdiction rule set out in: - paragraph 1(b), - paragraph 1(c). 3. Each Member State shall inform the Secretary-General of the Council in writing if it decides to apply paragraph 2, where appropriate with an indication of the specific circumstances or conditions in which its decision applies.

19 **Section 25(5) applies to: a British citizen, a British overseas territories citizen, a British National (overseas), a British Overseas citizen, a person who is British subject under the British Nationality Act 1981, a British protected person within the meaning of that Act.**

by virtue of Section 63(6) and 63A(6) to anything done in or outside Gibraltar by an individual who is Gibraltarian or is a British person ordinarily residing in Gibraltar.

Article 6 of the Italian Penal Code provides that offences committed in whole or in part in its territory means that is under Italian jurisdiction. Pursuant to the same Article an Italian citizen may also be punished for offences committed abroad, provided he is arrested on Italian territory. Article 7<sup>20</sup> extends Italian jurisdiction to acts committed abroad that constitute crimes against the personality of the Italian State. This could cover some of the offences established by the Framework Decision.. Pursuant to Article 9 an Italian citizen may be punished for offences committed abroad.

As regards the information on national system provided to the Commission, the Finnish legislation provide for criminal liability of legal persons in Chapter 9 and Chapter 17, Section 24 of the Penal Act.

According to Act No. 140/1961 Coll. Section 17 of the Czech Republic's Criminal Code the punishable nature of acts committed within the territory of the Republic shall be judged in accordance with Czech law. An offence shall be deemed to have been committed within the territory of the Republic if the perpetrator committed the conduct within the territory of the Republic, even though the interest protected by this Act was or would have been violated or endangered, whether fully or in part, abroad or violated or endangered the interest protected by this Act within the territory of the Republic or where this outcome would have ensued at least in part within the territory of the Republic, even though he or she committed the conduct abroad.

Under Section 17 (3)<sup>21</sup> a criminal act committed on board of a Czech-registered vessel or aircraft outside the territory of the Republic shall also be judged in accordance with Czech law.

Belgium ensures proper jurisdiction in Articles 3 and 7 of its Criminal Code and Article 10ter 3° of the Criminal Procedures Code.

Germany provides for appropriate jurisdiction rules in Articles 3, 7(2) no.1 and 9(1).

Article 23 of the Spanish Organic Law of the judiciary branch rules establish that Spanish jurisdiction will cover acts committed abroad by Spanish or foreign nationals. Article 4(1) of the Framework Decision is regulated by Article 23(2) and 23(4)of the Organic Law of the 1<sup>st</sup> July 1985 that constitute an universal jurisdiction over certain crimes committed abroad.

In Latvia, jurisdiction is covered by Section 2 and 4 of Latvian Criminal Law. Latvian law shall be applied to offences committed in its territory. Section 4(1), (3) (4) provide that citizens aliens or stateless persons who have a permanent residence permit, shall be held liable in accordance with the Latvian law for a criminal offence committed in the territory of another state. Article 4(3) establishes the rules for the incrimination of an act committed in connection with a Latvian's interest outside its territory.

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20 Italian Penal Code.

21 Act No. 140/1961 Coll., Czech's Criminal Code.

Sweden provided to the Commission only general references on their own jurisdiction law, stated that the internal law is in line with what has been established in the Framework Decision.

In accordance with the principle of territoriality, Slovak law covers offences committed within the territory of the Slovak Republic, including what are known as distance offences (Section 17 of the Criminal Code); in accordance with the principle of personality (Section 18 of the Criminal Code) it covers offences committed abroad by nationals of the Slovak Republic, stateless persons permanently resident in the Slovak Republic and foreign nationals permanently resident in the Slovak Republic.

Article 110 Paragraph 1 of the Polish criminal law shall apply to aliens who have committed a criminal offence abroad against the interests of Poland, a Polish citizen or a Polish organisational entity which is not a legal person, and to aliens who have committed an offence of a terrorist nature abroad. Paragraph 2 states that Polish criminal law shall apply to aliens who commit abroad a criminal offence other than those listed in Paragraph 1 if, under Polish criminal law, that criminal offence carries a penalty of more than 2 years' imprisonment, the offenders remain on Polish territory and no decision has been taken to extradite them.

Under Article 2, Dutch criminal law applies to anyone who commits any criminal offence in the Netherlands. Under the amended Article 5a, Dutch criminal law also applies to persons who have a fixed residence or abode and who have committed trafficking in human beings outside the Netherlands. In so far as the criminal offence is not committed in Dutch territory, Articles 5 and 5a establish jurisdiction in respect of Dutch nationals and persons with a fixed residence or abode. To that end, Article 273a has been added to Articles 5 and 5a. Article 5 states that the requirements of the double incrimination are not applicable to human trafficking.

Sections 6 – 9 of the Danish Penal Code contain provisions on criminal jurisdiction. The criminal jurisdiction requirement set out in Article 6(1) par (a) of the Framework Decision is regulated through the provision of Section 6(1) of the Criminal Code (the territorial principle), according to which acts committed within the territory of the Danish state are subject to Danish criminal jurisdiction. It should be noted, otherwise, that an act which is not committed in Denmark but has effects in this country may be subject to Danish criminal jurisdiction depending on the circumstances, according to Section 9 of the Criminal Code. Section 9 provides that where the punishable nature of an act depends on or is influenced by an actual or intended consequence, the act will also be considered to have been committed in the territory where the consequence has taken effect or was intended to take effect (the effects principle).

