

Strasbourg, 3 May 2016
cdpc/docs 2015/cdpc (2015) 22 - e

CDPC (2015) 22

EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

**COMPILATION OF REPLIES TO THE QUESTIONNAIRE
CONCERNING SMUGGLING OF MIGRANTS**

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Questionnaire

1. Do you have any laws or legislative measures covering the issue of migrant smuggling?
 - a. Is the issue set out in general criminal law or are there specific provisions dealing with the problem?
2. Is the smuggling of migrants a criminal offence under domestic law?
 - a. Does national law include a definition of migrant smuggling?
 - b. How is this conduct defined?
 - c. What are the material elements of the crime?
 - d. Is “financial gain” an element of the definition of smuggling of migrants?

Could you please provide, if possible, the relevant texts (in English or in French)?

3. Are the following activities criminalized under national legislation:
 - a. Attempts to smuggle migrants
 - b. Participation as an accomplice in the smuggling of migrants
 - c. Acting as instigator of the smuggling of migrants
 - d. Migrant smuggling as part of a criminal organisation
 - e. Circumstances that endanger, or are likely to endanger, the lives or safety of smuggled migrants
4. Does your domestic legislation permit use of special investigative techniques for the purpose of investigating the smuggling of migrants such as
 - a. Interceptions of telecommunication;
 - b. Undercover operations;
 - c. Financial investigations: including access to bank, financial or commercial records and/or databases;
 - d. specific form of protection for witnesses;
 - e. others; Please specify.
5. Does your domestic legislation enable seizure and/or confiscation:
 - of property, equipment or other instrumentalities used in or destined for use in offences related to smuggling of migrants?
 - of proceeds of crime derived from offences related to smuggling of migrants ? If yes specify the main features of the legal framework.
6. Is trafficking in persons defined under national law?
 - a. If so, how does this definition differ from that of migrant smuggling?
7. In relation to your country, are there any international, regional or bilateral agreements which address the issue of migrant smuggling?
8. Does your country have jurisdiction to prosecute crimes related to smuggling of migrants when they are committed outside its territory? If yes, specify the legal framework.
9. Do you have a national policy or action plan to address the issue of migrant smuggling?
10. Where possible, please provide information regarding:
 - a. Number of apprehended smugglers:
 - b. Number of investigations instigated against migrant smugglers:

c. Number of successful prosecutions of migrant smugglers:

11. In your country, is international cooperation on smuggling of migrants (specifically on mutual legal assistance and extradition) afforded
 - by statute?
 - by treaty or other agreement or arrangement (multilateral or bilateral)?
 - by virtue of reciprocity or comity?
 - Is the provision of mutual legal assistance subject to the double criminality requirement according to your domestic legal framework?

12. In your experience, is international co-operation regarding prosecution of migrant smugglers effective? Please specify.

13. In terms of international co-operation, what legal and/or practical obstacles have been encountered as regards co-operation with:
 - a. Council of Europe Member States:
 - b. Third party states:

14. Do you think existing Council of Europe instruments on international co-operation in criminal matters (Mutual legal assistance, extradition) are effective in dealing with migrant smuggling? If not, please specify.

Portugal

Do you have any laws or legislative measures covering the issue of migrant smuggling? Is the issue set out in general criminal law or are there specific provisions dealing with the problem?

Yes.

The issue of migrant smuggling is set forth in Law 23/2007, of 4 July 2007, which approves the legal framework of entry, permanence, exit and removal of foreigners into and out of national territory.

Is the smuggling of migrants a criminal offence under domestic law?

Yes

Does national law include a definition of migrant smuggling?

No.

How is this conduct defined?

According to Article 183 (1) and (2) of Law 23/2007 (Action to facilitate illegal immigration):

1. Whoever favours or facilitates by any means the illegal entry or transit of a foreign citizen in national territory is punishable with a prison penalty up to three years.
2. Whoever favours or facilitates by any means the illegal entry or transit of a foreign citizen in national territory with a profit intention is punishable with a prison penalty from 1 up to 4 years.

What are the material elements of the crime?

The material elements of the crime are the favoring or facilitation by any means the illegal entry or transit of a foreign citizen in national territory, including with the profit intention.

Is “financial gain” an element of the definition of smuggling of migrants?

Yes.

Could you please provide, if possible, the relevant texts (in English or in French)?

Act 29/2012 of August 9 amended by Act 29/2012 of August 9

CHAPTER I: General Provisions

Article 1: Purpose

The present law establishes the conditions and procedures on the entry, stay, exit and removal of foreign citizens from Portuguese territory, as well as the long-term resident status.

Article 2: Transposition of directives

1. This act transposes into the internal legal system the following EU directives:
 - a) Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification;
 - b) Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air;
 - c) Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents;

- d) Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities;
 - e) Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data;
 - f) Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service;
 - g) Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research;
 - h) Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals;
 - i) Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment;
 - j) Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals;
 - k) Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection;
 - l) Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State.
2. Simultaneously, it entrenches the transposition into national law of the following Community acts:
- a) Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence;
 - b) Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third-country nationals;
 - c) Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985;
 - d) Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence.

Article 3: Definitions

For the purposes of this Act the following definitions shall apply:

- a) «Highly Qualified Activity», is the activity that requires technical and specialised competences, or competences of exceptional nature and thereby require adequate qualifications for its performance, such as higher education qualification;
- b) «Self-employed Activity», any activity carried out personally, under a contract for provision of services, relating to the activity carried out by the independent professional (liberal professions) or by way of a company;
- c) «Temporary work», the seasonal or short-term professional activity performed for a period not exceeding six months, except if it is performed under an investment Contract;
- d) «Investment activity», any activity carried out personally or by a company, in order to achieve, at least, one of the following situations in national territory and for a period of five years or more:
 - i) Capital transfers equal to, or more than, €1 million into Portugal;
 - a) ii) Creation of at least 30 new jobs;
 - b) iii) Investment in real estate equal to, or more than, €500.000;
- e) «EU Blue Card», the residence title that enables a third-country citizen to reside and take a highly-qualified employment in national territory;

- f) «Research Centre», any kind of public or private body, or a research and development unit either public or private, which conducts research activities in an officially recognized way;
- g) «Particularly exploitative working conditions», means working conditions, including those resulting from gender based or other discrimination, where there is a striking disproportion compared with the terms of employment of legally employed workers which, for example, may affect workers' health and safety, and which offends against human dignity;
- h) «Implementing Convention», the Convention Implementing the Schengen Agreement of 14 June 1985, signed in Schengen in 19 June 1990;
- i) «Forced return decision», an administrative or judicial decision or act, stating or declaring that the stay of a third-country national is illegal and imposing an obligation to return, and therefore, leave national territory;
- j) «Educational Establishment», a public or private establishment, officially recognised and whose courses of study are sanctioned;
- k) «Third State », any State that is neither a member of the European Union, nor a party to the Implementing Convention, or on which this Convention is not being enforced;
- l) «Unremunerated Trainee», a third-country national who has been admitted in national territory e for a training period without remuneration in accordance with national legislation;
- m) «University Student», a third-country national accepted by an establishment of higher education to pursue as his/her main activity a full-time course of study leading to a higher education qualification or certification officially recognised, including the possibility of attending a preparatory seminar for the main course as well as any research work for purposes of obtaining an academic degree;
- n) «school pupil», a third-country national admitted into national territory to follow a recognised programme of secondary education in the context of an exchange scheme operated by an organisation recognised for that purpose, or by individual admission;
- o) «External Borders», borders with third-countries, the airports for flights originating or with destination to territories of States which are not bounded by the Implementing Convention, as well as sea ports, except in what concerns the traffic between Portuguese shores, and the regular ferry connections between States Parties to the Implementing Convention;
- p) «Internal Borders», the common land borders with States Parties to the Implementing Convention, their airports for flights departing directly and exclusively originating from or heading to States which are Party to the Implementing Convention, as well as sea ports for regular ferry connections exclusively originating from or heading to States Parties to the Implementing Convention, not calling at any ports outside these territories;
- q) «Researcher», a third-country national holding an appropriate higher education qualification, who is selected by a research centre for carrying out a research project for which the above qualification is normally required ;
- r) «Voluntary Service Scheme», means a programme of activities of practical solidarity, based on a State or a Community scheme, pursuing objectives of general interest;
- s) «International Protection», means the recognition by a Member State of a third-country national or stateless person as a refugee or person in need of subsidiary protection;
- t) «Higher professional qualifications», means qualifications attested by evidence of higher education qualifications or attested by at least five years of professional experience of a level comparable to higher education qualifications and which is relevant in the occupation or sector specified in the work contract or binding job offer;
- u) «Return», the return of a third-country national to his/her country of origin or provenance, whether in voluntary compliance with an obligation to return, or in accordance with Community or bilateral readmission agreements or other arrangements enforced, or to another third-country, to which the third-country national concerned voluntarily decides to return to and in which he or she will be accepted;
- v) «Legal Resident», a foreign citizen holding a Portuguese residence title, with a period of validity of one year or more;

- w) «Company», companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, except non-profit organisations;
- x) «Residence Permit», the document issued according to the rules and the adopted uniform format in the European Union, to a third-country national holding a residence permit;
- y) «Airport Transit», transit for the purposes of removal by air, of a third-country national and, if necessary his / her escorting, through the airport premises;
- z) «Carrier», any natural or legal person that provides air, sea or land transportation services, on a professional basis;
- aa) «Port or Airport International Zone», the area between the embarkation and disembarkation points and the place where the documentary check of passengers is carried out;
- bb) «Centre equated to detention facility», facility created in the international areas of Portuguese airports designed to accommodate passengers non-admitted into national territory who are waiting to be returned.

Article 4: Scope

1. The provisions of the present Act shall apply to all foreign and stateless persons.
2. Without prejudice to its subsidiary application and unless expressly provided otherwise, this Act shall not apply to:
 - a) Nationals of an EU Member State, of a State Party to the European Economic Area or of a third-country with which the European Union has concluded an agreement on the free movement of persons;
 - b) Third-country nationals residing in national territory as refugees or beneficiaries of subsidiary protection under the ruling provisions of asylum, or beneficiaries of temporary protection;
 - c) Third-country nationals who are family members of a Portuguese citizen or of a foreign citizen covered by the preceding sub-paragraphs.

Article 5: Special Regulations

1. The provisions of this Act shall not affect the special regulations listed in:
 - a) Bilateral or multilateral agreements between the European Community, or between the European Union and its Member States, on the one hand, and with one or more third States, on the other;
 - b) International Conventions of which Portugal is a Party to, or by which Portugal is bound, especially those entered into force or to be signed with Portuguese-speaking countries or under the Community of Portuguese-Speaking Countries;
 - c) Protocols and Memoranda of Understanding between Portugal and third-countries.
2. The provisions of this Act shall not prejudice the obligations arising from the Convention Relating to the Status of Refugees, adopted in Geneva on 28 July 1951, and amended by the Additional Protocol to the Convention Relating to the Refugee Status, adopted in New York, on 31 January 1967, from international conventions on human rights and from international conventions on matters of extradition of persons that Portugal has subscribed or is ruled by.

CHAPTER II: Entry to and exit from national territory

SECTION I: Border Crossing

Article 6: Border Control

1. Entry into and exit from Portuguese territory shall take place in the recognised border posts during working hours, without prejudice to the provisions set out in the Implementing Convention.
2. All persons who enter national territory or exit from it shall be subject to border control, whenever they come from or head to States that are not Parties to the Schengen Implementing Convention.

3. The provisions of the preceding paragraph shall equally apply to those individuals travelling in a flight that does internal stopovers yet departed from or heads to States that are not Parties to the Schengen Implementing Convention.
4. Border check can be carried out on board ships, while travelling, following request of the ship's captain or of the shipping agent and on payment of a fee.
5. After performing the exit check of a ship or vessel is carried out, the Portuguese Immigration and Borders Service, from now on designated as SEF, issues an exit clearance, without which the ship may not leave the harbour.
6. On grounds of public policy and national security, after consulting the other States Parties to the Schengen Agreement, document control at internal borders may, on exceptional circumstances and for a limited period, be temporarily reintroduced.

Article 7: International Zone of ports

1. The international zones of ports correspond to fenced quays under the jurisdiction of the ports administration, and to embarking and disembarking points in the areas of free quays.
2. The international zones of ports also comprise SEF's bureaus.

Article 8: Access to international zones of ports and airports

1. Access to international zones of ports and airports, for stopover or transfer in international connections, by foreign citizens who are required to hold a transit visa, in accordance with this act, is conditional upon ownership of that visa.
2. Access to the international zone of a port is restricted and subject to a permit granted by SEF.
3. Access permits for the international zone of a port may be granted for certain purposes by the person in charge of the sea border post, including visits or provision of onboard services.
4. A fee is charged for issuing permits granting access to the international zone of a port and for boarding vessels.
5. Crew members and passengers may be granted permits to come ashore at border posts for the duration of their stay in the port.
6. The permit enables its holder to circulate in the area adjoining the port, and it is granted by SEF upon request of the shipping agent accompanied by a formal declaration.
7. Short stay visas may be granted at sea border posts, in accordance with the provisions of this Act.

SECTION II: General conditions of entry

Article 9 : Travel documents and replacement documents

1. To enter into or depart from Portuguese territory foreign citizens must hold a recognised and valid travel document.
2. The period of validity of the travel document must exceed the duration of stay, exception made to foreign residents who are re-entering the country.
3. The following foreign citizens are also entitled to enter or leave Portugal:
 - a) Nationals of States with which Portugal has signed international conventions and therefore may enter the country with an identity card or equivalent document;
 - b) Those covered by relevant conventions between the States Parties to the North Atlantic Treaty;
 - c) Holders of a laissez-passer issued by authorities of their home countries or of the countries that represent them;
 - d) Holders of a flight licence or a crew membership certificate as provided for in Annexes 1 and 9 of the Convention on International Civil Aviation or other documents that replace them when on duty;

- e) Holders of a seafarer's identity document as provided for in Convention number 108 of the Labour International Organisation when on duty;
- f) Those who are nationals of States with which Portugal has international conventions under which entry is permitted with a maritime identity card, when on duty.
- 4. The laissez-passer referred to in sub-paragraph (c) of the preceding paragraph is valid solely for transit, and, when issued in Portuguese territory, only allows its holder to exit the country.
- 5. Nationals of States with which Portugal has international Conventions in this regard are allowed to enter or leave Portugal with an expired passport.
- 6. Foreign citizens may also leave Portuguese territory if in possession of a safe-conduct or when holding a travel document for purposes of expulsion of a third-country national.

Article 10: Entry Visa

- 1. In order to enter national territory, foreign citizens must hold a valid visa which is adequate to the purpose of the visit, granted under this Act, or by the competent authorities of the States Parties to the Implementing Convention.
- 2. The visa enables its holder to come to a border post and request entry into the Country.
- 3. The following may, nonetheless, enter the Country without holding a visa:
 - a) Foreign citizens holding a valid residence permit, an extension of stay or an identity card as referred to in paragraph 2 of Article 87;
 - b) Citizens who are entitled to do so in accordance with International Conventions to which Portugal is a party.
- 4. A visa may be annulled by the issuing authority abroad, or by SEF in national territory, or at border posts, when the visa holder has been subject of an alert for purposes of refusal of entry in the Schengen Information System (SIS), in SEF's Integrated Information System, or if he/she has provided false information in his/hers visa application.
- 5. The cancellation of visas by SEF in accordance with the preceding paragraph shall be immediately transmitted to the issuing authority.
- 6. The annulment decision is communicated by electronic means to the High Commissioner for Immigration and Intercultural Dialogue [Alto Comissariado para a Imigração e Diálogo Intercultural, I.P], henceforth referred to as ACIDI, and to the Advisory Council for Immigration Affairs [Conselho Consultivo para os Assuntos da Imigração], henceforth referred to as "Advisory Council", together with a statement listing the grounds for the decision.

Article 11: Means of subsistence

- 1. Foreign citizens are not allowed to enter the country if they do not hold sufficient means of subsistence, both for the period of the intended stay and for the return trip to the country in which his/ her admission is guaranteed, or if they are not in a position to obtain such means lawfully.
- 2. For the purposes of entering and staying in the country, foreign citizens shall possess funds per capita, equal to the amount fixed by joint regulatory order of the members of the government responsible for internal affairs, work and social security. Foreign citizens who are able to prove that their maintenance and accommodation are guaranteed for the duration of their stay may be exempted from this requirement.
- 3. The amounts established in accordance with the preceding paragraph shall be automatically updated based on the percentage increases in the national minimum wage.

Article 12: Letter of sponsorship

- 1. For the purposes given in the preceding Article, the third-country national may, alternatively, deliver a letter of sponsorship subscribed by a national citizen or by a foreign citizen entitled to legally stay in Portuguese territory.
- 2. The acceptance of the abovementioned letter of sponsorship is conditional on proof of the subscriber's financial standing and compulsorily includes the commitment to ensure:

- a) The necessary conditions for staying in national territory;
 - b) The refunding of removal costs, in the event of an illegal stay.
3. The provisions of the preceding paragraph do not exclude the responsibilities of bodies mentioned in Articles 198 and 198-A, provided that the respective requirements are met.
 4. The letter of sponsorship is a binding document for the requirement stated in paragraph 2 (b).

Article 13: Purposes and conditions of stay

Whenever deemed necessary to prove the objective and conditions of stay, border authorities may require adequate proof from the foreign citizen.

SECTION III: Declaration of entry and accommodation form

Article 14: Declaration of entry

1. Foreign citizens entering the Country from another Member State by way of a border not subject to control shall be required to report this fact within three working days after the date of entry.
2. The declaration of entry shall be submitted to SEF, under the provisions to be determined by regulatory order of the member of the government responsible for internal affairs.
3. The provisions of the preceding paragraphs shall not apply to foreign citizens who:
 - a) Are residents or are authorised to stay in the country for more than six months;
 - b) Immediately after entering the Country, stay in hotels or in other kind of accommodation units to which the provisions of Article 16, paragraph 1, apply;
 - c) Are covered by the EU legal framework or equivalent arrangements.

Article 15: Accommodation form

1. The purpose of the accommodation form is to enable the control of foreign citizens within national territory.
2. Each foreign citizen, including nationals of other European Union Member States, shall fill in and sign one accommodation form. The accommodation form's model is approved by regulatory order of the member of the government responsible for internal affairs.
3. It is not compulsory for both spouses and accompanying minors to fill in and sign a form, as it is not compulsory for all members of a group travelling together. This requirement may be fulfilled by one of the spouses or by one of the members of the abovementioned travel group.
4. With the purpose of simplifying the process of submitting the accommodation forms, hotels and other accommodation units must be registered at SEF's Accommodation Forms Information System [SIBA – Sistema de Informação de Boletins de Alojamento], so that they may be safely delivered by electronic means.
5. The paper forms and their duplicates, as well as the replacement electronic forms mentioned in the preceding paragraph, shall be filed in and stored for one year to be counted from the day after the date when the departure of the foreign national was reported.

Article 16: Notification of accommodation

1. Hotel operators, complementary tourist accommodation or tourist resorts, as well as those units supplying accommodation to foreign citizens in return of payment, shall inform SEF within three days, by means of an accommodation form. Alternatively, in those regions where there are no SEF bureaux, they shall submit the abovementioned form to the National Guard [Guarda Nacional Republicana], or to the Public Security Police [Polícia de Segurança Pública].
2. The departure of foreign citizen from the aforementioned accommodation unit shall be communicated to the authorities within the same time period (three days) referred to in the preceding paragraph.

3. The accommodation forms, once completed in accordance with paragraph 4 of the preceding Article, shall be delivered safely, under the procedures to be established by regulatory order of the member of the government responsible for internal affairs.

SECTION IV : Travel Documents

SUBSECTION I : Travel documents issued to foreign citizens by Portuguese Authorities

Article 17: Travel documents

1. Portuguese authorities may issue the following documents to foreign citizens:
 - a) Passport for foreign citizens;
 - b) Travel document for refugees;
 - c) Laissez-passer;
 - d) Travel document for forced removal or judicial expulsion of third-country nationals;
 - e) Travel list for students.
2. Travel documents issued to foreign citizens by Portuguese authorities are not acceptable as evidence of the holder's nationality.

Article 18: Passport for foreign citizens

The procedures for granting passports to foreign citizens meet the provisions of specific legislation.

Article 19: Travel document for refugees

1. Foreign citizens residing in Portugal as refugees, in accordance with the provisions of the Asylum Act, as well as refugees covered by the provisions of paragraph 11 of the Annex to the Convention Relating to the Status of Refugees, adopted in Geneva on 28 July 1951, may obtain a travel document based on a model to be approved by regulatory order of the member of the government responsible for internal affairs.
2. The travel document for refugees is valid for a one-year period, may be extended, and can be used for an unlimited number of journeys, enabling the return of its holder within its validity period.
3. The travel document for refugees may include one single person or the holder and his/her children or adopted children under the age of ten.
4. Additional endorsements are not allowed in any travel document after its issuing, except in what concerns the extension of the validity period provided for in paragraph 2.

Article 20: Authorities responsible for granting a travel document for refugees

The following authorities are competent to grant and extend the validity of a travel document for refugees:

- a) In national territory, SEF's National Director, personally or by delegation of powers;
- b) Abroad, the consular or diplomatic authorities, following SEF's approval.

Article 21: Issuing and control of a travel document for refugees

1. Travel document for refugees shall be granted by the competent authorities for that purpose.
2. SEF is responsible for controlling and keeping a national register of the issued travel documents.

Article 22: Conditions of validity of the travel document for refugees

1. The travel document for refugees is only valid when filled in legibly and fully filled in with all indispensable data, and with blank inapplicable spaces crossed out.
2. No corrections or erasures of any kind shall be allowed.

3. The photographs shall be recent, in colour with a plain contrasting background, and easily identifiable.
4. The holder's photograph and the signature of the issuing body are authenticated by affixing the service's embossed seal.
5. The travel document has to be personally signed by its holder, except if in the appropriate place it is declared by the issuing authority that the document's holder cannot or is unable to sign.

Article 23: Application for a travel document for refugees

1. The application for a travel document for refugees shall be completed by the applicant.
2. The application for a travel document for refugees for a minor may be completed by:
 - a) Either parent, if within wedlock;
 - b) By the parent who holds parental responsibilities over the minor, according to court decision;
 - c) By a third person who, in the absence of parents, has legally recognised parental power over the minor.
3. As regards individuals who have been restrained from exercising their rights or were declared incapacitated to manage their affairs, the application shall be made by whoever holds their guardianship or trusteeship.
4. SEF's National Director may, in duly substantiated cases, accomplish by internal order the actions provided for in paragraphs 2 and 3.

Article 24: Restrictions on the use of a travel document for refugees

The refugee who, making use of a travel document for refugees issued in accordance with this Act, has been in a country in relation to which he/she becomes covered by any of the situations provided for in paragraphs 1 to 4 of Section C, Article 1 of the Geneva Convention Relating to the Status of Refugees, of 28 July 1951, must hold a travel document issued by that country.

Article 25: Unlawful use of a travel document for refugees

1. Any travel document for refugees which is not in strict conformity with the Law will be seized by the authorities to whom it is presented to and subsequently forwarded to SEF.
2. Travel documents that contain distorted information on the identity data of those concerned may be refused.

Article 26: Laissez-passer

1. Foreign citizens who do not reside in the country and prove the impossibility or difficulty in leaving Portuguese territory may be entitled to a laissez-passer.
2. In exceptional cases, on grounds of reasons of national interest or to comply with international obligations, a laissez-passer may be issued to foreign citizens that do not reside in Portugal, provided that they prove that are unable to obtain other travel document.
3. The issuing of a laissez-passer to the exclusive purpose of allowing departure from the country is of the competence of SEF's National Director, personally or by delegation of powers.
4. The issuing of a laissez-passer with the exclusive purpose of allowing the entry into the Country is of the competence of the Portuguese embassies and permanent consular posts, following SEF's approval.
5. The model for a laissez-passer is approved by regulatory order of the member of the government responsible for internal affairs.

Article 27: Travel Document for removal or expulsion of third-country nationals

1. Any third-country national who has been subject to a forced removal or expulsion measure and does not hold a travel document, will be issued a document for that purpose.

2. The document provided for in the preceding paragraph is valid for one single journey.
3. The format of that same document is approved by regulatory order of the member of the government responsible for internal affairs.

SUB-SECTION II: Travel documents issued by foreign authorities

Article 28: Control of travel documents

Non-resident foreign citizens holding travel documents issued in Portuguese territory by foreign diplomatic missions or consular posts shall present those documents to SEF within three days of the issuing date, in order to validate them.

SECTION V: Entry and departure of third-country students

Article 29: Entry and stay of students residing in the European Union

1. Students who are third-country nationals and reside in territory of other European Union Members may enter and temporarily stay in national territory without a visa, provided that they are travelling in the context of a school trip properly organised by an officially recognised educational establishment.
2. For the purposes of the preceding paragraph, the students shall:
 - a) Be accompanied by a teacher of the educational establishment;
 - b) Be included in the list of students participating in the school trip, issued by the respective educational establishment, which shall bear the identification of the students as well as the purpose and circumstances of the trip.
 - c) Hold a valid travel document.
3. The requirement specified in sub-paragraph (c) of the preceding paragraph does not apply whenever the students are registered in a travel list for students, duly validated by an official and qualified department of the Member State where the journey started, containing the following items:
 - a) Recent photographs of the students;
 - b) Confirmation of their resident status;
 - c) Re-entry permit.

Article 30: Departure of students residing in Portugal

Third-country students residing in national territory may equally travel to other European Union Member States, provided they meet the conditions specified in the preceding paragraph. SEF is the body responsible for the validation of the afore-mentioned travel list for students.

SECTION VI: Entry and exit of minors

Article 31: Entry and exit of minors

1. Without prejudice to types of tourism or youth exchange programmes, the competent authority must refuse entry into the country to foreign citizens who are less than 18 years old when not accompanied by whoever holds parental responsibility over them, or when there is no one in Portugal who has been duly authorized by the legal representative of the minor to take responsibility for the duration of his / her stay.
2. Excluding duly justified and exceptional cases, foreign minors are not admitted in Portugal if whoever holds parental responsibility or is in charge of him/her is not authorized to enter the Country.
3. If the foreign minor is not accepted into national territory, the entry of the accompanying adult must also be refused.

4. The departure from Portuguese territory will be refused to those foreign minors residing in the country when traveling unaccompanied by whoever holds parental responsibility, or by someone that does not hold a legally certified authorisation granted by the person who holds parental responsibility.
5. Unaccompanied minors awaiting a decision on their admission into national territory or on their repatriation shall be granted all material support and assistance necessary to meet their basic needs of food, hygiene, accommodation and medical assistance.
6. Unaccompanied minors may only be returned to their country of origin or to a third-country which is willing to receive them provided that there is a guarantee that upon arrival they will be given appropriate care and assistance.

Section VII: Refusal of entry

Article 32: Refusal of entry

1. Admission into Portuguese territory is refused to foreign citizens who:
 - a) Do not cumulatively fulfill all legal requirements for entering the country; or
 - b) Have been subject to an alert in the Schengen Information System for the purposes of refusing entry; or
 - c) Have been to an alert in SEF's Integrated Information System for purposes of refusing entry; or
 - d) Represent a danger or serious threat to public order, national security, and national health or to the international relations of European Union Member States, as well as to those of States that have adopted the Implementing Convention.
2. The refusal of entry on grounds of public health may only be based on diseases that have been defined in the applicable instruments of the World Health Organization, or on other infectious or contagious parasitic diseases which have been object to protection measures in national territory.
3. A medical exam may be required to a third-country national in order to establish that he/she does not have any of the abovementioned diseases, as well as to determine any adequate medical measures.

Article 33: Alert for refusal of entry

1. Alerts for purposes of refusing entry are entered into SEF's Integrated Information System, regarding foreign citizens:
 - a) Who have been subject to a forced return or expulsion measure;
 - b) Who have been returned into another Country under a readmission agreement;
 - c) In relation to whom there are strong evidences of having committed serious criminal acts;
 - d) In relation to whom there are clear indications that they intend to commit serious criminal acts or pose a serious threat to the public order, national security or to the international relations of a European Union Member State, as well as to those of States that have adopted the Implementing Convention;
 - e) Who have been escorted to the border in accordance with Article 147.
2. Alerts are also entered into SEF's integrated Information System for purposes of refusing entry regarding citizens benefiting from assisted voluntary return programmes, according to the provisions of Article 139. The alert is cancelled in the case provided for in paragraph 3 of that Article.
3. Alerts may also be issued to citizens who have been sentenced through a final and binding decision to imprisonment for more than one year, even if such sentence has not been served; or who have been subject to identical punishment more than once, even if the enforcement of the penalty has been suspended.
4. Entry ban measures that are not conditional upon the time limits established in accordance with this Act shall be periodically reviewed, with a view to either maintain or withdraw them.
5. Entry ban measures that have not been enacted by judicial decision and which are subject to the time limits defined pursuant to this Act may be reviewed at any time, at the initiative of SEF's National

Director on humanitarian grounds as well as for reasons of national interest, with a view to their cancellation.

6. Alerts in the Schengen Information System concerning foreign citizens are conditional upon the decision delivered by the competent authorities of a State Party to the Implementing Convention.
7. SEF's National Director is competent to issue alerts concerning foreign citizens in the Schengen Information System, or in SEF's Integrated Information System for purposes of refusing entry.

Article 34: Seizure of Travel Documents

When the refusal of entry is grounded on the presentation of a travel document that is false, forged, someone else's, or fraudulently obtained, it will be seized and forwarded to the national or foreign competent authority, in accordance with the applicable provisions.

Article 35: Checking the validity of documents

When in doubt as to the authenticity of documents issued by Portuguese Authorities, SEF may access the information available in the application that led to the issuing of a passport, identity card, or any other document used for crossing the borders.

Article 36: Limits on the refusal of entry

Exception made to the cases referred to in paragraphs 1 (a), (c) and (d) and 3 of Article 33, entry shall not be refused to foreign citizens who:

- a) Were born in Portuguese territory and here reside regularly;
- b) Have children effectively under their charge who are minors and of Portuguese nationality, in accordance to the specifications of paragraph 1 (c) of Article 122;
- c) Have custody of minor children with Portuguese or foreign nationality, the latter legally residing in Portugal, over whom they effectively hold parental responsibilities and to whom they provide maintenance and education.

Article 37: Competence to refuse entry

Refusal of entry into national territory is under the responsibility of SEF's National Director, personally or by delegation of powers.

Article 38: Decision and notification

1. The decision on refusal of entry is issued following a hearing of the foreign citizen, which represents, for all purposes and effects, a hearing of the interested party, and shall be immediately reported to the diplomatic or consular representation of that person's country of origin.
2. The decision on refusal of entry shall be notified to the applicant, in a language that he/she presumably understands, with the indication of the grounds that lead to such decision, as well as information regarding the right to appeal and the respective time limit for that action.
3. The respective carrier is also notified for purposes of the provisions of Article 41.
4. Whenever the removal of the foreign citizen is not possible within forty eight hours of the issuing of the decision on refusal of entry, the fact shall be communicated to the judge of the lower criminal court [juízo de pequena instância criminal] of the respective area of jurisdiction, with a view to determine the detention of the citizen in a detention facility or in a centre equated to detention facility.

Article 39: Appeal

The decision on refusal of entry may be subject to appeal with devolutive effect only, before the administrative courts.

Article 40: Rights of citizens who were refused entry

1. During the stay in the international zone of an airport or sea port, in a detention facility or in a centre equated to detention facility, the foreign citizen whose entry has been refused may communicate with the diplomatic or consular representation of his/her country, or with any person of his/her choice. The citizen may also receive the assistance of interpreters, as well as health care, including medical visits, when necessary, and all material support to meet his/her basic needs.
2. The foreign citizen, whose entry in national territory has been refused, is timely provided with legal assistance by a lawyer, at his/her own expense, or when requested, access to legal protection. In this case, the provisions of Act 34/2004, of July 29, shall apply mutatis mutandis in the scheme provided to the appointment of a legal representative for the defendant in urgent matters.
3. For the purposes of the provisions of the preceding paragraph, the right to legal assistance to a foreign citizen whose entry has been refused may be established in a protocol to be jointly signed by the Ministry of Internal Affairs, the Ministry of Justice and the law Bar Association [Ordem dos Advogados].
4. Without prejudice to the protection granted by the Asylum Act, the provisions of Article 143 shall also apply, mutatis mutandis, to the foreign citizen whose entry has been refused.

CHAPTER III: Obligations of carriers

Article 41: Responsibilities of carriers

1. Any carrier transporting into Portuguese territory by air, sea or land, a foreign citizen who does not meet the necessary entry requirements shall provide for his/her return, in the shortest possible time, into the territory where he/she began to use that means of transport, or, if that proves impossible, into the Country that issued the travel document, or, alternatively, into any other territory where his/her admission is guaranteed.
2. In the interim period and before embarking takes place, the passenger is under the charge of the carrier, and it is the carrier responsibility to cover for any expenses related with the period of stay of the passenger in a detention facility or in a centre equated to a detention facility.
3. Where appropriate, the foreign citizen who does not meet the necessary entry requirements will be removed from Portuguese territory, escorted by SEF.
4. The carrier shall also cover the expenses incurred by the escort, as well the payment of the respective fee.
5. The provisions of the preceding paragraphs shall also apply to foreign citizens in transit who have been refused entry, provided that:
 - a) The carrier which was supposed to take him/her aboard and supply transportation to the Country of final destination refuses to do so;
 - b) The authorities of the Country of destination have refused the citizen's entry and have sent him/her back to Portuguese territory.

Article 42: Data transmission

1. Air carriers transporting passengers have the obligation to convey, during the check in process and at SEF's request, all information related to passengers that they transport to a border post through which they will enter national territory.
2. The information referred to in the preceding paragraph shall include:
 - a) Number, type, issuing date and validity of the travel document used;

- b) Nationality;
 - c) Full name;
 - d) Date of birth;
 - e) Border post of entry in national territory;
 - f) Transport code;
 - g) Departure and arrival time of the means of transport;
 - h) Total number of passengers carried;
 - i) Initial boarding point.
3. The transmission of the abovementioned data does not exempt carriers from their obligations and responsibilities provided for in the preceding Article.
 4. Ship-owners and sea agents representing them, as well as captains of fishing vessels sailing in international waters, shall submit to SEF a list of their crew members and passengers, which must not be amended or in any other way deleted or modified in what concerns the elements that have been originally registered, and must communicate the presence of any concealed passengers, forty eight hours prior to arrival and up to two hours before leaving any national port.

Article 43: Data processing

1. Carriers shall collect the data mentioned in the preceding Article and transmit them electronically to SEF or, in case of malfunction, by any other appropriate means, with the purpose of facilitating the enforcement of controls at the authorised border crossing post through which passengers will enter national territory.
2. SEF shall keep such data in a temporary file.
3. After the entry of passengers, the authority referred to in the preceding paragraph shall delete all data within twenty four hours as of the moment of their transmission, except if such data are necessary for legal actions to be carried out by the authorities responsible for carrying out control of passengers at external borders, in accordance with the law, and in compliance with Act 67/98, of October 26th on personal data protection.
4. Carriers shall delete the personal data they have collected and transmitted to SEF within twenty four hours of arrival of the means of transport.
5. Without prejudice to the provisions of Act 67/98, of 26 October, on personal data protection, all data referred to in the preceding paragraph may be used for implementing legal provisions on matters of security and public order.

Article 44: Passenger information

1. For the purposes of implementing the provisions of Article 42, carriers, when collecting personal data, shall supply the following information to passengers involved:
 - a) Identification of the person who is processing the relevant data;
 - b) Purposes for which the data is being collected;
 - c) Other information, considering the specific circumstances in which the personal data is being collected, which is essential to guarantee the passenger a loyal processing of data, as well as the final recipient or category of recipients of data, the mandatory nature of the answer, as well as possible consequences of failing to reply, the possible right of access to data that concerns them and the right to having them duly rectified.
2. Where data have not been obtained from the data subject, the person responsible for processing them, or his/her representative, shall at the time of undertaking the recording of personal data or no later than the time when the data are first disclosed, provide the data subject with the information mentioned in the previous paragraph.

CHAPTER IV: Visas

SECTION I: Visas granted abroad

Article 45: Types of visa granted abroad

The following visas may be issued abroad:

- a) Airport transit visa;
- b) (Repealed);
- c) Short-stay visa;
- d) Temporary stay visa;
- e) Visa for obtaining a residence permit, hereinafter referred to as residence visa.

Article 46: Territorial validity of visas

1. Airport transit and short-stay visas may be valid for one or more States Parties to the Implementing Convention.
2. The temporary stay and residence visas are only valid in Portuguese territory.

Article 47: Individual visa

1. The individual visa shall be affixed either to an individual or family passport.
2. (Repealed).
3. Visas granted abroad are issued in individual form.
4. (Repealed).
5. (Repealed).

Article 48: Authorities responsible for granting visas

1. The following authorities are competent to issue visas:
 - a) Portuguese embassies and permanent consular posts, for airport transit or short-stay visas applied by holders of diplomatic, service, official and special passports, or travel documents issued by international organisations;
 - b) Permanent consular posts and consular sections, in all other cases.
2. The authorities mentioned in the preceding paragraph shall request the necessary assessment, information and complementary elements which are necessary for processing the applications.

Article 49: Airport transit visa

1. The purpose of the airport transit visa is to allow the passage of its holder through an airport of a State Party to the Implementing Convention, when making an international connection.
2. The holder of an airport transit visa only has access to the international zone of the airport, and therefore must continue travelling either in the same or another aircraft, according to his/her air ticket.
3. Nationals of States defined by regulatory order of the members of the government responsible for internal affairs and foreign affairs, or the holders of travel documents issued by those States are required to hold an airport transit visa.
4. The order referred to in the preceding paragraph determines the exceptions on the requirement of this type of visa.

Article 50

(Repealed)

Article 51: Short-stay visas

1. The short-stay visa enables its holder to enter Portuguese territory for purposes that, whilst acceptable to the relevant authorities, do not justify the granting of another type of visa, including transit, tourism and visiting or accompanying family members who hold a temporary stay visa.
2. The visa may be granted with a validity period of one year and for one or more entries, provided that neither the length of a continuous stay nor the total length of successive stays exceeds ninety days in any one hundred and eighty days to be counted from the date of first entry through an external border.
3. In duly substantiated cases, and when it serves the best interests of the Country, a multiple-entry visa valid for one year or more may be granted to certain people by regulatory order of the members of the government responsible for internal affairs and foreign affairs.

Article 52: General conditions for granting residence, temporary stay and short-stay visas

1. Without prejudice to the special conditions for granting each type of visa and to the special arrangements set out in agreements, protocols or similar instruments, treaties and international conventions to which Portugal is Party to, residence, temporary stay and short-stay visas shall only be granted to third-country nationals who meet the following requirements:
 - a) Are not the subject of a removal measure and are now in the period following the time when they were refused to enter in national territory;
 - b) Are not the subject of an alert in the Schengen Information System (SIS) by any of the Contracting Parties for purposes of refusing entry;
 - c) Are not the subject of an alert in SEF's Integrated Information System for purposes of refusing entry, in accordance with the provisions of Article 33;
 - d) Hold sufficient means of subsistence, as defined by regulatory order of the members of the government responsible for internal affairs and solidarity and social security;
 - e) Hold a valid travel document;
 - f) Are covered by travel insurance;
2. In order to be granted a residence visa for purposes of pursuing professional activities as an employed or self-employed person, residence visa for study, students exchange schemes, traineeship or voluntary scheme purposes, and temporary and short-term visa, the third-country national shall also hold a ticket ensuring his/her return.
3. The issuing of a temporary stay or residence visa is refused to any third-country national who has been convicted of a crime which according to the Portuguese legal framework is punishable by imprisonment for one year or more, even if the sentence has not been served, or who has been given the same sentence on more than one occasion, even if its execution has been suspended.
4. The issuing of a visa may be refused to any person that may represent a serious threat to the public order, safety or health.
5. Whenever the granting of a visa is refused on the grounds provided for in paragraph 1 (b) and (c), the applicant is informed on the possibility of requesting amendment of any errors in personal data.
6. Where the applicant is the subject of a refusal of entry issued by a State Party or Associated to the Schengen Implementing Convention, the reporting State shall be previously consulted and its interests taken into account, in accordance with Article 25 of that Convention.

Article 53: Preliminary procedures for visa granting

1. For purposes of visa granting, a prior opinion issued by SEF is mandatory in the following situations:
 - a) When the application concerns residence and temporary stay visas;
 - b) When such is determined on grounds of national interest, for internal security reasons, or for preventing illegal immigration and related crimes.
2. In what concerns the visa applications mentioned in the preceding paragraph, a negative opinion shall be issued whenever the applicant has been sentenced in Portugal through a court final and binding

decision with a sentence of imprisonment for more than one year, even if the sentence has not been served, or if the applicant has been given the same sentence on more than one occasion, even though it has been suspended.

3. In urgent and duly substantiated cases, a prior consultation may be waived, more specifically when it regards applications for residence visa for purposes of carrying out employed or self-employed activities.
4. Granting of visa requires a prior consultation to the Information and Security Services if it is determined by reasons of national security or regarding compliance with approved procedures under the European common security policy.
5. SEF is responsible for requesting and obtaining from other authorities opinions, information and other necessary data to establish compliance with the provisions of this Act on matters of granting of residence and temporary stay visa.
6. If the opinion necessary for granting a visa is negative, it becomes binding and shall be issued within seven days in the case short-stay visas, or within twenty days for all the other cases. After this period, the absence of a reply corresponds to an approval.

SUBSECTION I: Temporary stay visa

Article 54: Temporary stay visa

1. The temporary stay visa enables the entry of its holder into Portuguese territory for the purposes of:
 - a) Receiving medical treatment in official or officially recognised health establishments;
 - b) Transferring citizens who are nationals of States Parties to the World Trade Organization, within the scope of providing services or taking part in vocational training in Portuguese territory;
 - c) Carrying out an employed or self-employed activity, of temporary nature which duration does not exceed, as a rule, a six-month period;
 - d) Conducting, in national territory, scientific research in research centres, a teaching activity in a higher education establishment, or a highly qualified activity for less than one year;
 - e) Undertaking, in national territory, an amateur sporting activity certified by the respective federation, provided that the club or sports association provides accommodation and health care;
 - f) Staying in national territory for periods of more than three months, in certain exceptional and duly substantiated cases, including for purposes of pursuing a course of study in an education establishment, a pupil exchange scheme, an unremunerated professional internship or a voluntary service scheme during one year or less, or for purposes of compliance with international agreements in the framework of the World Trade Organization, and those arising from international conventions and agreements of which Portugal is a Party, with freedom to provide services;
 - g) Accompanying a family member subject to medical treatment in accordance to sub-paragraph (a) above.
2. The temporary stay visa is valid for four months and for multiple entries in national territory without prejudice to the provisions of paragraph 4 of Article 56.
3. The maximum period for reaching a decision regarding a temporary stay visa is 30 days, from the beginning of the examination of the visa application.

Article 55: Temporary stay visa for transfer of workers

The granting of temporary stay visas to citizens who are nationals of States Parties to the World Trade Organization, and who have been transferred for purposes of providing services or take part in vocational training in Portuguese territory, is conditional on compliance with the following requirements:

- a) The transfer must be done between branches of the same company or group of companies; and the branch located in Portuguese territory must provide the same services as those provided by the company from which they were transferred;
- b) The transfer only covers partners or employees who have been, for at least one year, in a branch located in another State Party to the World Trade Organisation, and who fall into one of the following categories:
 - a) Those who hold decision- making competences, hold senior positions and act as managers of an branch or department, under general guidance from the administration board;
 - 1. ii) Those that hold specific technical knowledge crucial to the activity, its research equipment or the techniques or management thereof;
 - 2. iii) Those who must receive vocational training in a branch located in national territory.

Article 56: Temporary stay visa for taking up temporary employment

- 1. A temporary stay visa may be granted to third-country nationals who intend to take up a temporary employment, provided that they have an actual or promised employment contract.
- 2. The Employment and Vocational Training Institute [IEFP - Instituto do Emprego e Formação Profissional] keeps an information system, accessible to the public, listing all temporary employment vacancies, and which have not been taken by nationals of European Union Member States, or of the European Economic Space, or by third-country nationals who legally reside in Portugal. Those vacancies are disclosed on IEFP's own initiative or at the request of the employing entities or of the associations that are members of the Advisory Council, on the Portuguese Embassies and permanent consular posts.
- 3. For the purposes of the provisions of the preceding paragraphs, the autonomous regions of the Azores and Madeira Islands maintain an information system on job offers in those regions.
- 4. The temporary stay visa for purposes of taking up a temporary employment is granted for the period of the duration covered by the employment contract.
- 5. Exceptionally, a temporary stay visa for purposes of taking up a temporary employment for a period exceeding six months may be granted, provided that the activity falls within an investment contract and up to the time limit of its implementation.

Article 57: Temporary stay visa for conducting research or a highly qualified activity

The temporary stay visa may be granted to third-country nationals who intend to conduct research, a teaching job in a university or equivalent high level teaching institution or a highly qualified activity for a period of less than one year provided that:

- a) They are admitted for purposes of taking part in a research centre which is duly recognized by the Ministry of Education and Science, specifically by means of an actual or promised employment contract, an actual or promised contract for the provision of services, or a research grant for scientific purposes; or
- b) They hold an actual or promised employment contract, or a written job offer, or a contract for provision of services for purposes of teaching in a higher education establishment, or carrying out a highly qualified activity in national territory.

SUBSECTION II : Residence visa

Article 58 : Residence visa

- 1. The residence visa enables its holder to enter Portuguese territory with a view to apply for a residence permit.
- 2. The residence visa is valid for two entries in Portuguese territory and enables its holder to remain there for a period of four months.

3. Without prejudice to the application of specific conditions, when assessing the residence visa application, the final purposes for taking up residency in Portugal will be particularly taken into consideration.

4. Without prejudice to shorter time limits established in this Act, the period to issue a decision on the application for a residence visa is 60 days.

Article 59: Residence visa for taking up an employment

1. The granting of a visa for obtaining a residence permit for purposes of taking up employment is conditional upon the existence of job opportunities that have not been taken by Portuguese nationals, by workers who are nationals of European Union Member States, by workers who are nationals of the European Economic Space, by workers who are nationals of third States with which the European Union has signed an Agreement on the free movement of persons, as well as by workers who are third-country nationals and legally reside in Portugal.
2. For the purposes of the preceding paragraph, the Council of Ministers, following a prior opinion of the Standing Commission for Social Consultation [Comissão Permanente da Concertação Social] approves, on an annual basis, a global quota which indicates the availability of employment opportunities, which are presumed not to have been taken by the workers referred to in the preceding paragraph, and may exclude specific sectors or activities that do not require further workers, if justified by the circumstances of the labour market.
3. In the global quota mentioned in the preceding paragraph there will be specific quotas for each of the autonomous regions, in accordance with the respective needs and regional particularities.
4. The Employment and Vocational Training Institute, as well as its respective branches in each autonomous region, keeps an information system permanently updated and accessible to the public in the Internet, containing all job offers covered by paragraph 1, and publicises them, by its own initiative or by request of the employers or of the immigrant associations recognised as being representative of immigrant communities by ACIDI, pursuant the law.
5. Up to the quota limit established under the provisions of paragraph 2, and for job offers not taken by the workers referred to in paragraph 1, a residence visa for purposes of taking up employment may be issued to third-country nationals who meet the requirements laid down in Article 52 and who:
 - a) Hold an actual or promised employment contract; or
 - b) Have qualifications, competencies or expertise acknowledged and adequate for carrying out one of the activities covered by the preceding paragraph, and regarding whom the employer has expressed a specific manifestation of individual interest.
6. For the purposes of sub-paragraph (b) of the preceding paragraph, all applications of third-country nationals shall be forwarded through the Employment and Vocational Training Institute or, in the case of the autonomous regions, by their respective departments, to the employers offering the jobs covered by paragraph 4.
7. In exceptional cases, and regardless of the quota established in paragraph 2, a visa for purposes of applying for a residence permit for taking up employment may be granted to third-country nationals who meet the conditions laid down by Article 52 and who hold an employment contract, provided they make proof that the job position was not taken by the workers mentioned in paragraph 1.
8. The Employment and Vocational Training Institute shall draw up a bi-annual report on the implementation of the global quota.
9. For the purposes of the preceding paragraph, visa granting under this provision shall be communicated within five days to the Employment and Vocational Training Institute.

Article 60: Residence visa for taking up a self-employed activity or for immigrant entrepreneurs

1. A visa for purposes of obtaining a residence permit for taking up a self-employed activity may be granted to a third-country national who:

- a) Holds a contract or written proposal for a contract for provision of services in the context of self-employment; and
 - b) Has the necessary qualifications to engage in self-employed activity, where applicable.
2. A residence visa is granted to immigrant entrepreneurs who intend to invest in Portugal, provided that:
- a) They have made investments; or
 - b) They prove to hold available financial resources in Portugal; including those resulting from loans obtained from a banking institution in Portugal, and they demonstrate by any means their intention make investments in Portuguese territory.

Article 61: Residence visa for conducting research or highly qualified activity

1. A residence visa for purposes of conducting scientific research shall be granted to third-country nationals who have been admitted as students in higher education at doctoral level, or as researchers cooperating with a research centre recognised by the Ministry of Education and Science, specifically by means of an actual or promised employment contract, of contract or written proposal for provision of services or of a scientific research grant.
2. A residence visa for the purpose of teaching in a higher education establishment or conducting a highly qualified activity shall also be issued to third-country nationals who have an appropriate contract or promised contract for provision of services.
3. The time limit for deciding upon the visa application referred to in this Article is 30 days.
4. The provisions of Article 59 shall not apply to the third-country nationals covered by this Article.

Article 61 -A: Residence visa for a highly qualified activity carried out by an employed person

1. A residence visa for carrying out a highly qualified activity by an employed person is granted to third-country citizens who:
 - a) Hold an actual or promised employment contract with a validity of at least one year, establishing an annual remuneration of at least 1.5 times the average gross annual salary or three times the social support index [IAS – Indexante de Apoios Sociais];
 - b) As regards regulated professions, hold higher professional qualifications, duly attested in accordance with the provisions of Act 9/2009, of 4 March, or of an Act establishing the recognition of professional qualifications which are required to access and carry out the occupation specified in the actual or promised employment contract;
 - c) As regards unregulated professions, hold relevant higher professional qualifications in the occupation or sector specified in the actual or promised employment contract.
2. For purposes of employment in professions in the major groups 1 and 2 of the International Standard Classification of Occupations (ISCO), which are designated by Resolution of the Council of Ministers, upon prior opinion issued by the Standing Commission for Social Consultation, as professions which are in particular need of third-country national workers, the salary threshold provided for in paragraph 1 a) may be at least 1,2 times the average gross annual salary, or two times the social support index.
3. Where there is doubt regarding the activity's framework, and for purposes of assessing the adequacy of the professional experience of the third-country national, the ministries responsible for employment and for education and science shall issue an opinion before granting a visa.