**1.4. Article 5: Extradition and prosecution<sup>22</sup>**

**This article has been largely superseded by the Decision on the European Arrest Warrant<sup>23</sup>. Since the further applicability of Article 5 requires and in-depth analysis of the European Arrest Warrant, e.g. Article 33, and of the subsequent implementation problems, for e.g. annulment the transposition law in one Member States, this question shall be addressed in the context of the further development regarding the EAW.**

**1.5. Article 6: International Law of refugee<sup>24</sup>**

**The Commission is not able to take a final position of the implementation of this provision due to the lack of information provided by Member States. However the Commission has no indication that the international law on refugees has been violated as a result of the implementation of this Framework Decision.**

**1.6. Article 7: Communication of information between the Member States<sup>25</sup>**

**This Article is at the core of collaboration and cooperation between law enforcement authorities.**

**The United Kingdom is able to access and post information which may relate to criminal intelligence, on the EU database (Iconet) established for this purpose.**

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**22 Article 5 Extradition and prosecution**

**1. (a) Any Member State which, under its law, does not extradite its own nationals shall take the necessary measures to establish its jurisdiction over the infringements referred to in Article 1(1) when such infringements are committed by its own nationals outside its territory. (b) Each Member State shall, when one of its nationals is alleged to have committed in another Member State the infringements referred to in Article 1(1) and it does not extradite that person to that other Member State solely on the ground of his nationality, submit the case to its competent authorities for the purpose of prosecution, if appropriate. In order to enable prosecution to take place, the files, information and exhibits relating to the offence shall be transmitted in accordance with the procedures laid down in Article 6(2) of the European Convention on Extradition of 13 December 1957. The requesting Member State shall be informed of the prosecution initiated and of its outcome. 2. For the purpose of this Article, a "national" of a Member State shall be construed in accordance with any declaration made by that State under Article 6(1)(b) and (c) of the European Convention on Extradition, where appropriate as amended by any declarations made with respect to the Convention relating to extradition between the Member States of the European Union(9).**

**23 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.**

**24 Article 6 International law on refugees**

**This framework Decision shall apply without prejudice to the protection afforded refugees and asylum seekers in accordance with international law on refugees or other international instruments relating to human rights, in particular Member States' compliance with their international obligations pursuant to Articles 31 and 33 of the 1951 Convention relating to the status of refugees, as amended by the Protocol of New York of 1967.**

**25 Article 7 Communication of information between the Member States**

**1. If a Member State is informed of infringements referred to in Article 1(1) which are in breach of the law on the entry and residence of aliens of another Member State, it shall inform the latter accordingly. 2. Any Member State which requests another Member State to prosecute, on the grounds of a breach of its own laws on the entry and residence of aliens, infringements referred to in Article 1(1) must specify, by means of an official report or a certificate from the competent authorities, the provisions of its law which have been breached.**

In appropriate circumstances the Secretary of State for the Home Department shall provide a report to another Member State requesting the State to consider prosecuting an individual when he considers that the individual concerned has acted in breach of one of the United Kingdom laws on the entry and residence on aliens as is an infringement referred to Article 1(1) of the Directive. In Gibraltar infringements of other states immigration law would be notified to them either through the Interpol secure website, through Schengen liaison officers (between Gibraltar and Spain) or through other police to police contact.

Belgium referred to Article 7 paragraph 1 of the Convention of the 29 of May 2000 on Mutual Assistance in Criminal Matters between Member States of the European Union and to Article 21 paragraph 2 of the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959.

Germany did not provide information in this regard.

The Code of Criminal Procedure of the Republic of Latvia, Section 471 (Types of international cooperation) Section 472 (legal basis on cooperation in criminal matters) and Section 473 (Competent Authorities for cooperation in criminal matters) comply with Article 7 of the Framework Decision.

Pursuant to Section 45 (c) of the Danish Aliens Act, which was inserted by Act No. 362 of 6 June 2002 concerning an amendment of the Danish Aliens Act (Initiatives against terrorism etc., a follow-up on UN Security Council Resolution No. 1373 of 28 September 2001 concerning measures to combat terrorism), it is ensured that the immigration authorities can pass on information from cases concerning aliens for the purpose of possible prosecution of crimes committed by the alien in question in Denmark or abroad.

## 2. IMPLEMENTATION OF THE FRAMEWORK DECISION BY ICELAND.

As stated by point 6 of the preamble, this Framework Decision constitutes a development of provisions of the Schengen *acquis* within the meaning of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen *acquis*, which falls within the area referred to in Article 1(E) of Council Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application of that Agreement.

The Act On Foreigners No. 96 /2002<sup>26</sup> of Iceland (entered into force January 1st, 2003) Chapter I General Provisions, Section 57, contains specific provisions regarding migrant smuggling, fines or imprisonment for up to six years, which shall be ordered if a person, for purposes of financial gain, operates an organization for providing assistance to foreigners in entering Iceland or any other country illegally.

Attempted violations of the provisions of this Act are punishable and accomplices are criminally liable as provided for in Chapter III of the General Penal Code.

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26 This Act has been amended by Amendments No 27/2003 and 20/2004.