Article 62: Residence visa for study, students exchange schemes, traineeships or voluntary service schemes

1. The admission of a third-country national in Portuguese territory for purposes of studying, participating in a secondary level pupil exchange scheme, unremunerated traineeship, or voluntary service scheme is conditional upon the granting of a residence visa to that effect.
2. A visa for obtaining a residence permit for the purposes set out in the preceding paragraph shall be granted, provided that the third-country national:

- a) Holds a travel document, which validity covers, at least, the expected length of the stay;
 - b) Is a minor, according to the Portuguese legal framework, provided that he/she obtains an authorisation from whoever holds parental power to remain in the Country for the expected period of stay.
3. The procedures for granting a visa for issue of a residence permit to the third-country nationals mentioned in paragraph 1, who participate in European Union programmes for promoting mobility to the European Union, or to the Community of Portuguese-Speaking Countries, or to the interest of such countries, shall be facilitated in accordance to the rules to be defined by regulatory order of the members of the government responsible for foreign affairs and internal affairs.
 4. In addition to the general conditions laid down by paragraph 2, the third-country national who apply for a visa for obtaining a residence permit for the purpose of pursuing a course of study in higher education, shall meet the admission requirements of that teaching institution for such end.
 5. In addition to the general requirements set out in paragraph 2, the third-country national who requires a visa for obtaining a residence permit for the purpose of following a secondary education programme, shall meet the following conditions:
 - a) Not be below the minimum age nor above the maximum age set by regulatory order of the members of the government responsible for internal affairs and education;
 - b) Have been accepted in a secondary education establishment, with the possibility of being admitted under a secondary education pupil exchange scheme carried out by an institution duly accredited by the Ministry of Education to such end;
 - c) Be received for the duration of his/her stay by a family that meets the conditions set by the pupil exchange scheme; or have his/her accommodation ensured.
 6. In addition to the general requirements established in paragraph 2, the third-country national who applies for a visa for obtaining a residence permit for the purpose of carrying out an unremunerated traineeship, must be accepted as trainee by a company or an officially acknowledged vocational training institution.
 7. In addition to the general requirements established in paragraph 2, the third-country national who requires a visa for obtaining a residence permit for the purpose of participating in a voluntary service scheme, shall:
 - a) Be of minimum age for that purpose as established by regulatory order of the member of the government responsible for internal affairs;
 - b) Have been admitted by an officially recognised organisation which, in Portugal, is in charge of the respective voluntary service scheme.
 8. For purposes of granting a visa under the provisions of this Article, the minimum amount for the means of subsistence required in the regulatory order referred to in paragraph 1 (d) of Article 52 may be waived in the light of circumstances of the particular case.

Article 63: Residence visa within the framework of mobility of higher education students

1. The third-country national who resides as a student in higher education in an European Union Member State and applies to follow, in Portugal, part of the course of study already commenced, or to complement that course with a similar one, shall be granted a residence visa within a period that does not hamper the pursuit of the relevant studies, and never exceeding 60 days, provided that he/she:
 - a) Meets the conditions laid down by paragraphs 2 and 4 of the preceding Article; and
 - b) Participates in a European Union or bilateral exchange programme, or has been admitted as student in a Member State for no less than two years.
2. Whenever Portugal is the first Member State of admission, SEF must, upon request of the second Member State, provide the appropriate information concerning the stay of the student in national territory.

Article 64: Residence visa for family reunification

Whenever an application for purposes of family reunification is approved by SEF in accordance with the provisions of this Act, a residence visa allowing entry into national territory shall be issued to the applicants.

Article 65

Communication and notification

1. For the purposes of the provisions of the preceding Article, SEF shall inform the Directorate-General of Consular Affairs and Portuguese Communities of the approval of family reunification applications, and likewise inform the applicants.
2. The residence visa is issued following the notification mentioned in the preceding paragraph and according to the entailed terms, which implies that SEF's assessment on the application is compulsory, pursuant to Article 53.

SECTION II: Visas granted at border posts

Article 66: Types of visa

At the border posts the following types of visa may be granted:

- a) (Repealed.);
- b) Short-stay visas;
- c) Special visas.

Article 67: Short-stay visa

1. On exceptional grounds, short-stay visas may be granted at the border checkpoints to the foreign citizen who, by unexpected reasons, was unable to apply to the competent authorities for a visa, provided that the applicant:
 - a) Holds a valid travel document enabling border crossing;
 - b) Meets the conditions laid down by Article 11;
 - c) Is not subject to an alert in the Schengen Information System for purposes of refusal of entry;
 - d) Does not represent a threat to the public order, to the public security or to the international relations of a European Union Member State;
 - e) Has ensured the return travel to the country of origin or to the country of destination, as well as the respective admission of entry to these countries.
2. Short-stay visas issued in accordance with the provisions of the preceding paragraph may only be granted for one single entry and its validity must not exceed 15 days.
3. Visas covered by this Article may be valid for one or more States Parties to the Implementing Convention.

Article 68: Special visa

1. On humanitarian grounds or for reasons of national interest determined by regulatory order of the member of the government responsible for internal affairs, a special visa for temporarily entering and remaining in the Country may be granted to foreign citizens that do not meet the legal requirements for doing so.
2. The visa mentioned in the preceding paragraph is only valid in Portuguese territory.
3. The competence provided for in paragraph 1 may be delegated to SEF's National Director, or to another person acting on his behalf.

4. If the person admitted to Portugal under the conditions of the preceding paragraphs is subject to an alert in the Schengen Information System, that admission shall be communicated to the competent authorities of the other States Parties to the Implementing Convention.
5. When the foreign citizen holds a diplomatic, service, official or special service passport, or a travel document issued by an international organisation, the Ministry of Foreign Affairs shall be consulted wherever possible.

Article 69: Competence for granting visas at border posts

SEF's National Director, personally or by delegation of powers, is the competent authority responsible for granting the visas referred to in this section.

SECTION III: Cancellation of visas

Article 70: Cancellation of visas

1. Visas may be cancelled in the following situations:
 - a) When the holder fails to meet the requirements which grounded its granting;
 - b) When visas have been granted based on false declarations, by fraudulent means or by calling upon reasons others than those that led to entry of its holder in the Country;
 - c) When the respective holder has been the subject of removal order from national territory.
2. Residence and temporary stay visas may also be canceled when the respective holder, without valid reasons, is absent from the Country for a period of 60 days, during the validity period of the visa.
3. The provisions of the preceding paragraphs shall also apply during the validity period of the extensions of stay granted under this Act.
4. The residence visa shall also be cancelled when the application for a residence permit is refused.
5. After the visa holder enters Portuguese territory, the cancellation of visas to which the preceding paragraphs refer to, is under the competence of the member of the government responsible for internal affairs, who may delegate powers to SEF's National Director, who can sub-delegate this competence.
6. Visa cancellations in accordance to the preceding paragraph shall be communicated by electronic means to the Directorate-General of Consular and Portuguese Community Affairs.
7. The cancellation of visas prior to its holder arriving in Portugal is of the competence of diplomatic missions and permanent consular posts, and shall be communicated by electronic means to SEF.

CHAPTER V: Extension of stay

Article 71: Extension of stay

1. Foreign citizens who have been admitted in national territory under the provisions of this Act and wish to remain in the Country for a period which exceeds that originally permitted may be granted an extension of stay.
2. The extension of stay granted to holders of transit and short-stay visas may be valid for one or more States Parties to the Implementing Convention.
3. Except in duly justified cases, the extension referred to in paragraph 1 may be granted provided that the conditions which grounded the admission of the foreign citizen still prevail.
4. The temporary stay visa for employment purposes may only be extended if the applicant holds a work contract in accordance to the law and is covered by the National Health Service or has Health Insurance.
5. The temporary stay visa issued for purposes of performing a research or highly qualified activity may only be extended if the applicant holds a work contract, a contract for provision of services or a scientific research grant, and is covered by the National Health Service or has Health Insurance.

6. Except in duly substantiated cases, the extension of stay to holders of residence permit for purposes of employment, self-employment and carrying out a research or highly qualified activity is conditional upon the maintenance of the conditions which grounded the admission of the foreign citizen.

Article 72: Limits on the extension of stay

1. The duration of stay may be extended for:
 - a) Up to 5 days if the applicant holds a transit visa;
 - b) Up to 60 days if the applicant holds a special visa;
 - c) Up to 90 days if the applicant holds a residence visa;
 - d) Up to 90 days, with the possibility of extension for another 90-day period, if the applicant holds a short-stay visa, or has been admitted into the country without the need for a visa;
 - e) Up to one year, with the possibility of extension for another year, if the applicant holds a temporary stay visa, except for the cases provided for in paragraph 1 (c) of Article 54, in which case it may be extended only for 90 days.
2. The extension of stay may be granted over and above the limits provided for in the preceding paragraph, while awaiting a resolution concerning a residence permit application, as well as in duly substantiated cases.
3. For exceptional reasons occurring after legal entry into national territory, an extension of stay may be granted to family members of the temporary stay visa holder, however the validity of such extension shall not exceed the validity and duration of the visa granted to the family member.
4. The extension of stay granted to citizens admitted in the Country under visa waiver and to holders of short-stay visas is limited to Portugal, whenever their stay exceeds 90 days within six months to be counted from the date of the first crossing of an external border.
5. Without prejudice to the sanctions provided for in this Act, and unless exceptional circumstances arise, applications for extension of stay will be refused if they have been submitted 30 days after the expiry of the authorised period of stay.
6. The extension of stay is granted by means of a visa sticker which format shall be approved by regulatory order of the member of the government responsible for internal affairs.

Article 73: Competence

The competence for deciding upon applications for extension of stay is held by SEF's National Director, personally or by delegation of powers.

CHAPTER VI: Residence in national territory

SECTION I: General provisions

Article 74: Types of residence permit

1. There are two types of residence permit:
 - a) Temporary residence permit;
 - b) Permanent residence permit.
2. The foreign citizen who has been authorised to reside in Portuguese territory shall be granted a residence title.

Article 75: Temporary residence permit

1. Without prejudice to the special legal provisions applicable, the temporary residence permit is valid for a one-year period to be counted from the date of issue, and is renewable for successive periods of two years.

2. The residence title shall, nonetheless, be renewed in the event of a change in any of the particulars recorded in the document.

Article 76: Permanent residence permit

1. The permanent residence permit has no time limit.
2. The residence title must, however, be renewed every 5 years or whenever there is any alteration to the particulars recorded in it.
3. When applying for a permit renewal, the holder is exempted from delivering any documents which have been previously inserted in the electronic system used by SEF.

Article 77: General conditions for granting a temporary residence permit

1. Without prejudice to the special conditions applicable, in order to obtain a residence permit the applicant must cumulatively meet the following requirements:
 - a) Hold a valid residence visa, granted to one of the purposes established in this Act as grounds for granting a residence permit;
 - b) Absence of any fact that, if known by the competent authorities, could preclude the granting of that visa;
 - c) To be present in Portuguese territory;
 - d) To hold means of subsistence, such as defined by the regulatory order referred to in paragraph 1 (d) of Article 52;
 - e) To have accommodation ensured;
 - f) Being registered in the Social Security, whenever applicable;
 - g) Not having been convicted for any crime punishable by imprisonment for more than one year;
 - h) Not being in a period of ban of entry into national territory, as a result of a removal order from the Country;
 - i) Not being the subject of any alert in the Schengen Information System;
 - j) Not being the subject of any alert in SEF's Integrated Information System for purposes of refusing entry, in accordance with Article 53.
2. Without prejudice to the special legal provisions applicable, a residence permit may be refused on grounds of public order, security or health.
3. The refusal of residence permit on grounds of public health may only be based on diseases that have been defined in the applicable instruments of the World Health Organization, or on other infectious or contagious parasitic diseases which have been object to protection measures in national territory.
4. A medical examination may be required to applicants of a residence permit with a view to establish that he/she does not have any of the above mentioned diseases, and to determine the adequate medical measures.
5. The medical examinations and measures to which the preceding paragraph refers to may not be performed on a systematic basis.
6. Whenever the applicant is the subject of an alert for refusal of entry issued by a State Party or Associated to the Schengen Implementing Convention, it shall be previously consulted and its interests taken into account, in accordance with Article 25 of that Convention.

Article 78: Temporary residence permit renewal

1. The renewal of temporary residence permit must be requested by the interested parties up to thirty days before the document's expiry.
2. Third-country nationals only have their residence permit renewed if they:
 - a) Hold means of subsistence, such as defined by the regulatory order mentioned in paragraph 1 (d) of Article 52;
 - b) Have accommodation ensured;

- c) Have complied with their tax and social security obligations;
 - d) Have not been sentenced for any crime punishable by imprisonment that individually or cumulatively exceeds one year, even if he/she has been convicted of an intentional crime provided in this Act - or was somehow related to that crime, or crime of terrorism, violent crime or particularly violent crime or highly organised crime – and the sentence has been suspended.
3. A residence permit may not be renewed on grounds of public order or public security.
 4. Diseases contracted after the issuing of the first residence title shall not constitute sufficient grounds for refusing the renewal of the residence permit.
 5. A residence permit shall not be renewed to any foreign citizen that is declared to be contumacious, until he/she produces evidence that such declaration has expired.
 6. If an application is rejected, a copy of that decision must be forwarded to ACIDI, and to the Advisory Council, together with the reasons grounding such decision.
 7. The receipt issued against delivery of application for renewal of residence permit is valid as residence title for a period of 60 days, renewable.
 8. SEF may conclude protocols with local authorities, as well as with departments of the Autonomous Regions, with a view to facilitate and simplify procedures for renewal of residence permits and respective titles.

Article 79: Renewal of residence permits in particular cases

1. Residence permits of foreign citizens who are in prison may only be renewed provided that the respective holders have not been the subject of an expulsion measure.
2. The application for renewing a residence permit with an expired validity does not imply any proceedings, provided that it is submitted up to 30 days counted from the date the interested party was released from prison.

Article 80: Permanent residence permit

1. Without prejudice to the provisions of this Act concerning the status of third-country nationals who are long-term residents, a permanent residence permit will be granted to foreign citizens that cumulatively meet the following requirements:
 - a) Hold a temporary residence permit for at least five years;
 - b) During the last five years of residence in Portuguese territory they have not been sentenced for any crime punishable by imprisonment that, individually or cumulatively, exceeds one year, even if they have been convicted of an intentional crime provided in this Act - or were somehow related to that crime, or crime of terrorism, violent crime or particularly violent crime or highly organised crime - and the sentence has been suspended;
 - c) Have means of subsistence, such as defined by the regulatory order mentioned in paragraph 1 (d) of Article 52;
 - d) Have accommodation ensured;
 - e) Prove to have sufficient command of basic Portuguese language.
2. The period of residence prior to the entry into force of the present Act, is relevant to accomplish the provisions of the preceding paragraph.

Article 81: Application for a residence permit

1. The application for a residence permit may be made by the interested party or by a legal representative and shall be submitted to SEF.
2. The application may cover minors under guardianship of the applicant.
3. While a decision regarding the application for a residence permit is pending, for reasons that are not attributable to the applicant, he/she may carry out a professional activity in accordance with the law.
4. The applicant for a residence permit may simultaneously apply for family reunification.

Article 82: Decision and notification

1. The application for a residence permit shall be decided within 60 days.
2. The application for renewing a residence permit shall be decided within 30 days.
3. In the absence of a decision within the period provided for in the preceding paragraph, for reasons that are not attributable to the applicant, the decision is considered favorable, and the residence title immediately issued.
4. A decision rejecting the application shall be communicated to the applicant, informing the grounds for refusal, as well as the right to appeal and respective time limit for that action, and a copy shall be sent to the Advisory Council.

Article 83: Rights of a residence permit holder

1. Without prejudice to the application of special provisions and other rights established in the law, or in international conventions that Portugal is a Party to, the holder of residence permit is entitled, without the need to get a special authorisation on grounds of being a foreign citizen, to:
 - a) Education and teaching;
 - b) Employment;
 - c) Self-employment;
 - d) Professional guidance, training, further training and retraining;
 - e) Health care;
 - f) Access to the law and courts.
2. The application of provisions that guarantee equal treatment to foreign citizens shall be ensured, particularly in what concerns social security, tax benefits, trade union memberships, recognition of diplomas, certificates and other professional credentials or documents granting them access to goods and services made available to the public, as well as the application of provisions that grant them special rights.

Article 84: Identification document

The residence title replaces, for all legal purposes, the identification document, without prejudice to the provisions laid down by the Treaty of Friendship, Cooperation and Consultation [Tratado de Amizade, Cooperação e Consulta] between the Portuguese Republic and the Federative Republic of Brazil, signed in Porto Seguro on 22 April 2000.

Article 85: Cancellation of residence permit

1. A residence permit will be cancelled when:
 - a) Its holder has been the subject of a forced return measure or of an expulsion decision from national territory; or
 - b) The residence permit has been obtained on grounds of false or fraudulent declarations, of false or forged documents, or through fraudulent means; or
 - c) There are strong reasons to believe that its holder committed serious criminal acts, or there is strong evidence that he/she intends to commit acts of that nature, specifically in the European Union territory; or
 - d) By reasons of public order or security.
2. Without prejudice to the application of special provisions, the residence permit may also be cancelled when the interested party, without reasonable motives, is absent from the Country:
 - a) Being the holder of a temporary residence permit, six consecutive months or eight interpolated months, within the overall validity of the authorisation;
 - b) Being the holder of a permanent residence permit, 24 consecutive months or, in a period of three years, 30 interpolated months.

3. The absence from the Country beyond the limits established in the preceding paragraph must be justified by means of an application submitted to SEF, before the resident leaves national territory, or, in exceptional cases, after his/her departure.
4. The residence permit of citizens that are absent for longer periods than those established in paragraph 2 will not be cancelled if they prove that during their stay abroad they resided in their country of origin where they carried out a professional or business activity or one of social or cultural nature.
5. Any cancellation of a residence permit shall be communicated to the interested party and, by electronic means, to ACIDI and to the Advisory Council, stating the facts that grounded such decision. Cancellation results in seizing of the respective title.
6. The authority responsible for cancelling the document is the member of the government responsible for internal affairs, personally or by delegation of powers to SEF's National Director.
7. The cancellation decision may be subject to devolutive appeal before the administrative courts.

Article 86: Registration of residents

Residents must inform SEF on any alteration to their civil status or address, within 60 days counted from the date such alteration occurred.

Article 87: Foreign citizens exempted from residence permit

1. Diplomatic or consular agents accredited in Portugal, as well as administrative, domestic service or equivalent staff that serves diplomatic missions or consular posts of their respective States, members of staff of international organizations with head-office in Portugal, or their family members, are exempted from residence permit requirement.
2. The persons referred to in the preceding paragraph are granted an identification document issued by the Ministry of Foreign Affairs, after consulting SEF.

SECTION II: Residence Permit

SUBSECTION I: Residence permit for pursuing a professional activity

Article 88: Residence permits for employment purposes

1. In addition to the general requirements laid down by Article 77, residence permit for employment purposes shall only be granted to third-country nationals who have a legal employment contract and are registered in the Social Security System.
2. Exceptionally, upon SEF's National Director proposal, or by initiative of the member of the government responsible for internal affairs, the requirement laid down by paragraph 1 (a) of Article 77 may be waived provided that, in addition to the other general requirements established in that provision, the foreign citizen also meets the following conditions:
 - a) Holds an employment contract or has an employment relationship confirmed by a trade union, by an association which is party to the Advisory Council, or by the Working Conditions Authority;
 - b) Has entered legally in national territory and here remains legally;
 - c) Is registered and up to date with payments to the Social Security System.
3. In order to implement the quotas defined in Article 59, SEF shall inform, by electronic means, the Employment and Vocational Training Institute on the granting of any residence permit under the provisions of the preceding paragraphs, and in the Autonomous Regions, the corresponding regional services.
4. The granting of residence permit under the terms of the preceding paragraphs shall be communicated by SEF, by electronic means, to the Working Conditions Authority or, in the Autonomous Regions to the respective regional secretariat, so that these departments may monitor compliance with all legal

obligations of the employers in relation to the residence permit holder, as well as to the Tax Authorities and the relevant services of the Social Security.

5. The holder of a residence permit for purposes of taking up employment may be self-employed, provided that his/her residence title is replaced. In that case the provisions of the following Article shall apply, *mutatis mutandis*.

Article 89: Residence permit for self-employment purposes

1. In addition to the general requirements laid down by Article 77, a residence permit for carrying out a self-employed activity shall only be granted to third-country nationals who meet the following requirements:
 - a) Have formed a company in accordance with the law, and declared the start of its activities to the tax and social security authorities as an individual entrepreneur, or have signed a contract for providing services as a self-employed person;
 - b) Detain the necessary qualifications to engage in a self-employed activity, when applicable;
 - c) Hold means of subsistence, such as defined in paragraph 1 (d) of Article 52;
 - d) When required, present a declaration issued by the respective professional association certifying that they comply with membership requirements.
2. Exceptionally, upon SEF's National Director proposal, or by initiative of the member of the government responsible for internal affairs, the requirement laid down by paragraph 1 (a) of Article 77 may be waived, provided that there is evidence that the foreign citizen entered and resides legally in national territory.
3. The holder of a residence permit for purposes of carrying out a self-employed activity may be employed, in which case is applicable, with the necessary adjustments, the dispositions of the preceding Article, and his/her residence title must be replaced.

Article 90: Residence permit for carrying out a research or highly qualified activity

1. A residence permit for research purposes, for teaching in a higher education educational establishment, or for pursuing a highly qualified activity, will be granted to third-country nationals who, in addition to the requirements laid down by Article 77, meet the following conditions:
 - a) Are admitted for purposes of taking part in a research centre which is duly recognized by the Ministry of Education and Science, specifically by means of an actual or promised employment contract, an actual or promised contract for the provision of services, or a research grant for scientific purposes; or
 - b) Hold a contract for provision of services for purposes of teaching in a higher education establishment, or a contract for provision of services that is compatible with a highly qualified activity;
 - c) Are registered in the Social Security System.
2. The applicant may be exempted from the requirement laid down by paragraph 1 (a) of Article 77, whenever he/she entered and resided legally in national territory.
3. The holder of a residence permit granted under the provisions of paragraph 1 (a) may carry out a teaching activity in accordance with the law.

SUBSECTION II: Residence permit for investment activities

Article 90 –A: Residence permit for investment activities

1. A residence permit for purposes of performing investment activities shall be granted to the third-country citizens who, cumulatively:
 - a) Meet the general requirements laid down by Article 77, with the exception of paragraph 1 (a);
 - b) Hold a valid Schengen visa;

- c) Regularise their stay in Portugal within 90 days of their first entry into national territory;
 - d) Meet the requirements laid down by paragraph 3 (d).
2. The residence permit shall be renewed for a period of two years pursuant to this Act, provided that the requirements laid down by Article 3 (d) 3 remain valid.
 3. Conditions for enforcing the special framework provided for in this Article, specifically with regard to minimum quantitative requirements, minimum periods of permanence, and means of evidence, shall be defined by regulatory order of the members of the government responsible for foreign affairs and internal affairs.

Subsection III: Residence permit for purposes of study, unremunerated training or voluntary service

Article 91: Residence permit granted to students in higher education

1. A residence permit shall be granted to the higher education student who holds a residence visa issued in accordance with the provisions of paragraphs 2 and 4 of Article 62, provided that the applicant:
 - a) Proves to be enrolled and to have paid the respective fees charged by the educational establishment;
 - b) Possesses means of subsistence, as settled by the Order mentioned in paragraph 1 (d) of Article 52;
 - c) Is covered by the National Health Service or has health insurance.
2. The residence permit is valid for one year and is renewable for equal periods, provided that its holder continues to meet the conditions of the preceding paragraph.
3. Exceptionally, if the third-country national has legally entered and legally stays in Portugal and meets the conditions established in paragraph 1, a residence permit for purposes of study in a higher education establishment may be granted with exemption of the requirement provided for in paragraph 1 (a) of Article 77.
4. Where the duration of the course of study is less than one year, the residence permit must have the necessary validity to cover the duration of the study.

Article 92: Residence permit granted to students in secondary education

1. A residence permit will be issued to holders of residence visa for the purpose of carrying out secondary education studies, provided that the applicant is enrolled in a secondary education establishment and covered by the National Health Service or by health insurance.
2. The validity of the residence permit to which the preceding paragraph refers to shall not exceed one year, and may be renewed for a similar period, provided that the conditions for its granting are still met.

Article 93: Residence permit for unremunerated trainees

1. A residence permit will be issued to a holder of residence visa for the purpose of accomplishing unremunerated traineeship, provided that he/she is covered by the National Health Service or has health insurance.
2. The granting of residence permit in accordance with the provisions of the preceding paragraph is conditional upon delivery by the interest party of a training contract for purposes of carrying out an unremunerated traineeship with a company or officially recognised vocational training institution, which has been certified by the Employment and Vocational Training Institute.

Article 94: Residence permit for voluntary service

1. A residence permit will be issued to a holder of residence visa for the purpose of participating in a voluntary service scheme, provided that he/she is covered by the National Health Service or by a health insurance.

2. The granting of residence permit under the provisions of the preceding paragraph is conditional upon delivery by the interested party of a contract concluded with the organisation in charge of such programme in Portugal. The contract must describe the tasks that the applicant will perform, the conditions he/she will benefit from by performing such tasks, his/her working hours, as well as, where applicable, the training he/she will receive with a view to perform his/her service correctly.
3. The validity of the residence permit referred to in paragraph 1 may not exceed one year.
4. In exceptional cases, if the duration of the voluntary service scheme exceeds one year, the validity of the residence permit may correspond to the period concerned.
5. The residence permit granted under the provisions of this Article is not renewable.

Article 95: Cancellation and non-renewal

Without prejudice to the provisions of Articles 78 and 85, the residence permit issued under the provisions of this section may be cancelled or not renewed if its holder:

- a) Does not meet or ceases to meet the requirements laid down by Article 62, or in respect to his/her category, in Articles 91 to 94;
- b) Does not comply with the provisions of Article 97; or
- c) Does not make acceptable progress in his/her course of study.

Article 96: Procedural and transparency safeguards

1. The decision upon an application for renewal of a residence permit is adopted and communicated to the applicant within a period of time that does not hinder the pursuing of studies, without prejudice to a reasonable period of time for processing the application.
2. The examining of the application may be suspended if the information provided by the applicant is inadequate. In that case, the necessary additional information shall be requested to the interested party.
3. A refusal on granting residence permit is communicated to the applicant, together with indication of the grounds for refusal, as well as information regarding the right to appeal, and the respective time limit.
4. The decision on refusal or cancellation of a residence permit under the provisions of this section, may be subject to a devolutive appeal before the administrative courts.

Article 97: Pursuing a paid professional activity

1. The holders of a residence permit for purposes of taking part in a voluntary service scheme are not allowed to engage in any paid professional activity.
2. Out of the period which was scheduled to accomplish the course of study or following completion of the unremunerated traineeship, and subject to the applicable rules and requirements of the relevant activity, students may engage in a paid professional activity, under the provisions of paragraph 1 of Article 88, upon prior authorisation granted by SEF.
3. SEF is under the obligation of sending notifications as specified in paragraphs 3 and 4 of Article 88.

SUBSECTION IV: Residence permit for family reunification

Article 98: Right to family reunification

1. A citizen with a valid residence permit has the right to family reunification with the family members that are abroad, with whom he/she have lived in another country, or that are dependent on him/her or lived in cohabitation, whether the family relationship arose before of after the citizen's entry in Portugal.
2. In the circumstances referred to in the preceding paragraph, the right to family reunification is also recognised to the family members who have legally entered national territory and that depend on or live in cohabitation with the holder of a valid residence permit.

3. Refugees, recognised under the asylum law, have the right to family reunification with family members who are in national territory or abroad, without prejudice to the legal provisions that grant the refugee status to the respective family members.

Article 99: Family members

1. For the purposes of the provisions of the preceding Article, the following are considered family members of the resident:
 - a) The spouse;
 - b) Minors or incapable children under guardianship of the couple or of one spouse;
 - c) Minors adopted by an unmarried applicant, by a married applicant or by the spouse, following decision taken by the relevant authority of the country of origin, provided that its legal framework comprises the same rights and duties of natural filiation and provided that such decision is acknowledged by Portugal;
 - d) Children who are of full age and are dependent of the couple or of one of the spouses, and study in a Portuguese education establishment;
 - e) First-degree relatives in the direct ascending line of the resident or his/her spouse, provided that they are dependent on them;
 - f) Minor siblings provided they are under the tutelage of the resident, in accordance with a decision made by the relevant authority of the country of origin, and provided that such decision is recognised by Portugal.
2. For purposes of family reunification, the following are also considered family members of a refugee who is an unaccompanied minor:
 - a) First-degree relatives in the direct ascending line;
 - b) His/her legal guardian or any other relative, if the refugee has no relatives in the direct ascending line or such relatives cannot be traced.
3. For purposes of family reunification with a holder of a residence permit on grounds of study, unremunerated traineeship or voluntary service, only those mentioned in paragraph 1 (a) and (c) are considered family members.
4. Family reunification with an underage or incapable child of one of the spouses is conditional upon authorisation of the other parent, or upon decision of the relevant authority according to which the child has been entrusted to that parent.
5. For purposes of the provisions of paragraph 2, it is considered 'unaccompanied minor' the third-country national or stateless person under the age of 18 years old, who:
 - a) Has entered national territory unaccompanied and is not under the guardianship of a responsible adult, whether by law or custom; or
 - b) Has been left unaccompanied after his/her entry in national territory.

Article 100: Registered partnership

1. Family reunification may be authorised with:
 - a) The partner with whom the foreign resident maintains, either in national territory or abroad, a de facto union duly recognised under the law;
 - b) The unmarried minor children or those considered incapable, including the children adopted by a de facto partner, provided that they have been entrusted to that partner;
2. The provisions regarding the exercise of the right to family reunification shall apply, mutatis mutandis, to family reunification under the provisions of the preceding paragraph.

Article 101: Requirements for exercising the right to family reunification

1. In order to exercise the right to family reunification, the applicant shall have:
 - a) Accommodation ensured;

- b) Means of subsistence, such as defined in the regulatory order mentioned in paragraph 1 (d) of Article 52.
2. The provisions of the preceding paragraph are not applicable to family reunification of refugees.

Article 102: Authority

The decision regarding applications for family reunification is under the responsibility of SEF's National Director, personally or by delegation of powers.

Article 103: Application for family reunification

1. The application for family reunification with family members who are abroad shall be submitted to SEF by the citizen who is entitled to that right.
2. Whenever the family members are in national territory, the application for family reunification may be delivered either by the family members or by the citizen who is entitled to that right.
3. The application must include the following:
 - a) Documents evidencing the existence of relevant family ties or of a registered partnership;
 - b) Documents evidencing compliance with the requirements for exercising the right to family reunification;
 - c) Certified copies of the travel documents of the family members or of the de facto partner.
4. When a refugee is unable to submit official documents proving a family tie, other proofs of the existence of such relationship shall be taken into consideration.

Article 104: Examination of the application

1. SEF may, if necessary, interview the applicant for family reunification, and his/her family members, and conduct any other inquiries deemed necessary.
2. When examining an application regarding a de facto partner of the applicant for family reunification, SEF must ponder factors such as the existence of common children, former cohabitation, and the registration of the partnership as well as any other reliable means of proof.

Article 105: Time limits

1. At the earliest possible date, and in any event within three months, SEF shall notify the applicant, in writing, on the decision rendered.
2. In exceptional circumstances related to possible complexities when examining an application, the period of time referred to in the preceding paragraph may be extended by three months, in which case the applicant shall be informed of such extension.
3. An application not decided upon six months after its submittal is considered tacitly granted.
4. In case of tacit granting, and upon request of the applicant, SEF shall certify such granting and inform the Director General of Consular and Portuguese Communities Affairs, for the purpose of issuing a residence visa under the provisions of Article 64.

Article 106: Application rejection

1. An application for family reunification may be rejected in the following circumstances:
 - a) When the requirements for exercising the right to family reunification are not met;
 - b) When the family member is refused to enter national territory;
 - c) When the presence of the family member represents a threat to public policy, public security or public health.
2. When the granting of an application for family reunification is hindered by reasons of public policy or security, the seriousness or type of infringement to public order or security perpetrated by the family

member, or the dangers that may arise from the permanence of that person in national territory, must be taken into consideration.

3. Before deciding on a rejection of the family reunification application, the nature and solidity of the person's family relationships, the duration of his/her stay in Portugal and the existence of family, cultural and social ties with the country of origin, will be pondered.
4. The rejection of an application submitted by a refugee cannot lie solely on the lack of documents evidencing the family relationship.
5. The rejection of an application must be communicated, by means of forwarding a copy of the decision, with the respective grounds for rejection, to ACIDI and to the Advisory Council, without prejudice to the applicable rules on the protection of personal data.
6. The applicant is notified of the rejection of his/her application with the indication of the reasons justifying such decision, and is informed of his/her right to appeal and the respective time limit for that action.
7. The rejection of an application for family reunification may be subject to devolutive appeal before the administrative courts.
8. When the members of the family are already in national territory and the rejection of the application is exclusively grounded on non-compliance with the conditions laid down by paragraph 1 (a), the appeal has suspensory effect.

Article 107: Residence of family members

1. A family member who holds a visa issued in accordance with Article 64, or who is in national territory after having obtained granting to an application of family reunification, is entitled to a residence permit of the same duration as that held by the resident.
2. A family member of the holder of a permanent residence permit is entitled to a renewable residence permit with a validity of two years.
3. Two years after the issuing of the first residence permit to which the preceding paragraphs refer to, and assuming that the family relationship continues to exist, or independently from the aforementioned time period, whenever the person entitled to family reunification has minor children residing in Portugal, the family members are entitled to an autonomous permit.
4. In exceptional cases, including legal separation, divorce, widowhood, death of a relative in the ascending or descending line, charge drawn up by the Public Prosecution for domestic violence, and when the person becomes of full age, an autonomous residence permit may be granted before the end of the time limit established in the preceding paragraph.
5. The first residence permit granted to a spouse under the legal framework of family reunification will be autonomous, provided that he/she has been married to the resident for more than five years.

Article 108: Residence permit cancellation

1. Without prejudice to the provisions of Article 85, the residence permit issued under the right to family reunification is cancelled when the marriage, registered partnership or adoption had as only purpose allowing the entry of the interested party into the country.
2. Inquiries and specific checks may be performed where there are founded reasons to suspect of fraud, or of a marriage, partnership or adoption of convenience, as laid down by the preceding paragraph.
3. Before the decision on cancellation of the residence permit under family reunification is rendered, the nature and solidity of the person's family relationships, his/her stay in Portugal and the existence of family, cultural and social ties with the country of origin are taken into account.
4. The decision on cancellation of the permit is issued following a hearing of the foreign citizen, which represents, for all purposes and effects, a hearing of the interested party.
5. The decision on cancellation of the permit is notified to the interested party with the indication of the grounds of such decision, and contains information regarding the right to appeal and respective time limit.

6. The cancellation decision shall be conveyed electronically to ACIDI and to the Consulting Council, without prejudice to the applicable rules on the protection of personal data.
7. The decision on cancellation of the permit to the family member based on the provisions of paragraph 1 may be subject to appeal, with suspensory effect, before the administrative courts.

SUBSECTION V: Residence permit issued to victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration

Article 109: Residence permit

1. A residence permit shall be granted to the foreign citizen who is or has been a victim of offences related to trafficking in human beings or subject of an action to facilitate illegal immigration, even if he/she has illegally entered the country or does not meet the necessary requirements for being granted a residence permit.
2. The residence permit mentioned in the preceding paragraph shall be issued after the expiry of the reflection period provided for in Article 111, provided that:
 - a) It is necessary to extend the stay of the party concerned in national territory considering the interest that his/her presence may have to judicial investigations and proceedings;
 - b) Whether he/she shows a clear intention to cooperate with the authorities in the investigation and suppression of trafficking in human beings and facilitation of illegal immigration;
 - c) Whether he/she has severed all relations with those suspected of the offences listed in the preceding paragraph.
3. The residence permit may be granted before the expiry of the reflection period provided for in Article 111, if it is clear that the concerned party meets the criterion laid down by sub-paragraph (b) of the preceding paragraph.
4. A residence permit may also be granted after expiry of the reflection period provided for in Article 111 to the foreign citizen who is identified as a victim of trafficking in human beings under special legislation, with exemption of the conditions laid down by paragraph 2 (a) and (b).
5. The residence permit granted under the provisions of the preceding paragraphs is valid for one year and shall be renewed for equal periods if the conditions listed in paragraph 2 are still complied with, or if there is need to maintain the protection of the person identified as victim of trafficking in human beings, under special legislation.

Article 110: Information provided to the victims

When the competent authorities or organisations acting within the framework of protection of crime victims' deem that a foreign citizen may fall into the scope of the provisions of the preceding Article, they shall inform him/her of the possibilities offered under this section.

Article 111: Reflection period

1. Before issuing the residence permit provided for in Article 109, SEF will grant a reflection period to the person concerned allowing him/her to recover and escape the influence of the perpetrators of the offences.
2. The reflection period mentioned in the preceding paragraph has a minimum duration of 30 days and a maximum duration of 60 days, from the starting point in which the competent authorities ask for the person concerned collaboration, or when he/she expresses willingness in collaborating with the competent authorities in charge of the investigation, or when the person is identified as a victim of trafficking in human beings under the provisions of the applicable special legislation.
3. During the reflection period, the person concerned is entitled to the treatment provided for in Article 112, and it shall not be possible to enforce any expulsion order against him/her.
4. The reflection period shall not create any entitlement to residence under this section.

Article 112: Rights of the victim before the granting of a residence permit

1. Before the granting of a residence permit, the person pointed out or identified as a victim of trafficking in human beings or subject to an action to facilitate illegal immigration, who does not hold sufficient resources, is granted standards of living capable of ensuring his/her subsistence and access to appropriate emergency medical treatment.
2. For the purposes of the provisions of the preceding paragraph, the specific needs of the most vulnerable persons shall be taken in due account, including psychological assistance, when necessary.
3. The protection and safety of the person mentioned in paragraph 1 shall also be ensured.
4. When necessary, the person mentioned in paragraph 1 is provided with translation and interpretation services, as well as legal protection under the provisions of Act 34/2004 of 29 July, exception made to paragraph 2 of Article 7, which does not apply.

Article 113: Rights of the residence permit holder

1. The holder of a residence permit granted under the provisions of Article 109, who does not have sufficient resources falls within the scope, with the necessary adjustments, of the provisions of the preceding Article.
2. The holders of a residence permit granted under the provisions of Article 109, who do not hold sufficient resources and have special needs, such as minors, pregnant women, the disabled or victims of sexual violence or other forms of violence, are given the necessary medical and social assistance.
3. The holder of a residence permit granted under Article 109 is given access to official existing programmes whose purpose is to help him/her recovering a normal social life, including courses designed to improve their professional skills or to prepare their assisted return to the country of origin.

Article 114: Minors

1. In applying the provisions of Articles 109 to 112, the best interests of the child shall be taken in due account, and the procedures shall be appropriate to his/her age and maturity.
2. The reflection period provided for in paragraph 2 of Article 111 may be extended if it is in the best interest of the child.
3. Minors who are victims of trafficking in human beings or subject to an action to facilitate illegal immigration have access to the education system under the same conditions as national citizens do.
4. All steps shall be taken to establish the identity and nationality of the unaccompanied minor, as established by paragraph 5 of Article 99, as well as every effort to locate his/her family as quickly as possible, and to ensure legal representation, including representation in criminal proceedings, if necessary, in accordance to the law.

Article 115: Residence permit cancellation

1. Without prejudice to the provisions of Article 85, the residence permit granted under this section may be cancelled at any time in case:
 - a) The holder has actively, voluntarily and in his/her own initiative renewed contacts with the suspects of committing trafficking in human beings or action to facilitate illegal immigration; or
 - b) The competent authority believes that the victim's cooperation is fraudulent or that his/her complaint is wrongful or fraudulent; or
 - c) The victim ceases to cooperate.
2. Sub-paragraph (c) of the preceding paragraph does not apply to holders of the residence permit granted under paragraph 4 of Article 109.

SUBSECTION VI: Residence permit granted to holders of long-term resident status in another European Union Member State

Article 116: Right of residence of holders of long-term resident status in another European Union Member State

1. The third-country national who has acquired a long-term resident status in another European Union Member State and stays in national territory for more than three months has the right of residence provided that he/she:
 - a) Is employed; or
 - b) Is self-employed; or
 - c) Pursues a course of study or vocational training; or
 - d) Presents a strong motive to set up residence in national territory.
2. The provisions of the preceding paragraph are not applicable to long-term residents who stay in national territory as:
 - a) Employees posted by a service provider for the purpose of cross-border provision of services;
 - b) Cross-border service providers.
3. The provisions of the preceding paragraph is without prejudice to the full application of the relevant Community law on social security applicable to third-country nationals.
4. Third-country nationals under paragraph 1 are granted residence permit as long as they have:
 - a) Means of subsistence;
 - b) Accommodation.
5. With a view to assess compliance with the requirement provided in sub-paragraph a) of the preceding Article, the resources shall be evaluated by reference to its nature and regularity, considering the level of minimum wages and pensions.
6. The granting of a residence permit to third-country nationals under paragraph 1 (a) falls within the scope of the provisions of paragraph 1 of Article 88.
7. The granting of a residence permit to third-country nationals under paragraph 1 (b) falls within the scope of the provisions of paragraph 1 of Article 89.
8. The granting of a residence permit to third-country nationals under paragraph 1 (c) is conditional upon the submittal, by the person concerned, of an enrolment in an officially recognised higher education establishment, or admission in an officially recognised establishment or company of vocational training.

Article 117: Application for a residence permit

1. The long-term resident mentioned in the preceding Article shall submit to SEF an application for residence permit within three months as from the date of entry in national territory.
2. The application mentioned in the preceding paragraph shall be accompanied by documents confirming that the applicant fulfils the conditions for exercising his/her right to residence as mentioned in the preceding Article.
3. The application shall also be accompanied by the long-term resident title and a valid travel document or certified copies of those documents.
4. The decision on an application for a residence permit submitted in accordance with the preceding Article shall be rendered within three months.
5. If the application is not accompanied by the documents mentioned in paragraphs 2 and 3, or in exceptional circumstances linked with complexity of the examination of the application, the time limit referred to in the preceding paragraph may be extended for a period not exceeding three months. In such cases, the applicant shall be informed thereof.
6. SEF's National Director has the powers to decide on the granting of a residence permit in accordance to the present section, personally or by delegation of powers.
7. In the absence of a decision within six months, the application is considered approved.

8. The granting of a residence permit to a long-term resident as well as to his/her family members shall be conveyed by SEF to the competent authorities of the Member State which granted the long-term resident status.

Article 118: Family reunification

1. Residence permit in national territory is granted to family members of the residence permit holder issued in accordance with the provisions of Article 116, who live with him/her in the Member State which for the first time granted him/her the long-term resident status.
2. For the purposes of the provisions of the preceding paragraph, family members are considered those relatives mentioned in paragraph 1 of Article 99, as well as those mentioned in paragraph 1 of Article 100.
3. The submitting of an application for a residence permit is ruled by the provisions of the preceding Article.
4. The person concerned shall attach to his/her application for residence permit the following documents:
 - a) His/her EU long-term resident title and a valid travel document or certified copies of the same;
 - b) Evidence that he/she resided in the Member State which granted him/her for the first time the long-term resident status as a family member or registered partner of a long-term resident;
 - c) Evidence that he/she holds means of subsistence and is covered by the national health service or by health insurance.
5. For purposes of evaluating the means of subsistence referred to in sub-paragraph (c) of the preceding paragraph, the nature and regularity of those means, as well as the level of minimum wages and allowances must be taken into account.
6. If the family was not already constituted in the Member State which granted the applicant the long-term resident status for the first time, the provisions of chapter VI's section IV shall apply.
7. Family members covered by the provisions of the preceding paragraphs are granted a residence permit of identical length as the one granted to the long-term resident. The provisions of paragraph 8 of the preceding Article shall apply in this case.

Article 119: Public policy, public security and public health

1. The application for a residence permit submitted in accordance with this section can be refused when the person concerned represents a threat to public policy or public security.
2. The decision for rejection in accordance with the provisions of the preceding paragraph must take into consideration the seriousness or type of offence to public policy or security committed by the long-term resident or his/her family member, or the dangers that might result from that person's stay in national territory.
3. The decision mentioned in paragraph 1 must not be grounded on economic reasons.
4. The application for a residence permit submitted by a long-term resident or his/her family member may also be rejected if the person concerned represents a threat to public health under the provisions of paragraph 3 of Article 77.
5. The provisions of paragraphs 4 and 5 of Article 77 are applicable to those situations referred to in the preceding paragraph.

Article 120: Cancellation and non-renewal of a residence permit

1. Without prejudice of the provisions of Article 85, until the holder of a residence permit granted in accordance with this section obtains the long-term resident status in national territory, he/she may be subject to a decision on cancellation or non-renewal of the residence permit in the following situations:
 - a) On grounds of public policy or public order. The severity or type of offence against public policy or public security, or the danger that emanates from the stay of the person concerned, as well

as the length of residence and the existence of links with the country, are facts that shall be taken into consideration;

- b) When the conditions provided for in articles 116 e 118 are no longer met.
2. SEF shall convey any cancellation or non-renewal of the long-term resident residence permit, or his/her family members, to the competent authorities of the Member State which granted for the first time ever the long-term resident status.

Article 121: Procedural safeguards

1. The decision on the rejection of an application for a residence permit, or non-renewal or cancellation of a residence permit granted in accordance to this section shall be notified to the interested party, indicating the grounds for refusal, non-renewal or cancellation, along with information regarding the right to appeal and respective time limits.
2. The decisions referred to in the preceding paragraph are electronically conveyed to ACIDI and to the Advisory Council.

SUBSECTION VII: 'EU blue card' residence permit

Article 121 –A: 'EU blue card' holders

1. 'EU blue card' is a residence title which entitles its holder to reside and carry out a highly qualified activity in national territory, in accordance with the provisions of this section.
2. 'EU blue card' holders have the right to family reunification under the provisions of Section IV.
3. 'EU blue card' shall not be awarded to third-country citizens:
 - a) Who are authorised to reside in a Member State on the basis of temporary protection or have applied for a residence permit on that basis, as well as beneficiaries of the protection granted on grounds of Act 27/2008 of 30 June, or have applied for that protection and are awaiting a decision on their status;
 - b) Who are family members of Union citizens, in accordance with Act 37/2006 of 9 August;
 - c) Who have applied for or are holders of a residence permit for purposes of pursuing a research activity, in accordance with Article 90, paragraph 1;
 - d) Who enjoy a long-term resident status in a European Union Member State, in accordance with paragraph 1 (a) and (b) of Article 116;
 - e) Who are temporarily staying in Portugal in order to carry out investment-related trading activities, as seasonal workers or posted within the framework of a provision of services;
 - f) Who, pursuant to an agreement concluded between the European Union and the third-country of nationality, enjoy rights of free movement equivalent to those of European Union citizens;
 - g) Whose expulsion has been suspended for reasons of fact or law;

Article 121 –B: Conditions for granting an 'EU blue card'

1. An 'EU blue card' for purposes of carrying out a highly qualified activity shall be granted to third-country citizens who, in addition to the conditions set out in Article 77, exception made to paragraph 1 (e) of that Article, cumulatively meet the following requirements:
 - a) Produce a work contract that is compatible with carrying out a highly qualified activity, for not less than one year, with a salary of at least 1,5 times the average national gross annual salary or, in cases provided for in paragraph 2 of Article 61 –A, a salary of at least 1,2 times the average national gross annual salary;
 - b) Have health insurance or submit proof that they are covered by the National Health Service;
 - c) Are registered with the social security system;
 - d) For unregulated professions, submit the documents establishing the relevant higher professional qualifications in the activity or sector specified in the work contract or binding job offer;

- e) For regulated profession specified in the work contract or binding job offer, submit documents establishing professional certification, where applicable.
2. The applicant may be exempted from the requirement provided for in paragraph 1 (a) of Article 77 in case he/she is a holder of a valid residence title for national territory.
3. For the purposes of paragraph 1 (d) the provisions of paragraphs 2 and 4 of Article 61 –A shall apply.
4. An application for an ‘EU blue card’ shall be rejected in the following situations:
 - a) If the employer has been sanctioned for illegally employing foreign workers in the last five years;
 - b) For reasons of public policy, public security or public health

Article 121 –C: Authority

The decisions provided for in this section are under the responsibility of the following:

- a) In cancellation cases, the member of the government in charge of internal affairs with the option to delegate powers to SEF’s National Director;
- b) In all other cases, SEF’s National Director, personally or by delegation of powers.

Article 121 –D: Procedure

1. The application for an ‘EU blue card’ shall be submitted by a third-country citizen, or his/her employer, at SEF’s national directorate or at SEF’s regional office of the area of residence of the citizen or his/her employer.
2. The application shall be accompanied by documents supporting that the applicant meets the requirements listed in Article 121 –B.
3. Where the information or documents provided by the applicant are insufficient, the examination of the application is suspended and the applicant is required to provide additional information or documents within a period set by SEF of no-less than 20 days.
4. The decision on the application shall be notified to the applicant, in writing within a period not exceeding 60 days.
5. Decisions rejecting granting or renewal of ‘EU blue card’, as well as cancellations, shall be notified in writing to the applicant, or his/her employer, specifying the grounds for refusal, the right to appeal and respective time limits.

Article 121 –E: ‘EU blue card’ duration, renewal and issuing

1. ‘EU blue card’ has the initial validity of one year and is renewable for successive periods of two years.
2. Renewal of the ‘EU blue card’ must be requested by the interested party up to thirty days before expiry of the document’s validity period.
3. The ‘EU blue card’ shall be issued in accordance with the uniform format of residence title to third-country nationals as provided for in Order number 1432/2008 of 10 December. The designation ‘EU blue card’ must be entered under heading “type of card”.
4. The provisions of Article 212 shall apply to the issuing of the ‘EU blue card’.

Article 121 –F: ‘EU blue card’ cancellation or refusal of the renewal

1. ‘EU blue card’ shall be canceled whenever:
 - a) It has been obtained on grounds of false or fraudulent declarations, of false or forged documents, or through fraudulent means;
 - b) There are strong reasons to believe that the ‘EU blue card’ holder committed serious criminal acts, or there is strong evidence that he / she intends to commit acts of that same nature, specifically in European Union territory;
 - c) There are reasons of public policy, public security or public health.
2. The ‘EU blue card’ is only renewed when the holder cumulatively:

- a) Meets or continues to meet the conditions for entry and residence laid down by this section, or when the same conditions which enabled the issuing of the document are maintained;
- b) Has sufficient resources to maintain him/herself, as defined by regulatory order of the members of the government responsible for internal affairs and social security, without having recourse to social security assistance, exclusion made to unemployment benefit;
- c) Has not been convicted of a crime with punishment or penalties which, individually or collectively, exceed one year imprisonment;
- d) Does not produce any risk to public policy, public security or public health.

Article 121 –G: Access to the labour market

1. For the first two years of legal employment in national territory, access to the labour market for the holder of a 'EU blue card' shall be restricted to the exercise of paid employment activities which meet the conditions set out in Article 121-B.
2. After the first two years of legal employment in national territory, the holder of an 'EU blue card' must provide a written information to SEF, where possible in advance, of any alterations affecting the granting conditions.

Article 121 –H: Equal treatment

1. 'EU Blue Card' holders shall enjoy equal treatment with nationals as regards:
 - a) Working conditions, including pay and dismissal, as well as health and safety requirements at the workplace;
 - b) Freedom of association, affiliation and membership of an organization representing workers or employers or of any organisation whose members are engaged in a specific occupation, including the benefits conferred by such organisations, without prejudice to the national provisions on public policy and public security;
 - c) Education and vocational training, in accordance with the requirements set out in the applicable legislation;
 - d) Recognition of diplomas, certificates and other professional qualifications in accordance with the relevant legislation;
 - e) Relevant rules concerning social security;
 - f) Payment of income-related acquired statutory pensions in respect of old age, at the rate applied;
 - g) Access to goods and services and the supply of goods and services made available to the public, including procedures for obtaining housing, as well as information and counseling services afforded by employment offices;
 - h) Free access to the entire Portuguese territory.
2. The right to equal treatment as laid down by paragraph 1 shall be without prejudice to the right to cancel or to refuse the 'EU Blue Card' in accordance with Article 121-F.
3. The right to equal treatment may be limited in the situations provided for in paragraph 1, exception made to paragraph 1 (b) and (d), whenever the holder of a 'EU blue card' from another Member State moves to national territory, under Article 121 –L and a decision on the granting of a 'EU blue card' in Portugal is still pending.
4. In cases where the decision referred to in the preceding paragraph is still pending and the applicant is allowed to work, he/she must enjoy full equality of treatment.

Article 121 –I: Long-term resident status for 'EU Blue Card' holders

1. The provisions of Articles 125 to 133, with the alterations contained in the following paragraphs, shall apply to holders of 'EU blue card' who wish to benefit from the long-term resident status.

2. The long-term resident status may be granted to the holder of an 'EU blue card' who have obtained it in Portugal under the provisions of Article 121 –B, provided that the following conditions are cumulatively met:
 - a) five years of legal and continuous residence within the European Union territory as an 'EU Blue Card' holder;
 - b) legal and continuous residence in national territory as an 'EU Blue Card' holder for two years immediately prior to the submission of the relevant application in Portugal.
3. For the purposes of the provisions set out in this Article regarding the calculation of the period of legal and continuous residence within the European Union, periods of absence from the territory of the European Union shall not interrupt the period referred to in paragraph 2 (a) of this Article, provided that they are shorter than 12 consecutive months and do not exceed in total 18 months.
4. The provisions of the previous paragraph also apply in cases where the third-country citizen has only resided in national territory as an 'EU blue card' holder.
5. In case of loss of long-term resident status for former holders of 'EU blue card', the provisions of Article 131 with the necessary adjustments as regards the period mentioned in paragraph 1 (c) of that Article, which is extended to 24 consecutive months, shall apply.

Article 121 –J: Long-term resident permit

1. 'EU blue card' holders who fulfill the conditions set out in the previous Article for the acquisition of the long-term resident status shall be issued with an EU long-term resident permit.
2. In the residence permit referred to in the previous paragraph, under the heading "remarks" the following shall be entered: "Former EU Blue Card holder".

Article 121 –K: Residence permit for 'EU blue card' holders in another Member State

1. The 'EU blue card' holder who has resided for at least 18 months as an 'EU blue card' holder in the Member State that first issued the title may, together with his/her family members, move to Portugal for the purpose of highly qualified employment.
2. Applications for 'EU blue card' in national territory and, where applicable, for a residence permit for purposes of family reunification, must be submitted within 30 days as from the moment the 'EU blue card' holder from another Member State enters national territory.
3. The application referred to in the preceding paragraph shall be accompanied by supporting documents confirming the situation mentioned in paragraph 1 and that the applicant meets the requirements set out in paragraph 1 of Article 121-B.
4. The application may be refused under paragraph 4 of Article 121-B, or if the 'EU blue card' issued by another Member State has expired or has been canceled on the course of the application' examination.
5. In case of rejection of the application, and without prejudice to the provisions of the following paragraph, the third-country citizen and his/her employer may be held responsible for the costs related to the return and readmission of the EU Blue Card holder and his family members.
6. If the application is rejected on grounds of paragraph 4 (a) of Article 121-B, the employer is held responsible for the costs mentioned in the previous paragraph.
7. Decisions rendered on the applications submitted pursuant to this Article shall be communicated, in writing, by SEF to the authorities of the Member State of the 'EU blue card' holder, preferably electronically.

SUBSECTION VIII: Residence permit under special circumstances

Article 122: Residence permit with residence visa exemption

1. The following third-country nationals are exempted from visa requirement for granting of temporary residence permit:

- a) Minors, children of foreign citizens who are holders of a residence permit, born in Portuguese territory;
 - b) Minors born in national territory who have stayed here and are attending pre-school education or primary school, secondary or professional education;
 - c) Children of holders of a residence permit who have reached full age and normally stayed in national territory since they were 10 years old;
 - d) Adults born in national territory who have not left the country or have lived in Portugal since the age of 10 years old;
 - e) Minors who are under compulsory guardianship in accordance to the Civil Code;
 - f) Citizens who no longer are entitled to enjoy the right to asylum in Portugal, because the reasons for which they obtained this protection no longer prevail;
 - g) Those suffering from a disease that requires extended medical assistance, preventing him/her to return to the country so as to avoid risks to his/her own health;
 - h) Those who served in the Portuguese Armed Forces;
 - i) Those who have lost Portuguese citizenship and stayed in national territory in the last fifteen years;
 - j) Those who have not left national territory, and whose right of residence has expired;
 - k) Those who have minor children residing in Portugal, or minor children of Portuguese nationality over who he/she effectively exercises parental responsibilities and ensures livelihood and education;
 - l) Diplomatic and consular agents, or his/her spouse or dependant relatives in the ascending or descending line, who have been accredited in Portugal for a period of not less than three years;
 - m) Those who are or have been victims of a criminal offence or a serious or very serious administrative offence related to the labour relationship, in accordance with paragraph 2 of this Article, of which there are indications substantiated by the inspection services of the ministry responsible for employment matters, provided that he/she has reported the offence to the competent authorities and collaborates with them;
 - n) Those who have been granted a residence permit under the provisions of Article 109;
 - o) Those who, having been granted a residence permit for purposes of study under Articles 91 or 92, and having concluded them, wish to pursue a professional activity in national territory, as an employed or self-employed person, exception made in cases where the permit has been issued under cooperation agreements and there are no solid grounds of national interest that may justify it;
 - p) Those who, having been granted a temporary stay visa for purposes of carrying out a research or highly qualified activity, wish to pursue in national territory a research activity, or a teaching activity in a higher education establishment, or a highly qualified activity, either as an employed or as a self-employed person.
 - q) Those who provide evidence of an investment activity in accordance with the provisions of Article 3.
2. For the purposes of sub-paragraph (m) of the preceding paragraph, only offences resulting in conditions of lack of social protection, exploitation of salary or working hours, or in particularly abusive working conditions, shall be considered, or in case of using the activity of minors who are illegally staying in national territory.
 3. In the situations provided for in paragraph 1 (n), (o) and (p), the provisions of Articles 88, 89 or 90 shall apply, adapted accordingly, depending on the case.
 4. A residence permit with visa exemption shall also be granted to direct ascendants of foreign citizens under paragraph 1 (b), who effectively exercise parental powers. Both applications may be simultaneously submitted.
 5. Where the minor, with no well-founded reason, stops attending pre-school or primary school, the temporary residence permit granted under paragraphs 1 (b) and 3 shall be cancelled or not renewed.

6. Where the minor, with no well-founded reason, stops attending secondary school or professional training, the temporary residence permit granted under paragraphs 1 (b) and 3 shall be cancelled or not renewed.
7. Holders of a residence permit granted with visa exemption under the preceding numbers are entitled to benefit from the rights provided for in Article 83.

Article 123: Exceptional Framework

1. In extraordinary situations that may arise which do not fall into the scope of the provisions of Article 122, as well as situations where a residence permit is granted for humanitarian reasons in accordance with the asylum law which rules the right to asylum, upon a proposal of SEF's National Director or by initiative of the member of the government responsible for internal affairs, a temporary residence permit can be granted, exceptionally, to foreign citizens who do not meet the requirements of this Act:
 - a) For reasons of national interest;
 - b) For humanitarian reasons;
 - c) For public interest reasons resulting from the exercise of a relevant activity in science, culture, sports, economic or social activities.
2. The decisions of the member of the government responsible for internal affairs regarding applications for residence permit made under the exceptional scheme provided for in this Article shall be duly substantiated.

Article 124: Foreign minors born in the country

1. Foreign minors born in Portuguese territory enjoy a resident status identical to the one granted to any of his/her parents.
2. For purposes of issuing a residence title, any of the parents must submit the application in the following six months after the minor's birth registration.
3. After expiry of the period provided for in the preceding paragraph, any citizen may request from the minors' curator that he/she may replace the parents and requires the granting of the status for the minors.

CHAPTER VII: Long-term resident status

Article 125: Beneficiaries

1. Third-country nationals residing legally in national territory and fulfilling the necessary conditions for the granting of the status, qualify for the long-term resident status.
2. Third-country nationals do not qualify for the long-term resident status if they:
 - a) Hold a residence permit for purposes of study, unremunerated professional traineeship or voluntary service;
 - b) Are authorised to reside in national territory under temporary protection or have submitted an application for a residence permit for that reason and are awaiting a decision on their status;
 - c) (Repealed.);
 - d) (Repealed.);
 - e) Stay in Portugal only for temporary reasons, as seasonal workers, workers posted by a service provider for the purposes of cross-border provision of services, or as a cross-border providers of services;
 - f) Enjoy a legal status under the Vienna Convention on diplomatic relations adopted on 18 April 1961 or the Vienna Convention on consular relations adopted on 24 April.

Article 126: Conditions for acquiring a long-term resident status

1. The long-term resident status shall be granted to the third-country national who:
 - a) Has a legal and uninterrupted residence in national territory for at least five years before submitting the application, or in case he/she is a beneficiary of international protection, since the date of submittal of the application that resulted in the international protection status granting;
 - b) Holds stable and regular resources for his/her own livelihood and his/her family members without having recourse to the solidarity subsystem;
 - c) Has health insurance;
 - d) Has accommodation;
 - e) Proves proficiency in basic Portuguese.
2. Residence periods for the reasons mentioned in paragraph 2 (e) and (f) of the preceding Article are not relevant for the assessment of the period mentioned in sub-paragraph a) of the preceding paragraph.
3. In cases covered by the provisions of paragraph 2 (a) of the preceding Article, every time a third-country national is granted a residence permit that qualifies him/her to a long-term resident status, the period in which he/she was a holder of a resident permit for purposes of study, unremunerated vocational training or voluntary service is accounted for, in half, for calculation of the period mentioned in paragraph 1 (a).
4. Periods of absence from national territory do not affect the period mentioned in paragraph 1 (a), and are used for its calculation, provided that they are shorter than 6 successive months, and do not exceed, in total, 10 months of the period mentioned in paragraph 1 (a).
5. However, in the calculation of the period mentioned in paragraph 1 (a), the periods resulting from detachment for work purposes, more specifically as regards a cross-border provision of services, shall be taken into account.
6. For the purposes of applying the provisions of paragraph 1 (b), the resources are assessed by their nature and regularity, taking into consideration the level of minimum wages and pensions, before submitting the application for acquiring a long-term resident status.
7. Periods of uninterrupted permanence in national territory under a working visa or a stay permit, issued according to the provisions of the preceding legislation, are relevant to the calculation of the period foreseen in paragraph 1 (a).

Article 127: Public order and public security

1. The status of long-term resident may be refused for public order or public security reasons. The severity or type of offence against public policy or public security, or the danger that emanates from the stay of the person concerned, as well as the length of residence and the existence of links to the country, are facts that shall be taken into consideration.
2. The refusal referred to in the preceding paragraph cannot be grounded on economic reasons.
3. Without prejudice to the provisions of the preceding paragraphs, the long-term resident status on grounds of international protection shall be refused when such protection is withdrawn, suspended or its renewal is refused, in accordance with paragraph (a) and (b) of Article 41 of Act 27/2008, of June 30, that establishes the conditions and procedures for granting asylum or subsidiary protection and the statuses of asylum-seeker, refugee and subsidiary protection.

Article 128: Authority

The granting or refusal of the long-term resident status is under the responsibility of SEF's National Director, personally or by delegation of powers.

Article 129: Procedure for acquiring a long-term resident status

1. SEF's delegation in the applicant's area of residence has the powers to receive the application for granting of a long-term resident status.
2. The application shall be accompanied by documents demonstrating that the third-country national fulfils the conditions laid down by Article 126, as well as a valid travel document or a certified copy of it.
3. Without prejudice to the provisions of the preceding paragraph, the application for granting a long-term resident status made by a third-country national who is simultaneously a holder of a long-term EU title issued by another Member State, shall be preceded by a consultation to the citizen with the purpose of ascertaining if the applicant still benefits from international protection.
4. As soon as possible, and in any event within six months, the applicant shall be notified of the decision rendered.
5. Under extraordinary circumstances linked with complexity of the examination of the application, the time limit referred to in the preceding paragraph may be extended for a period of three months. In such cases, the applicant shall be informed thereof.
6. In the absence of a decision within six months, the application is considered approved.
7. If the conditions laid down in Article 126 are met, and the applicant does not represent a threat within the scope of Article 127, the long-term resident status shall be granted.
8. Anyone who applies for a long-term resident status is informed of his/her rights and obligations.
9. The long-term resident status is permanent on the basis of title that is renewable.
10. The granting of the long-term resident status to a third-country national holder of a residence permit granted in accordance with Article 116 shall be reported by SEF to the Member State which granted the citizen the long-term resident status for the first time ever.

Article 130: EU long-term residence permit

1. Long-term residents are issued an EU long-term residence permit.
2. The EU long-term residence permit is valid for five years, and is automatically renewed, upon request, in the end of the expiry period.
3. The EU long-term residence permit is issued according to the rules and to the uniform format of residence permit for third-country nationals in force in the European Union. Under the heading "type of permit" shall be the designation "Long-term resident-EU".
4. If an EU long-term residence permit is issued to a third-country national who has benefited from international protection in another Member State, the document's heading shall include the observation "International protection granted by (Identification of the Member State) on... (date)".
5. If the international protection is transferred, the above-mentioned observation shall be modified upon request from the member where the third-country national has enjoyed international protection.
6. As soon as possible, and in any event within three months, the residence permit shall be fitly modified with the above-mentioned observation.

Article 131: Loss of the status

1. Long-term residents will lose their resident status in the following cases:
 - a) Fraudulent acquiring of the long-term resident status;
 - b) Adoption of an expulsion measure according to the provisions of Article 136;
 - c) Absence from the territory of the European Union for a period of 12 successive months;
 - d) Acquiring the long-term resident status in another Member State;
 - e) Absence from national territory for a period of six successive years.
2. Absences from the territory of the European Union for a period of more than 12 successive months justified by specific or exceptional reasons do not imply the loss of the status, particularly when the long-term resident stayed in the country of origin with the purpose of pursuing a professional or entrepreneurial activity, or of a cultural or social nature.

3. Absences from national territory for a period of more than 6 successive years justified by specific or exceptional reasons do not imply the loss of the status, particularly when the long-term resident stayed in the country of origin for purposes of carrying out a professional or entrepreneurial activity, or of a cultural or social nature.
4. When the loss of the status is attributed to those situations provided for in paragraph 1 (c) and (e), the person concerned can recover the long-term resident status by means of an application, as long as he/she meets the requirements laid down by paragraph 1 (b) and (d) of Article 126.
5. The decision on the application referred to in the preceding paragraph is given within three months.
6. The expiry of the EU long-term residence permit does not imply the loss of the long-term resident status.
7. The loss of long-term resident status implies the cancellation of the residence permit and the seizure of the EU long-term residence permit.
8. The cancellation of the residence permit to the long-term resident is a competence of the member of the government responsible for internal affairs, with possibility of delegation of powers to SEF's National Director.
9. If the loss of the long-term resident status leads to the removal from national territory of the third-country national who has been the holder of the EU long-term residence permit provided for in paragraph 4 of Article 130, that removal can only be done to the country identified in the heading 'observations'.
10. In the situation mentioned in the preceding paragraph, if there are serious reasons to believe that the third-country citizen may represent a threat to national security or public order, or if he/she has been sentenced in Portugal by a final judgment for an intentional crime that carries a term of non-suspended imprisonment of at least one year, even if, when convicted for an intentional crime provided for in this Act or somehow related to that crime, or crime of terrorism, violent crime or particularly violent crime or highly organised crime the respective sentence has been suspended, or if the international protection status granted by another Member State has been withdrawn, the removal of the citizen can be made to a different country, in accordance with the principle of non-refoulement.
11. If the loss of the long-term resident status does not result on the removal of the citizen, he/she shall be granted a residence permit with visa exemption.

Article 132: Procedural safeguards

1. Decisions rejecting an application for a long-term resident status or loss of that status shall be notified to the interested party with the indication of the grounds for refusal and containing information regarding the right to appeal and relevant time limits.
2. The grounds for refusal of the application for a long-term resident status or loss of that status shall be electronically reported to ACIDI, I. P., indicating the reasons for such decision.
3. The decision rejecting the application for a long-term resident status or the decision on the loss of that status is subject to appeal, with suspensory effect, before the administrative courts.

Article 133: Equal treatment

Beneficiaries of the long-term status shall enjoy equal treatment with the national citizens under the provisions of the Constitution and the law, more specifically as regards:

- a) Access to an employed or self-employed activity, provided that such activity does not entail even occasional involvement in the exercise of public authority, without prejudice to the application of the special scheme granted to citizens from Portuguese-speaking countries;
- b) Access to conditions of employment and working conditions, including conditions regarding dismissal and remuneration;
- c) Education and vocational training including study grants and allowances according to the applicable legislation;

- d) Recognition of professional diplomas, certificates and other qualifications in accordance to law and national procedures;
- e) Social security, social assistance and social protection;
- f) Tax benefits;
- g) Health care;
- h) Access to goods and services and the supply of goods and services made available to the public, as well as to procedures for obtaining accommodation;
- i) Freedom of association and affiliation and membership of an organisation representing workers or employers, or any organisation whose members are engaged in a specific occupation, including the benefits conferred by such type of organisations, without prejudice to the national provisions on public policy and public security.
- j) Free access to the entire national territory.

CHAPTER VIII: Removal from national territory

SECTION I: General provisions

Article 134: Grounds for removal

1. Without prejudice to the provisions in the existing international conventions of which Portugal is party to or will be bound to, the foreign citizen shall be subject to forced removal or to an expulsion order whenever:
 - a) He/she illegally enters or stays in Portuguese territory;
 - b) He/she acts against national security or public policy;
 - c) His/her presence or activities in the country are a threat to the interests or dignity of the Portuguese State or its nationals;
 - d) He/she interferes abusively in the exercise of the rights to political participation that are reserved to national citizens;
 - e) He/she has performed acts that, if were known by the Portuguese authorities would have prevented his/her entry in the country;
 - f) In relation to whom there are strong reasons to believe that he/her has committed serious offences or intends to commit such actions, specifically in the European Union territory;
 - g) He/she holds a valid residence title, or other title that confers the right to stay in another Member State, and he/she fails to comply with the requirement of immediately depart to that Member State;
 - h) The provisions of the preceding paragraph shall be without prejudice to any criminal liability which the foreign citizen may have incurred;
 - i) Refugees shall be applied the most beneficial scheme resulting from legislation or any international convention to which the Portuguese state is bound to.
2. The provisions of the preceding paragraph shall be without prejudice to any criminal liability which the foreign citizen may have incurred.
3. Refugees shall be applied the most beneficial scheme resulting from legislation or any international convention to which the Portuguese state is bound to.

Article 135: Restrictions to forced removal or expulsion

Exception made to cases of threat to national security or public order and to the situations provided for in paragraph 1 (c) and (f) of Article 134, foreign citizens cannot be removed or expelled from national territory if:

- a) They were born in Portuguese territory and habitually reside here;
- b) They have custody of minor children of Portuguese or foreign nationality, residing in Portugal, and effectively exercise parental responsibilities upon them, providing for their livelihood and education;

- c) They live in Portugal since the age of 10 years old or less, and habitually reside in the country.

Article 136: Protection of the long-term resident in Portugal

1. The decision on a judicial expulsion of a long-term resident can only be grounded on the fact that he/she represents an actual and sufficiently serious threat to public policy or public security. This decision shall not be grounded on economic reasons.
2. Before the decision of expulsion of a long-term resident can be made, the following elements shall be taken into account:
 - a) The length of residence in the territory;
 - b) The age of the person concerned;
 - c) The consequences for that person and for his/her family members;
 - d) The bonds with the country of residence or the absence of bonds with the country of origin.
3. The decision on expulsion is liable of appeal with suspensory effect.
4. The long-term resident who does not hold sufficient financial resources is given legal support according to the law.

Article 137: Forced removal of long-term residents in an European Union Member State

1. A forced removal measure can be applied to the holder of a long-term resident status granted by an European Union Member State if he/she illegally stays in national territory.
2. Until the third-country national holder of a residence permit granted under Article 116 is given the status of long-term resident in national territory, the decision on forced removal may only be taken in accordance with the provisions of paragraphs 1 and 2 of Article 136, after consulting the European Union Member State which granted him/her the status.
3. In case of forced removal to the territory of the European Union Member State which granted him/her the long-term resident status, SEF shall notify the competent authorities of the decision.
4. SEF shall take all the measures to effectively execute such decision, and shall inform the competent authorities of the European Union Member State which granted the long-term resident status to the person concerned on the adopted measures to the implementation of the forced removal decision.

Article 138: Voluntary departure from national territory

1. The foreign citizen who illegally enters or stays in national territory shall be notified by SEF to voluntarily leave national territory within the period that will be settled, from 10 to 20 days.
2. The foreign citizen who has had his/her residence permit cancelled shall be notified by SEF to voluntarily leave national territory within the period that will be settled, from 10 to 20 days.
3. The period mentioned in the preceding paragraphs can be extended by SEF when taking into consideration specific circumstances such as the length of stay, the existence of children attending school and the existence of other family and social links. The foreign citizen shall be notified of the extension of the period.
4. In case of decision of cancellation of the residence permit according to the provisions of Article 85, where there is a risk of absconding, or the application for extension of stay has been refused on grounds of being manifestly unfounded or fraudulent, or the concerned person represents a threat to public order or security or to national security, the foreign citizen shall be notified to immediately leave national territory, at the risk of incurring in the crime of serious disobedience.
5. Compliance with the order to immediately depart from national territory implies the use by the foreign citizen of the first means of travel available and suitable to his/her situation.

Article 139: Assisted voluntary return

1. The State may assist the voluntary return of foreign citizens who meet the requirements to the countries of origin, under cooperation programmes concluded with international organisations, more specifically the International Organisation for Migration or non-governmental organisations.
2. Foreign citizens benefiting from assistance under the provisions laid down by the preceding paragraph, when holding a residence permit, shall return it at the border post when boarding.
3. During a period of three years after departure of the country, beneficiaries of assisted voluntary return can only be admitted into national territory if they return the amounts received, with interest on deferred payment at the legal rate.
4. The provisions of the preceding paragraph are without prejudice to the possibility of the short-term visa issuing, for humanitarian reasons, in accordance to the provisions laid down by Article 68.
5. Citizens who have benefited from a temporary protection scheme are not subject to the requirement provided for in paragraph 3.

Article 140: Authorities responsible for removal

1. The forced removal can be determined in accordance to the present law, by SEF's National Director, personally or by delegation of powers.
2. SEF's National Director is responsible for the decision of closing the forced removal procedure.
3. The judicial expulsion order is determined by a relevant judicial authority.
4. The expulsion order is an ancillary penalty or is adopted where the foreign citizen subject to the decision has legally entered or stayed in Portugal.

Article 141: Procedural competence

1. SEF's National Director has the powers, personally or by delegation, to bring an action of forced removal and to order the pursuing of the procedure, as well as to determine its filing to the competent court.
2. SEF's National Director also has the powers to close the file.

Article 142: Coercive measures

1. As regards expulsion procedures, in addition to the coercive measures listed in the Penal Code, exception made to provisional detention, where there is a risk of absconding, the judge may also determine the following:
 - a) Regular reporting (in person) to SEF;
 - b) House confinement using electronic surveillance means in accordance to the provisions of the law;
 - c) Placing the person concerned in a detention facility or equated facility, in accordance to the provisions of the law.
2. The lower criminal courts [juízos de pequena instância criminal] of the area where the foreign citizen was found have the powers to enforce coercive measures.

Article 143: Country of destination

1. Forced removal and expulsion cannot be made to a country where the foreign citizen may be subject to persecution for the reasons that, in accordance to the law, substantiate the granting of the right to asylum or where the foreign citizen may suffer from torture, inhuman or degrading treatment according to the sense of Article 3 of the European Convention on Human Rights.

2. In order to benefit from the guarantee provided for in the preceding paragraph, the person concerned shall call upon the fear of being persecuted and provide evidence within the period that will be granted to him/her.
3. For the cases provided for in the preceding paragraph, the person concerned is removed to another country that accepts him/her.

Article 144: Entry ban period

The foreign citizen subject to a removal decision is refused to enter national territory for up to five years. Such time period, however, may be longer in case there is any serious threat to public order, public security or national security.

SECTION II: Forced removal ordered by an administrative authority

Article 145: Forced removal

Without prejudice of the application of the readmission scheme, the forced removal can only be ordered by an administrative authority on grounds of illegal entry or staying in national territory.

Article 146: Arrangements on the forced removal decision

1. The foreign citizen who illegally enters or stays in national territory shall be detained by a police authority and, when possible, handed over to SEF with the respective police report. The citizen shall be presented within forty eight-hours at the most to the judge of the lower criminal court [juízo de pequena instância criminal] under his/her jurisdiction or to the district court in other areas of the country, in order to validate and possibly enforce coercive measures.
2. If detention in a detention centre, or equated facility, is ordered, SEF shall be notified of the fact in order to further the judicial proceeding aiming at the removal of the foreign citizen from national territory.
3. The detention provided for in the preceding paragraph cannot exceed more than the necessary period to allow the execution of the removal decision, which is of 60 days.
4. If the detention in a detention centre, or equated facility, is not ordered, SEF shall also be notified for the purposes referred to in paragraph 2, and the foreign citizen shall be notified to appear in person in the respective Service.
5. A forced removal procedure shall not be arranged against the citizen who: a) Illegally enters national territory, nevertheless lodges an application for asylum at any police authority within 48 hours after his/her entry; b) Holds a valid residence permit or any other permit that provides him/her the right to stay in another Member State and complies with the requirement to immediately depart to that Member State; c) Is readmitted or accepted upon request of another Member State, in compliance with international agreements or conventions concluded in that regard, provided that he/she is the holder of a permit that enables him/her to legally stay or reside in national territory; d) Holds a residence permit or other permit entitling his/her legal stay in national territory, in accordance with the legal provisions in force.
6. The foreign citizen who is in the conditions referred to in sub-paragraph (a) of the preceding paragraph awaits on conditional release the decision on his/her application, and shall be notified by SEF of his/her rights and obligations in accordance with the provisions of the law which rules the right to asylum.
7. According to the provisions of paragraph 1 the authorities and officers from SEF, Guarda Nacional Republicana, Polícia de Segurança Pública, Polícia Judiciária and Polícia Marítima are competent to make arrests.

Article 146 -A: Conditions for detention

1. The foreign citizen detained in a detention centre or equated facility is authorised, upon request, to contact his/her legal representative, family members and relevant consular authorities.
2. The foreign citizen detained in a detention centre or equated facility has the right to communicate with his/her lawyer or legal counsel in private.
3. The foreign citizen detained in a detention facility or equated facility has the right to emergency health care and essential treatment of illness. Special attention shall be paid to vulnerable persons, particularly minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.
4. Under the management powers of detention facilities granted to SEF, other protocols may be concluded with national or international organisations with recognised work in the area of immigration, with the purpose of defining the conditions for authorising visits to those citizens.
5. The detained foreign citizen is provided a document with the rules of the detention centre or equated facility, as well as his/her rights and duties, such as the right to contact the bodies referred to in paragraph 1.
6. Detained families should be provided separated accommodation so as to ensure adequate privacy.
7. Detained accompanied minors shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age, and shall have, depending on the length of their stay, access to education.

Article 147: Escort to a border post

1. The foreign citizen detained under the provisions of paragraph 1 of Article 146 who, during judicial questioning and after being informed on the provisions of paragraphs 2 and 3, claims that he/she wants to leave national territory may, by resolution of the competent judge and if duly provided with documents, be handed over to SEF's custody so as to be escorted to a border post in the shortest possible period of time.
2. The citizen who declares the will to be escorted to the border post is refused to enter national territory for a period of one year.
3. Escort to a border post implies the registration of the citizen in the Schengen Information System and in the national list of alerts on persons to be refused entry during the entry ban period.

Article 148 Proceedings

1. During the proceedings, the hearing of the person concerned is ensured, and he/she shall enjoy all the guarantees to his/her defence.
2. The audition mentioned in the preceding paragraph is valid for all purposes and effects as an hearing of the concerned person.
3. The officer responsible for the proceedings must promote all the essential procedures in order to obtain the truth. He/she may refuse, by means of a reasoned order, the request of the person against whom the proceedings was brought, whenever he/she considers the alleged facts as proven.
4. Once the assessment on the proceedings is concluded, the respective report is drawn up. This report, produced by the responsible officer, includes the description and assessment of the facts ascertained and proposes the resolution considered the most appropriate by the officer. The proceedings are then submitted to the authority with powers to render a decision.

Article 149: Forced removal decision

1. The forced removal decision falls within the competence of SEF's National Director.

2. The removal decision shall be electronically reported to ACIDI and to the Advisory Council, and notified to the concerned person against whom the proceedings were brought, indicating the grounds, the right to appeal, as well as its registration at the Schengen Information System and in the national list of alerts on persons to be refused entry for the period of the entry ban, without prejudice to the applicable rules as regards the protection of personal data.
3. The forced removal decision must indicate:
 - a) The grounds;
 - b) Legal obligations of the third-country national to be removed;
 - c) The refusal of entry in national territory and its duration;
 - d) The indication of the country to where the foreign citizen benefiting from the guarantee provided for in Article 143 shall not be sent to.

Article 150: Appeal

1. The forced removal decision rendered by SEF's National Director is subject to devolutive appeal before the administrative courts.
2. The provisions of the previous paragraph are without prejudice to the citizen's right to pursue priority procedures or with suspensory effect, as provided for in the administrative procedural law.
3. The foreign citizen, upon request, shall enjoy legal protection. Act 34/2004, of July 29, shall apply, *mutatis mutandis*, in the scheme provided to the appointment of a legal representative for the defendant in urgent matters.
4. Upon request of the interested party, translation and interpretation services may be provided for purposes of the appeal referred to in paragraphs 1 and 2.

SECTION III: Judicial expulsion

SUBSECTION I: Ancillary penalty of expulsion

Article 151 Ancillary penalty of expulsion

1. The ancillary penalty of expulsion can be applied to the non-resident foreign citizen who has been convicted of an intentional crime with a non-suspended penalty of imprisonment of at least six months, or a fine as an alternative to imprisonment for more than 6 months.
2. The same penalty may be imposed to a foreign citizen resident in Portugal, who was convicted of an intentional crime with a penalty of imprisonment of one year or more. Nevertheless, when the penalty is enforced, the seriousness of the facts practiced by the defendant, as well as his/her character, eventual re-occurrence, degree of social integration, special prevention and period of residence in Portugal shall be taken into account.
3. Without prejudice to the provisions of the preceding paragraph, the ancillary penalty of expulsion can only be imposed to the permanent resident foreign citizen where his/her conduct seriously threatens the public policy or national security.
4. If the ancillary penalty of expulsion is imposed, the judge responsible for the enforcement of sentences [juiz de execução de penas] shall order the penalty's enforcement as soon as:
 - a) In cases of conviction with a sentence of imprisonment for at most five years: half of the sentence served;
 - b) In cases of conviction with a sentence of imprisonment for more than five years: two thirds of the sentence served.
5. In cases of conviction with a sentence of five years or less imprisonment, and provided that the remaining time for completion of the sentence is complied with in the country of destination, the judge responsible for the enforcement of sentences [juiz de execução de penas], upon a reasoned proposal of the prison's director and provided that there is no objection from the sentenced person, may decide

on the anticipation of enforcement of the ancillary penalty of expulsion when a third of the sentence has been served.

SUBSECTION II: Autonomous judicial measure of expulsion

Article 152: Competent court

1. The following courts are competent for applying the autonomous measure of expulsion:
 - a) In the respective area of jurisdiction: judges of the lower criminal courts [juízo de pequena instância criminal];
 - b) In the rest of the country: district courts.
2. Territorial competence is determined on the basis of the place where the foreign citizen lives or the place where he/she is found.

Article 153: Expulsion procedure

1. Where SEF is aware of any fact that may constitute a ground for expulsion, it will organize a procedure for gathering evidence that empower the decision.
2. The expulsion procedure starts with the order that initiated the procedure and must include, in addition to the identification of the concerned foreign citizen, all the relevant evidence, more specifically the circumstance of being or not a resident in the country and, when residing in the country, the period of residence.
3. In case the foreign citizen is also indicted of the crime of disobedience for failure to immediately leave national territory, in accordance with the provisions of paragraph 4 of Article 138, he/she shall likewise face trial for this matter.

Article 154: Trial

1. Upon reception of the proceedings, the judge will schedule the trial that should take place in the following five days, ordering a notification of the defendant, of the witnesses listed in records and of SEF, represented by the respective regional director.
2. The presence of the defendant at the hearing is mandatory.
3. The notification to the defendant shall mention that, if he/she so wishes, it is possible to challenge the proceedings at the hearing and add a list of witnesses or any other evidence elements.
4. SEF's notification, which is represented by the respective regional director, seeks the appointment of the official or officials who may provide the court with the explanations considered relevant for the decision.
5. For the cases provided for in paragraph 1 (f) of Article 134, the provisions of paragraphs 1 and 2 of Article 382 and Articles 385 and 389 of the Penal Code shall apply.

Article 155: Adjournment of the hearing

1. The hearing can be adjourned only once, and no later than the tenth day after the first date settled:
 - a) If the defendant asks for a new date in order to prepare his/her defence;
 - b) If the defendant misses the trial;
 - c) If witnesses considered crucial miss the trial;
2. The provisions of sub-headings a) and c) of the preceding paragraph shall not apply to the cases provided for in paragraph 1 (f) of Article 134.

Article 156: Subsidiary application of the summary procedure

Exception made to the cases provided for in paragraph 1 (f) of Article 134, the provisions of the Penal Code concerning trial in summary procedure shall apply *mutatis mutandis*.

Article 157: Decision content

1. The judicial expulsion decision must contain:
 - a) The grounds for decision;
 - b) Legal obligations of the defendant;
 - c) The entry ban refusing entry into national territory and indicating the respective period;
 - d) The indication of the country to which the foreign citizen benefits of the guarantee provided for in Article 143.
2. The enforcement of the decision entails the registration of the expellee in the Schengen Information System and in the national list of alerts on persons to be refused entry for the period of the entry ban.
3. SEF shall notify the expellee of the registration in Schengen Information System.

Article 158: Appeal

1. The judicial decision determining the expulsion may be subject to devolutive appeal before the court of appeal [tribunal da relação].
2. The provisions of the Criminal Procedure Code on ordinary appeal shall apply on a supplementary basis.

SECTION IV: Enforcement of the decisions on forced removal and judicial expulsion

Article 159: Competence for the execution of the decision

SEF is responsible for the execution of decisions on forced removal and expulsion.

Article 160: Compliance with the decision

1. The foreign citizen against whom a decision on forced removal or judicial expulsion has been issued is granted a period to leave national territory, between 10 to 20 days.
2. In duly substantiated situations, more specifically when there are concrete and objective reasons to believe that there is any risk of absconding, where the third-country national uses false or falsified documents, or is detected in situations indicating the commission of a crime, or there are serious reasons to believe that he/she committed serious criminal acts, or strong evidence of his/her intention to commit such acts, the citizen shall be handed over to SEF's custody with a view to executing the forced removal or judicial expulsion decision.
3. Until execution of the forced removal or judicial expulsion decision, and while the period referred to in paragraph 1 is still valid, the competent judge may be required to subject foreign citizen to one of following arrangements:
 - a) Placement in a detention centre or equated facility;
 - b) Obligation to stay at home using electronic surveillance means;
 - c) Regular reporting (in person) to SEF or other police authorities;
 - d) Payment of a security.
4. On the course of the granted period, the special needs of vulnerable persons shall be taken into account, more specifically the needs of minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.
5. During the time period granted for voluntary departure, the foreign citizen has the right to maintain family unit with family members that are in national territory, as well as to emergency health care and essential treatment of illness and, in case of a minor, access to the public education system.
6. The time period set out in paragraph 3 (a) may be longer, but may in no case exceed three months in situations where there are clear indications that the foreign citizen has committed or intends to commit a serious offence, or if he/she has been convicted for an intentional crime, or poses a serious threat to public

order, national security or the international relations either of a European Union Member State or of States that have adopted the Implementing Convention.

Article 161: Non-compliance with the decision

1. The foreign citizen who does not leave national territory within the time limit fixed shall be detained and escorted to the border post with a view to be removed from national territory.
2. If it is not possible to execute the forced removal or expulsion decision within forty eight hours after the detention, the fact shall be reported to the judge of the lower criminal court [juízo de pequena instância criminal] of the respective jurisdiction area, or the district court in the remaining areas of the country, with a view to set the placing of the foreign citizen in a detention centre or equated facility.

Article 162: Announcement of decision

The execution of the forced removal or expulsion decision must be communicated, through diplomatic channels, to the competent authorities of the country of destination of the foreign citizen.

SECTION V: Readmission

Article 163: Readmission concept

1. According to the provisions of international conventions, all foreign citizens who are illegally staying in the territory of a State, entering the country directly from another State, may be readmitted by the latter upon request made by the State in which territory they are staying.
2. When Portugal is the requesting State, the readmission is active; when Portugal is the requested State, readmission is passive.

Article 164: Competence

The acceptance by Portugal of readmission applications as well as submittal of readmission applications to another State is a competence of SEF's National Director, who may delegate that power.

Article 165: Active readmission

1. Where a foreign citizen who is irregularly staying in Portugal shall be readmitted by another State, SEF shall formulate the application in accordance with the provisions of Article 153 mutatis mutandis.
2. On the course of the proceedings, the hearing of the foreign citizen to be returned to the required State shall be guaranteed, and shall weight for all purposes as a hearing of the interested party.
3. If the application submitted by Portugal is accepted, the competent authority shall determine the return of the foreign citizen to the required State.
4. Where the application is refused, an expulsion proceedings shall be initiated.
5. The State making the readmission application is competent to determine the return of the foreign citizen to the required State.
6. If the required State is a third-country, the return of the foreign citizen to the required State implies the citizen's registration in the national list of persons to be refused entry in the Schengen Information System.

Article 166: Appeal

The decision to return a foreign citizen to the required State is subject to devolutive appeal to the member of the government responsible for internal affairs, within 30 days.

Article 167: Entry ban

The foreign citizen who has been returned to another State under an international convention is refused entry in the country for a period of three years.

Article 168: Passive readmission

1. The foreign citizen readmitted into Portuguese territory and who does not meet the legal requirements for staying in the country shall be the subject of a removal order from national territory provided for in this chapter.
2. The following third-country nationals shall be immediately readmitted without formalities into national territory:
 - a) Third-country nationals who have acquired the long-term resident status in Portugal, as well as their family members, whenever they have been the subject of a forced removal order of the Member state where they exercised their right of residence;
 - b) Third-country nationals who are holders of residence permit («EU Blue Card») granted in accordance with Articles 121 -A and following, as well as their family members, even if the title has expired or has been withdrawn during the examination of the request, whenever they have been the subject of a forced removal order of the Member State where they went to for purposes of performing a highly-qualified activity;
 - c) Third-country nationals who are the subject of a request for admission formulated by another member State, under agreements or conventions in that regard, provided that they are holders of permits that enable them to legally reside or stay in national territory.
3. The readmission obligation mentioned in the preceding paragraph is without prejudice to the possibility of the long-term resident and his/her family members move to a third Member State.

SECTION VI: Mutual recognition of removal decisions

Article 169: Recognition of a removal decision taken against a third-country national

1. Decisions on removal taken by the competent administrative authority of a European Union Member State or a Party State in the Implementing Convention against a third-country national who is in national territory shall be recognised and executed provided that the removal decision is based upon:
 - a) A serious and actual threat to public policy or national security of the State that issued the decision;
 - b) Non-compliance by the concerned third-country national of the rules regarding entry and stay of foreign citizens of the State that issued the removal decision.
2. A removal decision based on the provisions of sub-paragraph (a) of the preceding paragraph is only recognised if it was taken in case of:
 - a) Sentencing of the third-country national by the issuing State for an offence punishable by at least one year imprisonment;
 - b) Existence of serious grounds indicating that a third-country national has committed serious criminal offences, or the existence of solid evidence of his/her intention to commit such offences within the territory of a European Union Member State or of a State Party to the Implementing Convention.
3. If the person covered by the provisions of the preceding paragraph holds a residence permit issued in national territory, the recognition and execution of the removal decision can only be determined by a judicial authority in accordance with the provisions of articles 152 to 158.
4. Without prejudice to the provisions of paragraph 2 of Article 25 of the Implementing Convention, where the person subject to a removal decision mentioned in paragraphs 1 and 2 holds a residence permit issued by a European Union Member State or by a State Party to the Implementing Convention, SEF

shall consult the competent authorities of that State in order to eventually cancel the residence permit pursuant to the provisions in force in that State, as well as of the State that issued the removal decision.

5. The removal decision in accordance with the provisions of paragraphs 1 and 2 is only recognised if it is not adjourned or suspended by the issuing State.
6. The provisions of this Article shall apply without prejudice to the provisions on determining the responsibility of European Union Member States on the examination of an asylum application and on the readmission agreements concluded between European Union Member States.

Article 170: Competence

1. SEF has the competence to execute the removal measures mentioned in the preceding Article.
2. Where a removal decision taken by a competent national authority is executed by a European Union member State or a State Party to the Implementing Convention, SEF shall provide the competent body of the enforcing State with all documents needed to certify the continued enforceability of the decision.
3. SEF is allowed to establish and maintain a personal data file for the purposes provided for in this section, without prejudice to compliance with constitutional and legal rules as regards data protection.
4. SEF is also responsible for cooperating and exchanging relevant information with the competent authorities from other European Union member States or States parties to the Implementing Convention with a view to recognise and execute removal decisions in accordance with the provisions of the preceding Article.

Article 171: Enforcement of the removal

1. The removal decision recognised in accordance with the provisions of Article 169 shall only be executed if the provisions of Article 135 are complied with, and after a preliminary examination of the situation of the person concerned in order to ensure that neither the Constitution, the relevant international conventions nor the law prevents its execution.
2. Any third-country national that illegally stays in national territory and against whom there is a decision in accordance with the provisions of Article 169, shall be detained by a police authority and handed over, with the respective police report, to SEF where he/she will remain under custody. SEF shall escort the citizen to the border.
3. The decision on the enforcement of the removal may be subject to devolutive appeal before the administrative courts.
4. The foreign citizen who has been issued a decision taken in accordance with the provisions of paragraph 3 of Article 169 shall be handed over to SEF where he/she will remain under custody in order to be escorted to the border and be removed as soon as possible.
5. Where removal is not possible to execute within forty eight hours after detention, the third-country national shall be brought before a judge of the lower criminal court [juízo de pequena instância criminal] at the respective jurisdiction area or at the competent district court, for validating the detention and eventual enforcement of coercive measures.
6. The order that validates detention and delivery to SEF's custody may be subject to appeal in accordance with the provisions of Article 158.
7. After execution of the removal measure, SEF shall notify the competent authority of the Member State which issued the removal decision.

Article 172: Financial compensation

The financial return for costs related with the removal of third-country nationals follows the criteria endorsed by the Council of the European Union.

SECTION VII Assistance to removal by air during airport transit Article 173 Preference for a direct flight

When a third-country national is removed by air, the possibilities for taking a direct flight to the country of destination shall be taken into account.

Article 174: Request for airport transit in the territory of a Member State

1. If it is impossible to take a direct flight, airport transit may be requested to the competent authorities of another member State, provided that does not imply a change of airport in the territory of the requested Member State.
2. Request for airport transit, with or without an escort, and related assistance measures, more specifically the measures mentioned in paragraph 2 of Article 177, shall be submitted in writing and must be reported to the Member State as soon as possible, and in any case no later than two days before transit.
3. SEF's National Director has the powers to request airport transit, personally or by delegation of powers.
4. Transit may not be initiated without the approval of the requested Member State, exception made in cases where there is no answer to the request mentioned in paragraph 1 within the time limits to which the requested Member State is obliged to abide. The transit operation may initiate upon a mere notification.
5. For the purposes of dealing with the request referred to in paragraph 1, the information on the form to be used for requesting and authorising transit in accordance with the Annex of Directive 2003/110/EC of November 25, shall be forwarded to the requested Member State.
6. SEF shall take appropriate action to ensure that the transit operation takes place in the shortest possible time, at the latest within twenty-four hours.
7. The third-country national shall be immediately readmitted into Portuguese territory if:
 - a) The airport transit permit was refused or repealed; or
 - b) During transit, the third-country national entered the requested Member State without holding a permit; or
 - c) The removal of the third-country national to another transit country or to the country of destination, or boarding to the connecting flight, was unsuccessful; or
 - d) Transit is not possible for any other reason.
8. SEF shall bear the costs incurred in returning the third-country national.
9. SEF shall bear the costs related with measures for assisting airport transit mentioned in paragraph 2 of Article 177, which were paid by the requested Member State.

Article 175: Assistance to airport transit in national territory

1. Airport transit may be authorised to the competent authorities of a Member State who are removing a third-country national when deemed necessary.
2. Airport transit may be refused if:
 - a) The third-country national is accused of a criminal offence or is wanted for the carrying out of a sentence, in accordance with applicable law; or
 - b) Transit through other States or admission by the State of destination cannot be guaranteed; or
 - c) The removal measure entails changing airport in national territory; or
 - d) For practical reasons, the requested assistance is impossible at a particular moment; or
 - e) The presence of the third-country national in national territory represents a threat to public policy, public security or public health, or to the international relations of the Portuguese State.
3. As regards sub-paragraph (d) of the preceding paragraph, the requesting State shall be given in the earliest opportunity a date as close as possible to the originally requested on which transit may be assisted, in so far as the other conditions are complied with.

4. Authorisations for airport transit which have already been issued may be revoked if circumstances within the meaning of paragraph 2 subsequently come to light, thus justifying a refusal of the transit.
5. SEF shall inform the competent authorities of the requesting Member State forthwith of the refusal or revocation of an airport transit authorisation under paragraph 2 or of the preceding paragraph, or of any other reason why the transit is not possible, and shall provide an explanation of the reasons.

Article 176: Decision on granting assistance to airport transit

1. The decision on authorisation or refusal of airport transit is a competence of SEF's National Director, personally or by delegation of powers.
2. The decision on authorisation or refusal of airport transit shall be reported to the competent authorities of the requesting Member State within forty-eight hours. Nevertheless, in duly substantiated cases it may be extended for an equal period.
3. Where no reply is provided within the deadline referred to in the preceding paragraph, the transit operations may be started by means of a notification by the requesting Member State.

Article 177: Assistance measures to airport transit

1. Based on mutual consultations with the requesting Member State, within the available means and in compliance with the relevant international standards, all the assistance measures necessary shall be provided with a view to ensure that the third-country national has left the territory. 2. Assistance measures mentioned in the preceding paragraph are the following: a) Meeting the third-country national at the aircraft and escorting him/her within the confines of the transit airport, in particular to his/her connecting flight; b) Providing emergency medical care to the third-country national and, if necessary, to his/her escort; c) Providing sustenance for the third-country national and, if necessary, his/her escort; d) Receiving, keeping and forwarding travel documents, particularly in the case of unescorted removals; e) In cases of unescorted transit, informing the requesting Member State of the place and time of departure of the third-country national from national territory; f) Informing the requesting Member State if any serious incidents took place during the transit of the third-country national.
2. Mutual consultations are not required in accordance with paragraph 1 when providing the assistance measures referred to in sub-paragraph (b) of the preceding paragraph.
3. Without prejudice to the readmission of the third-country national, in cases where the completion of transit operations cannot be ensured, despite the assistance provided for in accordance with paragraphs 1 and 2, upon request and in consultation with the requesting Member State, all necessary assistance measures may be taken with a view to continue the transit operation, which may be carried out within 48 hours.
4. Appropriate information with regard to the costs of the services provided in accordance with paragraph 2(b) and (c) shall be borne to the requesting Member State, in addition to the criteria on quantification of the actual costs incurred referred to in sub-paragraph 2.
5. Assistance to the readmission of the third-country national shall always be granted by the requesting Member State, when such readmission takes place.

Article 178: International conventions

1. The starting of transit operations by means of a mere notification can be subject to international conventions concluded with one or more Member States.
2. The international conventions mentioned in the preceding paragraph shall be notified to the European Commission.

Article 179: Central authority

1. SEF is the central authority responsible for the receipt of requests for airport transit assistance.

2. SEF's National Director shall appoint contact points for all the relevant airports of transit who can be contacted throughout all transit operations.

Article 180: Escort

1. For purposes of application of this section, «escort» means all persons from the requesting Member State responsible for accompanying the third-country national during airport transit in national territory, including the persons responsible for medical care and interpreters.
2. When carrying out the transit operation, the powers of the escorts shall be limited to self-defense.
3. In the absence of national police officers, the escorts may use reasonable and proportionate action in response to an immediate and serious risk to prevent the third-country national from escaping, causing injury to himself/herself or to a third party, or damage to property.
4. Under all circumstances, escorts must comply with national legislation.
5. Escorts shall not carry weapons during transit by air and shall wear civilian clothes.
6. Escorts shall provide means of appropriate identification, including the transit authorisation, or where applicable, the notification referred to in paragraph 3 of Article 176.

Article 180 -A: Implementation of removal decisions

1. SEF's National Director has the competence to decide on the organisation or participation of the Portuguese State in joint flights for purposes of removing from the territory of two or more Member States the third-country nationals who are subject to of forced removal or judicial expulsion decisions.
2. The afore-mentioned decision is guided by principles of efficiency by means of sharing of existing resources and, in particular, by compliance with international conventions or agreements regarding human rights which bind the Member States.
3. The organisation of a joint operation of removal by air, open to the participation of other Member States, shall ensure:
 - a) The essential information to be provided to the competent authorities of the other Member States, with a view to determine their interest in participating in the operation;
 - b) The implementation of the necessary measures to the appropriate evolution of the joint operation, considering the provisions of Article 4 of the Council Decision 2004/573/EC of 29 April 2004 and its annex.
4. For the purposes of the preceding paragraph, the organising national authority, in accordance with the common guidelines on security provisions provided for in the afore-mentioned annex, undertakes to the following:
 - a) Ensuring that third-country nationals hold the valid travel documents, as well as entry visas, when required, to the country or countries of transit or destination of the joint flight;
 - b) Providing the necessary health care, medicinal products, translation or interpreting services, as well as escort services, in accordance with principles of necessity, proportionality and identification provided for in Article 180;
 - c) Monitoring every joint removal operation which shall be performed by a reliable and appropriate body that will be appointed by regulatory order of the member of the government responsible for internal affairs;
 - d) Preparing an internal and confidential report of the joint removal operation which includes preferably, where available, statements of incidents or of application of coercive measures or medical measures, as well as progress reports from other participant Member States.
5. Without prejudice of the provisions of Council Decision 2004/573/EC of 29 April 2004 and its annex, the arrangements of this Article shall apply, mutatis mutandis, to the participation of the Portuguese State in joint operations organised by other Member States.

CHAPTER IX : Penal provisions

Article 181 : Illegal entry, stay and transit

1. The entry of foreign citizens into Portuguese territory in infringement of the provisions of Articles 6, 9 and 10, and of paragraphs 1 and 2 of Article 32 is deemed illegal.
2. The stay of foreign citizens in Portuguese territory when not authorised in accordance with the provisions of this law or of the law governing the right to asylum, as well as when an illegal entry has been registered in accordance with the provisions of the preceding paragraph, is deemed illegal.
3. Transit of foreign citizens in Portuguese territory when the concerned citizens do not have their admission guaranteed in the country of destination is deemed illegal.

Article 182: Civil and criminal liability of legal persons and equivalent bodies

1. Legal persons and equivalent bodies are responsible, generally speaking, for the crimes provided for in this Act.
2. The bodies mentioned in paragraph 1 shall be jointly liable, according to civil law, for the payment of fines, penalties, compensations and other payments to which they are condemned to pay in result of the offences provided for in this Act.
3. In addition to the criminal liability for the crimes provided for in Articles 183, 184 and 185, there is also civil liability for all costs regarding the stay and removal of the involved foreign citizens, including any expenses regarding the remittance to the country of origin of any amounts regarding outstanding remuneration.

Article 183: Action to facilitate illegal immigration

1. Whoever favours or facilitates by any means the illegal entry or transit of a foreign citizen in national territory shall be punished by a term of imprisonment of three years or less.
2. Whoever favours or facilitates by any means the illegal entry or transit of a foreign citizen in national territory, for profit, shall be punished by a term of imprisonment from one to five years.
3. If on the course of an action to facilitate illegal immigration the facts are carried out by transporting or maintaining the foreign citizen under inhuman or degrading conditions, or risking his/her life or causing serious threat to his/her physical health or causing death, the offender shall be punished with a term of imprisonment from one to eight years.
4. Attempt to commit the provided offences is also punishable. 5. Penalties incurred to the bodies mentioned in paragraph 1 of Article 182 are either in the form of a fine, which minimum and maximum limits are doubled, or by prohibition of professional activity from one to five years.

Article 184 Association for facilitating illegal immigration

1. Whoever promotes or founds a group, organisation or association whose activity is to practice the crimes provided for in the preceding Article shall be punished by a term of imprisonment from one to six years.
2. Whoever is part of such groups, organisations or associations, as well as those supporting or providing assistance for recruiting new elements, shall incur in the same penalty.
3. Whoever leads the groups, organisations or associations mentioned in paragraph 1 shall be punished by a term of imprisonment from one to eight years.
4. Attempt to commit the provided offences is also punishable.
5. Penalties incurred to the bodies mentioned in paragraph 1 of Article 182 are either in the form of a fine, which minimum and maximum limits are doubled, or by prohibition of professional activity from one to five years.

Article 185: Recruiting illegal labour

1. Whoever, with a view to making a profit, to him/herself or to a third person, entices or recruits, for purposes of getting into the labour market, foreign citizens who do not hold a valid residence title or visa enabling them to carry out a professional activity shall be punished by a term of imprisonment from one to five years.
2. Whoever consistently directs the actions provided for in the preceding paragraph shall be punished by a term of imprisonment from two to six years.
3. Attempt to commit the provided offences is also punishable.

Article 185 -A: Using the activity of an illegally staying foreign citizen

1. Whoever, on a regular basis, uses the activity of foreign citizens who do not hold a residence permit or visa enabling them to legally stay in Portugal, shall be punished by a term of one year imprisonment or a fine up to 240 days.
2. In cases referred to in previous paragraph, whoever uses simultaneously the activity of a significant number of illegally staying foreign citizens, shall be punished by a term of two years or less imprisonment or a fine up to 480 days.
3. Whoever uses the work of a minor foreign citizen, even if he/she is authorised to work under the provisions of the Labour Code, shall be punished by a term of two years or less imprisonment or a fine up to 480 days.
4. If the actions mentioned in the preceding paragraphs also evince particularly abusive or degrading working conditions, the offender shall be punished by a term of one to five years imprisonment unless a more serious penalty is applied under any other legal provision.
5. If the employer or person using the work or services of a illegally staying foreign citizen is aware that the citizen is a victim of crimes related to trafficking in human beings, he/she shall be punished by a term of two to six years imprisonment unless a more serious penalty is applied under any other legal provision.
6. In the event of repeated infringements, the penalty limits shall be increased under general terms.
7. Penalties incurred to the bodies mentioned in paragraph 1 of Article 182 are either in the form of a fine, which minimum and maximum limits are doubled, or by preventing the exercise of a professional activity from three months to five years.

Article 186: Marriage or partnership of convenience

1. Whoever marries or is linked by registered partnership with the sole purpose of offering the possibility of obtaining, or for actually obtain a visa, a residence permit or a «EU Blue Card», or for defrauding the legislation in force as regards acquisition of citizenship, shall be punished by a term of one to five years imprisonment.
2. Whoever, on a regular basis fosters or creates conditions for the practice of the actions provided for in the preceding paragraph shall be punished by a term of two to six years imprisonment.
3. Attempt to commit the provided offences is also punishable.

Article 187: Infringement of an entry ban measure

1. The foreign citizen who enters national territory during the period in which he/she was banned to enter shall be punished by a term of two years or less imprisonment or a fine up to 100 days.
2. In case of conviction, the court may decree as ancillary measure, by means of a duly grounded judicial decision, the expulsion of the foreign citizen, in accordance with the provisions of Article 135.
3. Without prejudice of the provisions of paragraph 1, the foreign citizen may be removed from national territory with a view to comply with the remainder of the period of entry ban in accordance with the proceedings which determined the citizen's removal.

Article 188: Investigation

1. In addition to the competent entities, SEF also holds the competence to investigate the crimes provided in this chapter, and other related crimes, such as trafficking in human beings.
2. Covert investigations carried out by SEF under the framework of preventing and investigating illegal immigration-related crimes which have the involvement of criminal associations, shall follow the provisions of Act 101/2001, of August 25.

Article 189: Seized objects

1. The objects seized by SEF that have been declared lost in favour of the State are assigned to the State provided that they:
 - a) Are documents, weapons, ammunition, vehicles, telecommunication devices, computers or other useful items to the service;
 - b) Result from the enforcement of international conventions related to illegal immigration.
2. The usefulness of objects mentioned in sub-paragraph (a) of the preceding paragraph should be proposed by SEF in the final report of the respective criminal proceedings.
3. Objects mentioned in sub-paragraph (a) of paragraph 1 may be temporarily used by SEF from the moment of its seizure until the declaration of loss or recovery upon an order issued by SEF's National Director that shall be conveyed to the authority that oversees the proceedings.

Article 190: Ancillary penalties and coercive measures

The crimes provided for in this Act may have ancillary penalties applied of prohibition or suspension of the exercise of public functions provided for in the Penal Code, as well as coercive measures provided for in the Code of Criminal Procedure.

Article 191: Sentence transmission

Courts shall send to SEF, electronically and within the shortest possible time, the following:

- a) Certificates of convictions given in criminal proceedings against foreign citizens;
- b) Certificates of decisions given on proceedings for crimes of facilitating illegal immigration and recruitment of illegal labour;
- c) Certificates of decisions given on expulsion proceedings;
- d) Certificates of decisions given on extradition proceedings relating to foreign citizens.

CHAPTER X : Administrative offences

Article 192 : Illegal stay

1. The stay of a foreign citizen in Portuguese territory for a period exceeding the initially granted is an administrative offence punishable with the following fines:
 - a) From €80 to €160, if the period of stay does not exceeds 30 days;
 - b) From €160 to €320, if the period of stay is more than 30 days but does not exceed 90 days;
 - c) From €320 to €500, if the period of stay is more than 90 days but does not exceed 180 days;
 - d) From €500 to €700, if the period of stay is longer than 180 days.
2. The same fine shall apply when the offence provided for in the preceding paragraph is detected when the citizen is leaving the country.

Article 193: Unauthorised access to the port's international zone

1. Access to the international zone of the port by an individual non-authorized by SEF is an administrative offence punishable with a fine from €300 to €900.
2. The access on board of any ship by an individual non-authorized by SEF is an administrative offence punishable with a fine from €500 to €1000.

Article 194: Transporting a person unauthorised to enter the country

The transport into Portuguese territory of a foreign citizen who does not hold a valid travel document or visa by a carrier operator or by any person on the course of his/her professional activity is an administrative offence punishable, for each foreign citizen carried, with a fine from €4000 to €6000 in case of legal persons, and from €3000 to €5000, in case of natural persons.

Article 195: Absence of airport transit visa

Carriers, as well as anyone on the course of a professional activity, who carry to a national airport foreign citizens who do not hold an airport transit visa when needed are liable to a fine, for each foreign citizen, from €4000 to €6000, in case of legal persons, and from €3000 to €5000, in case of natural persons.

Article 196: Failure to comply with the data reporting requirement

Carriers who fail to provide the information they are required to in accordance with Articles 42 and 43, or who have provided incorrect, incomplete or false data, provide it after the time limit established shall be punished, for each journey, with a fine from €4000 to €6000 in case of legal persons, and from €3000 to €5000, in case of natural persons.

Article 197: Absence of declaration of entry

Failure to comply with the provisions of paragraph 1 of Article 14 is an administrative offence punishable with a fine from €60 to €160.

Article 198: Carrying out an unauthorised professional activity

1. The exercise of a self-employed activity by a foreign citizen who does not hold the adequate residence permit, when required, is an administrative offence punishable with a fine from €300 to €1200.
2. The perpetration of the offences provided for in this Article may lead to the enforcement of ancillary sanctions provided for in Articles 21 and following of the general framework of administrative offences [Regime Geral das Contraordenações].
3. (Repealed.)
4. (Repealed.)
5. (Repealed.)
6. (Repealed.)
7. (Repealed.)
8. (Repealed.)
9. (Repealed.)
10. ((Repealed.)

Article 198 -A: Employing an illegally-staying foreign citizen

1. Whoever employs a foreign citizen who does not hold a residence permit or a visa authorising him/her to carry out a working activity is liable to the application of one of the following fines:

- a) From €2000 up to €10 000, if employing one to four citizens;
 - b) From €4000 up to €15 000, if employing 5 to 10 citizens;
 - c) From €6000 up to €30 000, if employing 11 to 50 citizens;
 - d) From €10 000 up to €90 000, if employing more than 50 citizens.
2. The perpetration of the offences provided in this Article may lead to the enforcement of the following ancillary sanctions:
 - a) Those provided in Articles 21 and following of the general framework of administrative offences [Regime Geral das Contraordenações];
 - b) Obligation to refund some or all public benefits, aids or subsidies, including European Union funding, granted to the employer for up to 12 months preceding the detection of illegal employment, when the offence occurred during the performance of duties or as a result of the performance of duties for which the allowance was granted;
 - c) Obligation to publish the enforceable judgment.
 3. Sanctions mentioned in paragraph 1 (b) and (g) of Article 21 of the general framework of administrative offences [Regime Geral das Contraordenações], when applied pursuant to the provisions of the previous paragraph, have a maximum duration of five years.
 4. The ancillary sanction referred to in paragraph 2 (c) of this Article requires:
 - a) The publication, at the expense of the infringer, of a statement holding the identification of the offender, the offence, the infringed rule and the enforced sanction in SEF's website, in a national newspaper and in a regional or local periodic publication of the area of the offender's headquarters.
 - b) The statement referred to in the previous sub-paragraph shall be sent to the competent administrative authority whenever the performance or access to the activity provided by the offender requires administrative permissions, including permits, licenses, authorisations, validations, authentications, certifications and acts issued following previous contacts and records.
 5. The employer, the user by means of a contract of provision of services, agreement for occasional employment or temporary work and the general contractor are severally liable for:
 - a) Payment of fines provided in the previous paragraphs and of outstanding pay of a work contract, its breach or termination;
 - b) Sanctions imposed as a result of non-compliance with labour legislation;
 - c) Sanctions resulting from non-declaration of income subject to discounts for tax authorities and social security regarding the work performed by the foreign citizen whose professional activity was illegally used;
 - d) Payment of the costs regarding the stay and removal of the foreign citizens involved in the situation;
 - e) Payment of any costs arising from the sending of outstanding pay to the country to which the illegally employed third-country national has, or has been, returned.
 6. Also severally liable, under the provisions of the preceding paragraph, is the main contractor who does not get from the other contracting party the statement of compliance with legal requirements as regards hiring foreign citizens.
 7. Failure to comply with the provisions of the preceding paragraph may be liable to disciplinary action if the main contractor is Public Administration.
 8. For purposes of calculating the outstanding pays and wages subject to contributions to tax authorities and social security, it is assumed that, without prejudice of the provisions of labour and tax legislation, the level of remuneration is at least the minimum monthly salary guaranteed by law, in collective agreements or in accordance with practices established in the concerned areas of activity, and that the employment relationship has, at least, three months, except if the employer, the user of the activity, or the employed citizen prove otherwise.
 9. In accordance with labour legislation, failure to comply with the provisions of paragraphs 5 and 6 is considered a very serious administrative offence.

10. If the employer does not pay for any outstanding remuneration for the work actually provided, as well as any costs arising from the stay and removal of the involved foreign citizens, the settlement note produced in the respective process represents an enforcement note. In this situation, rules on the common enforcement procedure apply for payment of the accurate amount.
11. If the offender is a legal person or equated, he/she is severally liable for the payment of the fine with the managers, directors or administrators.

Article 198 -B: Providing assistance to the third-country citizen which professional activity was illegally used

1. Trade unions or immigrant associations with recognised representativeness, in accordance with the law, by ACIDI, I.P., and other bodies with responsibilities or activities in the integration of immigrants, may lodge a complaint against the employer and user of the professional activity of an illegally-staying third-country national, in the service with inspection competences of the ministry responsible for employment, more specifically in the following situations:
 - a) Non-payment of outstanding pay;
 - b) Existence of an employment relationship with lack of social protection, wage and working hours' exploitation or in particularly abusive working conditions;
 - c) For illegally using child labour.
2. Without prejudice of the provisions of the preceding paragraph, the organisations that promote immigrant rights and interests, particularly against the use of the professional activity of a illegally-staying foreign citizen, the use of child labour, the discrimination as regards access to employment, training or the employment or self-employment conditions, have legal standing to intervene, as a representative or in assisting the interested person, provided that the following conditions are cumulatively met:
 - a) The defence of the interests involved are explicitly included in their assignments of statutory objectives;
 - b) There is the explicit permission of the person concerned.
3. The voluntary or forced return to the country of origin of the third-country national whose activity is being illegally used shall be without prejudice to the provisions of the preceding paragraphs.
4. Third-country nationals whose activity is being illegally used and who are the subject of a forced removal decision from Portuguese territory shall be informed of the rights provided for in this Article at the time they receive the notification for forced removal, under the provisions of Article 149.

Article 198 -C: Inspections

1. SEF has the competence to perform regular inspections with a view to control the use of the activity of illegally staying third-country nationals, in accordance with the provisions of paragraph 2 of Article 181.
2. The inspections mentioned in paragraph 1 are carried out by taking into account SEF's assessment on the existing risk in national territory of the use of illegally staying third-country nationals, by areas of activity.
3. SEF shall convey until the end of May of each year the final report of the inspections carried out in accordance with the provisions of the preceding paragraphs, to the member of the government responsible for internal affairs, who shall communicate it to the European Commission by 1 July of each year.

Article 199: Failure to provide a travel document

The breach to the provisions of Article 28 represents an administrative offence punishable with fine from €60 to €120.

Article 200: Absence of an application for residence permit

The breach to the dispositions of paragraph 2, Article 24 is an administrative offence punishable with fine from €60 to €120.

Article 201: Failure to renew a residence permit in due time

An application for renewing a temporary residence permit submitted after the time limit established in paragraph 1 of Article 78 is an administrative offence punishable with fine from €75 to €300.

Article 202: Non-compliance with certain duties

1. Non-compliance with the duties of communication established in Article 86 constitutes an administrative offence punishable with fine from €45 to €90.
2. Non-compliance with the duty provided in paragraph 1 of Article 6 constitutes an administrative offence punishable with fine from €200 to €400.
3. Embarking and disembarking of foreign citizens outside the border posts specifically designated for that purpose and by infringement of the provisions of paragraph 1 of Article 6, constitutes an administrative offence punishable with fine from €50000 to €100000.
4. The carrier and its representatives in Portuguese territory are jointly liable for paying the fines established in the preceding paragraph.

Article 203: Failure to provide information on accommodation

1. Failure to electronically register the foreign citizens under the provisions of paragraph 4 of Article 15, or failure to submit the accommodation form in accordance with paragraph 1 or 2 of Article 16, constitutes an administrative offence punishable with the following fines:
 - a) €100 to €500, when 1 to 10 accommodation forms have not been registered;
 - b) €200 to €900, when 11 to 50 accommodation forms have not been registered;
 - c) €400 to €2000, if the accommodation forms relating to 51 citizens have not been submitted or registered.
2. In case of negligent failure to comply with the time limit established for communicating the accommodation or departure of the foreign citizen, the limit for the minimum and maximum fine is reduced to one quarter.

Article 204: Negligence and voluntary payment

1. On the administrative offences provided in the preceding Articles, negligence shall always be punishable.
2. In case of negligence, the fines' minimum and maximum amounts shall be reduced to half of the total established for each fine.
3. In case of voluntary payment, the minimum and maximum amounts for the fines shall be reduced to half of the total established for each fine.

Article 205: Default in payment of fines

Extension of stay, where applicable, shall only be granted after submittal of evidence of payment of any fine charged following proceedings for offenses provided in Articles 192, 197, 199 and in paragraphs 1 of Article 198 and 2 of Article 202.

Article 206: Destination of the fines

The proceeds from fines charged under the provisions of this Act will be distributed as follows:

- a) 60% to the State;
- b) 40% to SEF.

Article 207: Competence for imposing fines

1. The application of fines and ancillary sanctions provided for in this chapter are under the competence of SEF's National Director, personally or by delegation of powers, without prejudice to the specific powers assigned to other entities as regards the provisions of paragraph 9 of Article 198-A.
2. For the purposes of the provisions of the preceding paragraph, SEF shall keep an individual record, without prejudice to the applicable rules on matters of protection of personal data.

Article 208

(Repealed.)

CHAPTER XI: Taxes and other charges

Article 209: Applicable framework

1. Fees charged for the issuing of visas at consular posts are those established in the table of consular fees.
2. Taxes and other charges collected by the administrative procedures referred to in this Act, are determined by regulatory order of the member of the government responsible for internal affairs.
3. The escort of foreign citizens, whose removal from Portuguese territory is the carrier's responsibility, as well as placing of passengers who were not admitted into national territory in detention centres or equated facilities, under the provisions of Article 41, implies the charge of fees up to the value which will be determined by regulatory order of the member of the government responsible for internal affairs.
4. The total fees and charges to be collected in accordance with paragraphs 2 and 3 constitute revenue assigned to SEF.

Article 210: Fee exemption or reduction

1. Without prejudice to the provisions of the preceding Article, SEF's National Director may exceptionally grant an exemption or a reduction to the fees incurred in for the proceedings established in this Act.
2. The following shall be exempted from payment of fees:
 - a) Visas granted under the provisions of paragraph 1 (a) of Article 48, as well as those of Articles 57 and 61;
 - b) Visas and extensions of stay granted to foreign citizens who are holders of diplomatic, service, official and special passports and equally to holders of travel documents issued by international organisations;
 - c) Visas granted to children of residence permit holders under the provisions on family reunification;
 - d) Visas and residence permits granted to foreign citizens who benefit from study grants conferred by the Portuguese State;
 - e) Special visas.
3. Third-country nationals shall benefit from exemption or reduction of fees when the law of those countries ensures equality of treatment to Portuguese citizens.

CHAPTER XII: Final provisions

Article 211: Change of citizenship

1. The Central Registry Office [Conservatória dos Registos Centrais] shall inform SEF, where possible electronically, of any citizenship changes registered relating to individuals residing in national territory.
2. The communication provided for in the preceding paragraph shall be made within 15 days following registration.

Article 212: Identification of foreign citizens

1. With a view to establish or confirm the identity of foreign citizens, SEF may use civil identification means provided for in the law and in community regulations applicable to the issuing of identity cards and visas, more specifically the gathering of face images and fingerprints, using where possible biometrics and expert opinions.
 2. The personal data record is an information integrated system, hereinafter referred to as SII/SEF, under the responsibility and management of SEF. SII/SEF shall respect the following rules and features:
 - a) Data gathering for automated processing under SII/SEF shall be limited to the strictly necessary for managing the control of entry, stay and exit of foreign citizens, as well as to preventing an actual danger or suppressing a criminal offence falling into the scope of its tasks and powers;
 - b) The different categories of the gathered data shall be, as far as possible, distinguished in accordance with the level of accuracy or reliability. Moreover, factual data shall be distinguished from data entailing an assessment of the facts;
 - c) SII/SEF is composed of personal data and legal interest data, incorporating information within the tasks the law bestows as regards:
 - h) Foreign citizens, nationals from European Union Member States, stateless persons, and national citizens, when the information relates to control on their transit on land, sea and air borders, as well as their stay and activities carried out in national territory;
 1. ii) Identification and whereabouts of foreign citizens or nationals of European Union Member States regarding the suspicion or practice of an action to facilitate illegal immigration or criminal association for that purpose;
 - d) In addition to those mentioned in the preceding paragraph, personal data gathered for purposes of processing under SII/SEF are the following:
 - i) Name, name of father/mother, nationality, country of birth, birth place, marital status, gender, date of birth, death date, professional situation, diseases that may be dangerous or a threat to public health according to this Act, name of household's members, addresses, signature, references of natural and legal persons in national territory, as well as the number, place and date of issuing, and expiry date of identification and travel documents;
 2. ii) Judicial decisions that under the law shall be conveyed to SEF;
 3. iii) Participation or evidence of participation in illegal activities, as well as data related to physical personal particulars, objective and unchangeable, nicknames, the indication that the person concerned is armed, is violent, the reason why the person concerned is subject of an alert, and recommendation for further action;
 4. iv) As concerns legal persons or equivalent bodies, in addition to the afore-mentioned data, the following shall also be gathered: name, business name or trading name, tax address, address, tax identification number, nature of the business, initial and ending date of the activity.
4. With a view to prevent the consultation, modification, suppression, addition or communication of data of SII/SEF by means non-authorized by this Act and by Article 15 of Act 67/98, of 26 October, on personal data protection, the following technical measures shall be adopted for ensuring the safety of:
 - a) Data media and its transportation, with the purpose of preventing unauthorised reading, copying, modification or removal;

- b) Data input, with a view to prevent the unauthorised input of data and the unauthorised inspection, modification or deletion of stored personal data;
 - c) The use of automated data, in order to prevent the use of automated data processing systems by unauthorised persons using data communication equipment;
 - d) Data access, in order to ensure that persons authorised to use an automated data processing system only have access to the data relating to the performance of their legal duties;
 - e) Data transmission, in order to ensure that the use of such data is limited to authorised bodies;
 - f) Input control, so as to ensure that it is possible to verify and establish which personal data have been input into automated data or processing systems and when and by whom the data were input.
5. Data may be communicated in accordance with international and Community conventions to which Portugal is bound to, as well as within international or national cooperation, to law enforcement authorities and public services within the competences of the legal attributions of the body requiring such data, and only as regards data that may be relevant for the purposes they are communicated.
 6. Personal data shall be retained only for the period necessary for the purpose which grounded the record at SII/SEF and in accordance with that end. The record shall be subject to an assessment on the need for continuation of such data 10 years following the last issuing of documents relating to its holder, after which they can be stored on an historical file during 20 years after the date of that document.
 7. The provisions of the preceding numbers shall not prevent the automated data processing for purposes of statistics or studies, provided that it is not possible to identify the persons to whom the data relates.
 8. The number appearing in the identification card mentioned in paragraph 1 shall also be used for identification purposes before the Public Administration, particularly as regards tax, security, social and health matters.
 9. The transmission to the competent legal authority or to other holders of the right to access any integral parts of the electronic workflow used by SEF for the exercise of the rights conferred by the law shall always be made by electronic means.
 10. With the purpose of facilitating procedures on visa issuing, the citizen shall be exempted from presenting certificates or other documents to prove the data already included in the Public Administration information systems. SEF shall obtain such documents, more specifically at tax authorities, work and social security services and attached them to the file.

Article 213: Costs

1. Any costs resulting from the removal of the foreign citizen that cannot be afforded by him/her or that he/she shall not pay for pursuant to special schemes provided for in international conventions, nor are covered by the bodies referred to in Article 41, shall be borne by the State.
2. The State may bear the costs resulting from the voluntary departure of the country of the following:
 - a) Family members of the foreign citizen who was subjected to a forced removal or expulsion decision where they are dependent and provided that they cannot pay such costs;
 - b) Foreign citizens who do not hold the necessary means of subsistence, provided that it is impossible to obtain the necessary support from the diplomatic representations of their countries.
3. In order to meet the costs resulting from the application of this Act, the necessary amount shall be allocated to SEF's budget.

Article 214: Duty to collaborate

1. All services and bodies of the Public Administration have the duty to assure that the bodies with which they conclude public contracts do not receive work provided by illegally staying foreign citizens.
2. The services and bodies above mentioned may terminate a contract, with just cause, if, in a date after its granting, the private entities receive work rendered by illegally staying foreign citizens.
3. The Public Administration bodies and sea captains have the duty to report the following situations:
 - a) Arrest or detention of a vessel, as well as when these measures cease;

- b) Evacuation for health reasons of crew members or passengers of a vessel;
- c) Disappearance of passengers or crew members from a vessel;
- d) When clearance is denied for a vessel to leave to port;
- e) When passengers or crew members of a vessel are detained;
- f) When emergency plans are set off in national ports;
- g) When crew members or passengers are removed from the vessel by the competent authority, more specifically the Marine Police [Policía Marítima], and by request of the sea captain.

Article 215: Duty to report

When issuing a title that regularises the stay of the foreign citizen in national territory, SEF must report to tax authority, social security and employment services all the necessary data with a view to register the citizen in those services, if not already registered.

Article 216: Regulation

1. The law that regulates this Act as well as the regulatory orders herein provided for shall be approved within 90 days.
2. The special legislation provided for in Article 109 shall be approved within 120 days.

Article 217: Transitional provisions

1. For all legal purposes, the holders of working visa, permanence permit, temporary staying visa for purposes of carrying out an employed activity, extension of stay for purposes of performing a professional activity and studying visa granted under Decree-Law 244/98, of 8 August, as amended by Act 97/99 of 26 July, by Decree-Law 4/2001 of 10 January and by Decree-Law 34/2003, of 25 February, are considered holders of a residence permit which has to be replaced at its expiry date by residence titles. Depending on the cases, the provisions regarding renewal of temporary residence permit or granting of permanent residence permit shall apply.
2. For the purposes of the provisions of paragraph 1 (a) of Article 80, the period of legal permanence shall be accounted for in accordance to the titles mentioned in the preceding paragraph.
3. Applications for extension of stay for purposes of carrying out a professional activity under Article 71 of Regulatory-Decree 6/2004, of 26 April, shall be converted into residence permit applications for purposes of carrying out an employed or self-employed activity under this Act, with visa exemption.
4. Foreign citizens covered by Article 71 of Regulatory Decree 6/2004, of 26 April are granted an extension of stay of three months with a view to obtain a work contract or proof of a labour relationship, by a trade union, by an association which is party to the Advisory Council, or by the Working Conditions Authority, for purposes of granting a residence permit in accordance with the provisions of the preceding paragraph.
5. Applications for work visa under paragraph 2 of Article 6 of the Agreement between the Portuguese Republic and the Federative Republic of Brazil on reciprocal hiring of nationals, of 11 July 2003, are converted into applications for residence permit, with visa exemption.
6. Pending the global quota which indicates the availability of employment vacancies provided for in Article 59, the Employment and Vocational Training Institute or, in the Autonomous Regions, the respective departments, shall publish all vacancies that within 30 days were not filled by Portuguese citizens, nationals of European Union Member States, of the European Economic Area, of a third-country with which the European Community has concluded an agreement on free movement of people, or by third-countries nationals that legally reside in Portugal.
7. Residence visa for obtaining a residence permit for purposes of carrying out an employed activity may be granted within the limits of the employment vacancies mentioned in the preceding paragraph, if the remaining legal conditions are complied with.

8. Holders of a residence permit issued under previous legislation shall replace the title they hold for the card provided for in paragraph 1 of Article 212, in accordance with the rules and period to be established in regulatory legislation.

Article 218: Repeal

1. The following are repealed:
 - a) Article 6 of Act 34/94 of 14 September;
 - b) Act 53/2003 of 22 August;
 - c) Decree-Law 244/98 of 8 August, as amended by Act 97/99 of 26 July, Decree-Law 4/2001 of 10 January, and Decree-Law 34/2003 of 25 February.
2. Pending express repeal, Regulatory Decree 6/2004 of 26 April shall be in force, as well as regulatory orders approved under Decree-Law 244/98 of 8 August, as amended by Act 97/99 of 26 July, Decree-Law 4/2001 of 10 January, and Decree-Law 34/2003 of 25 February, in what may be compatible with this Act.

Article 219: Autonomous regions

The provisions of the preceding articles do not affect the competences conferred in the Autonomous Regions of the Azores and Madeira to the respective regional bodies and services. These and the Portuguese Republic and European Union services shall ensure coordination, with the intervention in procedures provided for in this Act.

Article 220 : Entry into force

The present Act shall enter into force on the 30th day after its publication.

Are the following activities criminalized under national legislation:

- **Attempts to smuggle migrants**

Yes, according to Article 183 (4): «Any attempt is punishable».

- **Participation as an accomplice in the smuggling of migrants**

Yes, according to the general rules of the Criminal Code.

- **Acting as instigator of the smuggling of migrants**

Yes. According to the general rules of the Criminal Code.

- **Migrant smuggling as part of a criminal organization**

Yes, as foreseen in Article 184 of Law 23/2007 (Association to facilitate illegal immigration):

1. Whoever founds a group, organization or association whose activity is to practice the crimes foreseen in the preceding article is punishable with a prison penalty from 1 up to 6 years.
2. Whoever is part of those groups, organizations or associations incurs in the same penalty.
3. Whoever leads the groups, organizations or associations mentioned in paragraph 1 is punishable with a prison penalty from 2 up to 8 years.
4. 4 – (...)
5. 5 – (...)

- **Circumstances that endanger, or are likely to endanger, the lives or safety of smuggled migrants**

Yes, according to Article 183 (3) of Law 23/2007:

3 - If the facts are carried out through transportation or maintenance of the foreign citizens under inhuman or degrading conditions or putting his/her life in danger or causing serious offences to his/her physical integrity or causing death, the perpetrator is punishable with a prison penalty from 2 up to 8 years.

Does your domestic legislation permit use of special investigative techniques for the purpose of investigating the smuggling of migrants such as

- **Interceptions of telecommunication;**

Yes, according to the Code of Criminal Procedure and Law 144/99, of 31 of August that approves the law on international judicial co-operation in criminal matters.

- **Undercover operations;**

Yes, according to Law 101/2001 of 25 August, which regulates undercover operations undertaken for the purposes of crime prevention and criminal investigation.

- **Financial investigations: including access to bank, financial or commercial records and/or databases;**

Yes, according to the Code of Criminal Procedure and Law 5/2002, of 11 January.

- **specific form of protection for witnesses;**

Yes. The protection of witnesses is foreseen in Law 93/99, of 14 July, which governs the enforcement of measures on the protection of witnesses in criminal proceedings where their lives, physical or mental integrity, freedom or property of a considerably high value are in danger due to their contribution to the collection of evidence of the facts which are subject to investigation. Provisions of the said Law have been regulated by Decree-Law 109/2003, of 22 August and Decree-Law 227/2009, of 14 September.

- **others; Please specify.**

(...)

Does your domestic legislation enable seizure and/or confiscation:

- **of property, equipment or other instrumentalities used in or destined for use in offences related to smuggling of migrants?**

Yes, according to Article 109 to 111 of the Criminal Code and Articles 178 et seq of the Code of Criminal Procedure. Article 189 of Law 23/2007 foresees as well the confiscation of documents, weapons, ammunition, telecommunication devices, computers or other useful to service and object that result from the enforcement of international conventions related to illegal immigration.

- **of proceeds of crime derived from offences related to smuggling of migrants ? If yes specify the main features of the legal framework.**

Yes, according to Article 109 to 111 of the Criminal Code and Articles 178 et seq of the Code of Criminal Procedure.

Is trafficking in persons defined under national law?

If so, how does this definition differ from that of migrant smuggling?

Yes, under Article 160 of the Criminal Code:

Article 160

Trafficking of persons

1. Whoever offers, recruits, delivers, allures, accepts, carries, accommodates or receives a person for sexual exploitation purposes, work exploitation or organs removal:
 - a) By means of violence, kidnapping or serious threat;
 - b) Through artifice or fraudulent manipulation;
 - c) With abuse of authority resulting from a hierarchical, economic, working or familiar dependence relationship;
 - d) Taking advantage of mental incapacity or of a situation of special vulnerability of the victim; or
 - e) By means of the attainment of the consent of the person who has control over the victim;

is punished with sentence of imprisonment from three to ten years.

2 The same sentence is applicable to whomever, by any means, allures, carries, proceeds to the accommodation or receiving of a minor, or delivers him, offers him or accepts him, for sexual exploitation purposes, work exploitation or organs removal.

3 In the case foreseen in the previous number, if the agent uses any of the means foreseen in the paragraphs of no. 1, or acts professionally or with profitable intention, is punished with sentence of imprisonment from three to twelve years.

4 Whoever, against payment or other compensation, offers, delivers, requests or accepts a minor, or attains or grants consent for his adoption, is punished with sentence of imprisonment from one to five years.

5 Whoever, being aware of the commission of the crime foreseen in nos. 1 and 2, uses the services or organs of the victim is punished with sentence of imprisonment from one to five years, if a more serious sentence is not applicable to him by virtue of another legal provision.

6 Whoever retains, hides, damages or destroys identification or travel documents of a person victim of a crime foreseen in nos. 1 and 2 is punished with sentence of imprisonment for not more than three years, if a more serious sentence is not applicable to him by virtue of another legal provision.

In relation to your country, are there any international, regional or bilateral agreements which address the issue of migrant smuggling?

International: Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime.

Regional: No.

Bilateral: The bilateral agreements in the fight against transnational organized crime celebrated or under negotiation includes the offence of trafficking of persons but not the migrant smuggling.

Does your country have jurisdiction to prosecute crimes related to smuggling of migrants when they are committed outside its territory? If yes, specify the legal framework.

Yes, under the conditions foreseen in Article 5 of the Criminal Code.

Do you have a national policy or action plan to address the issue of migrant smuggling?

Not exactly. Portugal have in force the III National Plan for the Prevention and Fight against Trafficking of Persons 2014-2017. The migrant smuggling is nowadays addressed in the framework of the European Union.

Where possible, please provide information regarding:

According to the Report of Immigration, Borders and Asylum 2014, of the Portuguese Immigration and Borders Service (SEF <http://www.sef.pt/portal/V10/EN/asp/page.aspx>)

305 crimes have been recorded in the mentioned year, 48 of them are action to facilitate illegal immigration (smuggling of persons).

Defendants in criminal cases completed at trial stage, in the first instance courts, for crimes of illegal immigration, in the years 2012 and 2013				
Year		2013	2012	2011
Crime		Nº Defendants	Nº Defendants	Nº Defendants
Illegal immigration	Action to facilitate illegal immigration	56	43	57
	Association to facilitate illegal immigration	19	36	12

Convicted persons in criminal cases completed at trial stage, in the first instance courts, for crimes of illegal immigration, in the years 2011 to 2013				
Year		2013	2012	2011
Crime		Nº Convicted	Nº Convicted	Nº Convicted
Illegal immigration	Action to facilitate illegal immigration	19	12	27
	Association to facilitate illegal immigration	...	7	5

Number of apprehended smugglers:

No information. However, 55 individuals have been made defendants by the commission of the crime of action to facilitate illegal immigration.

Number of investigations instigated against migrant smugglers:

330 inquires / investigations have been conducted by SEF by order of the Public Prosecution Service. In 2014, SEF concluded 273 files.

Number of successful prosecutions of migrant smugglers:

Defendants (action to facilitate illegal immigration /smuggling of persons): 55 individuals.

Convictions (in criminal proceedings involving the SEF collaboration): 1 individual convicted to 7 years imprisonment and 1 individual convicted to 2 years and 6 months for the commission of offences of trafficking in persons, coercion, abduction and injuries.

3 individuals convicted to 4 years imprisonment for the commission of the crime of sexual exploitation of persons (lenocínio).

1 individual convicted to 1 year and 9 months for the crime of association to facilitate illegal immigration.

In addition, SEF identified 88 victims related to the migration phenomena: 52 of them are related to the trafficking in persons and 27 to the action to facilitate illegal immigration.

In your country, is international cooperation on smuggling of migrants (specifically on mutual legal assistance and extradition) afforded

- **by statute?**

Yes, under Law 144/99, of 31 of august that approves the law on international judicial co-operation in criminal matters.

The forms of international co-operation foreseen in this Law are: a) extradition; b) transfer of proceedings in criminal matters; c) enforcement of criminal judgments; d) transfer of persons sentenced to any punishment, or measure, involving deprivation of liberty; e) supervision of conditionally sentenced or conditionally released persons; f) mutual legal assistance in criminal matters.

Articles 3 and 4 should be taken into consideration:

Article 3

Primacy of international treaties, conventions and agreements

1. The forms of co-operation mentioned in Article 1 above shall be carried out in accordance with the provisions of the international treaties, conventions and agreements that bind the Portuguese State and, where such provisions are non-existent or do not suffice the provisions of this law.
2. The provisions of the Code of Criminal Procedure shall apply as subsidiary provisions.

Article 4

Principle of reciprocity

1. International co-operation in criminal matters, as provided for in this law, falls within the province of the principle of reciprocity.

(...)

- **by treaty or other agreement or arrangement (multilateral or bilateral)?**

Please see the previous answer

- **by virtue of reciprocity or comity?**

Please see the previous answer

Is the provision of mutual legal assistance subject to the double criminality requirement according to your domestic legal framework?

No.

In your experience, is international co-operation regarding prosecution of migrant smugglers effective? Please specify.

Yes.

In terms of international co-operation, what legal and/or practical obstacles have been encountered as regards co-operation with:

- **Council of Europe Member States:**

No obstacles have been found.

- **Third party states:**

No obstacles have been found.

Do you think existing Council of Europe instruments on international co-operation in criminal matters (Mutual legal assistance, extradition) are effective in dealing with migrant smuggling? If not, please specify.

No experience exists regarding this question. However, the existing provisions seems to be adequate.

Armenia

Do you have any laws or legislative measures covering the issue of migrant smuggling?

There are specific provisions dealing with the problem.

Is the smuggling of migrants a criminal offence under domestic law?

- **Does national law include a definition of migrant smuggling?** - Yes
- **How is this conduct defined?** (See Article 329.1, 1 paragraph)
- **What are the material elements of the crime?** (the means or tools of illegal transportation of migrants)
- **Is “financial gain” an element of the definition of smuggling of migrants?**- Yes

Could you please provide, if possible, the relevant texts (in English or in French)?

(a.b.c.d.) **Article 329.1.** /Organization of Illegal Migration/ was added to the Criminal Code of the Republic of Armenia by the law No 84-N of 21 June 2014 to bring Criminal Code of the Republic of Armenia in line with international standards, according to which:

1. Organization of entry into the Republic of Armenia, stay in the Republic of Armenia or transit (transfer) through the territory of the Republic of Armenia of a foreign citizen or stateless person committed with mercenary motives by violating the procedure prescribed by the legislation of the Republic of Armenia for entry, stay or transit or by presenting false documents or false information for receiving a proper permission for entry, stay or transit — shall be punished by a fine in the amount of one-hundred-fold to two-hundred-fold of the minimum salary, or by imprisonment for a term of maximum three years.
2. Organization of exit from the Republic of Armenia, entry into a foreign state or stay in a foreign state of a citizen of the Republic of Armenia, of a foreign citizen permanently residing in the Republic of Armenia or of a stateless person committed with mercenary motives by violating the procedure for exit, entry or stay prescribed by the legislation of the Republic of Armenia or by presenting false documents or false information for receiving a proper permission for exit, entry or stay — shall be punished by a fine in the amount of one-hundred-fold to two-hundred-fold of the minimum salary or by imprisonment for a term of maximum three years.
3. The same acts, provided for in parts one or two of this Article, committed:
 - (1) by organizing illegal migration of two or more persons;
 - (2) by a group of persons with prior agreement;
 - (3) in conditions dangerous to human life or health or in conditions humiliating human honor and dignity;
 - (4) by the use of official position —

shall be punished by imprisonment for a term of three to eight years with confiscation of property or without it, with deprivation of the right to hold certain positions or to engage in certain activities for a term of maximum three years or without it.

Are the following activities criminalized under national legislation:

- **Attempts to smuggle migrants-** Yes
- **Participation as an accomplice in the smuggling of migrants-**Yes
- **Acting as instigator of the smuggling of migrants-**Yes
- **Migrant smuggling as part of a criminal organization-**Yes
- **Circumstances that endanger, or are likely to endanger, the lives or safety of smuggled migrants-**Yes

Does your domestic legislation permit use of special investigative techniques for the purpose of investigating the smuggling of migrants such as

- **Interceptions of telecommunication** -Yes
- **Undercover operations** - Yes
- **Financial investigations: including access to bank, financial or commercial records and/or databases-** Yes
- **specific form of protection for witnesses** - Yes
- **others, please specify**

Article 98 of the Criminal Procedure Code of the RA: PROTECTION OF THE PERSONS PARTICIPATING IN CRIMINAL PROCEEDINGS:

Any person involved in a criminal proceedings, who can transmit data essential for detecting the crime and its perpetrator, as a result of which may be threatened his, his family member, close relative or a neighbor's life, health, property, rights and legal interests, has the right to protection.

Does your domestic legislation enable seizure and/or confiscation:

- **of property, equipment or other instrumentalities used in or destined for use in offences related to smuggling of migrants?** - Yes
- **of proceeds of crime derived from offences related to smuggling of migrants ? If yes specify the main features of the legal framework.**

Article 103.1 of the Criminal Code of the RA envisages seizure/ confiscation of proceeds of crime derived from offences related to smuggling of migrants in favour of the State.

Is trafficking in persons defined under national law?

If so, how does this definition differ from that of migrant smuggling?

Article 132 of the Criminal Code of the RA defines that recruitment, transportation, transfer, harboring, or receipt of persons for the purpose of sexual exploitation or forced labor, by means of the threat or use of force, of fraud, of using the dependence, of blackmail, of threat of destruction or damage to property, if this was done for mercenary purposes, is punished with a fine in the amount of 300 to 500 minimal salaries, or correctional labor for up to 1 year, or arrest for up to 2 months, or imprisonment for the term of 1 to 4 years.

In relation to your country, are there any international, regional or bilateral agreements which address the issue of migrant smuggling?

There are both multilateral and bilateral agreements:

Multilateral agreements – with Benelux countries and EU

Bilateral agreements – with Czech Republic, Sweden, Bulgaria, Federal Republic of Germany, Swiss Confederation, Lithuania, Latvia, Denmark

Does your country have jurisdiction to prosecute crimes related to smuggling of migrants when they are committed outside its territory? If yes, specify the legal framework.

Article 3 of Criminal Procedure Code of the RA: The impact of criminal procedural law in space

Outside the territory of the Republic of Armenia, legally being under the flag of the Republic of Armenia or wearing the emblem, at the port or airport of the Republic of Armenia the proceedings of registered crimes committed in the air, sea or ship are conducted by the provisions of this Code.

Criminal procedure code of a foreign country can be applied while implementing separate investigative or court actions with the mediation of courts or criminal prosecution bodies of another state, if it is provided by the international treaties of the Republic of Armenia.

Do you have a national policy or action plan to address the issue of migrant smuggling?

During 2013-2015 the national program on the fight against human trafficking dated 28.02.2013 N 186-N was adopted.

Where possible, please provide information regarding:

- **Number of apprehended smugglers:**
- **Number of investigations instigated against migrant smugglers:** 10 cases (up to 17.10.2015)
- **Number of successful prosecutions of migrant smugglers:**

In your country, is international cooperation on smuggling of migrants (specifically on mutual legal assistance and extradition) afforded

- **by statute? - Yes**
- **by treaty or other agreement or arrangement (multilateral or bilateral)? - Yes**
- **by virtue of reciprocity or comity? - No**
- **Is the provision of mutual legal assistance subject to the double criminality requirement according to your domestic legal framework? - No**

In your experience, is international co-operation regarding prosecution of migrant smugglers effective? Please specify.

In terms of international co-operation, what legal and/or practical obstacles have been encountered as regards co-operation with:

- **Council of Europe Member States:**
- **Third party states:**

Do you think existing Council of Europe instruments on international co-operation in criminal matters (Mutual legal assistance, extradition) are effective in dealing with migrant smuggling? If not, please specify.

Montenegro

Do you have any laws or legislative measures covering the issue of migrant smuggling? Is the issue set out in general criminal law or are there specific provisions dealing with the problem?

There is no specific law, but the issue of migrant smuggling is covered by the Criminal Code of Montenegro.

Is the smuggling of migrants a criminal offence under domestic law?

Does national law include a definition of migrant smuggling?

How is this conduct defined?

What are the material elements of the crime?

Is “financial gain” an element of the definition of smuggling of migrants?

Could you please provide, if possible, the relevant texts (in English or in French)?

This criminal offense, in addition to what was previously provided in the Yugoslav legislation as a criminal offense the illegal crossing of the state border (Article 249 of the Criminal Code of the FRY), includes actions relating to the smuggling of migrants. By ratifying the Protocol against the Smuggling of Migrants by Land, Sea and Air, to the United Nations Convention against Transnational Organized the obligation to provide certain actions as a criminal offense.was taken.

The basic form of the criminal offence is made when a person without the required permission, crosses or attempts to cross the state border of Montenegro under arms or by use of force. Just crossing the state border of Montenegro without proper license is a misdemeanor.

Criminal offence “Illegal Crossing of State Border and Smuggling of Persons” is provided in article 405 of the Criminal Code and reads:

“Illegal Crossing of State Border and Smuggling of Persons

Article 405

(1) Anyone who, without the required permission, crosses or attempts to cross the state border of Montenegro under arms or by use of force shall be punished by a prison term up to one year.

(2) Anyone who is engaged in illegal transfer of other persons across the border of Montenegro, or who enables another person in return for a gain to illegally cross the border or to illegally stay or transit shall be punished by a prison term from three months to five years.

(3) Where the offence under para. 2 above was committed by several persons in an organized manner, through misuse of one’s office, or in a manner that endangers the life or health of persons whose illegal border crossing, stay or transit is enabled or where a number of people is smuggled, the perpetrator shall be punished by a prison term from one to ten years.

(4) The means intended for or used for the commission of the offences under paras 1 to 3 above shall be confiscated.”

Are the following activities criminalized under national legislation:

- **Attempts to smuggle migrants**
- **Participation as an accomplice in the smuggling of migrants**
- **Acting as instigator of the smuggling of migrants**
- **Migrant smuggling as part of a criminal organization**
- **Circumstances that endanger, or are likely to endanger, the lives or safety of smuggled migrants**

3b: Criminal Code of Montenegro covers the issue of punishment of the accomplice in article 23 and it reads:

“Principal and Co-principal

Article 23

- (1) A principal shall be a person who commits a criminal offence himself or a person who carries out the crime through another person provided that this other person can not be considered to be the principal.
- (2) Where several persons jointly take part in the commission of a crime with wrongful intent or by negligence, or where they follow their prior arrangement and jointly act with wrongful intent and thus make a significant contribution to the commission of the criminal offence, each person shall receive a punishment prescribed for the crime in question.”

For answers to the questions 3a, 3c, 3d & 3e please see answer to the question N^o2.

Does your domestic legislation permit use of special investigative techniques for the purpose of investigating the smuggling of migrants such as

- **Interceptions of telecommunication;**
- **Undercover operations;**
- **Financial investigations: including access to bank, financial or commercial records and/or databases;**
- **specific form of protection for witnesses;**
- **others; Please specify.**

According to the Criminal Procedure Code of Montenegro, if grounds for suspicion exist that a person has individually or in complicity with others committed, is committing or is preparing to commit criminal offences listed in Article 158 of the CPC (where Illegal Crossing of State Border and Smuggling of Persons is included) and evidence cannot be obtained in another manner or their obtaining would require a disproportional risk or endangering the lives of people, measures of secret surveillance may be ordered against those persons:

1. Secret surveillance and recording of telephone conversations and other distance communication;
2. Interception, collection and recording of computer data;
3. Entry into premises for the purpose of secret photographing and video and audio recording in premises;
4. Secret following and video and audio recording of persons and objects.

Also, if grounds for suspicion exist that a person has individually or in complicity with others committed, is committing or is preparing to commit criminal listed in Article 158 of the CPC (where Illegal Crossing of State Border and Smuggling of Persons is included) and circumstances of the case indicate that evidence shall be collected with a minimum violation of the right to privacy, measures of secret surveillance may be ordered against those persons:

1. Simulated purchase of objects or persons and simulated giving and taking of bribe;
2. Providing simulated business services or concluding simulated legal transactions;
3. Establishing fictitious companies;
4. Supervision over the transportation and delivery of objects of criminal offence;

5. Recording conversations upon previous informing and obtaining the consent of one of interlocutors;
6. Hiring undercover investigators and collaborators.

Does your domestic legislation enable seizure and/or confiscation:

- **of property, equipment or other instrumentalities used in or destined for use in offences related to smuggling of migrants?**
- **of proceeds of crime derived from offences related to smuggling of migrants ? If yes specify the main features of the legal framework.**

Please see the text of the art. 405 para.4 provided to the question N^o2.

Is trafficking in persons defined under national law?

If so, how does this definition differ from that of migrant smuggling?

When it comes to the criminal offence of trafficking in persons, Criminal Code of Montenegro provides this issue as a criminal offence. This criminal offence requires a certain orientation and actions ie. those associated with the achievement of specific objectives in relation to the person who is the subject of trade, ie. in connection with a passive entity.

Please see extract of the Criminal Code

“Trafficking in Persons

Article 444

- (1) Anyone who by use of force or threat, deceiving or keeping in deception, abuse of power, trust, dependence, position of vulnerability of another person, dispossession of personal documents or giving or receiving payments or other undue advantage to achieve the consent of a person having control over another person commits any of the following: recruits, transports, transfers, surrenders, sells, buys, mediates in sale, conceals or keeps another person for the purpose of exploitation of his labour, forced labour, submission to servitude, slavery or a relation similar to slavery, commission of criminal activity, prostitution or other type of sexual exploitation, beggary, exploitation for pornographic purposes, for conclusion of an unlawful marriage, unlawful extraction of organs for transplantation, or for exploitation in armed conflicts shall be punished by a prison term from one to ten years.
- (2) The acts under para. 1 above shall constitute criminal offences when committed against minors even where the perpetrator did not use force, threat or any other of the methods listed above.
- (3) Where the offence under paragraph 1 above was committed against a minor, or where the offence under paragraph 1 above was committed by a public official in exercising his official duty or where it was committed with premeditation to endanger life of one or more persons, the perpetrator shall be punished by a prison term for not shorter than three years.
- (4) Where the offence under paras 1 to 3 above resulted in a serious bodily injury, the perpetrator shall be punished by a prison term from one to twelve years.
- (5) Where the offence under paras 1 and 3 above resulted in the death of one or more persons, the perpetrator shall be punished by a prison term not shorter than ten years.
- (6) Anyone who regularly engages in the commission of the criminal offences under paras 1 to 3 above or where the offence was committed by several persons in an organised manner shall be punished by a prison term not shorter than ten years.
- (7) Anyone who uses the services of a person knowing that the person is a victim of the offence under para. 1 above shall be punished by a prison term from six months to five years.
- (8) Where the offence under para. 7 above was committed against a minor, the perpetrator shall be punished by a prison term from three to fifteen years.

(9) The consent of injured party who was a victim of the offence under paragraphs 1 to 3 above shall have no impact on the qualification of that criminal offence.

In relation to your country, are there any international, regional or bilateral agreements which address the issue of migrant smuggling?

Among others Montenegro ratified the United Nations Convention against Transnational Organized Crime and its Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime.

Does your country have jurisdiction to prosecute crimes related to smuggling of migrants when they are committed outside its territory? If yes, specify the legal framework.

Criminal Code of Montenegro states that criminal legislation of Montenegro shall also be applicable to a national of Montenegro where he commits abroad any criminal offence (including Illegal Crossing of State Border and Smuggling of Persons), provided that he is found in the territory of Montenegro or gets extradited to Montenegro. This provision provides (active) personal principle applicability of criminal legislation. Also, Criminal legislation of Montenegro shall also be applicable to a person who is not a national of Montenegro who commits outside the territory of Montenegro against Montenegro or its national any criminal offence in the commission of which a national of Montenegro is involved in any way, provided that he is caught in the territory of Montenegro or gets extradited to Montenegro. Criminal legislation of Montenegro shall also be applicable to a person who is not a national of Montenegro who commits a criminal offence abroad against a foreign country or a foreign national where such offence is punishable under the law of the country where it was committed by a prison term of four years or longer, provided that he is caught in the territory of Montenegro but not extradited to a foreign country. Unless otherwise provided for by this Code, in such a case a court may pronounce punishment which is more severe than the punishment provided for by the law of the country where the criminal offence was committed.

Do you have a national policy or action plan to address the issue of migrant smuggling?

In March 2011 the Government of Montenegro adopted a Strategy for Integrated Migration Management in Montenegro 2011-2016 and it covers the issue of migrant smuggling. This Strategy is followed with Action plan for 2 years period.

Where possible, please provide information regarding:

- **Number of apprehended smugglers:**
- **Number of investigations instigated against migrant smugglers:**
- **Number of successful prosecutions of migrant smugglers:**

Please see track record of the cases on Criminal offence “*Illegal Crossing of State Border and Smuggling of Persons*” under the article 405 of the Criminal Code of Montenegro for the period 1/1/2010 – 31/12/2014:

Year	Total number of pending cases	Number of solved cases
2010	4	1
2011	6	3
2012	6	4
2013	4	2
2014	4	4

In your country, is international cooperation on smuggling of migrants (specifically on mutual legal assistance and extradition) afforded

- **by statute?**
- **by treaty or other agreement or arrangement (multilateral or bilateral)?**
- **by virtue of reciprocity or comity?**

Is the provision of mutual legal assistance subject to the double criminality requirement according to your domestic legal framework?

Most of the cases of international cooperation are dealt with by COE conventions on international cooperation in criminal matters, but there are in place bilateral agreements with the countries in the region. Like COE conventions require rule on double criminality, bilateral agreements with Montenegro have the same provision. This rule is also implemented in the Law on Mutual Legal Assistance in Criminal Matters of Montenegro, providing that international assistance in criminal matters may be provided if the offence for which the provision of international legal assistance is requested is a criminal offence both under the domestic law and under the law of the foreign state the judicial authority of which presented the letter rogatory for international legal assistance.

In your experience, is international co-operation regarding prosecution of migrant smugglers effective? Please specify.

We have no exact data or information in this field, so we could not go into details, but bigger problems did not occurred in the past.

In terms of international co-operation, what legal and/or practical obstacles have been encountered as regards co-operation with:

- **Council of Europe Member States:**
- **Third party states:**

We have no exact data or information in this field, so we could not go into details, but bigger problems did not occurred in the past.

Do you think existing Council of Europe instruments on international co-operation in criminal matters (Mutual legal assistance, extradition) are effective in dealing with migrant smuggling? If not, please specify.

Yes.

Malta

Do you have any laws or legislative measures covering the issue of migrant smuggling?

Is the issue set out in general criminal law or are there specific provisions dealing with the problem?

Both the general legislation on crime (Criminal Code) and the specific legislation (Immigration Act) cover migrant smuggling.

Article 32 (1) (a) of the Immigration Act makes facilitating/assisting in irregular migration a crime punishable by a fine or a term of imprisonment for a term not exceeding two years or to both the term of imprisonment and the fine. Moreover Article 337 A of Chapter 9 of the Laws of Malta envisages a punishment of imprisonment for a period between 6 months and 5 years or a fine for persons who assist others in entering or leaving the country or attempting to do so in an illegal manner when this act is done for their personal gain.

Is the smuggling of migrants a criminal offence under domestic law?

Yes, as defined above.

Does national law include a definition of migrant smuggling?

The definition is found in the Article itself rather than having any ad-hoc definition.

How is this conduct defined?

Legislation defines this conduct as assisting any person to land or attempt to land or to reside or to leave in contravention of legislation.

What are the material elements of the crime?

The assistance in itself constitutes the elements of the crime in the specific legislation but in the general legislation there needs to be gain of some sort as well.

Is “financial gain” an element of the definition of smuggling of migrants?

Yes, in the case of the general legislation.

Could you please provide, if possible, the relevant texts (in English or in French)?

Link to Criminal Code: <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8574>
Link to Immigration Act: <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8722&l=1>

Are the following activities criminalized under national legislation:

- **Attempts to smuggle migrants**
- **Participation as an accomplice in the smuggling of migrants**
- **Acting as instigator of the smuggling of migrants**
- **Migrant smuggling as part of a criminal organisation**
- **Circumstances that endanger, or are likely to endanger, the lives or safety of smuggled migrants**

Activities covered at (a) to (d) above are criminalized under national legislation. Activity (e) is also criminalized but under more generic legislation referring to endangering the life of any person.

Does your domestic legislation permit use of special investigative techniques for the purpose of investigating the smuggling of migrants such as:

- **Interceptions of telecommunication;**
- **Undercover operations;**
- **Financial investigations: including access to bank, financial or commercial records and/or databases;**
- **specific form of protection for witnesses;**
- **others; Please specify.**

The Police in Malta can conduct anyone of the above forms of investigation but the methods used would be established on a case by case basis depending on the circumstances and the exigencies required.

Does your domestic legislation enable seizure and/or confiscation:

- **of property, equipment or other instrumentalities used in or destined for use in offences related to smuggling of migrants?**
- **of proceeds of crime derived from offences related to smuggling of migrants ? If yes specify the main features of the legal framework.**

By virtue of article 23 of the Criminal code any objects pertaining to the offence which has been committed can be seized by the Court authorities upon the arraignment of the person/s charged. Prior to the proceedings the police also have the power to seize any objects pertinent to an offence which has been committed, which objects would then be exhibited in court as evidence formally or otherwise and would form part of the acts of the proceedings in the case against the accused person/s. With regards to the proceeds of crime, if these have been found in the possession of the suspects, they would be confiscated and exhibited as evidence as above mentioned. Over and above we also have a procedure which allows for the seizure of assets of the accused persons equivalent to the amount of the proceeds of crime in terms of article 23A and 23B of the Criminal Code. The court shall order the freezing of such assets upon the request of the prosecution and upon finding of guilty the assets shall be confiscated altogether in favour of the Government of Malta.

Is trafficking in persons defined under national law?

If so, how does this definition differ from that of migrant smuggling?

Yes, Criminal Law defines trafficking in article 248 of Chapter 9. This is distinct from the crime of smuggling.

In relation to your country, are there any international, regional or bilateral agreements which address the issue of migrant smuggling?

Malta has negotiated and signed a number of bilateral agreements and MoUs that provide for methods of cooperation in various areas including the fight against human smuggling.

Does your country have jurisdiction to prosecute crimes related to smuggling of migrants when they are committed outside its territory? If yes, specify the legal framework.

The Maltese Courts shall have jurisdiction over any person who with the intent to make any gain aids, assists, counsels or procures any other person to enter or attempt to enter or to leave or attempt to leave or to transit across or to attempt to transit across or to attempt to transit across Malta, in Malta or outside Malta, or conspires to such effect with any other person.

In addition, where the persons aided, assisted, counseled, procured or the object of the conspiracy are more than three in number, the punishment shall be increased by one to three degrees. However, where the offence is committed as an activity of a criminal organization or while endangering the lives of the persons aided, assisted, counseled, procured or the object of the conspiracy as aforesaid, the punishment shall be increased by two degrees.

Moreover, the Maltese Courts shall have jurisdiction over any person who commits an offence on board any aircraft, ship or vessel registered in Malta wherever they may be.

Do you have a national policy or action plan to address the issue of migrant smuggling?

Currently, a national policy on migrant smuggling is not in place.

Where possible, please provide information regarding:

- **Number of apprehended smugglers:**
- **Number of investigations instigated against migrant smugglers:**
- **Number of successful prosecutions of migrant smugglers:**

Data available:

Persons arraigned in Court for Trafficking of Human Beings since 2010

	2010	2011	2012	2013	2014	2015* July
Cases	9	7	2	4	5	Nil

In your country, is international cooperation on smuggling of migrants (specifically on mutual legal assistance and extradition) afforded

- **by statute?**
- **by treaty or other agreement or arrangement (multilateral or bilateral)?**
- **by virtue of reciprocity or comity?**
- **Is the provision of mutual legal assistance subject to the double criminality requirement according to your domestic legal framework?**

Mutual legal assistance in all criminal matters is specifically regulated under the Criminal Code in various articles but primarily in article 649. Malta signed and, or ratified various multilateral conventions on serious organized crime (which therefore include illegal smuggling of migrants or trafficking in human beings) and which have also embedded therein provisions on MLA and extradition. As a commonwealth State, Malta

cooperates with other commonwealth states on the basis of reciprocity as it does in fact with all countries. Finally with regards to the last question the provision of mutual legal assistance is subject to the double criminality requirement according to our domestic legal framework but this is subject to the discretion of the Maltese competent authorities.

In your experience, is international co-operation regarding prosecution of migrant smugglers effective? Please specify.

In our experience the legal instruments are adequate and it all depends on those applying them to make cooperation effective or otherwise. We tend to consider cooperation in the EU as superior and this is thanks to structures like Eurojust and the related networks which facilitate cooperation among prosecutors.

In terms of international co-operation, what legal and/or practical obstacles have been encountered as regards co-operation with:

- **Council of Europe Member States:**
- **Third party states:**

No obstacles have been encountered with council of Europe Member states. With regards to third parties at times civil wars and internal insecurity in transit countries and countries of origin have made cooperation very difficult and at times impossible to achieve.

Do you think existing Council of Europe instruments on international co-operation in criminal matters (Mutual legal assistance, extradition) are effective in dealing with migrant smuggling? If not, please specify.

Kindly refer to reply at question 12.

Sweden

Do you have any laws or legislative measures covering the issue of migrant smuggling?

Is the issue set out in general criminal law or are there specific provisions dealing with the problem?

Yes, migrant smuggling and organisation of human smuggling is criminalised in Sweden. The legal provisions are to be found in the Aliens Act (2005:716).

Is the smuggling of migrants a criminal offence under domestic law?

Does national law include a definition of migrant smuggling?

Cf the legal provision below.

How is this conduct defined?

Cf the legal provision below.

What are the material elements of the crime?

Cf the legal provision below.

Is “financial gain” an element of the definition of smuggling of migrants?

Human smuggling does not require financial benefit or other material benefit. However, the crime can be considered a serious case of human smuggling if money or material benefits have been passed over to the perpetrator as payment.

Could you please provide, if possible, the relevant texts (in English or in French)?

Aliens Act (2005:716) (unofficial translation)

Chapter 20. Penalty provisions, etc.

Section 8

Any person who intentionally assists an alien to unlawfully enter or pass through Sweden, a Member State of the European Union or Iceland, Norway, Switzerland or Liechtenstein shall be sentenced for human smuggling to imprisonment for at most two years.

If the offence is to be regarded as gross, the sentence shall be imprisonment for gross human smuggling for at least six months and at most six years. In judging whether the offence is gross, special attention shall be paid to whether the act

1. was carried out in return for compensation,
2. was carried out as part of an activity that involved a large number of persons or
3. was carried out in forms that entail mortal danger for the alien or was otherwise carried out in ruthless forms.

If the offence is regarded as minor the sentence shall be a fine or imprisonment for at most six months.

An attempt or preparation to commit an offence under this Section shall be adjudged according to the provisions of Chapter 23 of the Penal Code.

Section 9

Any person who, for financial gain, plans or organises activities designed to enable aliens to travel to Sweden without passports or the permits required for entry into Sweden shall be sentenced for organisation of human smuggling to imprisonment for at most two years.

If the offence is gross the sentence shall be imprisonment for gross organisation of human smuggling for at least six months and at most six years. In judging whether the offence is gross, special attention shall be paid to whether the act involves the systematic exploitation of the vulnerable situation of aliens or involves mortal danger or other ruthlessness in relation to the aliens.

If the offence is regarded as minor the sentence shall be a fine or imprisonment for at most six months.

Any person assisting an alien to travel to Sweden without a passport or the permits required for entry into Sweden shall be sentenced for complicity under paragraphs one to three. This provision is applicable if the accomplice realised or had fair reason to assume that the journey was organised for financial gain through a said activity.

Are the following activities criminalized under national legislation:

- **Attempts to smuggle migrants**

Yes

- **Participation as an accomplice in the smuggling of migrants**

Yes

- **Acting as instigator of the smuggling of migrants**

Yes

- **Migrant smuggling as part of a criminal organisation**

Yes

- **Circumstances that endanger, or are likely to endanger, the lives or safety of smuggled migrants**

Yes

Chapter 20, Section 8 of the Aliens Act makes a reference to the provisions of Chapter 23 of the Penal Code.

Chapter 23, Section 4, first and second paragraphs of the Penal Code on Attempt, Preparation, Conspiracy and Complicity stipulates that: Punishment as provided for an act in this Code shall be imposed not only on

the person who committed the act but also on anyone who furthered it by advice or deed. The same shall apply to any other act punishable with imprisonment under another Law or statutory instrument.

A person who is not regarded as the perpetrator shall, if he induced another to commit the act, be sentenced for instigation of the crime and otherwise for aiding the crime.

As human smuggling under Chapter 20, Section 8 of the Aliens Act is an act punishable with imprisonment, attempts to smuggle migrants, participation as an accomplice in the smuggling of migrants or instigating smuggling of migrants are criminalised under Swedish legislation.

There is no requirement of involvement in an organised criminal group (part of a criminal organisation). However, the fact that a crime was carried out as part of an activity that involved a large number of persons may lead to that the offence is considered as gross human smuggling (Chapter 20, Section 8, second paragraph). Moreover, there are general aggravating circumstances under the Swedish Penal Code, Chapter 29, Section 2, which are considered by the court when determining a sentence. Under point 6 of that provision, the fact that a crime is committed as part of criminality that is exercised in an organised manner is an aggravating circumstance that shall be considered in addition to the aggravating circumstances of the specific crime.

In the case of gross human smuggling and gross organisation of human smuggling special attention should be paid to circumstances that endanger, or are likely to endanger, the lives or safety of smuggled migrants

Does your domestic legislation permit use of special investigative techniques for the purpose of investigating the smuggling of migrants such as

- **Interceptions of telecommunication;**
- **Undercover operations;**
- **Financial investigations: including access to bank, financial or commercial records and/or databases;**
- **specific form of protection for witnesses;**
- **others; Please specify.**

When someone is suspected of gross human smuggling (Chapter 20, section 8 of the Aliens Act) or gross organization of human smuggling (Chapter 20, section 9 of the Aliens Act), the answer to all of the above questions is **Yes**. When there are suspicions of such crimes, it is also possible to use secret surveillance of electronic communication (Chapter 27, section 19 of the Code of Judicial Procedure) and secret camera surveillance (Chapter 27, section 20 a of the Code of Judicial Procedure). When it comes to secret interception of electronic communication (Chapter 27, section 18 of the Code of Judicial Procedure) and secret camera surveillance it is also required that the circumstances of the particular crime gives reasons to believe that it may be punished by more than two years of imprisonment. It is also worth noting that a letter, telegram, or other dispatch in the possession of a postal or telecommunications undertaking may be seized if the crime is subject to a penalty of imprisonment for one year or more (Chapter 27, section 3 of the Code of Judicial Procedure). Financial investigations doesn't require that the offense is gross.

Does your domestic legislation enable seizure and/or confiscation:

- **of property, equipment or other instrumentalities used in or destined for use in offences related to smuggling of migrants?**
- **of proceeds of crime derived from offences related to smuggling of migrants ? If yes specify the main features of the legal framework.**

Yes, property, equipment and other instrumentalities used in or destined for use in offences related to smuggling of migrants as well as proceeds of crime derived from such offences can be confiscated under Swedish law (please see below).

Aliens Act

Chapter 20. Penalty provisions, etc.

Section 10

Payment made to any person who has committed an offence under Section 7, 8 or 9 (Sections 7, 8 and 9 refers to inter alia human smuggling and organisation of human smuggling) shall be declared forfeit. The same applies to other proceeds from such an offence. Anything that any person has accepted in reimbursement of costs in connection with such an offence or the value of what has been accepted shall be declared forfeit if acceptance is an offence under this Act and the penalty prescribed for the offence is imprisonment for more than one year.

Means of transport that have been used or were intended to be used in connection with an offence referred to in Section 7, 8 or 9 may be declared forfeit if the offence has been completed or the conduct is a punishable attempt or a punishable preparation, if the owner or commander or some other person who was acting for the owner committed the act or was complicit in it and the forfeiture is necessary to prevent crime or if there are some other special grounds.

Over and above what is said in the second paragraph, property that has been used to aid an offence referred to in Section 7, 8 or 9 may be declared forfeit, if this is necessary to prevent crime or if there are some other special grounds. The same provision applies if the property has been intended for use to aid such an offence and the offence was completed or if the conduct constituted a punishable attempt or a punishable preparation.

Forfeiture under the first, second and third paragraphs is not permitted if it is clearly unreasonable.

Is trafficking in persons defined under national law?

If so, how does this definition differ from that of migrant smuggling?

Trafficking in human beings is defined under Chapter 4, Section 1 a, in the Penal Code, as follows,

A person who, in other cases than those referred to in Section 1 (kidnapping), by unlawful coercion, deceit, exploitation of another person's vulnerable situation or by other such improper means recruits, transports, transfers, harbours or receives a person with the intent that he or she shall be exploited for sexual purposes, the removal of organs, military service, forced labour or other activity in a situation that places that person in distress, shall be sentenced for trafficking in human beings to imprisonment, for at least two years and at most ten years.

A person who commits an act referred to in the first paragraph against a person who is under eighteen years of age shall be sentenced for trafficking in human beings even if none of the improper means described in that paragraph was used.

If an offence referred to in the first or second paragraph is less serious, the sentence shall be imprisonment for at most four years.

Human smuggling is defined in the Swedish Aliens Act (2005:716), Chapter 20, Section 8 (se definition under question 2).

There are differences in the Swedish definitions of trafficking in human beings and human smuggling. Trafficking in human beings includes three components: an action (for example recruitment or

transportation), the use of certain improper means and the purpose of exploitation. When a victim is under eighteen years of age no use of improper means is required.

In relation to your country, are there any international, regional or bilateral agreements which address the issue of migrant smuggling?

Apart from having implemented the EU Directive 2002/90/EC and the Framework Decision 2002/946/JHA on the facilitation of unauthorized entry, transit and residence into national legislation, Sweden has ratified The United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air.

As regards regional cooperation, the establishment of the BSRBCC (Baltic Sea region Border control Cooperation) was decided in Turku/Finland in the context of the first meeting of the heads of the Border Guard Services of the -10- Baltic Sea States in 1997. Member States are: Estonia, Denmark, Finland, Germany, Latvia, Lithuania, Norway, Poland, Russia and Sweden. Iceland holds an observer status.

The field of operations of the BSRBCC covers extensively the entire field of cross border criminality.

Does your country have jurisdiction to prosecute crimes related to smuggling of migrants when they are committed outside its territory? If yes, specify the legal framework.

Yes, Swedish courts can establish jurisdiction over such crimes if, for example, the crime was committed by a Swedish citizen or by an alien domiciled in Sweden or who is present here. In order for Swedish courts to establish jurisdiction over such crimes, the act must be subject to criminal responsibility under the law of the place where it was committed (dual criminality).

Chapter 2 of the Swedish Penal Code – On the Applicability of Swedish Law

(extract, unofficial translation)

Section 2

Crimes committed outside the Realm shall be adjudged according to Swedish law and by a Swedish court where the crime has been committed:

1. by a Swedish citizen or an alien domiciled in Sweden,
2. by an alien not domiciled in Sweden who, after having committed the crime, has become a Swedish citizen or has acquired domicile in the Realm or who is a Danish, Finnish, Icelandic, or Norwegian citizen and is present in the Realm, or
3. by any other alien, who is present in the Realm, and the crime under Swedish Law can result in imprisonment for more than six months.

The first paragraph shall not apply if the act is not subject to criminal responsibility under the law of the place where it was committed or if it was committed within an area not belonging to any state and, under Swedish law, the punishment for the act cannot be more severe than a fine.

In cases mentioned in this Section, a sanction may not be imposed which is more severe than the severest punishment provided for the crime under the law in the place where it was committed.

[- - -]

Do you have a national policy or action plan to address the issue of migrant smuggling?

No

Where possible, please provide information regarding:

- **Number of apprehended smugglers:**

Unfortunately it's not possible to provide information regarding apprehended smugglers.

- **Number of investigations instigated against migrant smugglers:**

See table below.

- **Number of successful prosecutions of migrant smugglers:**

See table below.

To answer questions concerning prosecution regarding migrant smugglers in Sweden it is necessary to define migrant smuggler. The numbers below is a merge of two crimes which according to The Swedish Prosecution Authority combined can be defined as migrant smuggling. The crimes are to help migrants to illegally leave Sweden or to enter Sweden or another country (human smuggling), and for profit design and organized activities which promote that migrants travel in and out of Sweden without passports or the permits required for entry into this country (gross human smuggling).

Migrant smuggling in Sweden	2008	2009	2010	2011	2012	2013	2014
Number of investigations instigated against migrant smugglers	211	168	90	55	75	109	85
Whereof number of successful prosecutions of migrant smugglers	109	75	31	20	26	14	17

In your country, is international cooperation on smuggling of migrants (specifically on mutual legal assistance and extradition) afforded

- **by statute?**
- **by treaty or other agreement or arrangement (multilateral or bilateral)?**
- **by virtue of reciprocity or comity?**

Is the provision of mutual legal assistance subject to the double criminality requirement according to your domestic legal framework?

Extradition

The Extradition for Criminal Offences Act (1957:668) regulates the conditions and procedures for extradition from Sweden. The Act was drafted in close connection with the work of the Council of Europe which led to the 1957 European Convention on Extradition and in all essential respects the Act is based on the Convention. Within the EU the procedure for extradition has in general been replaced by surrender according to the European Arrest Warrant. Traditionally Sweden has not made extradition conditional on the existence of an agreement with the other state involved.

International legal assistance

The provisions on international legal assistance in criminal matters are mainly contained in the International Legal Assistance in Criminal Matters Act (2000:562). Under the Act, Sweden can as a main rule provide assistance even if Sweden does not have an agreement on legal assistance in criminal matters with the other state, i.e. no demand for reciprocity is made.

In order for certain measures to be undertaken in Sweden, it is required that the deed for which the request relates corresponds to a crime under Swedish law. A requirement of this kind for double criminality is made when the request relates to

- a) provisional attachment, seizure and search of premises and other measures under Chapter 28 of the Code of Judicial Procedure,
- b) secret interception of telecommunications,
- c) permission for cross-border secret interception of telecommunications,
- d) secret camera surveillance,
- e) electronic eavesdropping (bugging),
- f) forensic examination of a deceased person.

(However, an exception is made from this requirement in the case of a request for search of premises and seizure from a Member State of the European Union or from Iceland or Norway. In this case, it is sufficient for the act in question to be punishable by imprisonment in the applicant state.)

No demand for double criminality is made for other measures.

In your experience, is international co-operation regarding prosecution of migrant smugglers effective? Please specify.

See below

In terms of international co-operation, what legal and/or practical obstacles have been encountered as regards co-operation with:

- **Council of Europe Member States:**
- **Third party states:**

See below

Do you think existing Council of Europe instruments on international co-operation in criminal matters (Mutual legal assistance, extradition) are effective in dealing with migrant smuggling? If not, please specify.

Concerning questions 12–14, the cooperation against serious transnational crime, including fight against migrant smuggling, is working well in Sweden, although there have been few cases so far. Regular channels for cooperation are being used (i.a. Europol, Eurojust, 2000 MLA Convention) in cases pertaining to serious cross border crime. In general, Sweden believes that the current legal system is satisfactory, although there is always room for improvement as regards its practical implementation.

Greece

Do you have any laws or legislative measures covering the issue of migrant smuggling?

Is the issue set out in general criminal law or are there specific provisions dealing with the problem?

Law 4251/2014 (Immigration Code) covers, among others, and the issue of migrant smuggling.

Is the smuggling of migrants a criminal offence under domestic law?

Article 29 par. 5 and 6 and article 30 of the above mentioned law (4251/2014) are the penal provisions of migrant smuggling.

Does national law include a definition of migrant smuggling?

In article 1 – ib of the Law 4251/2014 we have the definition of a victim of migrant smuggling but we do not have a definition of migrant smuggling.

How is this conduct defined?

What are the material elements of the crime?

The above articles penalize the transfer from abroad to Greece of citizens of third countries who are not allowed to enter the Greek territory, the receipt of these citizens from the entry points, their further movement within the country or in a Member State of the EU or any other country, the facilitation of their transport and the facilitation of their stay in the country by providing them, inter alia, accommodation.

Is “financial gain” an element of the definition of smuggling of migrants?

Obtaining (or attempting to obtain) financial gain by committing migrant smuggling is an aggravating circumstance of the offence (art. 30 par. 1b of the Law 4251/2014).

Could you please provide, if possible, the relevant texts (in English or in French)?

Article 29 par. 5 and 6 of the Immigration Code

5. Whoever facilitates a third country national to enter Greek territory or leave it, without being subjected to the control provided for in Article 5, shall be punished with imprisonment up to ten (10) years and a fine of twenty thousand (20,000) euros. if the above acted by speculation or by profession or habit or the crime was committed by two (2) or more persons, an imprisonment of at least ten (10) years fine of at least fifty thousand (50,000) euros is imposed.

6. Whoever facilitates the illegal staying of a third country citizen or hinders police investigations to identify, arrest and deportation, is punished by imprisonment of at least one (1) year and a fine of at least five thousand (5,000) euros. If this person acted by speculation imprisonment of at least two (2) years and a fine of at least ten thousand (10,000) euros is imposed.

Article 30 of Immigration Code

1. Masters or ship captains, watercraft or aircraft captains and drivers of any kind of means of transport carrying from abroad in Greece third country nationals, who have no right to enter the Greek territory or to which admission for any reason is prohibited, as well as those who receive them from the entry points, external or internal frontiers to move them inside the country or in a Member - State of the EU or a third

country or facilitate their transportation or provide them with accommodation for concealment are punished:

- a. with imprisonment of up to ten (10) years and a fine of ten thousand (10,000) to thirty thousand (30,000) euros for each transferred person,
- b. by imprisonment of at least ten (10) years and a fine of thirty thousand (30,000) to sixty thousand (60,000) euros for each transferred person if the offender acts speculation, by profession or habit or is a recidivist or has the status of civil servant or tourist, marine or travel agent, or if two or more acting jointly;
- c. by imprisonment of at least fifteen (15) years and a fine of two hundred thousand (200,000) euros for each transferred person if the act may cause a risk for humans,
- d. by life imprisonment and a fine of seven hundred thousand (700,000) euros for each transferred person if in the above case «c» death occurred.

2. Masters or ship captains, watercraft or aircraft captains and drivers of any kind of means of transport shall not accept for transfer persons who are not equipped with the necessary travel documents or have not undergone the normal police control. Perpetrators are punished under the provisions of paragraph 1 of this article. The above offense is considered to be granted, in the case of sea and air transport, where the person who boarded illegally is found therein at the start of the control by the competent state bodies before sailing or take-off or after departure of a ship or the take-off of the plane and, as regards other forms of transport, if the person departing clandestinely is found therein during the last exit control or near the border. The penalties referred to in paragraph 3 of this article apply to the persons referred to in this paragraph.

3. Airlines or shipping companies, as well as any other individual or legal person performing any form of public transport of persons shall not accept for carriage and take all steps to prevent the transfer from abroad to Greece of third countries nationals: a) who do not present all valid passports or other travel documents and visa where required or b) who hold passports or other travel documents with signs of forgery or counterfeiting. On airlines that violate the above obligations a fine of five thousand (5,000) euros to thirty thousand (30,000) euros for each transferred person is imposed with decision of the airport chief. In the shipping companies, and any other individual or legal person, the same fine is imposed by the decision of the Secretary General of the Decentralized Administration. In case of recurrence within the same calendar year, the above penalties may be doubled but can not exceed the amount of thirty thousand (30,000) euros, by decision of the competent body. Fines are not imposed on the companies which can prove that they have taken adequate precautions to ensure that the passengers - third countries nationals - not covered in the aforementioned cases «a» and «b» of this paragraph.

4. The persons referred to in paragraphs 1, 2 and 3 as well as travel agencies and owners of means of transport are jointly liable for subsistence costs and expenses refoulement of these persons abroad. The same responsibility applies to those who guaranteed the repatriation of third country citizens, if the conditions of entry or residence in the country have been violated. The attestation process and payment of the above fine shall be effected in accordance with the provisions of the Public Revenues Collection Code.

5. The persons referred to in the first subparagraph of paragraph 1 or owners of means of transport or their representatives in Greece are required, immediately after the arrival of the means of transport, to deliver to the passport control services the arrival slips or records of passengers who are citizens of third countries, which carry to Greece and vice versa. The same obligation is in force on arrival of charter flights from third countries. By decision of the Minister of Public Order and Citizen Protection the elements of these notes or lists are established.

6. The above sanctions are not imposed on men rescue situations at sea, transport for persons in need of international protection, following the requirements of international law and to the transfer cases within the

country or its facilitating, in order to implement the procedures of Articles 83 of Law no. 3386/2005 or Article 13 of Law. 3907/2011, after informing the competent police and port authorities.

7. The provisions of Article 253A of the Code of Criminal Procedure apply to the offenses mentioned in Article 29 and in this Article, whether the conditions of Articles 187 and 187A of the Penal Code are met.

8. The time limit for lodging an appeal and the appeal itself against the conviction for violations of this Article, and paragraphs 5, 6 and 8 of the previous article do not suspend the execution of the decision.

9. For the trial of crimes mentioned in paragraph 1, except that in the case d, and in Article 29, the competent court is the Single-Member Court of Appeals and the procedure set out in Article 308A of the Criminal Procedure Code is applied.

10. Property derived from the criminal activity of this Article, and paragraphs 5, 6 and 8 of Article 29 or obtained in any way from such criminal activity or property used wholly or partly for the above criminal activity is seized and, unless appropriate return to the owner under Article 310 paragraph 2 and 373 of the Code of Criminal Procedure, is confiscated mandatory with conviction. Confiscation shall apply even if the property belongs to a third party if he was aware of criminal activity at the time of acquisition of property. If the property or the product in the preceding paragraph exceeds four thousand (4,000) euros and can not be seized, other assets of equal value are seized and confiscated under the terms of the preceding paragraph.

11. The provisions of this Article and of paragraphs 5, 6 and 8 of Article 29 apply and when the offenses were committed abroad by a national or a foreigner, even if the act is not punishable under the laws of the country in which they were committed.

Are the following activities criminalized under national legislation:

- **Attempts to smuggle migrants**

Yes, attempt is punished under the general provision of our Penal Code (art. 42).

- **Participation as an accomplice in the smuggling of migrants**

It is also punished under the general provision of the Greek Penal Code (art. 45, 46 par. 1b and 47).

- **Acting as instigator of the smuggling of migrants**

We also use the general provision of the Penal Code (art. 46 par. 1a) to punish instigators of migrant smuggling.

- **Migrant smuggling as part of a criminal organization**

Yes (art. 30 par. 7 of the Law of 4251/2014)

- **Circumstances that endanger, or are likely to endanger, the lives or safety of smuggled migrants**

They are punished as aggravating circumstances of the offence (art. 30 par. 1 c and d of the Law 4251/2014).

Does your domestic legislation permit use of special investigative techniques for the purpose of investigating the smuggling of migrants such as

- **Interceptions of telecommunication;**

YES.

- **Undercover operations;**

YES

- **Financial investigations: including access to bank, financial or commercial records and/or databases;**

YES

- **specific form of protection for witnesses;**

YES

- **others:**

Use and combination of personal data.

Article 253A of the Code of Criminal Procedure where the SITs are stated, applies also for the offence of migrant smuggling (art. 30 par. 7 of the Law 4251/2014).

Does your domestic legislation enable seizure and/or confiscation:

- **of property, equipment or other instrumentalities used in or destined for use in offences related to smuggling of migrants?**
- **of proceeds of crime derived from offences related to smuggling of migrants ? If yes specify the main features of the legal framework.**

Pursuant article 30 par. 10 of the Law 4251/2014 seizure and confiscation of property etc that is used or derived from the offence of smuggling of migrants are imposed.

Is trafficking in persons defined under national law?

Articles 323 A and 351 of the greek Penal Code define the offence of human trafficking.

If so, how does this definition differ from that of migrant smuggling?

The purpose of the trafficker is exploitation of the persons, no matter if the victim has entered the country legally or not. Furthermore, the victims of trafficking have not consented or their consent is a result of deception or violence.

In relation to your country, are there any international, regional or bilateral agreements which address the issue of migrant smuggling?

Greece has ratified the UN Protocol against the Smuggling of Migrants by Land, Sea and Air.

Does your country have jurisdiction to prosecute crimes related to smuggling of migrants when they are committed outside its territory? If yes, specify the legal framework.

Pursuant article 30 par. 11 of the Law 4251/2014, smuggling of migrants is punished under the greek law even if a) the offence was committed abroad by a Greek citizen or not and b) this act is not punishable in the country where it was committed.

Do you have a national policy or action plan to address the issue of migrant smuggling?

Where possible, please provide information regarding:

- **Number of apprehended smugglers:**
- **Number of investigations instigated against migrant smugglers:**
- **Number of successful prosecutions of migrant smugglers:**

In your country, is international cooperation on smuggling of migrants (specifically on mutual legal assistance and extradition) afforded

- **by statute?**
- **by treaty or other agreement or arrangement (multilateral or bilateral)?**
- **by virtue of reciprocity or comity?**

Is the provision of mutual legal assistance subject to the double criminality requirement according to your domestic legal framework?

There are general provisions concerning MLA and extradition for all offences and not specific ones for the offence of smuggling of migrants.

Articles 437 – 461 of the Code of Criminal Procedure are the general legal framework for MLA and extradition.

Moreover, the provisions of the European Convention on Mutual Assistance in Criminal Matters of the Council of Europe and the provisions of the European Arrest Warrant are also implemented.

In your experience, is international co-operation regarding prosecution of migrant smugglers effective? Please specify.

In terms of international co-operation, what legal and/or practical obstacles have been encountered as regards co-operation with:

- **Council of Europe Member States:**
- **Third party states:**

Do you think existing Council of Europe instruments on international co-operation in criminal matters (Mutual legal assistance, extradition) are effective in dealing with migrant smuggling? If not, please specify.

Turkey

Do you have any laws or legislative measures covering the issue of migrant smuggling?

Trafficking in migrants is criminalised in the Turkish Criminal Code (CC) No.5237, under Article 79 CC, where general criminal norms are taking place.

Article 79

(1) Any person who, by illegal means and with the purpose of obtaining, directly or indirectly, a material gain:

- a) enables a non citizen to enter, or remain in, the country, or
- b) enables a Turkish citizen or a non citizen to go abroad,

shall be sentenced to a penalty of imprisonment for a term of three to eight years and a judicial fine of up to ten thousand days.

(Added sentence: Law 6008, of 22/7/2010, Art. 6)

Even if the crime has been stopped at the stage of attempt, it is sanctioned as if committed.

(2) (Added item: Law 6008, of 22/7/2010, Art. 6)

In cases where the crime is committed in a way to

- a) endanger the life of the victims,
- b) is committed by treating the victim in a demeaning manner,

the sentence to be imposed shall be increased by two thirds.

(3) Where the offence is committed in the course of the activities of a criminal organization, the penalty to be imposed shall be increased by one half.

(4) Where the offence is committed by a legal entity, the relevant security measures shall be imposed upon that legal entity.

Is the issue set out in general criminal law or are there specific provisions dealing with the problem?

This subject is provided for in details in Part "Special Provisions", Section "Trafficking in Human Beings and Migrants" of the CC.

Is the smuggling of migrants a criminal offence under domestic law?

The internal law of our country deals with trafficking in human beings and smuggling of migrants as a criminal offence.

Does national law include a definition of migrant smuggling?

Yes.

How is this conduct defined?

Trafficking in human beings and smuggling of migrants is defined in Article 79, par. 1 CC. Accordingly, any person, smuggling a foreigner into the country or accommodating a foreigner in the country or abetting or assisting a Turkish national or a foreigner to exit out of the country through unlawful means and with the purpose of gaining direct or indirect pecuniary benefits, shall be considered to have committed the crime of trafficking in migrants.

What are the material elements of the crime?

The pecuniary element of the crime according to Art.79 of the CC, consists of smuggling a foreigner into the country through unlawful ways, abetting or assisting a foreigner to stay illegally in the country abetting or assisting a Turkish national or a foreigner to exit out of the country through unlawful means. As is apparent from the clause, trafficking migrants is an optional and a moving crime.

Is “financial gain” an element of the definition of smuggling of migrants?

Under Article 79, par. 1 of the CC, it is not the "pecuniary benefits" that form the feature of the trafficking in migrants, but it is rather a "financial interest" that comprises pecuniary benefits as well.

Are the following activities criminalized under national legislation:

- **Attempts to smuggle migrants**

Even if the crime has been stopped at the stage of attempt, it is sanctioned as if committed.

- **Participation as an accomplice in the smuggling of migrants**

Articles 37, 38 and 39, regulating complicity and inciting to crime, as general provisions apply to trafficking in migrants as well.

- **Acting as instigator of the smuggling of migrants**

According to Art. 38 of the CC, a person, who incites another person to commit the crime of trafficking in migrants, is sentenced to the same sentence as if committed the crime.

- **Migrant smuggling as part of a criminal organisation**

According to Art.79, par.3 of the CC, if the crime of trafficking migrants is committed as an activity of an organisation, the sentence shall be increased by a half.

According to Article 220 of the CC, people, who organize groups or organisations with the purpose of committing the crime of trafficking in migrants, and those who become members of such organisations, are sentenced separately on migrant trafficking charges. Further, the organisation's executives are sentenced on charges of perpetrators of the committed crime.

- **Circumstances that endanger, or are likely to endanger, the lives or safety of smuggled migrants**

Pursuant to Art. 79, par. 2 of the CC, where the crime endangers the lives of the victims, the sentence is increased by half, up to two third.

Does your domestic legislation permit use of special investigative techniques for the purpose of investigating the smuggling of migrants such as

- **Interceptions of telecommunication;**

Because under Article 135, paragraph (a) of CC 5271, trafficking in migrants falls into the category of crimes, in which special investigation techniques are allowed, the internal law of Turkey allows tapping of communication.

- **Undercover operations;**

Under Art.139, par.7, item (a) of the Code of Criminal Procedure No.5271 (CCP), where the crime of trafficking in migrants is committed within the framework of any activities of a criminal organisation, appointing a “secret investigator” is allowed. Additionally, again in this regard, CCP, Art.140, par.1, item (a), provides that “monitoring through technological tools is allowed”.

- **Financial investigations: including access to bank, financial or commercial records and/or databases;**

Public Prosecutor’s Offices are entitled to fulfil such requests, according to their general powers and duties.

- **specific form of protection for witnesses;**

Under the Law on Protection of Witnesses 5726, Art.3, par. 1(b), where migrants trafficking is committed within the scope of organisational activities, witnesses have the right to benefit from the protection programme.

Does your domestic legislation enable seizure and/or confiscation:

- **of property, equipment or other instrumentalities used in or destined for use in offences related to smuggling of migrants?**
- **of proceeds of crime derived from offences related to smuggling of migrants ? If yes specify the main features of the legal framework.**

Pursuant to Art. 54 of the CC, an object, used in committing an intentional crime, or provided for committing a crime or generated from a committed crime, is confiscated, provided that it does not belong to good willed third persons.

Again, Pursuant to Art. 55 of the CC, pecuniary benefits, acquired through commission of a crime, or forming the subject of the crime, or provided for commission of a crime and the economical gains, generated as a result of utilisation or conversion of such pecuniary benefits, in cases, where not returned to the victim of the crime, are confiscated. Therefore the same provisions are applied for the crime of migrants trafficking and confiscation may be ordered. And the confiscation procedure, which allows ordering a confiscation, is regulated in the Code of Criminal Procedure. Article 123 of the said Law provides that objects or properties that can be subjected to object or profit confiscation, can be entrusted to the deposits section and in case the person possessing these does not consent to deliver them voluntarily, these properties can be seized. Article 128 regulates the method of “seizure of immovable properties, rights and credits”. Accordingly, in a limited number of crimes, including trafficking in migrants, in cases where there is strong evidence to believe that the crime was committed and that the property had been obtained from the crime, immovable properties, land, sea and air transport vehicles, any bank or other financial institution accounts, partnership shares in any companies, in which the perpetrator is a partner, any rights and credits from any real persons or legal entities, securities, rented cash counters, and other assets can be confiscated.

The seizure is performed even in cases, where such immovable properties, rights, credits, and other properties and assets are recorded under the ownership of a person other than the clearly identified defendant or accused.

Is trafficking in persons defined under national law?

Trafficking in human beings is defined as a crime in the internal law of Turkey. Article 80 of the CC deals with trafficking in migrants. The article reads as follows:

“(1) (Amended: 6/12/2006 – 5560/Art.3) Any person who procures, kidnaps, harbours or transports a person from one place to another or brings a person into the country or takes a person out of the country, by (1) the use of threat, pressure, force or violence, (2) employing deceit, (3) abusing his influence, or (4) obtaining a consent by exploiting control over another or the desperation of such other, for the purpose of forcing them into prostitution or to work, provide a service, harvest their organs or to subject them to slavery or any similar practice shall be sentenced to a penalty of imprisonment for a term of eight to twelve years and to a judicial fine of up to ten thousand days.

(2) Where an act is undertaken for the purposes referred to in section one and such act constitutes an offence, the consent of the victim shall be presumed to be invalid.

(3) Where a person under eighteen years of age is procured, kidnapped, harbored or transported from one place to another for the purposes described in section one, the offender shall be sentenced to a penalty described section one, notwithstanding the fact that no act instrumental to the offence has been resorted to.

(4) Security measures shall be imposed upon legal entities in respect of the aforementioned offences.”

If so, how does this definition differ from that of migrant smuggling?

In the crime of trafficking in migrants, “the purpose of gaining directly or indirectly pecuniary benefits” is required as a special intention. This crime shall be comprised of smuggling a foreigner into the country or abetting or assisting him to stay in the country or assisting a Turkish national or a foreigner in exiting abroad, provided that this special intention exists.

The crime of trafficking in human beings can be committed on a special purpose. The special intent in this crime is “forced labour, forced service, forced prostitution or slavery or forcing the giving away of body organs”. In other words, supplying, kidnapping, transporting, transferring or accommodating people for this purpose, shall comprise this crime.

Although in both crimes smuggling of people into the country and taking people out of the country is taking place as the material element of the crime, because the special intents of these crimes are different, in order to determine under which crime the action falls, the particular intention of the perpetrator should be identified.

In relation to your country, are there any international, regional or bilateral agreements which address the issue of migrant smuggling?

Our country is a party to The United Nations Convention against Transnational Organized Crime and its Protocol against the Smuggling of Migrants by Land, Sea and Air.

Does your country have jurisdiction to prosecute crimes related to smuggling of migrants when they are committed outside its territory? If yes, specify the legal framework.

According to the Article 13 of Turkish Penal Code related with the application of law in terms of person and place, Turkish law shall apply to the offence of smuggling of migrants committed in a foreign country whether or not committed by a citizen or non-citizen of Turkey. Even where a conviction or acquittal pursuant to the offence of smuggling of migrants have occurred in a foreign country, criminal proceedings in Turkey shall be conducted upon the request of the Ministry of Justice.

Do you have a national policy or action plan to address the issue of migrant smuggling?

It will be responded by the Ministry of Interior, the Directorate General for Migration Management.

Do you have a national policy or action plan to address the issue of migrant smuggling?

The first strategic priority that took place in **Turkey's Strategy Document and National Action Plan on Irregular Migration** which was ratified with the Consent of Ministry of Interior dated 05.03.2015 after being prepared in line with the opinions of the responsible institutions to be cooperated with in order to provide contribution for making irregular-migration-related policies and to implement effectively thereof is **"prevention of irregular migration and strengthening the measures for fight against organized crimes on migration"**. One of the requirements created within the scope of this priority is identified as **"effective fighting against migrant smuggling and other related organized crimes"**. The following specific objectives are included within this requirements:

a) Carrying out necessary works in order to provide specialization of judicial authorities who will conduct investigations on migrant smuggling and other related organized crimes,

b) Searching all kinds of damage caused by migrant smuggling and other related organized crimes and performing works in order to increase awareness in related institutions, organizations and public opinion concerning these crimes,

c) Taking necessary measures in order to ensure that the issue of migrant smuggling takes part in related strategy and action plans.

Where possible, please provide information regarding:

Number of apprehended smugglers:

Between 2010 and 2014, 3477 Smugglers of Migrants were captured.

Number of investigations instigated against migrant smugglers:

According to the statistical data based on last 5 years, 15.559 investigations were initiated due to the offense of Smuggling of Migrants. As a result of these investigations, 8191 cases were opened in Criminal Courts.

Number of successful prosecutions of migrant smugglers:

In last 5 years, 3983 cases opened due to the Smuggling of Migrants were resulted in conviction.

**In your country, is international cooperation on smuggling of migrants (specifically on mutual legal assistance and extradition) afforded
- by statute?**

In our country, as the law draft related with international cooperation has not been enacted yet, there is no such kind of national law at this stage.

- by treaty or other agreement or arrangement (multilateral or bilateral)?

Turkey ratified The United Nations Convention against Transnational Organized Crime and its Protocol against the Smuggling of Migrants by Land, Sea and Air on 18.03.2003 in Turkish Grand National Assembly.

On the other hand, within the scope of bilateral and multilateral conventions to which our country is a party, international legal cooperation is provided for the offense of smuggling of migrants besides other offences.

- by virtue of reciprocity or comity?

If there is no international convention, regional agreements or bilateral agreements, requests for international legal cooperation are executed within the framework of international customary law and the principle of reciprocity.

- Is the provision of mutual legal assistance subject to the double criminality requirement according to your domestic legal framework?

In our country, as the law draft related with international cooperation has not been enacted yet, there is no provision for mutual legal assistance related with double criminality.

In your experience, is international co-operation regarding prosecution of migrant smugglers effective? Please specify.

While prosecuting of smuggling of migrants, international cooperation is enabled efficiently within the scope of bilateral and multilateral agreements which our country is a party to.

In terms of international co-operation, what legal and/or practical obstacles have been encountered as regards co-operation with:

- **Council of Europe Member States:**
- **Third party states:**

According to the evaluation related with the requests for international cooperation with Member States of European Council and third party states within the context of the offence of Smuggling of Migrants;

As the offence of smuggling of migrants is a transnational offense, there can be jurisdiction for two countries: country of departure and country of arrival. While fulfilling the requests for legal assistance towards providing evidences in investigations and prosecutions initiated in both countries, the authorities can sometimes face with problems in accordance with the principle "ne bis in idem".

Do you think existing Council of Europe instruments on international co-operation in criminal matters (Mutual legal assistance, extradition) are effective in dealing with migrant smuggling? If not, please specify.

We think that current tools of European Council are effective in combating with smuggling of migrants.

Finland

Do you have any laws or legislative measures covering the issue of migrant smuggling?

Is the issue set out in general criminal law or are there specific provisions dealing with the problem?

Finland has specific criminal law provisions dealing with the problem (Chapter 17, Section 8 and Section 8(a) of the Criminal Code).

Is the smuggling of migrants a criminal offence under domestic law?

Does national law include a definition of migrant smuggling?

Yes it does.

How is this conduct defined?

It's defined in Chapter 17, Section 8 of the Criminal Code (see below).

What are the material elements of the crime?

The material elements of this offence present themselves in Chapter 17, Section 8 of the Criminal Code.

Is "financial gain" an element of the definition of smuggling of migrants?

Financial gain is not an element of the offence described in provisions

Could you please provide, if possible, the relevant texts (in English or in French)?

Chapter 17 - Offences against public order

Section 8 - Arrangement of illegal immigration

(1) A person who

- (1) brings or attempts to bring to or transport through Finland a foreigner without a passport, visa, residence permit or other document comparable to a passport, that is necessary for entry into the country,
- (2) brings or attempts to bring to or transport through Finland a foreigner whose document referred to in paragraph 1 is false, forged, issued to another person or received from an authority on the basis of essential information that is false or misleading, or by bribing the authority or violent resistance of the authority,
- (3) arranges or, as an intermediary, provides transportation for a foreigner referred to in paragraph 1 or 2 to Finland, or
- (4) gives to another person a document referred to in paragraph 2 for use in entry into the country,

shall be sentenced for arrangement of illegal immigration to a fine or imprisonment for at most two years.

(2) An act which, when taking into account in particular the humanitarian motives of the person committing it or his or her motives relating to close family relations, and the circumstances pertaining to the safety of the foreigner in his or her home country or country of permanent residence, and when assessed as a whole, is to be deemed committed under vindicating circumstances, does not constitute arrangement of illegal immigration.

Section 8(a) - Aggravated arrangement of illegal immigration

If, in the arrangement of illegal immigration,

- (1) grievous bodily harm, a serious illness or a state of mortal danger or comparable particularly grave suffering is intentionally or through gross negligence inflicted on another person or
- (2) the offence has been committed within the framework of a criminal organisation referred to in Chapter 6, section 5, subsection 2.

and the offence is aggravated also when assessed as whole, the offender shall be sentenced for aggravated arrangement of illegal immigration to imprisonment for at least four months and at most six years.

Are the following activities criminalized under national legislation:

Attempts to smuggle migrants

An attempt of some illegal immigration offences is punishable (Chapter 17, Section 8, Subsection 1, Paragraphs 1 and 2).

Participation as an accomplice in the smuggling of migrants

Complicity in and abetting of an intentional offence (for example these offences) are punishable according to Chapter 5, Section 3 and Section 6 of the Criminal Code.

Acting as instigator of the smuggling of migrants

Instigation to commit an intentional offence (for example these offences) is punishable according to Chapter 5, Section 5 of the Criminal Code.

Migrant smuggling as part of a criminal organization

Committing arrangement of illegal immigration within a framework of criminal organization is a ground to assess the offence as an aggravated arrangement of illegal immigration according to Chapter 17, Section 8(a) of the Criminal Code.

Circumstances that endanger, or are likely to endanger, the lives or safety of smuggled migrants

These kinds of circumstances are grounds to assess the offence as an aggravated arrangement of illegal immigration according to Chapter 17, Section 8(a) of the Criminal Code.

Does your domestic legislation permit use of special investigative techniques for the purpose of investigating the smuggling of migrants such as

Interceptions of telecommunication;

It's possible when we are dealing with aggravated arrangement of illegal immigration.

Undercover operations;

Normal undercover operations are not possible. However it's possible to direct cover activity by the police in an information network at a person suspected of arrangement of illegal immigration or aggravated arrangement of illegal immigration.

Financial investigations: including access to bank, financial or commercial records and/or databases;

Police has the right to get financial information for the investigation.

specific form of protection for witnesses;

There is no specific form of protection for witnesses of these offences.

others; Please specify.

Chapter 10 of the Coercive Measures Act includes many covert coercive means available for the investigation of aggravated arrangement of illegal immigration:

1. traffic data monitoring,
2. obtaining base station data,
3. extended surveillance (covers also arrangement of illegal immigration),
4. covert collection of intelligence (“light undercover operation”),
5. on-site interception,
6. technical observation (in some cases covers also arrangement of illegal immigration),
7. technical monitoring (in some cases covers also arrangement of illegal immigration),
8. technical surveillance of a device.

Does your domestic legislation enable seizure and/or confiscation:

of property, equipment or other instrumentalities used in or destined for use in offences related to smuggling of migrants?

Yes it does (Chapter 10, Section 4 of the Criminal Code).

of proceeds of crime derived from offences related to smuggling of migrants ? If yes specify the main features of the legal framework.

Yes it does (Chapter 10, Section 2 of the Criminal Code).

Chapter 10 — Forfeiture

Section 2 — Forfeiture of the proceeds of crime

- (1) The proceeds of crime shall be ordered forfeit to the State. The forfeiture shall be ordered on the perpetrator, a participant or a person on whose behalf or to whose benefit the offence has been committed, where these have benefited from the offence.
- (2) If no evidence can be presented as to the amount of the proceeds of crime, or if such evidence can be presented only with difficulty, the proceeds shall be estimated, taking into consideration the nature of the offence, the extent of the criminal activity and the other circumstances.
- (3) Forfeiture of the proceeds of crime shall not be ordered in so far as they have been returned to the injured party, or in so far as they have been or will be ordered to be reimbursed to the injured party by way of compensation or restitution. If a claim for compensation or restitution has not been filed or if the claim has still not been decided when the request for forfeiture is being decided, the forfeiture shall be ordered.

Section 4 — Forfeiture of an instrument of crime

(1) The following instruments shall be ordered forfeit to the State, when used in the commission of an offence:

- (1) a firearm, edged weapon or another similar lethal instrument, and
- (2) any other object or property the possession of which is punishable.

(2) Also the following may be ordered forfeit to the State:

- (1) an object or property that has been used in the commission of an intentional offence, and
- (2) an object or property that is closely connected to an intentional offence for which the proceedings have been brought, when it has been obtained or prepared solely or mainly for the intentional offence or where its characteristics make it especially suitable as an instrument of an intentional offence.

(3) In the assessment of the need for forfeiture, special consideration shall be taken of the prevention of further offences.

Is trafficking in persons defined under national law?

If so, how does this definition differ from that of migrant smuggling?

Provisions concerning trafficking in human beings and aggravated trafficking in human beings are in Chapter 25, Section 3 and Section 3 (a) of the Criminal Code. These provisions are in accordance with international criminalization obligations based on the Protocol supplementing the Convention against Transnational Organized Crime, 2002 Framework Decision on trafficking in human beings, Council of Europe Convention on Action against Trafficking in Human Beings and 2011 Directive. The structure and the content of these provisions are similar to articles in those document covering means (for example by abusing the vulnerable state of another person), ways of doing (for example takes control over another person) and purposes (for example for purposes of sexual abuse).

Chapter 25 - Offences against personal liberty

Section 3 - Trafficking in human beings

(1) A person who

- (1) by abusing the dependent status or vulnerable state of another person,
- (2) by deceiving another person or by abusing a mistake made by that person,
- (3) by paying remuneration to a person who has control over another person, or
- (4) by accepting such remuneration

takes control over another person, recruits, transfers, transports, receives or harbours another person for purposes of sexual abuse referred to in chapter 20, section 9, subsection 1(1) or comparable sexual abuse, forced labour or other demeaning circumstances or removal of bodily organs or tissues for financial benefit shall be sentenced for trafficking in human beings to imprisonment for at least four months and at most six years.

(2) Also a person who takes control over another person under 18 years of age or recruits, transfers, transports, receives or harbours that person for the purposes mentioned in subsection 1 shall be sentenced for trafficking in human beings even if none of the means referred to in subsection 1(1) –(4) have been used.

(3) An attempt is punishable.

Section 3(a) - Aggravated trafficking in human beings

(1) If, in trafficking in human beings,

- (1) violence, threats or deceitfulness is used instead of or in addition to the means referred to in section 3,
- (2) grievous bodily harm, a serious illness or a state of mortal danger or comparable particularly grave suffering is intentionally or through gross negligence inflicted on another person,
- (3) the offence has been committed against a child younger than 18 years of age or against a person whose capacity to defend himself or herself has been substantially diminished, or
- (4) the offence has been committed within the framework of a criminal organisation referred to in chapter 17, section 1a, subsection 4

and the offence is aggravated also when considered as whole, the offender shall be sentenced for aggravated trafficking in human beings to imprisonment for at least two years and at most ten years.

(2) Also a person who enslaves or keeps another person in servitude, transports or trades in slaves shall be sentenced for aggravated trafficking in human beings if the act is aggravated when assessed as whole.

(3) An attempt is punishable.

In relation to your country, are there any international, regional or bilateral agreements which address the issue of migrant smuggling?

From Finland's point of view the relevant international criminal law instruments are Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the Convention against Transnational Organized Crime, 2002 Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence and 2002 Directive defining the facilitation of unauthorised entry, transit and residence.

Does your country have jurisdiction to prosecute crimes related to smuggling of migrants when they are committed outside its territory? If yes, specify the legal framework.

According to Chapter 1, Sections 2, 3, 5 and 6 of the Criminal Code the Finnish law applies largely to smuggling of migrants offences connected with a Finnish vessel, directed at Finland, directed at a Finn and committed by a Finn or a person who is permanently resident in Finland. Also Section 8 is relevant. According to Section 11 the requirement of dual criminality has to be taken into account. The relevant provisions are as follows:

Chapter 1 - Scope of application of the criminal law of Finland

Section 2 - Offence connected with a Finnish vessel

(1) Finnish law applies to an offence committed on board a Finnish vessel or aircraft if the offence was committed

- (1) while the vessel was on the high seas or in territory not belonging to any State or while the aircraft was in or over such territory, or
- (2) while the vessel was in the territory of a foreign State or the aircraft was in or over such territory and the offence was committed by the master of the vessel or aircraft, a member of its crew, a passenger or a person who otherwise was on board.

(2) Finnish law also applies to an offence committed outside of Finland by the master of a Finnish vessel or aircraft or a member of its crew if, by the offence, the perpetrator has violated his or her special statutory duty as the master of the vessel or aircraft or a member of its crew.

Section 3 - Offence directed at Finland

(1) Finnish law applies to an offence committed outside of Finland that has been directed at Finland.

(2) An offence is deemed to have been directed at Finland

- (1) if it is an offence of treason or high treason,

- (2) if the act has otherwise seriously violated or endangered the national, military or economic rights or interests of Finland, or
- (3) if it has been directed at a Finnish authority.

Section 5 - Offence directed at a Finn

Finnish law applies to an offence committed outside of Finland that has been directed at a Finnish citizen, a Finnish corporation, foundation or other legal entity, or a foreigner permanently resident in Finland if, under Finnish law, the act may be punishable by imprisonment for more than six months.

Section 6 - Offence committed by a Finn

- (1) Finnish law applies to an offence committed outside of Finland by a Finnish citizen. If the offence was committed in territory not belonging to any State, a precondition for the imposition of punishment is that, under Finnish law, the act is punishable by imprisonment for more than six months.
- (2) A person who was a Finnish citizen at the time of the offence or is a Finnish citizen at the beginning of the court proceedings is deemed to be a Finnish citizen.
- (3) The following are deemed equivalent to a Finnish citizen:
 - (1) a person who was permanently resident in Finland at the time of the offence or is permanently resident in Finland at the beginning of the court proceedings, and
 - (2) a person who was apprehended in Finland and who at the beginning of the court proceedings is a citizen of Denmark, Iceland, Norway or Sweden or at that time is permanently resident in one of those countries.

Section 8 - Other offence committed outside of Finland

Finnish law applies to an offence committed outside of Finland which, under Finnish law, may be punishable by imprisonment for more than six months, if the State in whose territory the offence was committed has requested that charges be brought in a Finnish court or that the offender be extradited because of the offence, but the extradition request has not been granted.

Section 11 - Requirement of dual criminality

- (1) If the offence has been committed in the territory of a foreign State, the application of Finnish law may be based on sections 5, 6 and 8 only if the offence is punishable also under the law of the place of commission and a sentence could have been passed for it also by a court of that foreign State. In this event, no sanction that is more severe than what is provided by the law of the place of commission shall be imposed in Finland.
- (2) Even if the offence is not punishable under the law of the place of commission, Finnish law applies to it if it has been committed by a Finnish citizen or a person referred to in section 6, subsection 3(1), and the penalty for it has been laid down in
 - (1) sections 5 or 6 of chapter 11, if the act is a war crime or aggravated war crime referred to in article 15 of the second protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict or an act of participation into said acts,
 - (2) sections 1 – 9 of chapter 15 pursuant to section 12a of said chapter,
 - (3) sections 1 - 3 of chapter 16 and even if the object of the offence is a person referred to in chapter 40, section 11, paragraph (2), (3) or (5) or a foreign public official who is in the service of the International Criminal Court,
 - (4) sections 13, 14, 14a and 14b of chapter 16 and even if the provisions are applied pursuant to section 20 of the same chapter,
 - (5) section 18, 18a or 19 of chapter 17,

- (6) sections 6, 7 or 8a-8c of chapter 20,
- (7) sections 1-5, 9 or 9a of chapter 20, if the act is directed at a person below the age of eighteen years,
- (8) sections 7, 7a, 8 or 8a of chapter 30 and even if these provisions are applied on the basis of section 14 of said chapter, or
- (9) sections 1 - 4 of chapter 40 or 4a, if the offender is a member of Parliament, a foreign public official or a member of a foreign parliament. (637/2011)

Do you have a national policy or action plan to address the issue of migrant smuggling?

Finland has no particular national policy or action plan concerning this issue.

Where possible, please provide information regarding:

Number of apprehended smugglers:

Information is not available.

Number of investigations instigated against migrant smugglers:

In 2014 were 125 persons (132 offences) suspected of arrangement of illegal immigration and 53 persons (22 offences) suspected of aggravated arrangement of illegal immigration.

Number of successful prosecutions of migrant smugglers:

In 2014 in district courts were 30 sentences for arrangement of illegal immigration and 2 sentences for aggravated arrangement of illegal immigration.

In your country, is international cooperation on smuggling of migrants (specifically on mutual legal assistance and extradition) afforded

- **by statute?**
- **by treaty or other agreement or arrangement (multilateral or bilateral)?**
- **by virtue of reciprocity or comity?**

Is the provision of mutual legal assistance subject to the double criminality requirement according to your domestic legal framework?

Mutual legal assistance in criminal matters

Mutual legal assistance in criminal matters can be afforded based on the Act on International Legal Assistance in Criminal Matters (4/1994) even in the absence of a treaty. International assistance in criminal matters can be afforded also pursuant treaties or other arrangements to which Finland is a Party. Especially in relation to Member States of the European Union specific legislation in relation to international assistance in criminal matters can also be applied.

The Act on International Legal Assistance in Criminal Matters does not require reciprocity. However, the Ministry of Justice may decide that assistance be refused, where the requesting state would not afford corresponding assistance pursuant to a request for assistance made by a Finnish authority.

According to the Act on International Legal Assistance in Criminal Matters, the double criminality requirement is applied to coercive measures. Where coercive measures are requested or where the request otherwise involves the use of coercive measures under the Coercive Measures Act (806/2011),

such measures shall not be used, where not permitted under Finnish law had the offence to which the request relates been committed in Finland in similar circumstances.

Extradition

Extradition can be based on the Extradition Act (456/1970) even in the absence of a treaty. Extradition can also be based on treaties to which Finland is a Party. The Act does not require reciprocity.

In relation to Member States of the European Union the Act on Extradition On the Basis of an Offence Between Finland and Other Member States of the European Union (1286/2003) is applied. The Act does not require reciprocity.

In relation to Nordic States the Act on Extradition On the Basis of an Offence Between Finland and Other Nordic States (1383/2007) is applied. The Act does not require reciprocity.

In your experience, is international co-operation regarding prosecution of migrant smugglers effective? Please specify.

Prosecutors' experience in international co-operation related matters has been quite effective and mostly done with countries in Europe. The most recent co-operation partners have been Sweden and Austria with whom co-operation has been running very well and according to mutual plan.

Occasionally prosecutors need to do co-operation with countries outside EU or Europe. They have faced more difficulties with these countries compared to the co-operation with EU-countries. In relation to this some prosecutors mentioned especially Russia. However, some prosecutors have reported about good results in co-operations with Russia.

It has also turned out that in some cases authorities have been unwilling to investigate other international links than the one which shows from where the suspected persons has entered the country concerned. In such cases the completeness of the criminal activity would not come out. Many prosecutors referred to Eurojust and thanked Eurojust for its good assistance in facilitating the mla-procedure.

In terms of international co-operation, what legal and/or practical obstacles have been encountered as regards co-operation with:

- **Council of Europe Member States:**
- **Third party states:**

Do you think existing Council of Europe instruments on international co-operation in criminal matters (Mutual legal assistance, extradition) are effective in dealing with migrant smuggling? If not, please specify.

The National Bureau of Investigation serves as the international criminal exchange hub in the Police and hosts the national centres of Interpol, Europol and Schengen cooperation. In general, the information systems as well as instruments in use are adequate. The effectiveness of cooperation varies from country to country. The Police has had, e.g. good pre-trial cooperation with some European countries where JITs (Joint Investigation Team) have been established. In some cases, however, the Police do not receive any reply to their request at all or the reply will be delayed causing serious problems to the investigation. These kind of problems relate mainly to third countries (not EU Member States).

The Finnish Border Guard carries through international cooperation in criminal matters regarding illegal entry into the country mainly in the area of the Gulf of Finland Coast Guard District and to some extent also

in the eastern Finland Coast Guard District. Other Districts have much less international cooperation, or none. The amounts of requests for legal aid in the Finnish Border Guard have not been substantial.

Altogether it can be concluded that the existing instruments prove to be sufficient and no legal obstacles for international cooperation could be detected. Practical obstacles for international cooperation are mainly on a general level, e.g. that the replies from Member States as well as third party states have been partly insufficient or there have been delays in replies, or that replies have not been received altogether. However, no substantial practical obstacles have been identified.

According to the Finnish Prosecution Service no legal obstacles have been noticed with Council of Europe Member States. However, the biggest practical obstacles relate to the delays in the execution of the requests, insufficient information about the execution of or state of the play of the requests despite several inquiries on the part concerned. It has also been noted that the diplomatic channels are far too slow and lead to difficulties in meeting deadlines. The way of communication should be much more fluent and the procedure more simplified with those countries which require using diplomatic channels. (13 a)

What said above applies to both Council of Europe Member States and third states. However, prosecutors' co-operation with some countries in Asia and Middle-East has turned out to be very difficult, often almost impossible because they do not react to the requests at all (13 b.).

According to the Finnish Prosecution Service it is worth mentioning that co-operation with EU-countries goes well. In general the existing Council of Europe instruments seem to be sufficient. The most important thing is to have as many countries as possible to join (ratify) these instruments. Many of the existent difficulties relate to the fact that 1) it is hard to know/find the competent executing authority, 2) the channels are far too slow, 3) the communication tools or procedure are complicated.

Latvia

Do you have any laws or legislative measures covering the issue of migrant smuggling?

Is the issue set out in general criminal law or are there specific provisions dealing with the problem?

Yes, smuggling of migrants is addressed in Criminal Law, by stating the liability for illegal movement of a person across the State border.

Is the smuggling of migrants a criminal offence under domestic law?

Does national law include a definition of migrant smuggling?

Criminal Law doesn't provide exact definition, but the Section 285 of the Criminal Law states the liability for illegal movement of a person across the State border.

How is this conduct defined?

As mentioned above

What are the material elements of the crime?

Actus reus of the offence stated in Section 285 of the Criminal Law is:

- 1) Object of the crime is administrative order in ensuring the border regime of the Republic of Latvia
- 2) Objective side manifests as active actions – the illegal movement of one or more persons across the state border by any transport, technical means, or means of other kind (also by swimming or on foot). The person who commits the crime can also cross the border illegally himself therefore in this case the offence should be qualified in aggregation with Article 284 of the criminal law (that states the liability for illegal crossing of the border).
- 3) The offence is considered to be complete, when the offender has illegally moved person or persons across the state border.
- 4) Special qualifying circumstances that are mentioned in the article:
 - the offence is committed by public official;
 - the offence is committed by an organised group;
 - the offence has resulted in serious consequences;
 - illegal movement of a large number of persons, that is, more than five persons at one time
 - the offence has resulted in the death of two or several human beings

Is “financial gain” an element of the definition of smuggling of migrants?

The Section 285 of the Criminal Law does not include “financial gain”, but includes other qualifying circumstances as stated above.

Could you please provide, if possible, the relevant texts (in English or in French)?

Section 285 of the Criminal Law. Illegal Movement of a Person Across the State Border

(1) For a person who commits illegal movement of a person across the State border, the applicable punishment is deprivation of liberty for a term up to two years or temporary deprivation of liberty, or community service, or a fine.

(2) For a person who commits the same acts, if they have been committed by a public official using his or her official position,

the applicable punishment is deprivation of liberty for a term up to four years or temporary deprivation of liberty, or community service, or a fine, with or without confiscation of property.

(3) For a person who commits the same acts, if they have been committed by an organised group or they have resulted in serious consequences, or also who commits illegal movement of a large number of persons, that is, more than five persons at one time, across the State border,

the applicable punishment is deprivation of liberty for a term up to seven years, with or without confiscation of property and with or without police supervision for a term up to three years.

(4) For the same acts, if they have resulted in the death of two or several human beings,

the applicable punishment is deprivation of liberty for a term up to ten years and with probationary supervision for a term up to three years.

Are the following activities criminalized under national legislation:

Attempts to smuggle migrants

Yes, the attempt is criminalized in accordance with Section 285 of the Criminal Law and paragraph 2 of Section 15 of the Criminal Law (that states the liability for attempt).

Participation as an accomplice in the smuggling of migrants

Yes, participation is criminalized in accordance with Section 285 of the Criminal Law and Section 20 (joint participation) of the Criminal Law.

Acting as instigator of the smuggling of migrants

Yes, participation is criminalized in accordance with Section 285 of the Criminal Law and Section 20 (joint participation) of the Criminal Law.

Migrant smuggling as part of a criminal organization

Yes, paragraph 3 of Section 285 of the Criminal Law states liability in cases when illegal movement of a person across the State border has been committed by an organised group.

Circumstances that endanger, or are likely to endanger, the lives or safety of smuggled migrants

Yes, paragraph 3 and 4 of Section 285 of the Criminal Law states liability in cases when illegal movement of a person across the State border has resulted in serious consequences or death of two or several human beings.

Does your domestic legislation permit use of special investigative techniques for the purpose of investigating the smuggling of migrants such as

Interceptions of telecommunication; Yes

Undercover operations; Yes

Financial investigations: including access to bank, financial or commercial records and/or databases; Yes

specific form of protection for witnesses; Yes (but is not considered as special investigative technique but as special procedural protection)

others; Please specify.

The full list of special investigative actions as stated in the Criminal Procedure Law:

- 1) control of legal correspondence;
- 2) control of means of communication;
- 3) control of data in an automated data processing system;
- 4) control of the content of transmitted data;
- 5) audio-control of a site or a person;
- 6) video-control of a site;
- 7) surveillance and tracking of a person;
- 8) surveillance of an object;
- 9) a special investigative experiment;
- 10) the acquisition in a special manner of the samples necessary for a comparative study;
- 11) control of a criminal activity.

Does your domestic legislation enable seizure and/or confiscation:

of property, equipment or other instrumentalities used in or destined for use in offences related to smuggling of migrants? Yes

of proceeds of crime derived from offences related to smuggling of migrants ? If yes specify the main features of the legal framework. Yes, as stated below in Section 355 of the Criminal Law (paragraph 1 and 2 subparagraph 6)

Section 355. Criminally Acquired Property

(1) Property shall be recognised as criminally acquired, if such property directly or indirectly has come into the property or possession of a person as a result of a criminal offence.

(2) If the opposite has not been proven, property, including financial resources, shall be recognised as criminally acquired if such property or resources belong to a person who:

- 1) is a member of an organised criminal group, or supports such group;
- 2) has him or herself engaged in terrorist activities, or maintains permanent relations with a person who is involved in terrorist activities;
- 3) has him or herself engaged in the trafficking of human beings, or maintains permanent relations with a person who is engaged in the trafficking of human beings;
- 4) has him or herself engaged in criminal activities with narcotic or psychotropic substances, or maintains permanent relations with a person who is engaged in such activities;
- 5) has him or herself engaged in criminal activities with counterfeit currency, State financial instruments or maintains constant relations with a person who is involved in such activities;
- 6) has him or herself engaged in criminal activities in order to cross the State boundary or to promote relocation of another person across the State boundary, or to ensure a possibility to other persons to reside illegally in the Republic of Latvia, or maintains constant relations with a person who is involved in such activities;
- 7) has him or herself engaged in criminal activities in relation to child pornography or sexual abuse of children, or maintains constant relations with a person who is involved in such activities.

(3) Within the meaning of this Section, the maintenance of permanent relations with another person who is engaged in specific criminal activities means that the person lives together with a second person or controls, determines, or influences the behaviour thereof.

Is trafficking in persons defined under national law?

If so, how does this definition differ from that of migrant smuggling?

Yes. Human trafficking is defined as the recruitment, transportation, transfer, concealment, accommodation or reception of persons for the purpose of exploitation, committed by using violence or threats or by means of deceit, or by taking advantage of the dependence of the person on the offender or of his or her state of vulnerability or helplessness, or by the giving or obtaining of material benefits or benefits of another nature in order to procure the consent of such person, upon which the victim is dependent. Article 285 of the Criminal law only states the liability for illegal movement of a person across the State border.

Section 154² of the Criminal Law. Meaning of Human Trafficking

(1) Human trafficking is the recruitment, transportation, transfer, concealment, accommodation or reception of persons for the purpose of exploitation, committed by using violence or threats or by means of deceit, or by taking advantage of the dependence of the person on the offender or of his or her state of vulnerability or helplessness, or by the giving or obtaining of material benefits or benefits of another nature in order to procure the consent of such person, upon which the victim is dependent.

(2) The recruitment, transportation, transfer, concealment, accommodation or reception of a minor for the purpose of exploitation shall be recognised as human trafficking also in such cases, if it is not connected with the utilisation of any of the means referred to in the Paragraph one of this Section.

(3) Within the meaning of this Section, exploitation is the involvement of a person in prostitution or in other kinds of sexual exploitation, the compulsion of a person to perform labour, to provide services or to commit criminal offences, the holding of a person in slavery or other similar forms thereof (debt slavery, serfdom or compulsory transfer of a person into dependence upon another person), and the holding a person in servitude or also the illegal removal of a person's tissues or organs.

(4) Within the meaning of this Section state of vulnerability means using the circumstances when a person does not have another actual or acceptable choice, only to submit to exploitation.

In relation to your country, are there any international, regional or bilateral agreements which address the issue of migrant smuggling?

Latvia has several bilateral agreements such as:

0. Agreement between the government of the Republic of Latvia and the Government of the Russian Federation on cooperation in questions of border guard services;
1. Agreement between the government of the Republic of Latvia and the government of the Republic of Lithuania on cooperation in combating organized crime and other offences and on joint actions in border regions;
2. Agreement between the government of the Republic of LATVIA and the Government of the Republic of ESTONIA on CROSS - BORDER cooperation in combating crime;
3. Agreement between the government of the Republic of Latvia and the Government of the Republic of Byelorussia on cross border cooperation in combating organized crime, trafficking of narcotic, psychoactive and precursors, terrorism and other criminal offences;
4. Latvia also has binding international agreements in field of police cooperation for example – Agreement between the government of the Republic of Latvia and the Government of the Russian Federation on cooperation in combating crime, especially forms of organized crimes and Agreement between the government of the Republic of Latvia and the Government of the Republic of Armenia on cooperation in combating terrorism, organized crime, trafficking of narcotic, psychoactive and precursors and other criminal offences.

Does your country have jurisdiction to prosecute crimes related to smuggling of migrants when they are committed outside its territory? If yes, specify the legal framework.

The Criminal Law doesn't apply different jurisdiction towards prosecution offences related to smuggling. The jurisdiction outside territory of Latvia is stated in Section 4 of the Criminal Law as set out below:

Section 4. Applicability of The Criminal Law Outside the Territory of Latvia

(1) Latvian citizens, non-citizens and foreigners who have a permanent residence permit for the Republic of Latvia, shall be held liable, in accordance with this Law, in the territory of Latvia for an offence committed in the territory of another state or outside the territory of any state irrespective of whether it has been recognised as criminal and punishable in the territory of commitment.

(1¹) For an offence committed by a natural person acting in the interests of a legal person registered in the Republic of Latvia, for the benefit of the person or as a result of insufficient supervision or control thereof in the territory of another state or outside the territory of any state irrespective of whether it has been recognised as criminal and punishable in the territory of commitment the legal person may be applied the coercive measures provided for in this Law.

(2) Soldiers of the Republic of Latvia who are located outside the territory of Latvia shall be held liable for criminal offences in accordance with this Law, unless it is provided otherwise in international agreements binding upon the Republic of Latvia.

(3) Foreigners who do not have permanent residence permits for the Republic of Latvia and who have committed serious or especially serious crimes in the territory of another state which have been directed against the Republic of Latvia or against the interests of its inhabitants, shall be held criminally liable in accordance with this Law irrespective of the laws of the state in which the crime has been committed, if they have not been held criminally liable or committed to stand trial in accordance with the laws of the state where the crime was committed.

(4) Foreigners who do not have a permanent residence permit for the Republic of Latvia and who have committed a criminal offence in the territory of another state or outside the territory of any state, in the cases provided for in international agreements binding upon the Republic of Latvia, irrespective of the laws of the state in which the offence has been committed, shall be held liable in accordance with this Law if they have not been held criminally liable for such offence or committed to stand trial in the territory of another state.

Do you have a national policy or action plan to address the issue of migrant smuggling?

Yes two policy documents address this issue:

1. Plan on prevention and combating organized crime for year 2014 – 2016 (illegal immigration is addressed in this plan as one of the main priorities);
2. Guidelines on prevention of human trafficking for year 2014 – 2020.

Where possible, please provide information regarding:

Number of apprehended smugglers:

This year until 26th of October State police has detained 83 persons for illegal movement of a person across the State border

Number of investigations instigated against migrant smugglers:

This year until 30th of September State border guard has initiated 28 criminal proceedings, 13 of them have been transferred for prosecution.

Number of successful prosecutions of migrant smugglers:

The statistics can only be provided together on Article 285 of the Criminal Law and Article 284 of the Criminal Law, that states the liability for illegal crossing of the border.

Statistics for 2014:

- 13 cases transferred to court with accusation in total of 30 persons;
- in 1 case with accusation of 1 person the criminal proceedings have been finished by Public Prosecutor's Penal Order;
- in 4 cases with accusation in total of 5 persons the criminal proceedings have been finished by termination of criminal proceedings, conditionally releasing from criminal liability.

Statistics for first half of 2015:

- 13 cases transferred to court with accusation in total of 21 persons
- in 1 case the criminal proceedings have been finished by Public Prosecutor's Penal Order.

In your country, is international cooperation on smuggling of migrants (specifically on mutual legal assistance and extradition) afforded

by statute? Yes

by treaty or other agreement or arrangement (multilateral or bilateral)? Yes

by virtue of reciprocity or comity? Yes

Is the provision of mutual legal assistance subject to the double criminality requirement according to your domestic legal framework? No

In your experience, is international co-operation regarding prosecution of migrant smugglers effective? Please specify.

In the view of Prosecutor's General's Office the cooperation that is carried out within the framework of international judicial co-operation is comprehensive and sufficient.

The ministry of Interior pointed out that operational cooperation is more flexible and varied, therefore also more effective, because the law states only basic principles for cooperation, therefore it is easier to carry out operative cooperation. On the other hand cooperation within the criminal proceeding has more strict regulation, and takes longer time; therefore it is more difficult to cooperate with third (non-EU) countries.

In terms of international co-operation, what legal and/or practical obstacles have been encountered as regards co-operation with:

Council of Europe Member States: None

Third party states: None

Do you think existing Council of Europe instruments on international co-operation in criminal matters (Mutual legal assistance, extradition) are effective in dealing with migrant smuggling? If not, please specify.

The existing international judicial co-operation instruments are sufficiently effective.

Serbia

Do you have any laws or legislative measures covering the issue of migrant smuggling?

Is the issue set out in general criminal law or are there specific provisions dealing with the problem?

Yes, in the general criminal law (The Criminal Code and The Criminal Procedure Code).

Is the smuggling of migrants a criminal offence under domestic law?

Does national law include a definition of migrant smuggling?

No

How is this conduct defined?

Article 350, Paragraph 2 of The Criminal Code stipulates that whoever with intent to acquire a benefit for himself or another makes it possible for another to illegally cross the Serbian border or to illegally stay in or transit through Serbia shall be punished by imprisonment of from six months to five years.

What are the material elements of the crime?

Article 350, Paragraph 2 of The Criminal Code stipulates that whoever with intent to acquire a benefit for himself or another makes it possible for another to illegally cross the Serbian border or to illegally stay in or transit through Serbia shall be punished by imprisonment of from six months to five years.

Is “financial gain” an element of the definition of smuggling of migrants?

Yes

Could you please provide, if possible, the relevant texts (in English or in French)?

Article 350 of The Criminal Code

(1) Whoever without a required permission crosses or attempts to cross the border of Serbia, carrying a weapon or using force, shall be punished by imprisonment of up to one year.

(2) Whoever with intent to acquire a benefit for himself or another makes it possible for another to illegally cross the Serbian border or to illegally stay in or transit through Serbia shall be punished by imprisonment of from six months to five years.

(3) If the offence referred to in paragraph 2 of this Article is committed by a group, by abuse of authority or in a manner endangering the lives and health of persons whose illicit crossing of the Serbian border, sojourn or transit is being facilitated, or if a substantial number of persons is being smuggled, the perpetrator shall be punished by imprisonment from one to ten years.

(4) If the offence specified in paragraph 2 of this Article is committed by an organized group, the offender shall be punished by imprisonment of from three to twelve years.

(5) The means intended or used for commission of the offence referred to in paragraphs 1 through 3 of this Article shall be impounded.

Are the following activities criminalized under national legislation:

Attempts to smuggle migrants

Yes, according to the article 30 of The Criminal Code:

Attempt
Article 30

(1) Whoever commences the perpetration of a criminal offence with intent, but does not complete it, shall be punished for an attempted criminal offence punishable by law with terms of imprisonment of five years or longer, and for attempted commission of other criminal offences only where the law explicitly provides for sanctions for such attempts.

(2) Perpetrators shall be punished for attempted criminal offences with the penalties prescribed for the criminal offence, or a mitigated penalty.

Participation as an accomplice in the smuggling of migrants

Yes, according to the articles 33 and 35 of The Criminal Code:

Co-perpetration
Article 33

Where several persons jointly commit a criminal offence by taking part in the commission with intent or by negligence, or substantively contribute to the commission of a criminal offence by carrying out another action with intent and based on a joint decision, each of shall be punished with the penalty prescribed for that offence.

Aiding and Abetting

Article 35

(1) Whoever with intent aids another in the commission of a criminal offence shall be punished with the penalty prescribed for that criminal offence, or a mitigated penalty.

(2) The following, in particular, shall be deemed as aiding and abetting in the commission of a criminal offence: providing instructions or advice on how to commit the criminal offence, placing at the disposal of the perpetrator the necessary means to commit the criminal offence, creating the necessary conditions or removing obstacles for the commission of the criminal offence, issuing prior promises to conceal the commission of the criminal offence, the offender, evidence of the criminal offence, and items acquired by the commission of the criminal offence.

Acting as instigator of the smuggling of migrants

Yes, according to the article 34 of The Criminal Code:

Instigation
Article 34

(1) Whoever with intent instigates another to commit a criminal offence shall be punished with the penalty prescribed for that criminal offence.

(2) Whoever with intent instigates another to commit a criminal offence whose attempt is punishable by law, but the offence is not attempted, shall be punished as if for an attempted criminal offence.

Migrant smuggling as part of a criminal organization

Yes

Article 350 Paragraph 4 of The Criminal Code stipulates that If the offence specified in paragraph 2 of this Article is committed by an organized group, the offender shall be punished by imprisonment of from three to twelve years.

Circumstances that endanger, or are likely to endanger, the lives or safety of smuggled migrants

Yes

Article 350 Paragraph 3 stipulates that If the offence referred to in paragraph 2 of this Article is committed by a group, by abuse of authority or in a manner endangering the lives and health of persons whose illicit crossing of the Serbian border, sojourn or transit is being facilitated, or if a substantial number of persons is being smuggled, the perpetrator shall be punished by imprisonment from one to ten years.

Does your domestic legislation permit use of special investigative techniques for the purpose of investigating the smuggling of migrants such as

Yes

Article 161 of The Criminal Procedure Code is provided special evidentiary actions may be ordered against a person for whom there are grounds for suspicion that he has committed a criminal offence referred to in Article 162 of this Code, and evidence for criminal prosecution cannot be acquired in another manner, or their gathering would be significantly hampered.

Special evidentiary actions may also exceptionally be ordered against a person for whom there are grounds for suspicion that he is preparing one of the criminal offences referred to in paragraph 1 of this Article, and the circumstances of the case indicate that the criminal offence could not be detected, prevented or proved in another way, or that it would caused is proportionate difficulties or a substantial danger. In deciding on ordering and the duration of special evidentiary actions, the authority conducting proceedings will especially consider whether the same result could be achieved in a manner less restrictive to citizens' rights.

Article 162 paragraph 1 of The Criminal Procedure Code is provided criminal offences in respect of which special evidentiary actions are applied. This article stipulates that under the conditions referred to in Article 161 of this Code, special evidentiary actions may be ordered for the following criminal offences:

1) those which according to separate statute fall within the competence of a prosecutor's office of special jurisdiction;

2) aggravated murder (Article 114 of the Criminal Code), abduction (Article 134 of the Criminal Code), showing, procurement and possession of pornographic materials and exploiting juveniles for pornography (Article 185 paragraphs 2 and 3 of the Criminal Code), extortion (Article 214 paragraph 4 of the Criminal Code), counterfeiting money (Article 223 paragraphs 1 to 3 of the Criminal Code), money laundering (Article 231 paragraphs 1 to 4 of the Criminal Code), unlawful production and circulation of narcotic drugs (Article 246 paragraphs 1 to 3 of the Criminal Code), threatening independence (Article 305 of the Criminal Code), threatening territorial integrity (Article 307 of the Criminal Code), sedition (Article 308 of the Criminal Code), inciting sedition (Article 309 of the Criminal Code), subversion (Article 313 of the Criminal Code), sabotage (Article 314 of the Criminal Code), espionage (Article 315 of the Criminal Code), divulging state secrets (Article 316 of the Criminal Code), inciting national, racial and religious hatred or intolerance (Article 317 of the Criminal Code), violation of territorial sovereignty (Article 318 of the Criminal Code), conspiring to conduct activities against the Constitution (Article 319 of the Criminal Code), plotting an offences against the constitutional order and security of Serbia (Article 320 of the Criminal Code), serious offences against the constitutional order and security of Serbia (Article 321 of the Criminal Code), illegal manufacture, possession and sale of weapons and explosive materials (Article 348 paragraph 3 of the Criminal Code), illegal crossing of the national boarder and human trafficking (Article 350 paragraphs 2 and 3 of the Criminal Code), abuse of office (Article 359 of the Criminal Code),

trading in influences (Article 366 of the Criminal Code), taking bribes (Article 367 of the Criminal Code), offering bribes (Article 368 of the Criminal Code), human trafficking (Article 388 of the Criminal Code), taking hostages (Article 392 of the Criminal Code) and the criminal offence referred to in Article 98 paragraphs 3 to 5 of the Law on the Secrecy of Data.

Interceptions of telecommunication

Yes

The Article 166 of The Criminal Procedure Code stipulates conditions for ordering:

If the conditions referred to in Article 161 paragraphs 1 and 2 of this Code are fulfilled, acting on a reasoned request by the public prosecutor the court may order interception and recording of communications conducted by telephone or other technical means or surveillance of the electronic or other address of a suspect and the seizure of letters and other parcels.

Undercover operations;

Yes

The Article 183 of The Criminal Procedure Code stipulates conditions for ordering:

If the conditions referred to in Article 161 paragraphs 1 and 2 of this Code are fulfilled, acting on a reasoned motion by the public prosecutor the court may order the deployment of an undercover investigator if evidence for criminal prosecution cannot be secured by other special evidentiary actions or if their collection would be made substantially more difficult.

Financial investigations: including access to bank, financial or commercial records and/or databases;

Yes

The Article 143 of The Criminal Procedure Code stipulates checking accounts and suspicious transactions:

Object of Checking

Article 143

If there exist grounds for suspicion that a person suspected of a criminal offence punishable by a term of imprisonment of four or more years, or of the criminal offence of showing, procuring and possessing pornographic materials and exploiting juvenile persons for pornography (Article 185 paragraph 4 of the Criminal Code), money laundering (Article 231 paragraph 5 of the Criminal Code), trading in influences (Article 366 paragraph 2 of the Criminal Code), taking bribes (Article 367 paragraph 4 of the Criminal Code) and giving bribes (Article 368 paragraph 2 of the Criminal Code) possesses accounts or conducts transactions, the authority conducting proceedings may order that accounts or suspicious transactions be checked.

The check referred to in paragraph 1 of this article encompasses:

- 1) acquiring data;
- 2) monitoring of suspicious transactions;
- 3) temporarily suspending a suspicious transaction.

specific form of protection for witnesses;

Yes, according to the articles 105-110 of The Criminal Procedure Code:

Protected Witness

Article 105

If there exist circumstances which indicate that by giving testimony or answering certain questions a witness would expose himself or persons close to him to a danger to life, health, freedom or property of substantial size, the court may authorise one or more measures of special protection by issuing a ruling determining a status of protected witness.

The measures of special protection include questioning the protected witness under conditions and in a manner ensuring that his identity is not revealed to the general public, and exceptionally also to the defendant and his defence counsel, in accordance with this Code.

Measures of Special Protection

Article 106

The measures of special protection ensuring that the identity of a protected witness is not revealed to the public are excluding the public from the trial and prohibition of publication of data about the identity of the witness.

The measure of special protection whereby data about the identity of a protected witness is withheld from the defendant and his defence counsel may be ordered by the court exceptionally if after taking statements from witnesses and the public prosecutor it determines that the life, health or freedom of the witness or a person close to him is threatened to such an extent that it justifies restricting the right to defence and that the witness is credible.

The identity of the protected witness withheld in accordance with paragraph 2 of this Article will be revealed by the court to the defendant and his defence counsel no later than 15 days before the commencement of the trial.

In deciding on the measures of special protection referred to in paragraphs 1 and 2 of this Article, the court will endeavour to order a harsher measure only if the purpose cannot be achieved by the application of a more lenient measure.

Initiating Proceedings for Determining Protected Witness Status

Article 107

The status of a protected witness may be granted by the court ex officio, or at the request of the public prosecutor or the witness himself.

The request referred to in paragraph 1 of this Article contains: the witness's personal data, data on the criminal offence in connection with which the witness is being examined, facts and evidence indicating that in the case of giving testimony there exists a danger to the life, body, health or property of substantial size of the witness or persons close to him, and a description of the circumstances to which the provision of evidence relates.

The request is submitted in a sealed cover marked "witness protection – strictly confidential" and is submitted during the investigation to the judge for preliminary proceedings, and after the indictment is confirmed, to the president of the panel.

If during his examination the witness withholds the provision of the data referred to in Article 95 paragraph 3 of this Code or his replies to certain questions, or refuses to give testimony, with the explanation that the circumstances referred to in Article 105 paragraph 1 of this Code exist, the court will invite the witness to act within three days in accordance with the provisions of paragraphs 2 and 3 of this Article.

If it deems the withholding of data, replies, or testimony clearly unfounded, or the witness fails to act in accordance with the provisions of paragraphs 2 and 3 of this Article within the prescribed time limit, the court will apply the provisions of Article 101 paragraph 2 of this Code.

Deciding on Determining Protected Witness Status
Article 108

During the investigation the judge for preliminary proceedings decides on determining protected witness status by issuing a ruling, and after the indictment is confirmed, the panel. The public is excluded from the trial if the decision is taken at that time (Article 363), without the exceptions prescribed by Article 364 paragraph 2 of this Code.

The ruling determining protected witness status contains a pseudonym of the protected witness, the duration of the measure and the manner in which it will be implemented: alteration or erasure from the record of data on the identity of the witness, concealment of the witness's appearance, examination from a separate room with distortion of the witness's voice, examination using technical devices for transferring and altering sound and picture.

The parties and the witness may appeal against the ruling referred to in paragraph 1 of this Article.

An appeal against a ruling of the judge for preliminary proceedings is decided on by the panel (Article 21 paragraph 4), and in other cases the panel (Article 21 paragraph 4) of the immediately higher court. A decision on the appeal is rendered within three days of the date of receiving documentation.

Examining a Protected Witness
Article 109

When the ruling determining protected witness status become final, the court will, by a special order that represents a secret, confidentially notify the parties, defence counsel and the witness about the date, hour and location of the questioning of the witness.

Before the commencement of the questioning the protected witness is notified that his identity will not be revealed to anyone but the court, the parties and the defence counsel, or only to the court and the public prosecutor, under the conditions referred to in Article 106 paragraphs 2 and 3 of this Code, and is informed about the manner in which he will be examined.

The court will caution all those present that they are required to keep confidential data on the protected witness and persons close to him and on other circumstances which may lead to the exposure of their identities, and that divulging a secret represents a criminal offence. The caution and the names of those present will be entered in the record.

The court will deny any question that requires an answer that might reveal the identity of the protected witness. If the examination of the protected witness is being conducted using technical means for altering sound and image, they are handled by a professional.

The protected witness signs the minutes with the pseudonym.

Protecting Data on a Protected Witness
Article 110

Data on the identities of the protected witness and persons close to him and on other circumstances which may lead to the exposure of their identities will be sealed under a separate cover marked "protected witness – strictly confidential", sealed and submitted for safekeeping to the judge for preliminary proceedings.

The sealed cover may be opened only by a court deciding on a legal remedy against a judgment. The reason, date and hour of its opening and the names of the members of the panel informed about the data referred to in paragraph 1 of this Article will be marked on the cover. The cover will thereafter be resealed, the date and time of resealing being indicated on the cover, and returned to the judge for preliminary proceedings.

The data referred to in paragraph 1 of this Article represent secret data. Besides public officials, all other persons who learn about them in any capacity whatsoever are required to maintain their confidentiality.

others; Please specify.

Yes

- covert surveillance and recording (Article 171 of The Criminal Procedure Code):

Article 171

If the conditions referred to in Article 161 paragraphs 1 and 2 of this Code are fulfilled, acting on a reasoned motion of the public prosecutor the court may order covert surveillance and [audio and video] recording of a suspect for the purpose of:

- 1) detecting contacts or communication of the suspect in public places where access is limited or in premises, except in a dwelling;
- 2) determining the identity of a person or locating persons or things.

The locations or premises referred to in paragraph 1 item 1) of this Article or vehicles belonging to other persons may be the object of covert surveillance and [audio and video] recording only if it is probable that the suspect will be present there or that he is using those vehicles.

- computer searches of already processed personal data (Article 178 of The Criminal Procedure Code):

Article 178

If the conditions referred to in Article 161 paragraphs 1 and 2 of this Code are fulfilled, acting on a reasoned motion by the public prosecutor the court may order computer searches of already processed personal data and other data and their comparison with data relating to the suspect and the criminal offence .

Does your domestic legislation enable seizure and/or confiscation:

of property, equipment or other instrumentalities used in or destined for use in offences related to smuggling of migrants?

Yes

The Article 350 Paragraph 5 of The Criminal Code stipulates:

„The means intended or used for commission of the offence referred to in paragraphs 1 through 3 of this Article shall be impounded.”

of proceeds of crime derived from offences related to smuggling of migrants ? If yes specify the main features of the legal framework.

Yes

The Article 92 of The Criminal Code stipulates:

„ (1) Money, valuables and all other material gains obtained by a criminal offence shall be seized from the offender, and if such seizure should not be possible, the offender shall be obligated to hand over another material goods corresponding to the value of the assets gained by the commission of the criminal offence, or pay a pecuniary amount commensurate with obtained material gain.

(2) Material gains obtained by a criminal offence shall also be seized from persons to whom they were transferred without compensation, or with compensation that was obviously disproportionate to their actual value.

(3) Where material gain is wrongfully obtained for another, such gain shall be seized.”

Is trafficking in persons defined under national law?

Yes

If so, how does this definition differ from that of migrant smuggling?

Article 388 of The Criminal Code stipulates a criminal offense Human Trafficking:

„(1) Whoever by force or threat, deception or maintaining deception, abuse of authority, trust, dependency relationship, difficult circumstances of another, retaining identity papers or by giving or accepting money or other benefit, recruits, transports, transfers, sells, buys, acts as intermediary in sale, hides or holds another person with intent to exploit such person’s labour, forced labour, commission of offences, prostitution, mendacity, pornography, removal of organs or body parts or service in armed conflicts shall be punished by imprisonment of from three to twelve years.

(2) When the offence referred to in paragraph 1 of this Article is committed against a juvenile, the offender shall be punished by the penalty prescribed for that offence even if there was no use of force, threat or any of the other mentioned methods of perpetration.

(3) If the offence referred to in paragraph 1 of this Article is committed against a juvenile, the offender shall be punished by imprisonment of a minimum of five years.

(4) If the offence referred to in paragraphs 1 and 3 of this Article resulted in serious bodily injury of a person, the offender shall be punished by imprisonment of from five to fifteen years.

(5) If the offence referred to in paragraphs 1 and 3 of this Article resulted in the death of one or more persons, the offender shall be punished by imprisonment of a minimum of ten years.

(6) Whoever habitually engages in offences referred to in paragraphs 1 to 3 of this Article or if the offence is committed by a group shall be punished by imprisonment of a minimum of five years.

(7) If the offence referred to in paragraphs 1 to 3 of this Article is committed by an organised group, the offender shall be punished by imprisonment of a minimum of ten years.

(8) Whoever knows or should know that a person is a victim of trafficking, and abuses his/her position or allow to another to abuse his/her position for the exploitation referred to in paragraph 1 this Article, shall be punished by imprisonment from six months to five years.

(9) If the offence referred to in paragraph 8 of this Article is committed against a juvenile, the offender shall be punished by imprisonment of from six months to five years.

(10) The agreement of persons to be exploited or placed in slavery or servitude referred to in paragraph 1 this Article shall not affect the existence of the criminal offence referred to in paragraphs 1, 2 and 6 of this Article.”

In relation to your country, are there any international, regional or bilateral agreements which address the issue of migrant smuggling?

The Republic of Serbia has ratified the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention against Transnational organized crime.

Does your country have jurisdiction to prosecute crimes related to smuggling of migrants when they are committed outside its territory? If yes, specify the legal framework.

Yes

The articles 8-10 of The Criminal Code stipulates:

Applicability of Criminal Legislation of Serbia to Serbian Citizens Committing Criminal Offences Abroad

Article 8

(1) The criminal legislation of Serbia shall also apply to citizens of Serbia who commit other criminal offences in foreign states other than those referred to in Article 7 of this Code, if found on the territory of Serbia, or extradited to Serbia.

(2) Under the conditions referred to in paragraph 1 of this Article, the criminal legislation of Serbia shall also apply to offenders who became citizens of Serbia after the commission of their offences.

Applicability of Criminal Legislation of Serbia to Foreign Citizens Committing Criminal Offences in Foreign Countries

Article 9

(1) The criminal legislation of Serbia shall also apply to foreign citizens who commit outside the territory of Serbia criminal offences against Serbia or its citizens even other than those referred to in Article 7 of this Code, if found on the territory of Serbia, or extradited to Serbia.

(2) The criminal legislation of Serbia shall also apply to foreign citizens who commit in foreign countries criminal offences against a foreign country or a foreign citizen which are under the law of the country where they were committed punishable by a term of imprisonment of five years or a more severe penalty, if found on the territory of Serbia and are not extradited to a foreign state. Unless specified otherwise by this Code, in such cases the court shall not impose penalties more severe than those prescribed by the law of the state in which the criminal offence was committed.

Special Requirements for Criminal Prosecution for Criminal Offences Committed in Foreign Countries

Article 10

(1) In the cases referred to in Articles 8 and 9 of this Code, criminal prosecution shall not be undertaken in the following cases:

- 1) if the offender has served in full the sentence to which he was convicted abroad;
- 2) if the offender was acquitted abroad by a final judgement, or the statute of limitations has expired, or the offender was pardoned;
- 3) if an offender of unsound mind was subjected to a relevant security measure abroad;
- 4) where under a foreign statute criminal prosecution requires an application by an aggrieved person, and no such application was submitted.

(2) In cases referred to in Articles 8 and 9 of this Code, criminal prosecution shall only be undertaken when the criminal offences are also punishable by the law of the country where they were committed. Where in the cases referred to in Articles 8 and 9 paragraph 1 of this Code under the law of the country where the act was committed it does not constitute a punishable offence, criminal prosecution shall be initiated only with the consent of the Republican Public Prosecutor.

(3) In the case referred to in Article 9 paragraph 2 of this Code the act committed was at the time of its commission deemed a criminal offence according to the general principles of law recognised in international law, criminal prosecution may be initiated in Serbia with the consent of the Republican Public Prosecutor, irrespective of the law of the country where the criminal offence was committed.

Do you have a national policy or action plan to address the issue of migrant smuggling?

No

Where possible, please provide information regarding:

Number of apprehended smugglers:

According to the Article 350 of The Criminal Code – criminal offence: Illegal Border Crossings and Human Trafficking - apprehended 156 persons, in 2014;

Number of investigations instigated against migrant smugglers:

According to the Article 350 of The Criminal Code – criminal offence: Illegal Border Crossings and Human Trafficking - investigations instigated against 256 persons (perpetrators) and accused 283 persons (perpetrators), in 2014;

Number of successful prosecutions of migrant smugglers:

According to the Article 350 of The Criminal Code – criminal offence: Illegal Border Crossings and Human Trafficking successful prosecutions against 224 persons (perpetrators), in 2014.

In your country, is international cooperation on smuggling of migrants (specifically on mutual legal assistance and extradition) afforded

by statute? No

by treaty or other agreement or arrangement (multilateral or bilateral)? No

by virtue of reciprocity or comity? Yes

Is the provision of mutual legal assistance subject to the double criminality requirement according to your domestic legal framework? Yes

In your experience, is international co-operation regarding prosecution of migrant smugglers effective? Please specify.

Yes

In terms of international co-operation, what legal and/or practical obstacles have been encountered as regards co-operation with:

- **Council of Europe Member States:**
- **Third party states:**

None at the moment.

Do you think existing Council of Europe instruments on international co-operation in criminal matters (Mutual legal assistance, extradition) are effective in dealing with migrant smuggling? If not, please specify.

Yes

Switzerland

**Do you have any laws or legislative measures covering the issue of migrant smuggling?
Is the issue set out in general criminal law or are there specific provisions dealing with the problem?**

La thématique des passeurs est notamment réglée par l'art. 116 de la loi sur les étrangers du 16 décembre 2005¹. Il s'agit donc d'une loi spécifique concernant le domaine des ressortissants et non pas du Code pénal suisse du 21 décembre 1937². L'art. 116, intitulé « Incitation à l'entrée, à la sortie ou au séjour illégaux » a la teneur suivante :

Art. 116 Incitation à l'entrée, à la sortie ou au séjour illégaux

1 Est puni d'une peine privative de liberté d'un an au plus ou d'une peine pécuniaire quiconque:

- a. en Suisse ou à l'étranger, facilite l'entrée, la sortie ou le séjour illégal d'un étranger ou participe à des préparatifs dans ce but;
- a^{bis}. facilite, depuis la Suisse, l'entrée, le transit, la sortie ou le séjour illégal d'un étranger dans un Etat Schengen ou participe à des préparatifs dans ce but;
- b. procure à un étranger une activité lucrative en Suisse alors qu'il n'est pas titulaire de l'autorisation requise;
- c. facilite l'entrée d'un étranger sur le territoire national d'un autre Etat ou participe à des préparatifs dans ce but après son départ de Suisse ou de la zone internationale de transit des aéroports, en violation des dispositions sur l'entrée dans le pays applicables dans cet Etat.

2 Dans les cas de peu de gravité, la peine peut consister en une simple amende.

3 La peine encourue est une peine privative de liberté de cinq ans au plus additionnée d'une peine pécuniaire ou une peine pécuniaire si:

- a. l'auteur agit pour se procurer ou procurer à un tiers un enrichissement illégitime;
- b. l'auteur agit dans le cadre d'un groupe ou d'une association de personnes, formé dans le but de commettre de tels actes de manière suivie ».

La révision de la loi sur l'asile (LAsi) décidée le 25 septembre 2015³ doit permettre d'auditionner les requérants d'asile sur un éventuel trafic organisé de migrants (art. 26, al. 4, P-LAsi). Cette disposition n'est pas encore entrée en vigueur.

Is the smuggling of migrants a criminal offence under domestic law?

Does national law include a definition of migrant smuggling?

Non. Le trafic de migrants n'est pas défini dans la législation nationale. L'art. 116 LEtr est rédigé en termes généraux et s'applique à toute personne qui facilite l'entrée, la sortie ou le séjour illégal d'un étranger en Suisse.

How is this conduct defined?

L'art. 116 LEtr est lié à l'art. 115 LEtr (Entrée, sortie et séjour illégaux, exercice d'une activité lucrative sans autorisation). Toutes les activités de facilitation et de préparation qui incitent à l'entrée, la sortie ou le séjour illégal d'un étranger sont punissables. Tel est par exemple le cas de la planification d'itinéraires appropriés,

¹ RS 142.20 Loi fédérale du 16 décembre 2005 sur les étrangers (LEtr)

² RS 311.0 Code pénal suisse du 21 décembre 1937

³ RS 142.31 Loi du 26 juin 1998 sur l'asile (LAsi)

de la procuration de faux passeports ou documents, du trafic de migrants avec instructions par téléphone ou encore le fait de faire franchir la frontière à un étranger qui n'est pas autorisé à entrer ou sortir.

What are the material elements of the crime?

L'art. 116 LEtr étant lié à l'art. 115 LEtr, la présence d'un acte principal visé à l'art. 115 LEtr est nécessaire, c.-à-d. une tentative d'entrée ou de sortie illégale, un séjour illégal ou encore l'exercice d'une activité lucrative sans autorisation (caractère accessoire limité). Un acte de facilitation ou un acte préparatoire à cette infraction doit avoir eu lieu. Cet acte doit avoir encouragé de manière pertinente la violation de la loi (causalité).

Seules les activités de facilitation ou de préparation qui sont réalisées intentionnellement sont punissables. Par conséquent, l'intéressé doit avoir commis l'infraction principale avec conscience et volonté (entrée ou sortie illégale, séjour illégal, travail au noir).

Is “financial gain” an element of the definition of smuggling of migrants?

Le gain financier ne constitue pas une condition à l'infraction. Conformément à l'art. 116, al. 3, LEtr la peine est plus sévère lorsque l'auteur agit pour se procurer ou procurer à tiers un enrichissement illégitime (let. a) ou agit dans le cadre d'un groupe ou d'une association de personnes, formé dans le but de commettre de tels actes de manière suivie (let. b).

Could you please provide, if possible, the relevant texts (in English or in French)?

Voir les notes de bas des pages 1 à 3.

Are the following activities criminalized under national legislation:

Attempts to smuggle migrants

La tentative de commettre un acte visé à l'art. 116 LEtr est punissable. Conformément à l'al. 1, let. a, a^{bis} et c, de simples actes préparatoires commis en vue d'une entrée, d'une sortie ou d'un séjour illégal sont expressément punissables. Une tentative entre en ligne de compte quand l'acte du passeur n'est pas causal ou qu'il n'y a pas eu de tentative de commettre l'acte principal visé à l'art. 115.

Participation as an accomplice in the smuggling of migrants

Selon l'art. 333 CP, les dispositions générales du Code Pénal s'appliquent aux actes sanctionnés par d'autres lois fédérales, pour autant que celles-ci ne prévoient pas elles-mêmes des dispositions en la matière. La complicité à commettre un acte visé à l'art. 116 LEtr est donc punissable en relation avec l'art. 25 CP.

Acting as instigator of the smuggling of migrants

Selon l'art. 333 CP, les dispositions générales du Code pénal s'appliquent aux actes sanctionnés par d'autres lois fédérales, pour autant que celles-ci ne prévoient pas elles-mêmes des dispositions en la matière. L'instigation à commettre un acte visé à l'art. 116 LEtr est donc punissable en relation avec l'art. 24 CP.

Migrant smuggling as part of a criminal organisation

Quiconque remplit les conditions de l'art. 116 LEtr en agissant dans le cadre d'un groupe ou d'une association de personnes formé dans le but de commettre de tels actes de manière suivie est puni plus

sévèrement (al. 3). L'art. 260^{ter} CP est éventuellement applicable (organisation criminelle). Sont considérées comme organisations criminelles au sens de cet article les groupes qui représentent une menace potentielle particulièrement élevée car ils disposent d'une structure solide et durable, cette structure et le personnel sont gardés secrets et ils visent à commettre des crimes violents ou à s'enrichir par des moyens criminels. Les exigences posées par l'art. 260^{ter} CP sont donc plus élevées que celles prévues par l'art. 116, al. 3, LEtr.

Circumstances that endanger, or are likely to endanger, the lives or safety of smuggled migrants

Dans ces cas, les dispositions sur la mise en danger de la vie ou de la santé d'autrui qui figurent sous le titre premier de la partie spéciale du Code pénal sont applicables en complément à l'art. 116 LEtr. On peut penser en particulier à l'art. 127 CP (exposition : « celui qui, ayant la garde d'une personne hors d'état de se protéger elle-même ou le devoir de veiller sur elle, l'aura exposée à un danger de mort ou à un danger grave et imminent pour la santé, ou l'aura abandonnée en un tel danger, sera puni d'une peine privative de liberté de cinq ans au plus ou d'une peine pécuniaire. ») ou à l'art. 129 CP (mise en danger de la vie d'autrui : « celui qui, sans scrupules, aura mis autrui en danger de mort imminent sera puni d'une peine privative de liberté de cinq ans au plus ou d'une peine pécuniaire. »).

Does your domestic legislation permit use of special investigative techniques for the purpose of investigating the smuggling of migrants such as

Interceptions of telecommunication;

Yes. According to Art. 269 para. 1 of the Criminal Procedure Code (CrimPC, SR 312.0)⁴ the public prosecutor may arrange for post and telecommunications to be monitored if: a. there is a strong suspicion that an offence listed in paragraph 2 has been committed; b. the seriousness of the offence justifies surveillance; and c. investigative activities carried out so far have been unsuccessful or the enquiries would otherwise have no prospect of success or be made unreasonably complicated. Art. 269 para. 2 lit. b. CrimPC lists Art. 116 para. 3 and Art. 118 para. 3 of the Federal Act of 16 December 2006 on Foreign Nationals (FNA, SR 142.20)⁵ as such offences amongst others.

Undercover operations;

Yes. According to Art. 286 para. 1 CrimPC the public prosecutor may order an undercover investigation if: a. it is suspected that an offence listed in paragraph 2 has been committed, b. the seriousness of the offence justifies the covert investigation and c. previous investigative activities have been unsuccessful or the enquiries would otherwise have no prospect of success or be made unreasonably complicated. Such offences according to Art. 286 para. 2 lit. b. are Art. 116 para. 3 and Art. 118 para. 3 FNA.

Financial investigations: including access to bank, financial or commercial records and/or databases;

Yes. According to Art. 284 CrimPC the compulsory measures court may, at the request of the public prosecutor, order the surveillance of transactions between a suspect and a bank or bank-type institution.

specific form of protection for witnesses;

Yes. Protective Measures are regulated in Art. 149 ff. CrimPC.

⁴ RS 312.0 Code de procédure pénale suisse du 5 octobre 2007 (Code de procédure pénale, CPP)

⁵ RS 142.20 Loi fédérale du 16 décembre 2005 sur les étrangers (LEtr)

others; Please specify.

Surveillance using Technical Surveillance Devices (Art. 280 & 281 CrimPC), Observation (Art. 282 & 283 CrimPC)

Does your domestic legislation enable seizure and/or confiscation:

of property, equipment or other instrumentalities used in or destined for use in offences related to smuggling of migrants?

Yes. According to Art. 263 CrimPC items and assets belonging to an accused or to a third party may be seized if it is expected that the items or assets: a. will be used as evidence; b. will be used as security for procedural costs, monetary penalties, fines or damages; c. will have to be returned to the persons suffering harm; d. will have to be forfeited.

of proceeds of crime derived from offences related to smuggling of migrants ? If yes specify the main features of the legal framework.

Yes. According to Art. 263 para. 1 lit. d CrimPC items and assets belonging to an accused or to a third party may be seized if it is expected that the items or assets will have to be forfeited (confiscation seizure). Procedure: Art. 266 CrimPC. Decision on seized property and assets: Art. 267 CrimPC.

Is trafficking in persons defined under national law?

If so, how does this definition differ from that of migrant smuggling?

L'art. 182 CP définit la traite d'êtres humains comme le fait de se livrer, en qualité d'offreur, d'intermédiaire ou d'acquéreur, à la traite d'un être humain à des fins d'exploitation sexuelle, d'exploitation de son travail ou en vue du prélèvement d'un organe. Le tort causé par l'art. 182 CP consiste en une exploitation par l'auteur d'une position de force et une suppression de l'autodétermination de la victime. Il s'agit d'un crime contre la liberté humaine.

L'art. 116 para 1 let. a LEtr puni quiconque, en Suisse ou en étranger, facilite l'entrée, la sortie ou le séjour illégal d'un étranger dans un Etat Schengen ou participe à des préparatifs dans ce but. Selon para 3 la peine est plus élevée si l'auteur agit pour se procurer ou procurer à un tiers un enrichissement illégitime (let. a) ou l'auteur agit dans le cadre d'un groupe ou d'une association de personnes, formé dans le but de commettre de tels actes de manière suivie (let.b).

In relation to your country, are there any international, regional or bilateral agreements which address the issue of migrant smuggling?

Switzerland has concluded bilateral agreements on police cooperation containing clauses on smuggling of migrants with Albania, Bosnia and Herzegovina, the Czech Republic, France, Hungary, Latvia, "the former Yugoslav Republic of Macedonia", Romania, Serbia and Slovenia. Moreover, Switzerland has bilateral cooperation agreements with all its neighboring states (Germany, France, Italy, Austria and Liechtenstein), which, though not explicitly mentioning a list of crimes, nevertheless allow cooperation in all fields of crime, therefore also covering smuggling of migrants.

These bilateral police cooperation agreements are complemented by the cooperation agreement Switzerland has with EUROPOL, extending also to the field of smuggling in migrants. Also, Switzerland is

party to the European Convention on Mutual Assistance in Criminal Matters, including its second additional protocol, as well as the European Convention on Extradition together with its two additional protocols.

At global level, Switzerland is a contracting party to the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational organized Crime. This protocol allows for cooperation based on requests for mutual legal assistance with all other contracting parties of the Protocol. The operational information exchange with States outside Europe is done via INTERPOL and based on its statutes and regulations.

Switzerland has concluded migration partnerships with five countries (Kosovo, Serbia, Bosnia-Herzegovina, Nigeria and Tunisia). These migration partnerships, based on a Memorandum of Understanding, are a flexible instrument of Switzerland's foreign migration policy and are the expression of the mutual will of two states to cooperate on different areas relevant to migration, which are of the interest of both partners. All five MoUs installing the different migration partnerships explicitly address the intention to increase bilateral cooperation in the fight against human trafficking and smuggling. As a result, specific programmes and projects addressing the issue of human trafficking and smuggling are being implemented in the context of Switzerland's migration partnerships. For instance, Switzerland is funding a project implemented by the United Nations Office on Drugs and Crime (UNODC) seeking to improve the organizational, operational and management capacities of Nigerian law enforcement officers in the fight against human trafficking. Another example is a specific training in the area of fight against human trafficking and smuggling for 50 senior government officials and civil society representatives from Serbia, Bosnia-Herzegovina and Montenegro dispensed by the International Institute of Humanitarian Law, which Switzerland financed in December 2014.

Does your country have jurisdiction to prosecute crimes related to smuggling of migrants when they are committed outside its territory? If yes, specify the legal framework.

Le principe de territorialité est en principe applicable : un délit est réputé commis au lieu où l'auteur a agi ou au lieu où le résultat s'est produit. Les actes de facilitation ou les actes préparatoires peuvent donc être commis en Suisse comme à l'étranger lorsque les dispositions de la Suisse en matière d'entrée et de sortie ont été violées (al. 1, let. a). En revanche, ces actes doivent être commis en Suisse lorsqu'ils visent à permettre l'entrée, le transit, la sortie ou le séjour illégal d'un étranger dans un Etat Schengen (al. 1, let a^{bis}). L'al. 1, let. c prévoit une dérogation au principe de territorialité en raison du Protocole contre le trafic illicite de migrants par terre, air et mer, additionnel à la Convention des Nations Unies contre la criminalité transnationale organisée du 15 novembre 2000. Est puni quiconque facilite l'entrée d'un étranger sur le territoire national d'un autre Etat ou participe à des préparatifs dans ce but après son départ de Suisse ou de la zone internationale de transit des aéroports, en violation des dispositions sur l'entrée dans le pays applicables dans cet Etat.

Do you have a national policy or action plan to address the issue of migrant smuggling?

Oui, un plan d'action a été élaboré et adopté par le Conseil fédéral suisse afin de mettre en œuvre une stratégie nationale de gestion intégrée des frontières (IBM : Integrated Border Management). Cette stratégie vise à coordonner les efforts déployés par l'ensemble des autorités impliquées aux échelons fédéral et cantonal. Parallèlement à la lutte contre migration illégale, la lutte contre le trafic de migrants est également un de ses objectifs principaux, de par son caractère international mais aussi par son ampleur. Ainsi, plusieurs mesures ont été développées à cet effet et sont actuellement mises en œuvre.

Where possible, please provide information regarding:

- **Number of apprehended smugglers:**
- **Number of investigations instigated against migrant smugglers:**
- **Number of successful prosecutions of migrant smugglers:**

	2013		2014	
	Délits	Accusés	Délits	Accusés
Incitation à l'entrée, à la sortie ou au séjours illégal (paragraphe 1a)	1066	1012	1108	1101
Faciliter l'entrée sur le territoire national d'un autre Etat (paragraphe 1c)	13	13	35	29
Faciliter l'entrée, le transit, la sortie ou le séjour illégal d'un étranger dans un Etat Schengen ou participer à des préparatifs dans ce but (paragraphe 1a ^{bis})	52	53	73	76
Faciliter l'entrée, la sortie ou le séjour illégal avec enrichissement ou association de personnes (paragraphe 3)	129	121	126	111
Total facilitations illégales (LEtr.)	1260	1183	1342	1292

In your country, is international cooperation on smuggling of migrants (specifically on mutual legal assistance and extradition) afforded

by statute?

Yes.

by treaty or other agreement or arrangement (multilateral or bilateral)?

Yes.

by virtue of reciprocity or comity?

Yes, voir art. 8 EIMP.

Is the provision of mutual legal assistance subject to the double criminality requirement according to your domestic legal framework?

Le principe de double incrimination est uniquement exigé pour les mesures de contrainte, cf. art. 64 al. 1 EIMP.

Voir Loi fédérale du 20 mars 1981 sur l'entraide internationale en matière pénale (Loi sur l'entraide pénale internationale, EIMP⁶).

⁶ RS 351.1 Loi fédérale du 20 mars 1981 sur l'entraide internationale en matière pénale (Loi sur l'entraide pénale internationale, EIMP)

In your experience, is international co-operation regarding prosecution of migrant smugglers effective? Please specify.

→ Within the framework of the EU Policy Cycle for organised and serious interational crime, EU is leading in cooperation with support of Europol different investigation platforms, so called EMPACT (European Multidisciplinary Platform against Criminal Threats). Operational Action Plans (OAP) has been created within this framework. The OAP contains operational actions, as the way to reach strategic goals, chosen by the participants.

EMPACT is an effective platform regarding prosecution of migrant smugglers. It is also an excellent platform for Best Practise and networking, to develop common investigations. Switzerland used this platform in the past during criminal proceedings against migrant smugglers in co-operation with the involved countries.

A active participation and cooperation of every country within this framework is absolutely necessary at any time and has to be strengthen.

In terms of international co-operation, what legal and/or practical obstacles have been encountered as regards co-operation with:

Council of Europe Member States:

A active participation and cooperation of every country within this framework is absolutely necessary at any time and has to be strengthen and improved.

Third party states:

Possible obstacles: Different economic developments; Corruption Vulnerability.

Our experiences showed also: Close co-operations and joint actions can possible with countries as e.g. Kosovo.

Do you think existing Council of Europe instruments on international co-operation in criminal matters (Mutual legal assistance, extradition) are effective in dealing with migrant smuggling? If not, please specify.

Yes, they are.

Germany

Do you have any laws or legislative measures covering the issue of migrant smuggling?

Is the issue set out in general criminal law or are there specific provisions dealing with the problem?

Under German law, migrant smuggling is a criminal offence under Sect. 96 Residence Act (“smuggling of foreigners into the federal territory”) and Sect. 97 Residence Act, (“smuggling of foreigners into the federal territory resulting in death; smuggling for gain and as organised gangs”), text available see below question 2).

Is the smuggling of migrants a criminal offence under domestic law?

Does national law include a definition of migrant smuggling?

Yes, see Sect. 96 (1) Residence Act (text available see below)

How is this conduct defined?

see answer a.

What are the material elements of the crime?

see answer a.

Is “financial gain” an element of the definition of smuggling of migrants?

Yes, under Sect. 95 (1) Nr. 1a it is a condition that the offender receives a pecuniary advantage or the promise of a pecuniary advantage in return (or acts in such a manner repeatedly or for the benefit of several foreigners, Sect. 95 (1) Nr. 1b). Under Sect 96 (1) Nr. 1 Residence Act there is a mandatory increase in penalty if the offender acts for gain.

Could you please provide, if possible, the relevant texts (in English or in French)?

The English text of the German Residence Act is available under http://www.gesetze-im-internet.de/englisch_aufenthg/index.html

(please note that the English version does not yet include recent changes e.g. in Sect. 96(1) and (5) and Sect. 97(4))

The German version of the Residence Act is available under http://www.gesetze-im-internet.de/aufenthg_2004/index.html#BJNR195010004BJNE010504116

Are the following activities criminalized under national legislation:

Attempts to smuggle migrants

Yes, see Sect. 96 (3) Residence Act.

Participation as an accomplice in the smuggling of migrants

Yes, Sect. 96 (1) Residence Act in connection with Sect. 25 (principals) or Sect. 27 (aiding) German Criminal Code

(http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0148)

Acting as instigator of the smuggling of migrants

Yes, Sect. 96 (1) Residence Act in connection with Sect. 26 (abetting) German Criminal Code.

Migrant smuggling as part of a criminal organization

Yes, see Sect. 96 (2) Nr. 2 Residence Act.

Circumstances that endanger, or are likely to endanger, the lives or safety of smuggled migrants

Yes, see Sect. 96 (2) Nr. 3, 4 and 5 Residence Act.

Does your domestic legislation permit use of special investigative techniques for the purpose of investigating the smuggling of migrants such as

- **Interceptions of telecommunication;**
- **Undercover operations;**
- **Financial investigations: including access to bank, financial or commercial records and/or databases;**
- **specific form of protection for witnesses;**
- **others; Please specify.**

Answer to question 4 a:

Yes, Sect. 100 a (2) Number 5 of the Code of Criminal Procedure (Strafprozessordnung, StPO) allows under very high circumstances the interception of telecommunication.

Section 100a

[Conditions Regarding Interception of Telecommunications]

(1) Telecommunications may be intercepted and recorded also without the knowledge of the persons concerned if 1. certain facts give rise to the suspicion that a person, either as perpetrator or as inciter or accessory, has committed a serious criminal offence referred to in subsection (2) or, in cases where there is criminal liability for attempt, has attempted to commit such an offence or has prepared such an offence by committing a criminal offence; and 2. the offence is one of particular gravity in the individual case as well; and 3. other means of establishing the facts or determining the accused's whereabouts would be much more difficult or offer no prospect of success.

(2) Serious criminal offences for the purposes of subsection (1), number 1, shall be:

.....

5. pursuant to the Residence Act:

a) smuggling of aliens pursuant to section 96 subsection (2);

.....

(3) Such order may be made only against the accused or against persons in respect of whom it may be assumed, on the basis of certain facts, that they are receiving or transmitting messages intended for, or transmitted by, the accused, or that the accused is using their tele-phone connection.

(4) If there are factual indications for assuming that only information concerning the core area of the private conduct of life would be acquired through a measure pursuant to subsection (1), the measure shall be inadmissible. Information concerning the core area of the private conduct of life which is acquired during a measure pursuant to subsection (1) shall not be used. Any records thereof shall be deleted without delay. The fact that they were obtained and deleted shall be documented.

Answer to question 4 b:

Yes according section §110 a (1) Number 3 of the Code of Criminal Procedure undercover operations are possible.

Section 110a

[Undercover Investigators]

(1) Undercover investigators may be used to clear up criminal offences where there are sufficient factual indications showing that a criminal offence of substantial significance has been committed 1. in the sphere of illegal trade in drugs or weapons, of counterfeiting money or official stamps; 2. in the sphere of national security (sections 74a and 120 of the Courts Constitution Act); 3. on a commercial or habitual basis; or 4. by a member of a gang or in some other organized way.

Undercover investigators may also be used to clear up felonies where certain facts substantiate the risk of a repetition. Their use shall only be admissible where other means of clearing up the serious criminal offence would offer no prospect of success or be much more difficult. Undercover investigators may also be used to clear up felonies where the special significance of the offence makes the operation necessary and other measures offer no prospect of success.

(2) Undercover investigators shall be officials in the police force who carry out investigations using a changed and lasting identity (legend) which is conferred on them. They may take part in legal transactions using their legend.

(3) Where it is indispensable for building up or maintaining a legend, relevant documents may be drawn up, altered and used.

Answer to question 4 c:

In German law financial investigations, including access to bank, financial or commercial records and/or databases, are not limited to a special kind of offence. They are permitted in every case where corresponding information is needed for the investigation of the offence or for the purpose of seizure/confiscation of assets. Legal basis for the request of this information is Section 161 of the German Code of Criminal Procedure. If the information is not given voluntarily, a search order and/or an order of seizure can be issued.

Answer to question 4 d:

If the witness has also committed a criminal act, it is possible to dispense with the prosecution, sections 153, 153 a of the German Code of Criminal Procedure Section 153 [Non-Prosecution of Petty Offences]

Answer to question 4 e:

In German law a search of the office or home or a body (Section 102) and seizure (Section 94) are not limited to a special kind of offence. They are permitted in every case where corresponding information is needed for the investigation of the offence.

Does your domestic legislation enable seizure and/or confiscation:

- **of property, equipment or other instrumentalities used in or destined for use in offences related to smuggling of migrants?**
- **of proceeds of crime derived from offences related to smuggling of migrants ? If yes specify the main features of the legal framework.**

Yes, Sect. 96 (5) Residence Act in connection with Sect. 74a and Sect. 73d German Criminal Code.

German legislation enables **seizure and confiscation of property, equipment or other instrumentalities** used in or destined for use in offences related to smuggling of migrants. According to Section 74 of the German Criminal Code (“Conditions of deprivation”) the court may make a deprivation order if an intentional offence has been committed and the concerning objects has been used to commit the offence or to prepare it. The provision in detail reads as follows:

Section 74 German Criminal Code Conditions of deprivation

(1) If an intentional offence has been committed objects generated by or used or intended for use in its commission or preparation, the court may make a deprivation order.

(2) A deprivation order shall not be admissible unless

1. the principal or secondary participant owns or has a right to the objects at the time of the decision; or

2. the objects, due to their nature and the circumstances, pose a danger to the general public or if there is reason to believe that they will be used for the commission of unlawful acts.

(3) Under the provisions of subsection (2) No 2 above the deprivation of objects shall also be admissible if the offender acted without guilt.

(4) If deprivation is prescribed or permitted by a special provision apart from subsection (1) above, subsections (2) and (3) above shall apply mutatis mutandis.

Smuggling of foreigners into the federal territory under German criminal law is punishable according to Section 96 of the German Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory. The elements of this offence are generally fulfilled if a person, in return for a pecuniary advantage, the promise of a pecuniary advantage, in the case of repeated actions or in the case of actions in favor of multiple foreigners, supports a foreigner in unlawfully entering or staying in Germany or in fraudulently obtaining a residence title.

“Objects for use in [the offence's] commission or preparation” within the meaning of section 74 of the German Criminal Code are deemed to include the following: An object that has been used for the offence, i.e. has actually been put to use. An object that was intended for the offence, i.e. it was not actually put to use but was foreseen or made available for a certain criminal act, even if it was meant to be used only as a contingency. The objects must be put to use at the stage of criminal attempt or at the time of the completion of the offence. However, the intent to put them to use in this way will also be sufficient. The mere occasional use of an object in connection with the offence is not sufficient. Furthermore, the use of the

object must specifically facilitate the realization of the intended offence or, as imagined by the perpetrator, at least be expected to do so. It is therefore sufficient if the offender has merely envisaged the object for potential use as an instrument in the offence. To this extent, German law permits extensive confiscation of objects used for offences.

If there are grounds to assume that the conditions as described above are in place for an object to be confiscated, the object may be seized on a preliminary basis pursuant to section 111b (1) of the Code of Criminal Procedure in order to ensure that it can be confiscated permanently at a later date. Regular use is made of this instrument in Germany.

German legislation enables also seizure and confiscation of **proceeds of crime** derived from offences related to smuggling of migrants, if the statutory requirements of Section 73 German Criminal Code are met and which reads as follows:

Section 73 Conditions of confiscation

(1) If an unlawful act has been committed and the principal or a secondary participant has acquired proceeds from it or obtained anything in order to commit it, the court shall order the confiscation of what was obtained. This shall not apply to the extent that the act has given rise to a claim of the victim the satisfaction of which would deprive the principal or secondary participant of the value of what has been obtained.

(2) The order of confiscation shall extend to benefits derived from what was obtained. It may also extend to objects which the principal or secondary participant has acquired by way of sale of the acquired object, as a replacement for its destruction, damage to or forcible loss of it or on the basis of a surrogate right.

(3) If the principal or secondary participant acted for another and that person acquired anything thereby, the order of confiscation under subsections (1) and (2) above shall be made against him.

(4) The confiscation of an object shall also be ordered if it is owned or subject to a right by a third party, who furnished it to support the act or with knowledge of the circumstances of the act.

If the confiscation of a particular object is impossible due to the nature of what was obtained or for some other reason, the court shall order the confiscation of a sum of money which corresponds to the value of what was obtained according to Section 73a German Criminal Code, which reads as follows:

Section 73a Confiscation of monetary value

To the extent that the confiscation of a particular object is impossible due to the nature of what was obtained or for some other reason or because confiscation of a surrogate object pursuant to section 73(2) 2nd sentence has not been ordered, the court shall order the confiscation of a sum of money which corresponds to the value of what was obtained. The court shall also make such an order in addition to the confiscation of an object to the extent that its value falls short of the value of what was originally obtained.

If the confiscation of an object is ordered title to the property or the right confiscated shall pass to the state once the order becomes final if the person affected by the order has a right to it at the time (Section 73e German Criminal Code). The rights of third parties in the object remain unaffected.

According to Section 111b para. 1 German Criminal Procedure Code objects may be secured by seizure if there are grounds to assume that the conditions for their forfeiture have been fulfilled. If there are grounds

to assume that the conditions have been fulfilled for confiscation of monetary value, attachment *in rem* may be ordered pursuant to Section 111d in order to secure such equivalent value.

Is trafficking in persons defined under national law?

The offence of Trafficking in Human Beings (THB) is defined in three sections of the German Criminal Code (StGB):

“Section 232: Human trafficking for the purpose of sexual exploitation

(1) Whosoever exploits another person’s predicament, or vulnerability arising from being in a foreign country, in order to induce them to engage in or continue to engage in prostitution, to engage in exploitative sexual activity with or in the presence of the offender or a third person or to suffer sexual acts on his own person by the offender or a third person shall be liable to imprisonment from six months to ten years. Whosoever induces a person under twenty-one years of age to engage in or continue to engage in prostitution or any of the sexual activity mentioned in the 1st sentence above shall incur the same penalty.

(2) The attempt shall be punishable.

(3) The penalty shall be imprisonment from one to ten years if

1. the victim is a child (section 176(1));

2. the offender through the act seriously physically abuses the victim or places the victim in danger of death; or

3. the offender commits the offence on a commercial basis or as a member of a gang whose purpose is the continued commission of such offences.

(4) The penalty under subsection (3) above shall be imposed on any person who

1. induces another person by force, threat of serious harm or by deception to engage in or continue to engage in prostitution or any of the sexual activity mentioned in subsection (1) 1st sentence above or

2. gains physical control of another person by force, threat of serious harm or deception to induce them to engage in or continue to engage in prostitution or any of the sexual activity mentioned in subsection (1) 1st sentence above.

(5) In less serious cases under subsection (1) above the penalty shall be imprisonment from three months to five years, in less serious cases under subsections (3) and (4) above imprisonment from six months to five years.

Section 233: Human trafficking for the purpose of work exploitation

(1) Whosoever exploits another person’s predicament, or vulnerability arising from being in a foreign country, to subject them to slavery, servitude or bonded labour, or makes him work for him or a third person under working conditions that are in clear discrepancy to those of other workers performing the same or a similar activity, shall be liable to imprisonment from six months to ten years. Whosoever subjects a person under twenty-one years of age to slavery, servitude or bonded labour or makes him work as mentioned in the 1st sentence above shall incur the same penalty.

(2) The attempt shall be punishable.

(3) Section 232(3) to (5) shall apply *mutatis mutandis*.

Section 233a: Assisting in human trafficking

(1) Whosoever assists in human trafficking under section 232 or section 233 by recruiting, transporting, referring, harbouring or sheltering another person shall be liable to imprisonment from three months to five years.

(2) The penalty shall be imprisonment from six months to ten years if

1. the victim is a child (section 176(1));
2. the offender through the act seriously physically abuses the victim or places the victim in danger of death; or
3. the offender commits the offence on a commercial basis or as a member of a gang whose purpose is the continued commission of such offences.

(3) The attempt shall be punishable.”

In accordance with Article 4(a) of the Council of Europe Convention on Action against Trafficking in Human Beings Convention (“the Convention”), trafficking in human beings includes three components: an action (“the recruitment, transportation, transfer, harbouring or receipt of persons”); the use of certain means (“threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person”); and the purpose of exploitation (“at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”). In the case of children, pursuant to Article 4(c) of the Convention, it is irrelevant whether the means referred to above have been used.

The actions contained in the definition of the Convention, are not part of the definition of THB in sections 232 and 233 StGB. The actions are listed in section 233a of the StGB, which criminalises all actions contained in the Convention when they are used to assist in a crime under sections 232 and 233 StGB. Section 233a is formulated as a catch-all provision which penalises a supportive act to a THB offense even if the latter does not reach the attempt phase.

If so, how does this definition differ from that of migrant smuggling?

Regarding the difference between trafficking and smuggling, reference is made to the answer provided to question 2a. Unlike the offence of trafficking in human beings, the smuggling of foreigners into the federal territory pursuant to Sect. 96 (1) Residence Act does not require the use of coercive means or the (future) exploitation of the victim. Both smuggling and trafficking may occur at the same time, but this will not always be the case.

In relation to your country, are there any international, regional or bilateral agreements which address the issue of migrant smuggling?

The German law is corresponding to Germany’s obligation under international law, especially EU-law.

Does your country have jurisdiction to prosecute crimes related to smuggling of migrants when they are committed outside its territory? If yes, specify the legal framework.

Yes, under certain circumstances – c.f. Sect. 96(4) Residence Act

Do you have a national policy or action plan to address the issue of migrant smuggling?

There is no formal action plan on penal law questions concerning migrant smuggling. The minimum penalty for migrant smuggling has been raised to 3 month of imprisonment in October 2015, see now Sect.96 (1) Residence Act. In minor cases monetary sanctions can be imposed alternatively.

Where possible, please provide information regarding:

Number of apprehended smugglers:

The number of identified (not necessarily apprehended) smugglers in Germany has raised by 40% to 2.149 in 2014 from 1.535 in 2013. In the first half of 2015 the German Federal Police has already identified 1.420 smugglers.

Number of investigations instigated against migrant smugglers:

According to the German police crime statistic for 2014, the number of recorded cases by German law enforcement authorities is as follows:

Sect. 96 Residence Act: 3612

Sect. 97 Residence Act: 163

Number of successful prosecutions of migrant smugglers:

Germany does not operate a central statistic on the outcome of preliminary investigations. In 2013, 7.417 persons were sentenced for infraction of the Residence Act (not only for smuggling of migrants (Sect. 96) but also e.g. for simple illegal stay (Sect. 95).

In your country, is international cooperation on smuggling of migrants (specifically on mutual legal assistance and extradition) afforded

- **by statute?**
- **by treaty or other agreement or arrangement (multilateral or bilateral)?**
- **by virtue of reciprocity or comity?**
- **Is the provision of mutual legal assistance subject to the double criminality requirement according to your domestic legal framework?**

The legal basis for rendering mutual legal assistance is dependent on the requesting state. Either there are bilateral or multilateral treaties which cover the request or assistance can be rendered on the basis of German national law. In the latter case reciprocity is not necessary. Double criminality is only required if coercive measures are necessary.

In your experience, is international co-operation regarding prosecution of migrant smugglers effective? Please specify.

There are no statistics on incoming or outgoing mutual legal assistance requests. Thus the question can only be answered on a very general level. International cooperation in those cases does not pose any specific challenges besides from those known from other types of requests. Currently it seems that there are no sufficient personal resources to cope with the challenges of thousands of migrants coming to Germany each day. Therefore not all cases of smuggling of migrants can be detected or investigated.

In terms of international co-operation, what legal and/or practical obstacles have been encountered as regards co-operation with:

- **Council of Europe Member States:**
- **Third party states:**

See answer to question 2.

Do you think existing Council of Europe instruments on international co-operation in criminal matters (Mutual legal assistance, extradition) are effective in dealing with migrant smuggling? If not, please specify.

yes

Slovakia

Do you have any laws or legislative measures covering the issue of migrant smuggling?

Is the issue set out in general criminal law or are there specific provisions dealing with the problem?

There is no specific provision in the Slovak Law dealing with the problem of migrant smuggling. This issue covers Articles 355 – 356 of the Slovak Criminal Code “Facilitation of Illegal Migration”.

Article 355

- (1) Whoever organises the illegal crossing of the State border of the Slovak Republic or transit through its territory, or facilitates such conduct or assists in it, for a person who is neither a citizen of the Slovak Republic nor a person with a permanent residence in the Slovak Republic, shall be punished by a prison sentence of one to five years.
- (2) Whoever, with the intention to directly or indirectly obtain a financial advantage for themselves or another person or another material advantage for a person who is neither a citizen of the Slovak Republic nor a person with a permanent residence in the Slovak Republic,
 - a) organises the illegal crossing of the State border of the Slovak Republic or transit through its territory, or facilitates such conduct, or assists in it, or
 - b) for the purpose under Paragraph a) produces, procures, provides or possesses a false travel document or false identification document, shall be punished by a prison sentence of three to eight years.
- (3) A prison sentence of seven to ten years shall be imposed upon an offender if they committed an act referred to in Subsection 1 or 2
 - a) and thus obtain a larger benefit for themselves or another person,
 - b) out of a special motive,
 - c) in a manner that may endanger the lives and health of the trafficked persons, or which constitutes inhumane treatment or degrading treatment, or the exploitation of the trafficked persons, or
 - d) in a more serious manner of conduct.
- (4) A prison sentence of ten to fifteen years shall be imposed upon an offender if they committed an act referred to in Subsection 1 or 2
 - a) and thus cause grievous bodily harm or death,
 - b) and thus obtain significant benefit for themselves or another person, or
 - c) as a member of a dangerous group.
- (5) A prison sentence of twelve to twenty years shall be imposed upon an offender if they committed an act referred to in Subsection 1 or 2
 - a) and thus cause grievous bodily harm or the death of several persons,
 - b) and thus obtain a benefit of large extent, or
 - c) and a crisis situation.

Article 356

Whoever, with the intention to directly or indirectly obtain a financial advantage for themselves or another person or other material advantage, facilitates or assists a person who is neither a citizen of the Slovak Republic nor a citizen of another EU Member State or a citizen of a State which is party to the European Economic Area or who does not have a permanent residence in their territory to remain, or become illegally employed in the Slovak Republic, another EU Member State or a State which is party to the European Economic Area shall be punished by a prison sentence of two to eight years.

Is the smuggling of migrants a criminal offence under domestic law? See answer to question No. 1

Does national law include a definition of migrant smuggling? NO

How is this conduct defined? See answer to question No. 1

What are the material elements of the crime? See answer to question No. 1

Is “financial gain” an element of the definition of smuggling of migrants? YES

Could you please provide, if possible, the relevant texts (in English or in French)?

See No. 1

Are the following activities criminalized under national legislation: YES

- Attempts to smuggle migrants
- Participation as an accomplice in the smuggling of migrants
- Acting as instigator of the smuggling of migrants
- Migrant smuggling as part of a criminal organisation
- Circumstances that endanger, or are likely to endanger, the lives or safety of smuggled migrants

Does your domestic legislation permit use of special investigative techniques for the purpose of investigating the smuggling of migrants such as

Interceptions of telecommunication; YES

Undercover operations; YES

Financial investigations: including access to bank, financial or commercial records and/or databases; YES

specific form of protection for witnesses; YES

others; Please specify.

Does your domestic legislation enable seizure and/or confiscation:

of property, equipment or other instrumentalities used in or destined for use in offences related to smuggling of migrants?

Article 83 of the Criminal Code of the Slovak Republic:

Confiscation of Items

(1) If the punishment of the forfeiture of items referred to in Section 60 Subsection 1 was not imposed, the court shall impose the confiscation of items if

- a) it belongs to a person who may not be prosecuted or convicted,
- b) it belongs to an offender whose punishment the court waived or to an offender against whom criminal prosecution was terminated or to an offender against whom criminal prosecution was conditionally suspended or to an offender against whom criminal prosecution was terminated due to the approval of a

settlement,

- c) it is in regard to goods without control stamps or without other technical control measures required by generally binding legal regulations for its identification for tax purposes,
- d) the circumstances of the case justify the assumption that the matter could be a source of financing terrorism, or
- e) the safety of persons or assets, or another similar public interest requires it.

(2) The State becomes the owner of the confiscated item, unless the court decides otherwise, based on a declared international treaty by which the Slovak Republic is bound.

(3) The provisions of Subsection 1 shall not apply, if

- a) the victim incurred an entitlement to damages, the satisfaction of which would be obstructed by the confiscation of items, or
- b) the value of the items is clearly disproportionate to the gravity of the offence.

(4) If an item referred to in Subsection 1 is unattainable or unidentifiable, or is merged with the offender's assets or with the assets of another person obtained in compliance with the law, the court may impose the confiscation of an item with a value that corresponds to the value of such item.

of proceeds of crime derived from offences related to smuggling of migrants ? If yes specify the main features of the legal framework.

Article 60 of the Criminal Code of the Slovak Republic

Forfeiture of Items

(1) The court shall impose the forfeiture of items,

- a) that were used to commit the criminal offence,
- b) that were intended for the commission of a criminal offence,
- c) which the offender acquired through a criminal offence or as a reward for it, or
- d) which the offender acquired for an item referred to in Paragraph c).

(2) If an item referred to in Subsection 1 is unattainable or unidentifiable, or is merged with the offender's assets or with the assets of another person obtained in compliance with the law, the court may impose the forfeiture of an item of a value that corresponds to the value of such item.

(3) An unattainable item means an item that is destroyed, damaged, lost, stolen, rendered useless, consumed, concealed, transferred to another person with the aim of excluding it from the scope of the law enforcement authorities or otherwise removed or the costs saved.

(4) An item under Subsection 1 also means the proceeds from a criminal offence, as well as profits, interests and other rewards deriving from those income or items.

(5) The court may impose the forfeiture of items only if such is an item belonging to the offender.

(6) The State becomes the owner of the forfeited item unless the court decides otherwise based on a declared international treaty by which the Slovak Republic is bound.

(7) The provisions of Subsection 1 shall not apply, if

- a) the victim incurred an entitlement to damages, the satisfaction of which would be obstructed by the forfeiture of items,
- b) the value of the items is clearly disproportionate to the gravity of the offence, or
- c) the court waived the punishment of the offender.

Is trafficking in persons defined under national law?

If so, how does this definition differ from that of migrant smuggling?

Article 179

Trafficking in Human Beings

- (1) Whoever with the application of fraudulent conduct, deception, the restriction of personal freedom, violence, threats of violence, threats of other grievous harm or other forms of coercion, by accepting or providing monetary fulfilment or other benefits in order to gain a person's consent on whom another person is dependent, or the abuse of their position or vulnerability or otherwise vulnerable position, entices, transports, harbours, transmits or accepts another person, even with their consent, for the purpose of prostitution or other forms of sexual exploitation, including pornography, forced labour and services, slavery or practices similar to slavery, servitude, removal of organs, tissues or cells or other forms of exploitation shall be punished by a prison sentence of four to ten years.
- (2) The same punishment referred to in Subsection 1 shall be imposed upon a person who entices, transports, harbours, transmits or accepts any person under the age of eighteen years, even with their consent, for the purpose of prostitution or other forms of sexual exploitation, including pornography, forced labour and services, slavery or practices similar to slavery, servitude, removal of organs, tissues or cells or other forms of exploitation.
- (3) A prison sentence of seven to twelve years shall be imposed upon an offender if they committed an act referred to in Subsection 1 or 2
- a) and thus obtain a larger benefit for themselves or another person,
 - b) against a protected person,
 - c) out of a special motive, or
 - d) in a more serious manner of conduct.
- (4) A prison sentence of twelve to twenty years shall be imposed upon an offender if they committed an act referred to in Subsection 1 or 2
- a) and thus obtain a significant benefit for themselves or another person,
 - b) and thus cause grievous bodily harm or death, or another particularly serious consequence, or
 - c) as a member of a dangerous group.
- (5) A prison sentence of twenty to twenty-five years or a life prison sentence shall be imposed upon an offender if they committed an act referred to in Subsection 1 or 2
- a) and thus obtain a benefit of a large extent for themselves or another person, or
 - b) thus cause grievous bodily harm or death to several persons.

In relation to your country, are there any international, regional or bilateral agreements which address the issue of migrant smuggling?

YES, mostly the bilateral treaties on police co-operation contain the issue of illegal migration.

Does your country have jurisdiction to prosecute crimes related to smuggling of migrants when they are committed outside its territory? If yes, specify the legal framework. NO

Do you have a national policy or action plan to address the issue of migrant smuggling?

National plan for the control of borders of the Slovak Republic for 2015 – 2018 was adopted by the resolution of the government of the Slovak Republic in March 2015.

Migration Policy of the Slovak Republic Perspective until 2020.

For the issue of facilitation of illegal migrants and trafficking in human beings MISO BORDER group was established. It is multidisciplinary integrated group of experts focused on elimination of illegal migration, organized form of unlawfully crossing of the state borders and trafficking in human beings.

Where possible, please provide information regarding:

Number of apprehended smugglers:

2013/20 2014/15 2015/16 until the 30 June 2015

Number of investigations instigated against migrant smugglers:

2013/29 2014/47 2015/16 until the 30 June 2015

Number of successful prosecutions of migrant smugglers:

2013/49 2014/64 2015/39 until the 30 June 2015.

In your country, is international cooperation on smuggling of migrants (specifically on mutual legal assistance and extradition) afforded

- **by statute?**
- **by treaty or other agreement or arrangement (multilateral or bilateral)?**
- **by virtue of reciprocity or comity?**
- **Is the provision of mutual legal assistance subject to the double criminality requirement according to your domestic legal framework?**

Judicial cooperation is granted on the basis of application of domestic legal regulation in accordance with the regulation provided in valid and effective international contractual basis of the Slovak Republic:

I) Reciprocity (mutuality) principle:

Legal assistance – implementation of acts on the basis of reciprocity under conditions as follows:

- confirmation of mutuality,
- legal regulation of the Slovak Republic regulates identical or similar manner of execution of an act or the execution of an act is not contrary to fundamental principles on which it is necessary to insist unconditionally,
- criminal proceedings are conducted in requesting country and the proceedings are in the stage of ensuring/gathering evidence,
- the legal assistance is requested by a competent authority.

2) Extradition:

- confirmation of mutuality,
- proportionality,
- it does not include a political criminal offence, racially motivated criminal act ...

II) International Agreement/Convention

Legal assistance is granted on the basis of rules as provided for by applied international agreement/convention on the basis of principles as follows:

- legal regulation of the Slovak Republic regulates identical or similar manner of execution of an act or the execution of an act is not contrary to fundamental principles on which it is necessary to insist unconditionally,
- in the requesting country the criminal proceedings are in the stage of evidence gathering,
- the legal assistance is requested by a competent authority.

Extradition is implemented on the basis of rules included in applied international agreement. Conditions:

- criminal act is punishable in both requesting and requested country (dual criminality principle),
- proportionality,
- it does not concern a political criminal act, racially motivated criminal act ...

III) Mutual recognition of judicial decisions within judicial cooperation between the EU member States on the basis of valid and efficient instruments:

Legal assistance is granted on the basis of rules included in applied instruments of the European Union. Extradition is implemented on the basis of the Council Framework Decision 2002/584/JHA of 13 June 2002 regarding European Arrest Warrant and surrender procedures between Member States.

National legal regulation (Code of Criminal Procedure) regulates competence, manner and form of implementation of the legal assistance.

Precedence of international agreement over the law applies.

In general, implementation of a legal assistance is not subject to dual criminality condition; this requirement applies only in cases where requested act infringes rights and legitimate interests of natural persons and legal entities.

In your experience, is international co-operation regarding prosecution of migrant smugglers effective? Please specify.

Assessment of efficiency of international cooperation in prosecuting smugglers of people has several points of view. First of all we need to state that there is not any principal difference between the approach of various countries to international cooperation in this field and the other areas of international cooperation regarding gathering evidence and surrender of persons for the purposes of criminal prosecution or service of a sentence.

The most important element to suppress this form of criminal activity lies with the Police work and their preventive measures, and/or efficient protection of state borders as well as other elements of international cooperation including complying with international regulation regarding granting asylum and/or protection of refugees including compliance with re-admission agreements.

In general, co-operation regarding prosecution of migrant smugglers is on very high level. Any improvements depend on the approach and willingness of countries to co-operate.

In terms of international co-operation, what legal and/or practical obstacles have been encountered as regards co-operation with:

Council of Europe Member States:

In general, there is extensive effort directed to elimination of legal and practical obstacles of implementation of mutual cooperation and especially regarding prompt and efficient reaction to organized forms of illegal activities. The still existing major problem is length of proceedings and celerity of reaction of judicial authorities to illegal conduct of offenders.

Currently there is topical issue of preservation/retaining and provision of telecommunication data linked to the judgment of the European Court of Justice rendered in joint matters: C-293/12 Digital Rights Ireland Ltd and C-594/12 Kärntner Landesregierung, Michael Seitlinger and others; especially there is the issue of ambiguous interpretation and application practice in various EU member States. Celerity of reaction of judicial authorities has principal impact on the course and outcome of criminal proceedings. Specific problems identified within cooperation with various members of the Council of Europe are not directly linked to the issue concerned; it mostly regards specificities of legal regulations of the countries concerned.

Third party states:

As regards some third countries there is the problem of dual criminality principle in relation to any legal assistance act as well as length of proceedings and in number of cases also impossibility to apply/use an outcome of legal assistance due to way of implementation of the act (absolute dissimilarity of legal regulations).

Do you think existing Council of Europe instruments on international co-operation in criminal matters (Mutual legal assistance, extradition) are effective in dealing with migrant smuggling? If not, please specify.

We do not consider efficient elaboration of new specific instruments for dealing with migrant smuggling. What would be most helpful is consistent and efficient application of existing instruments (e.g. Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters).

Romania

Do you have any laws or legislative measures covering the issue of migrant smuggling?

Is the issue set out in general criminal law or are there specific provisions dealing with the problem?

The Romanian Criminal Code incriminates “*the illegal crossing of the state border*” (Article 262 of the Criminal Code), “*smuggling of migrants*” (Article 263 of the Criminal Code), “*facilitating the illegal stay in Romania*” (Article 264 of the Criminal Code) and “*evading expulsion from the Romanian territory*” (Article 265 of the Criminal Code).

The legal provisions, relevant for the prevention and control of the smuggling of migrants are also found in: The Government Emergency Ordinance no. 105/2001 on the state border regime of Romania, The Government Emergency Ordinance 194/2002 on the regime of aliens in Romania, The Government Ordinance no. 44/2004 regarding the social integration of foreigners who have got a form of protection or a right of residence in Romania, as well as the citizens of the Member States of the European Union and the European Economic Area, The Government Ordinance 25/2014 on the *employment* and secondment of foreigners to Romania and for the amendment and completion of some rules regarding the regime of foreigners in Romania

Is the smuggling of migrants a criminal offence under domestic law?

Does national law include a definition of migrant smuggling?

The smuggling of migrants is defined by Article 263 of the Criminal Code.

How is this conduct defined?

According to Article 263 of the Criminal Code, named “*Smuggling of migrants*”:

“(1) Recruiting, instructing, guiding, transporting, transferring or harboring individuals for the purposes of fraudulently crossing Romania’s state border shall be punished by imprisonment from 2 to 7 years. (2) When the act was committed: a) in order to obtain material gain, directly or indirectly; b) using means that endanger the life, integrity or health of the migrant; c) by subjecting migrants to inhuman or degrading treatment, the punishment shall be by imprisonment from 3 to 10 years and the interdiction of certain rights. (3) Any attempt shall be punished.”

What are the material elements of the crime?

The actions that can constitute the material element of the offense are the recruitment, instruction, guidance, transportation, transfer or harboring of such persons. These modalities of perpetration complete the content of the offence only if they aimed at the illegal crossing of the Romanian state border.

Is “financial gain” an element of the definition of smuggling of migrants?

The intention of gaining a patrimonial benefit represents an aggravating circumstance of the offence of smuggling of migrants, requiring a bigger punishment (Article 263, paragraph 2 letter a).

Could you please provide, if possible, the relevant texts (in English or in French)?

Are the following activities criminalized under national legislation:

Attempts to smuggle migrants

As provided in Article 263 paragraph (3) (stated above), any attempt shall be punished.

Participation as an accomplice in the smuggling of migrants

Considering the provisions of Article 48 of the Romanian Criminal Code, an accomplice can be any person who deliberately facilitates or helps in any way the perpetration of smuggling of migrants. The same form of participation can also be brought against the one who promises, before or during the perpetration of the act, that he/she would conceal the proceeds of it or would favor the perpetrator, even if, after the perpetration of the deed, the promise is no longer fulfilled.

Acting as instigator of the smuggling of migrants

Considering the provisions of Article 47 of the Criminal Code, the instigator is the person who intentionally causes another person to commit the offense of smuggling of migrants.

Migrant smuggling as part of a criminal organization

“*The constitution of an organized criminal group*” is incriminated by Article 367 of the Criminal Code. The offense of smuggling of migrants can enter into the purpose of an organized criminal group, as defined in the last paragraph of Article 367.

Circumstances that endanger, or are likely to endanger, the lives or safety of smuggled migrants

The perpetration of the offense by means which endanger the life, integrity or health of the migrant constitutes an aggravating circumstance and calls for a bigger punishment (see above the content of Article 263 paragraph 2 letter b).

Does your domestic legislation permit use of *special investigative techniques* for the purpose of investigating the smuggling of migrants such as

Interceptions of telecommunication;

The interception of communications is provided by the Criminal Procedure Code as a special surveillance method (Article 138 et seq.) and can be used in investigations related to the smuggling of migrants. The warrant for the interception of communications is issued by the judge for rights and liberties, on the prosecutor's request.

Undercover operations;

The use of the undercover investigators is provided by Article 148 and seq. of the Criminal Procedure Code and it is also possible in cases of smuggling of migrants. The authorization shall be ordered by the prosecutor.

Financial investigations: including access to bank, financial or commercial records and/or databases;

The Criminal Procedure Code regulates “Obtaining data regarding the financial status of a person (Article 153) and “obtaining data regarding the financial transactions of individuals” (Article 138), both requiring the authorization of the judge for rights and liberties. The prosecution bodies have access to the databases of the National Trade Register Office, Ministry of Public Finance and the National Bank of Romania.

specific form of protection for witnesses;

The Romanian Criminal Procedure Code contains provisions intended for the protection of the threatened witnesses (Article 125 - Article 129) and the protection of vulnerable witnesses (Article 132 - Article 137). The minors and the people who have suffered trauma due to the perpetration of offences or the suspect's subsequent behavior are considered vulnerable witnesses. The protection granted to witnesses during the criminal trial can go from the physical protection (surveillance, home security, escorting witnesses etc.) to the protection of their identity or even their placement in a protection program.

others; Please specify.

The concept used by the Romanian Criminal Code is that of special methods of surveillance or investigation. The following are considered special methods of surveillance or investigation b) accessing a computer system; c) video, audio or photo surveillance; d) tracking or tracing with the use of technical devices; e) obtaining data regarding the financial transactions of individuals; f) withholding, delivery or search of mail deliveries; g) use of undercover investigators and informants; h) authorized participation in specific activities; i) controlled delivery; j) obtaining data generated or processed by providers of public electronic communication networks or by providers of electronic communication services intended for the public, other than the content of communications, stored by these under the special law on storing data generated or processed by providers of public electronic communication networks and by providers of electronic communication services intended for the public.

Electronic surveillance is the use of any of the methods listed above items a) - e).

Electronic surveillance is ordered by the Judge for Rights and Liberties when the following *requirements* are cumulatively met: a) there is a reasonable suspicion in relation to the preparation or commission of one of the offenses listed under par. (2); b) such measure is proportional to the restriction of fundamental rights and freedoms, considering the particularities of the case, the importance of information or evidence that are to be obtained or the seriousness of the offense; c) evidence could not be obtained in any other way or its obtaining implies special difficulties that would harm the investigation, or there is a threat for the safety of persons or of valuable goods. Electronic surveillance may be ordered in case of offenses against national security stipulated by the Criminal Code and by special laws, as well as in case of drug trafficking, weapons trafficking, trafficking in human beings, acts of terrorism, money laundering, counterfeiting of currency or securities, counterfeiting electronic payment instruments, offenses against property, blackmail, rape, deprivation of freedom, tax evasion, corruption offenses and offenses assimilated to corruption, offenses against the European Union's financial interests, offenses committed by means of computer systems or electronic communication devices, or in case of other offenses in respect of which the law sets forth a penalty of no less than 5 years of imprisonment.

The prosecutor may however authorize, for a time period of maximum 48 hours, electronic surveillance measures when: a) there is an emergency situation, and the obtaining of an electronic surveillance warrant would lead to a substantial delay of investigations, to the loss, alteration or destruction of evidence, or

would jeopardize the safety of the victim, of witnesses or of their family members; and b) the requirements indicated above are met.

Does your domestic legislation enable seizure and/or confiscation:

- **of property, equipment or other instrumentalities used in or destined for use in offences related to smuggling of migrants?**
- **of proceeds of crime derived from offences related to smuggling of migrants ? If yes specify the main features of the legal framework.**

Under the provisions of the Romanian Criminal Code, the assets (broadly, therefore including equipment and other tools) used or intended to be used in the perpetration of an offense provided by the criminal law shall be subject to confiscation (Article 112 letter b). All the property acquired by committing the offense provided by the criminal law (Article 112 letter e) is also subject to confiscation.

In case of smuggling of migrants committed in an organized criminal group, the provisions on the extended seizure may also be enforced (Article 112¹ of the Criminal Code). During the criminal trial, in order to prevent the concealment, destruction, disposal or avoiding the tracking of the assets that may be subject to confiscation/extended seizure, the prosecutor - during the prosecution or the judge - during the trial, may order the precautionary measures, according to Article 249 et seq. of the Criminal Procedure Code.

Is trafficking in persons defined under national law?

If so, how does this definition differ from that of migrant smuggling?

The offence of "human trafficking" is defined by Article 210 of the Criminal Code, which states that it is the recruitment, transportation, transfer, harbor or receipt of a person for exploitation purposes, perpetrated: a) by means of coercion, abduction, deception, or abuse of authority; b) by taking advantage of the inability of a person to defend themselves or to express their will or of their blatant state of vulnerability; c) by offering, giving and receiving payments or other benefits in exchange for the consent of an individual having authority over such person.

Although some of the acts that constitute the material element of the offence of human trafficking are also found in the incrimination of the smuggling of migrants, the purpose is different. If in the case of human trafficking it is about exploiting the person, in case of the smuggling of migrants it is about the illegal crossing of the state border. The meaning of the exploitation of a person is explained in Article 182 of the Criminal Code, through an exhaustive list: forcing a person to carry out work or a task; enslavement or other similar procedures to deprive of freedom or place in bondage; forcing persons into prostitution, pornography, in view of obtaining and distributing pornographic material or any other types of sexual exploitation; forcing into mendicancy;

Also, in the case of human trafficking there is always a form of coercion, abuse or misleading of the victim.

In relation to your country, are there any international, regional or bilateral agreements which address the issue of migrant smuggling?

Romania is a party to the Protocol against the Illegal Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, adopted in New York on 15 November 2000, ratified by the Law no. 565 of 16 October 2002.

As regards the bilateral agreements *on smuggling of migrants*, the following may be stated: The Agreement between the Romanian Government and the Federal Government of Austria regarding the Mutual Exchange of Information in the field of Migration Control and Asylum signed in Bucharest on 24 June 2004,

ratified by the Law no. 429 of 25 October 2004. The Agreement between Romania and the Republic of Indonesia on the Cooperation in Preventing and Combating Transnational Organized Crime, Terrorism and Other Types of Crimes, signed in Bucharest on 10 July 2006, ratified by Law no. 68 of 22 March 2007.

Other bilateral treaties (concluded either at government or state level) dealing with transnational organized crime and/or police and/or judicial cooperation in criminal matters are also in force. Information in this respect is available on the website of the Ministry of Justice, Ministry of Internal Affairs and Ministry of Foreign Affairs.

Does your country have jurisdiction to prosecute crimes related to smuggling of migrants when they are committed outside its territory? If yes, specify the legal framework.

Extraterritorial jurisdiction is also foreseen by the Romanian Criminal Code. In case the smuggling of migrants is committed by a Romanian national outside the country, the prosecution and judgment are determined by the existence of double criminal liability and the initiation of the criminal action is made with the prior permission of the General Prosecutor of Romania. The Romanian criminal law is also applicable to foreign citizens or persons without citizenship who are willingly in Romania, who committed offences outside the country (*the principle of universal jurisdiction*), only under the following circumstances: an offense was perpetrated, which the Romanian state has undertaken to suppress under an international treaty, whether it is provided or not by the criminal law of the state where it was committed; the extradition or surrender of the perpetrator were requested and denied.

Do you have a national policy or action plan to address the issue of migrant smuggling?

National Immigration Strategy for 2011 – 2014. Currently, the problems regarding the smuggling of migrants are included in the *National Strategy for Public Order and Safety 2015 - 2020*, approved by the Resolution no. 779/2015

Where possible, please provide information regarding:

Number of apprehended smugglers:

Number of investigations instigated against migrant smugglers:

Number of successful prosecutions of migrant smugglers:

During 2014, in cases of smuggling of migrants, Directorate for Investigating Organized Crime and Terrorism (DIICOT) of the Prosecution Office of the High Court of Cassation and Justice has issued 10 indictments and 13 decision of not to indict. By those 10 indictments, 62 defendants were submitted to trial, among which 33 in custody. Between January and June 2015, 4 indictments were issued and other 10 decisions of not to indict were issued too. By those 4 indictments, 29 defendants were submitted to trial, among which 20 in custody.

In your country, is international cooperation on smuggling of migrants (specifically on mutual legal assistance and extradition) afforded

- **by statute?**
- **by treaty or other agreement or arrangement (multilateral or bilateral)?**
- **by virtue of reciprocity or comity?**
- **Is the provision of mutual legal assistance subject to the double criminality requirement according to your domestic legal framework?**

The Law no. 302/2004 on international judicial cooperation in criminal matters is the national law dealing with the whole range of forms of international cooperation in criminal matters. This law shall be applied *based on and for executing the norms concerning judicial co-operation in criminal matters, as comprised in the international judicial instruments to which Romania is a Party*, which it supplements in situations that are not regulated therein.

In the absence of an international convention, judicial co-operation can take place by virtue of international courtesy, upon request sent through diplomatic channels by the Requesting State and with a written assurance of reciprocity from the competent authority in that State. In such case (where no treaty is in force) the Law 302/2004 is the common law in the matter for the Romanian judicial authorities. The absence of reciprocity does not prevent the execution of a request for international judicial co-operation in criminal matters, if it: a) proves to be necessary because of the nature of the act or of the need to fight against certain serious forms of crime; b) may contribute to an improvement of the defendant or convict's status or to his social reinsertion; c) may serve to clarify the judicial status of a Romanian national.

According to this law, mutual legal assistance and extradition are afforded extensively. There is only one exception in terms of the extradition of the Romanian nationals, extradition being thus subject to the conditions set by the Romanian Constitutions. Article 20 of the Law 302/2004 states that Romanian nationals may be extradited from Romania based on the multilateral international conventions to which Romania is a party and based on reciprocity, only if at least one of the following conditions is met: a) the person sought domiciles in the Requesting State at the date when the request for extradition is made; b) the person sought also has the citizenship of the requesting State; c) the person sought committed the act in the territory or against a national of a EU MS, if the requesting State is a EU MS. In the events provided at a) and c), when extradition is being requested in view of criminal prosecution or trial, a supplementary condition requires that the Requesting State provide assurances deemed as sufficient that, should he or she be sentenced to a custodial penalty through a final court judgment, the extradited person will be transferred to Romania to serve the penalty. Romanian citizens may be extradited also based on the provisions of bilateral treaties and based on reciprocity. In view of finding whether the conditions of Article 20 paragraphs (1) to (3) are met, the Ministry of Justice requests document issued by the competent authority of the requesting State to be presented.

Extradition may be allowed only if the fact of which the person the extradition of whom is being requested has been accused or for which he has been convicted is provided as an offence both in the law of the requesting State and in Romanian law. However, extradition may be granted even if the act concerned is not provided in Romanian law, if for this act the prerequisite of double criminality is excluded by an international convention to which Romania is a party. The differences between the legal classification and the name given to the same offence by the laws of the two States are irrelevant, if an international convention or, in its absence, a declaration of reciprocity does not provide otherwise.

In terms of mutual legal assistance, the Law 302/2004 provides mainly the grounds for the granting of assistance to the greatest extent possible. However, for certain forms of assistance, such as extradition or for the purpose of certain judicial activities such as the search, interception of communications, other technical surveillance methods, double criminality is a mandatory condition.

In your experience, is international co-operation regarding prosecution of migrant smugglers effective? Please specify.

The experience of Directorate for Investigation of Organized Crime and Terrorism of the Prosecution Office of the High Court of Cassation and justice is positive. So far no cases of requests for mutual legal assistance in the smuggling of migrants were reported as unexecuted or executed with great delay.

In terms of international co-operation, what legal and/or practical obstacles have been encountered as regards co-operation with:

Council of Europe Member States:

Cooperation with the EU MS which are also member of the Council of Europe is smoothly running and results are very positive. An important role of such results is played by Eurojust and Europol, and EJM contact points as well.

Cooperation with other states members of the Council of Europe which are not EU MS is also fruitful (some of them have posted liaison magistrates at EUROJUST or/and have designated contact points at EJM which is a big advantage). However, there are still practical difficulties related to lack of communication (including acknowledging receipt of requests) and lack of feedback and coordination. An important role here is played by PC-OC (especially taking into the tools drafted by the PC-OC) and the list of the contact points set up in this framework.

Third party states:

Cooperation with third states is fruitful as well. There is still room for improvement in terms of quality of communication and there is still need for cooperation and mostly for coordination.

From the perspective of third states, Romania relies mostly on the multilateral treaties adopted at the UN level (and the legal tools offered by UNODC), and only few bilateral treaties have been concluded. The weak point of the UN Convention (in terms of organized crime) is that the definition of "serious crime" is valid only for purposes of the application of the Organized Crime Convention.

Do you think existing Council of Europe instruments on international co-operation in criminal matters (Mutual legal assistance, extradition) are effective in dealing with migrant smuggling? If not, please specify.

At the Council of Europe level there is no migrant smuggling-related convention. Looking ahead, the concept of serious offences - which might/should include the migrant smuggling as well - is found indeed in the context of the existing crime-related conventions of the Council of Europe. However, the concept is not defined for any of these conventions, a reference to the national law being always made (e.g. money laundering - ETS 198 to a category of serious offences in the national law of the Party), cybercrime (ETS 185 - to be determined by domestic law)

Secondly, in the criminal matters, the Council of Europe treaties (as any other multilateral conventions) have been adopted for different purposes (e.g. harmonization/approximation of substantive national laws,

or/and improving national capabilities for preventing and/or combating crime) defined by the context (time and policy discussions) of its adoption.

Having this in mind, we need being clear about what effectiveness means, which are factors the effectiveness of a treaty (or parts of it) is depending on, and which are the mechanisms in place (if any) to asses such effectiveness (and, in case of an existing mechanism, to see if it really fulfill that function).

Spain

Do you have any laws or legislative measures covering the issue of migrant smuggling?

Is the issue set out in general criminal law or are there specific provisions dealing with the problem?

Yes. In Spain, migrant smuggling is criminalised by the Criminal Code⁷ (Title XV bis, Offences against foreign citizens, Article 318 bis).

Is the smuggling of migrants a criminal offence under domestic law?

Does national law include a definition of migrant smuggling?

Article 318 bis of the Criminal Code does not expressly define migrant smuggling but it describes the penalized conduct.

How is this conduct defined?

Any person who intentionally assists a person who is not a national of a Member State of the European Union to enter, to transit across or to remain in the territory of Spain, in breach of the laws on entry, transit and staying of aliens, shall be punished with the penalty from three to twelve months fine or from three months to one year imprisonment.

This conduct shall not be punishable when the only objective pursued by the author is providing humanitarian assistance to the person concerned.

What are the material elements of the crime?

- Article 318 bis requires the willingness (an intentional conduct) from the author of the offence.
- The objective (purpose) of this conduct is the entry, transit or staying of a foreign person in Spain.
- The economic profit is penalized as an aggravating circumstance of the offence, but it is not contemplated as an essential requirement in case of entry or transit across Spain (paragraph 1). However, it is an essential element in case of assistance to remain in Spain (paragraph 2).
- The smuggled person shall not be a Spanish national or a national from a Member State of the European Union.
- The offender may be a natural or a legal person. Natural persons can act individually or in the frame of an organization. Penalties applicable to legal persons are also foreseen.
- Aggravated penalties are applicable when:
 - the crime is perpetrated in the frame of an organization;
 - the offenders have perpetrated the act availing themselves of their status as an authority, agent thereof or public officer (in this case, penalties of absolute barring from six to twelve years are also foreseen); or
 - the smuggled person's life, personal health or integrity have been endangered.

⁷ Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal (consolidated text): <https://www.boe.es/buscar/act.php?id=BOE-A-1995-25444>

Is “financial gain” an element of the definition of smuggling of migrants?

“Financial gain” is considered as an aggravating circumstance. Those who perpetrate the conduct described in Article 318 bis paragraph 1 for profit shall be punished with the penalties higher by one degree to those foreseen in the aforementioned provision.

Could you please provide, if possible, the relevant texts (in English or in French)?

“Article 318 bis

1. Whoever intentionally assists a person who is not a national of a Member State of the European Union to enter Spanish territory or transit across, in breach of the laws on entry or transit of aliens, shall be punished with a fine from three to twelve months or imprisonment from three months to one year.

These facts shall not be punishable if the objective pursued by the author were only providing humanitarian assistance to the person concerned.

If the facts were committed for profit, the penalty shall be imposed in its upper half.

2. Whoever intentionally assists, for profit, a person who is not a national of a Member State of the European Union to remain in Spain, in breach of the laws on stay of aliens, shall be punished with a fine of three to twelve months or imprisonment of three months to one year.
3. The facts referred in paragraph 1 of this Article shall be punished with imprisonment from four to eight years when any of the following circumstances:

When the facts were committed within an organization dedicated to perform such activities. In the case of managers, directors or those in charge of these organizations, the upper half of the punishment shall be applied, which may be raised to the one immediately above in degree.

When the smuggled person’s life, personal health or integrity have been endangered.

4. The same penalties referred in the previous paragraph, as well as absolute barring from six to twelve years, shall be applicable when the offenders have perpetrated the act availing themselves of their status as an authority, agent thereof or public officer.
5. When, in accordance with the provisions of Article 31bis, a legal person is responsible for the offenses covered by this Title, it shall be punished with a fine from two to five years, or from three to five times the profit made if the resulting amount was higher. In light of the rules laid down in Article 66bis, judges and courts may also impose penalties laid down in subparagraphs b) to g) of paragraph 7 of Article 33.
6. Judges and courts, considering the seriousness of the circumstances, the conditions of the offender and the objective pursued, may impose the penalty lower by one grade to the respectively indicated”.

Are the following activities criminalized under national legislation:

Attempts to smuggle migrants

Yes. Article 15 of the Criminal Code states that attempted offences are punishable.

Participation as an accomplice in the smuggling of migrants

Yes. Article 27 of the Criminal Code considers principals and accessories as criminally responsible for felonies. Article 29 defines accessories as those who cooperate in carrying- out the offence with prior or simultaneous acts.

Acting as instigator of the smuggling of migrants

Yes. Article 28 of the Criminal Code considers that whoever induces another or others to commit a crime is consider as an offender.

Migrant smuggling as part of a criminal organization

Yes. Article 318 bis paragraph 3 (a) of the Criminal Code states that penalties higher in one degree to those foreseen in paragraphs 1 and 2 shall be imposed, when the offender belongs to an organization which perpetrates such operations. In the case of managers, directors or those in charge of these organizations, the upper half of the punishment shall be applied, which may be raised to the one immediately above in degree.

Circumstances that endanger, or are likely to endanger, the lives or safety of smuggled migrants

Yes. Article 318 bis paragraph 3(b) of the Criminal Code provides that penalties higher in one degree to those foreseen in paragraphs 1 and 2 shall be imposed, when the smuggled person's life, personal health or integrity have been endangered.

Does your domestic legislation permit use of special investigative techniques for the purpose of investigating the smuggling of migrants such as

Interceptions of telecommunication;

The Spanish Act on Criminal Procedure⁸ has been recently amended (Ley Orgánica 13/2015, de 5 de octubre, de modificación de la Ley de Enjuiciamiento Criminal para el fortalecimiento de las garantías procesales y la regulación de las medidas de investigación tecnológica) in order to improve the regulation of investigative techniques used so far. This modification incorporates Articles 588 bis and subsequent which regulate the interception of telecommunications regime. This regulation is guided by the principles of exceptionality, adequacy, necessity, and proportionality. Some of these techniques (ex. interception of telephonic and electronic communications, records on remote computers) can only be used in case of offences committed in the frame of a criminal organization, offences punishable with a maximum penalty of at least three years in prison or offences against minors.

Undercover operations;

The recent amendments of the Spanish Act on Criminal Procedure referred in the previous question also modify paragraphs 6 and 7 of Article 282. This provision provides that the competent judge may authorize members of the Judicial Police to act under a covered identity in closed communication channels in order to clarify offences committed in the frame of a criminal organization, offences punishable with a maximum penalty of at least three years in prison or offences against minors.

Financial investigations: including access to ban, financial or commercial records or databases;

⁸ Real decreto de 14 de septiembre de 1882 por el que se aprueba la Ley de Enjuiciamiento Criminal (consolidated text): <https://www.boe.es/buscar/act.php?id=BOE-A-1882-6036>

Article 22 of the Organic Act 15/1999, on Personal data protection⁹ points out that collection and processing of personal data for law enforcement purposes by Security Forces, without consent of those affected, shall be limited to those cases and categories of data required to prevent a real danger to public safety or to repress criminal offences, and such data must be stored in specific files established for the purpose, which must be classified by their degree of reliability.

Moreover, the Act 10/2010 on prevention of money laundering and terrorism financing¹⁰ establishes certain measures concerning obliged subjects who have access to financial operations that may hide money laundering from criminal activities (including smuggling of migrants). These subjects are obliged to inform about any suspicious financial operation or transaction to the Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offences (Spanish FIU under the Ministry of Economy and Competitiveness). The obliged subjects shall provide the FIU with all the information set out by the Act 10/2010.

According to Article 32 of this Act, the processing of personal data and files, whether automated or otherwise, created for fulfilment of the provisions of the Act, shall be subject to the provisions of the Organic Act 15/1999 and its implementing regulations. However, the data subject's consent shall not be required for the processing of data necessary for compliance with the reporting obligations referred.

Specific form of protection for witnesses;

The Organic Act 19/1994 on Protection of witnesses and experts in criminal proceedings¹¹ regulates protection measures aimed to guard the identity, domicile and other relevant data regarding witnesses in criminal proceedings (including those related to smuggling of migrants).

The Act 4/2015 on the Statute of the crime victim¹² sets out a catalogue of procedural and extra-procedural rights as well as support measures for victims of any offence, including the victims of smuggling of migrants.

Article 3 of the above mentioned Act provides a generic definition of the victim's right to protection, information, support, assistance and care, as well as to have active participation in criminal proceedings and to be treated with respect, in a professional, individualized and non-discriminatory manner from their first contact with authorities or public officials, during the performance of assistance and support to victims services and that of restorative justice, throughout criminal proceedings and for an adequate period of time after its completion, irrespective of whether the identity of the offender is known and of the result of the process.

Title III of Act 4/2015 specifically focuses on protection measures. According to Article 19, authorities and public officials in charge of investigating, prosecuting and judging the crimes shall adopt the necessary measures, in accordance with the provisions set down in the Act on Criminal Procedure, in order to protect the life of victims and their relatives, their physical and mental integrity, their freedom, security, sexual freedom and indemnity, as well as to properly respect their privacy and dignity, particularly when receiving their statement or when they must be witness in a trial, and to avoid secondary or repeat victimization. This same article provides for reinforced protection in case of victims under-age. The following articles refer to the right to avoid contact between victim and offender, the right to the protection of the victim during a criminal investigation – giving statement before the judicial authority without unjustified delays, the fewest

⁹ Ley Orgánica 15/1999, de 13 de diciembre, de Protección de Datos de Carácter Personal (consolidated text): <https://www.boe.es/buscar/act.php?id=BOE-A-1999-23750>

¹⁰ Ley 10/2010, de 28 de abril, de prevención del blanqueo de capitales y de la financiación del terrorismo (consolidated text): <https://www.boe.es/buscar/act.php?id=BOE-A-2010-6737>

¹¹ Ley Orgánica 19/1994, de 23 de diciembre, de protección a testigos y peritos en causas criminales: https://www.boe.es/diario_boe/txt.php?id=BOE-A-1994-28510

¹² Ley 4/2015, de 27 de abril, del Estatuto de la víctima del delito: http://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-4606

times as possible, in the company of a support person of the victim's choice, apart from their legal representative-. Additionally, it is also envisaged the individual evaluation of victims to determine their specific needs.

others; Please specify.

As said in the previous question, Act 4/2015 on the Statute of the Victim provides a wide catalogue of procedural and extra-procedural rights and tailored protection measures adopted after an individual evaluation of the victim's necessities.

Moreover, Organic Act 8/2015, on the Modification of the system for the protection of children and adolescents (Ley Orgánica 8/2015, de 22 de julio, de modificación del sistema de protección a la infancia y a la adolescencia) amends Article 59, paragraph 2 of the Organic Act 4/2000, regarding the rights, freedoms and social integration of foreigners in Spain¹³. This Article states that "whenever competent administrative bodies have enough reasons to believe that an undocumented migrant has been trafficked, they shall inform that person about the provisions of this article and they shall raise to the competent authority, for approval, the corresponding proposal so that a period of recovery and reflection is granted, according to the procedure legally established.

This recovery and reflection period shall have a minimum duration of ninety days, and shall suffice for the victim to be able to decide whether s/he is willing to cooperate with the authorities in the investigation of the crime and, where appropriate, in criminal proceedings. Both during the stage of identification of victims and during the recovery and reflection period, no disciplinary procedure shall be initiated based on infringement of Article 53.1.a) and any administrative penalty or, where appropriate, the enforcement of the expulsion or return eventually ordered shall be suspended".

Does your domestic legislation enable seizure and/or confiscation:

of property, equipment or other instrumentalities used in or destined for use in offences related to smuggling of migrants?

Yes. Articles 127 and subsequent of the Criminal Code regulate the seizure of any goods, assets and instruments used to prepare or to perpetrate an offence, whatever transformations they may have undergone.

of proceeds of crime derived from offences related to smuggling of migrants? If yes specify the main features of the legal framework.

Yes. Articles 127 and subsequent of the Criminal Code also cover the seizure of proceeds derived from crime. Article 127 bis expressly foresees that assets, goods and gains belonging to a person who has been condemned of a crime against aliens' rights or trafficking in human beings shall be seized when it is stated, on the basis of reasonable grounds, that they are related to a criminal activity, and their licit origin is not proved.

Is trafficking in persons defined under national law?

If so, how does this definition differ from that of migrant smuggling?

Trafficking in persons is regulated under Article 177 bis of the Criminal Code. It is therefore typified as an independent provision that contains specific characteristics.

¹³ Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social (consolidated text): <https://www.boe.es/buscar/act.php?id=BOE-A-2000-544>

Paragraph 1 of the referred article states that: “1. *It shall be convicted of human trafficking and punished with the penalty of five to eight years imprisonment whoever using violence, intimidation or deceit, or abusing a situation of superiority or need, or vulnerability of a national or alien victim, or giving or receiving payments or benefits to achieve the consent of a person having control over the victim, were to induce, transport, transfer, receive or house such a victim, included the exchange or transfer of control over those persons, for any of the purposes described below, within Spain, from Spain, in transit or with destination therein: a) Imposing on the victim forced work or services, slavery or practices similar to slavery or servitude or begging. b) Sexual exploitation including pornography. c) Exploitation of criminal activities. d) Extraction of their bodily organs. e) Forced marriages. There is a situation of need or vulnerability in which the person concerned has no real or acceptable alternative but to submit to abuse*”.

In relation to your country, are there any international, regional or bilateral agreements which address the issue of migrant smuggling?

Spain has currently signed 42 international bilateral agreements on police cooperation. All of them include smuggling of migrants within their scope. As an example, agreements signed with Cape Verde (2006), Algeria (2008), Brazil (2007), Qatar (2011), Moldova (2013) or Egypt (2015) can be mentioned.

Strictly concerning migration, Spain has signed several Frame Agreements on Migration which also cover the smuggling of migrants. Agreements with Mali, Niger or Senegal can be cited as an example.

Does your country have jurisdiction to prosecute crimes related to smuggling of migrants when they are committed outside its territory? If yes, specify the legal framework.

Article 23 paragraph 4 (d) of the Organic Act on the Judiciary¹⁴ states that the Spanish jurisdiction is competent to prosecute offences against aliens when they have been committed outside Spanish territory, in the cases contemplated by international treaties ratified by Spain or in normative acts adopted by an International Organization of which Spain is a Party.

Do you have a national policy or action plan to address the issue of migrant smuggling?

The Spanish policy against smuggling of migrants is based in five axes:

- Prevention at source.
- Operative cooperation with countries of origin and transit.
- Fight against criminal organizations that smuggle migrants.
- Better management of borders.
- Effective return policy.

Where possible, please provide information regarding:

Number of apprehended smugglers:

Number of investigations instigated against migrant smugglers:

Number of successful prosecutions of migrant smugglers:

No data available.

¹⁴ Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial (consolidated text): <https://www.boe.es/buscar/act.php?id=BOE-A-1985-12666>

In your country, is international cooperation on smuggling of migrants (specifically on mutual legal assistance and extradition) afforded

- **by statute?**
- **by treaty or other agreement or arrangement (multilateral or bilateral)?**
- **by virtue of reciprocity or comity?**

International cooperation in the field of smuggling of migrants is covered in Spain by general treaties, conventions and arrangement on legal cooperation on criminal matters: the European Convention on Mutual Assistance in Criminal Matters (Strasbourg, 20th April 1959), the United Nations Convention against Transnational Organized Crime (New York, 15th November 2000) or the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (Brussels, 29th May 2000).

Is the provision of mutual legal assistance subject to the double criminality requirement according to your domestic legal framework?

In the frame of the European Union, Article 20 of the Act 23/2014 on Mutual Recognition of decisions in criminal matters in the European Union¹⁵ sets out that offences concerning facilitation of unauthorized entry and residence, trafficking in human beings and participation in criminal organizations are not subject to the double criminality control.

In respect of mutual legal assistance provided outside the frame of the European Union, the double criminality control will be applied if so provided by the international instruments applicable.

In your experience, is international co-operation regarding prosecution of migrant smugglers effective? Please specify.

In terms of international co-operation, what legal and/or practical obstacles have been encountered as regards co-operation with:

- **Council of Europe Member States:**
- **Third party states:**

Spain is generally satisfied with the international co-operation experiences carried out so far.

Do you think existing Council of Europe instruments on international co-operation in criminal matters (Mutual legal assistance, extradition) are effective in dealing with migrant smuggling? If not, please specify.

Spain is generally satisfied with the effectiveness of Council of Europe instruments on international cooperation in criminal matters.

¹⁵ Ley 23/2014, de 20 de noviembre, de reconocimiento mutuo de resoluciones penales en la Unión Europea:
http://www.boe.es/diario_boe/txt.php?id=BOE-A-2014-12029

Netherlands

Do you have any laws or legislative measures covering the issue of migrant smuggling?

Is the issue set out in general criminal law or are there specific provisions dealing with the problem?

The Dutch Penal Code contains a specific provision that criminalises migrant smuggling. The provision is in line with the The United Nations Protocol against the Smuggling of Migrants, EU-Directive2002/90/EC and Framework Decision 2002/946/JHA.

Article 197a of the Penal Code

(1) Any person who assists another person to enter, or transit across the Netherlands or another Member State of the European Union, Iceland, Norway, or a state party to the (...) protocol against the smuggling of migrants over land, sea and in the air, supplementing the (...) Treaty against transnational organised crime, or provides opportunity thereto, means or information, while he knows or should seriously suspect that this entry or transit is unauthorised, shall be if found guilty of human smuggling punished with a imprisonment of at most 4 years or a monetary penalty of the fifth category.

(2) Any person who for financial gain assists another person with entering in order to reside in the Netherlands or another Member State of the European Union, Iceland, Norway, or a state party of the in the first paragraph indicated protocol, or provides opportunity thereto, means or information, while he knows or should seriously suspect that this access or transit is unauthorised, shall be punished with a prison sentence of at most 4 years or a monetary penalty of the fifth category.

(3) If one of the acts, described in the first and second paragraph, is committed in the execution of any duty or profession, a prison sentence of at most 6 years or a monetary penalty of the fifth category shall be imposed (...)

(4) If one of the acts, described in the first and second paragraph, is committed by a person who makes of this a customary practice or acts in association with other persons, this shall be punishable with a prison sentence of at most 8 years or a monetary penalty of the fifth category.

(5) If one of the acts, described in the first and second paragraph results in grievous bodily harm or life threatening danger to another person, it shall be punishable with a prison sentence of at most 12 years or a monetary penalty of the fifth category.

(6) If one of the acts, described in the first and second paragraph results in death, it shall be punishable with a prison sentence of at most 15 years or a monetary penalty of the fifth category

Is the smuggling of migrants a criminal offence under domestic law?

Does national law include a definition of migrant smuggling?

Yes.

How is this conduct defined?

(1) Any person who assists another person to enter, or transit across the Netherlands or another Member State of the European Union, Iceland, Norway, or a state party to the (...) protocol against the smuggling of migrants over land, sea and in the air, supplementing the (...) Treaty against transnational organised crime, or provides opportunity thereto, means or information.

What are the material elements of the crime?

assists another person to enter, or transit;

while he knows or should seriously suspect that this access or transit is unauthorised

d. Is “financial gain” an element of the definition of smuggling of migrants?

Only regarding assisting another person with entering in order to reside (197a (2) Penal Code)

Could you please provide, if possible, the relevant texts (in English or in French)?

Yes (above).

Are the following activities criminalized under national legislation:

Attempts to smuggle migrants

Yes. Article 45(1) of the Penal Code criminalises attempts to commit offenses, when the intention is revealed by the initiation of the act in question.

Participation as an accomplice in the smuggling of migrants

Yes. Article 48 under points 1° and 2° of the Penal Code respectively criminalises accomplices to offenses which are those persons who intentionally are helpful in committing offenses or for those persons who intentionally provide the opportunity, the means or information to commit offenses.

Acting as instigator of the smuggling of migrants

Yes. Article 47(1) and under point 2° of the Penal Code criminalises those persons who by virtue of gifting, exchanging promises, abusing authority, use violence or deception or in providing opportunity to, the means or information for intentionally instigating offenses shall be punished.

Migrant smuggling as part of a criminal organisation

Yes. Participation in a criminal organisation is punished under Article 140(1) of the Penal Code with a custodial sentence of at most 6 years. The criminal organization must have the goal to commit offences and migrant smuggling can be such an offence.

Circumstances that endanger, or are likely to endanger, the lives or safety of smuggled migrants.

Yes. Article 197a(5)-(6) include as aggravated offenses acts that lead to grievous bodily harm, grave danger or result in death. The above acts are punishable with respectively 6, 8 and 12 years imprisonment as maximum sentences or with a monetary penalty of the fifth category.

Does your domestic legislation permit use of special investigative techniques for the purpose of investigating the smuggling of migrants such as

Interceptions of telecommunication;

Yes, however not special but general techniques: Article 126l Code of Criminal Procedure.

Undercover operations;

Yes, however not special but general techniques: article 126h Code of Criminal Procedure.

Financial investigations: including access to bank, financial or commercial records and/or databases;

Yes however not special but general techniques: Article 126 Code of Criminal Procedure.

specific form of protection for witnesses;

Yes (in general) articles 226a etc. en 226l Code of Criminal Procedure, Decision on Witnesses protection.

others; (in general) Title IVA Code of Criminal Procedure

Does your domestic legislation enable seizure and/or confiscation:

- **of property, equipment or other instrumentalities used in or destined for use in offences related to smuggling of migrants?**
- **of proceeds of crime derived from offences related to smuggling of migrants ? If yes specify the main features of the legal framework?**

Yes. Articles 33 etc, 26e Penal Code, articles 94 etc, 126 etc and 511b Code of Criminal Procedure.

Is trafficking in persons defined under national law?

If so, how does this definition differ from that of migrant smuggling?

In the case of trafficking (the purpose of) exploitation is criminalised.

In the case of smuggling a cross border aspect is required. Trafficking can have cross-border aspects, but can also take place in a national context.

In relation to your country, are there any international, regional or bilateral agreements which address the issue of migrant smuggling?

The United Nations Protocol against the Smuggling of Migrants

EU-Directive2002/90/EC

EU-Framework Decision 2002/946/JHA

Bilateral MOU's (i.a The Caribbean Netherlands, China)

Does your country have jurisdiction to prosecute crimes related to smuggling of migrants when they are committed outside its territory? If yes, specify the legal framework.

Article 7(1) of the Penal Code ensures jurisdiction of the Netherlands via applicability of the Penal Code to Dutch nationals who find themselves guilty of the offenses listed under point 1, which specifically references Article 197a of the Penal Code.

Do you have a national policy or action plan to address the issue of migrant smuggling?

A multidisciplinary barriermodel in combating migrant smuggling has been developed in 2014. All different aspects relating to migrant smuggling are addressed in this barrier model, taking into account prevention, investigation and prosecution of organised crime groups and migration aspects. It includes activities for police, public prosecutors, border guards, immigration services, NGOs, private sector and includes cooperation with countries of origin and transit, as well as migrant smuggling in the Netherlands.

The Expertise Centre for human trafficking and people smuggling (EMM) gathers and processes information from different organisations. The KMar, Labour Inspectorate (ISZW), the National Police and

the INS participate in the EMM. The EMM gathers information on a national level and exchange this in close cooperation with international operating organizations combating international organised crime. Based on the gathered information, the EMM makes proposals to initiate criminal investigation. Besides that, the participating partners in the EMM produce quarterly reports on human trafficking and people smuggling.

Where possible, please provide information regarding:

- **Number of apprehended smugglers:**
- **Number of investigations instigated against migrant smugglers:**
- **Number of successful prosecutions of migrant smugglers:**

Number of prosecutions and convictions on human smuggling

	2009	2010	2011	2012	2013
Prosecutions	205	174	142	109	121
Convictions	212	145	92	87	92

In your country, is international cooperation on smuggling of migrants (specifically on mutual legal assistance and extradition) afforded

- **by statute?**
- **by treaty or other agreement or arrangement (multilateral or bilateral)?**
- **by virtue of reciprocity or comity?**

Is the provision of mutual legal assistance subject to the double criminality requirement according to your domestic legal framework?

UNTOC

European Convention on Mutual Assistance in Criminal Matters

EU--Framework Decision 2002/946/JHA

Bilateral agreements

In your experience, is international co-operation regarding prosecution of migrant smugglers effective? Please specify.

In response to the current migrant crisis, the prosecution of migrant smuggling is considered as an intensified priority. Recently Dutch government decided to establish a temporary Ministerial Committee on Migration (MCM) in order to manage the current migration flows. International cooperation with both EU- and non EU Member States is part of the activities of the MCM.

In general the investigation of migrant smuggling is overall effective in the Netherlands. Within the Royal Marechaussee a special unit is responsible for the investigations on human smuggling. In The Netherlands there are public prosecutors specialized in human smuggling dealing with these human smuggling cases. Moreover a Dutch liaison magistrate is stationed in Italy. Besides the expertise centre on human trafficking and people smuggling, a special operational multidisciplinary team was established targeting human smuggling in the Netherlands in 2014. This facilitates focus on human smuggling cases of all actors and authorities involved. It also yields better coordination and the exchange of information. This multidisciplinary team also links with several operational actions within Empact. Facilitated Illegal Immigration so there's also a focus on sharing information with international partners and Europol as well. There's an important role for the international liaison network of both the Royal Marechaussee liaisons and the National Police.

In terms of international co-operation, what legal and/or practical obstacles have been encountered as regards co-operation with:

Council of Europe Member States:

Legal structures are sufficient. Practical obstacles exist, i.e. capacity shortage, suboptimal use of procedures on legal assistance.

Third party states:

Cooperation with source or transit countries, even when being a party to the UNTOC protocol, is problematic when there is no central government authority.

Do you think existing Council of Europe instruments on international co-operation in criminal matters (Mutual legal assistance, extradition) are effective in dealing with migrant smuggling? If not, please specify.

Yes.

Austria

**Do you have any laws or legislative measures covering the issue of migrant smuggling?
Is the issue set out in general criminal law or are there specific provisions dealing with the problem?**

The **smuggling of migrants** is set out in a special law, the Aliens' Police Act (Fremdenpolizeigesetz 2005 [FPG]), in sections 114, 115, 116.

There are also regulations within the Austrian Penal Code (Strafgesetzbuch [StGB]) in section 104a PC "Trafficking in human beings".

All Austrian regulations can be found in the internet: www.ris.bka.gv.at.

Is the smuggling of migrants a criminal offence under domestic law?

- **Does national law include a definition of migrant smuggling?**
- **How is this conduct defined?**
- **What are the material elements of the crime?**
- **Is "financial gain" an element of the definition of smuggling of migrants?**

Could you please provide, if possible, the relevant texts (in English or in French)?

Are the following activities criminalized under national legislation:

- **Attempts to smuggle migrants**
- **Participation as an accomplice in the smuggling of migrants**
- **Acting as instigator of the smuggling of migrants**
- **Migrant smuggling as part of a criminal organisation**
- **Circumstances that endanger, or are likely to endanger, the lives or safety of smuggled migrants**

According to sec 114 Aliens' Police Act a person who supports the illegal entrance or transition of an alien through the territory of a member state of the EU or a neighbouring state of Austria with the intention of unlawful enrichment by the consideration for himself/herself or a third party shall be sentenced to a prison term of up to two years.

A person who committed the mentioned offence for profit, in relation to at least three aliens or in a way that puts aliens in an agonizing condition for a longer period of time shall be sentenced to a prison term of between six months and five years.

Treatment of all accessories as perpetrators:

Sec 12 PC. A criminal offence is committed not only by the immediate perpetrator that commits the criminal offence but also by anybody who abets another person to commit the offence or who contributes to its perpetration in any other way.

Criminality of an attempt, criminal liability of an attempt:

Sec 15. PC (1) Punitive sanctions against offences committed with intent apply not only to the committed offence but also to its attempt and any participation in an attempt.

(2) An offence is considered attempted as soon as the offender puts his decision to commit the offence or have another person commit it (sec 12) into practice by taking an action immediately preceding the commission of the offence.

(3) An attempted offence and participation in an offence will not be liable to punishment if the offence could not have been completed under any circumstances for lack of the perpetrator's personal qualities or circumstances required under the law, or on account of the type of action or object that has been subject to the offence.

Criminal organisation:

Section 278a PC: A person who sets up a enterprise-like association of a larger number of persons, designed

- for a longer period of time, or who - as a member (sec 278 subpara 3) - participates in such an association,
1. which is oriented – albeit not exclusively – to recurrently and deliberately committing serious punishable acts that constitute a threat to life, bodily integrity, liberty or property, or to committing serious punishable acts in the areas of sexually exploiting persons, human trafficking or the illicit traffic with military means, nuclear material and radioactive substances, hazardous waste, forged money or drugs,
 2. which thereby strives to obtain enrichment of a major scope, or considerable influence in political or business life, and
 3. which corrupts or intimidates others, or tries to screen itself in special ways against prosecutorial measures, shall be sentenced to a prison term of between six months and five years. § 278 (4) shall apply in analogy.
4. Does your domestic legislation permit use of special investigative techniques for the purpose of investigating the smuggling of migrants such as
- a. Interceptions of telecommunication;
 - b. Undercover operations;
 - c. Financial investigations: including access to bank, financial or commercial records and/or databases;
 - d. specific form of protection for witnesses;
 - e. others; Please specify.

With regard to investigative measures all the enumerated measures are available in cases of migrant smuggling. In addition the following investigative measures are available according to national law: tracking the accused with a special tracking device (e.g. his/her vehicle), house-searches and searches of vehicles as well as covert observation.

Does your domestic legislation enable seizure and/or confiscation:

- **of property, equipment or other instrumentalities used in or destined for use in offences related to smuggling of migrants?**
- **of proceeds of crime derived from offences related to smuggling of migrants ? If yes specify the main features of the legal framework.**

According to Section 109 CCP the following terms shall mean:

1. “seizure”

- a. is the preliminary establishment of a disposing power over objects and
- b. the preliminary ban to release objects or other property items to third parties (third-party ban), as well as the preliminary ban on selling or pledging such objects and values,

2. “confiscation”

- a. is a court decision establishing or continuing a seizure pursuant to item 1, and
- b. the court ban to sell, encumber or pledge real-estate property or rights recorded in a public register.

Seizure

Section 110. (1) A seizure shall be admissible if it appears to be necessary

1. for reasons of evidence,
2. to secure civil claims, or
3. to secure confiscation (Section 19a of the Criminal Law Code), forfeiture (Section 20 of the Criminal Law Code), extended forfeiture (Section 20b of the Criminal Law Code), a retraction (Section 26 of the Criminal Law Code) or another property-related measure stipulated by law.

(2) The public prosecutor shall order a seizure, and the criminal police shall perform it.

(3) The criminal police is entitled to seize objects (§ 109 item 1, letter a) at its own initiative

1. if
 - a. nobody has disposing power over them,
 - b. they were taken from the victim as a result of a criminal act,
 - c. they were found on the site of the offence and might have been used to commit the criminal act or might have been intended to commit it, or
 - d. they are of low value or can be replaced easily on a temporary basis,

2. if their possession is generally prohibited (Section 445a para 1),
 3. if they were found in the course of a search according to Section 120 para 2 or if they are found with a person, who has been arrested according to Section 170 para 1 or in course of this person's search according to Section 120 para 1 second sentence, or
 4. in the cases of Article 18 of the Council Regulation (EC) No. 608/2013 concerning implementation of the right to intellectual property by way of customs administration and cancellation of Council Regulation (EC) No. 1383/2013, Official Journal No. L 181 of 29/06/2013.
- (4) The seizure of objects for reasons of evidence (para 1 item 1) shall not be admissible and shall certainly be lifted upon a request by the person concerned whenever and as soon as the purpose of evidence can be satisfied by video, audio or other recordings, or by copies of written records or data processed with electronic support, and it is not to be assumed that the seized objects as such or the originals of the seized information will have to be viewed during the trial.

Section 113.

(1) The seizure ends

1. if the criminal police revokes it (para. 2)
2. if the office of public prosecution orders the cancellation (para. 3),
3. if the court orders the confiscation.

(2) The criminal police has to report to the office of public prosecution immediately but at the latest within 14 days of any seizure (section 100 para. 2 n° 2), unless the seizure is revoked according to section 110 para. 3 earlier on the grounds that the prerequisites are not or no longer fulfilled. This report can be combined with the following report if this is not detrimental to the interests of the case or of persons and if the seized objects are of low value, are under nobody's authority to dispose or their possession is generally prohibited (section 445a para. 1).

In the case of section 110 para. 3 n° 4 the criminal police has to proceed in accordance with the provisions of sections 3, 4 and 6 of the Product Piracy Act 2004 (Produktpirateriegesetz 2004), Federal Law Bulletin I N° 56/2004.

(3) The office of public prosecution immediately has to request the court to confiscate the objects or, if the prerequisites are not or no longer fulfilled, order the cancellation of the seizure.

(4) In case of the seizure of items (Section 109 n° 1 lit. a) a confiscation does also upon request not occur, if the seizure refers to items in terms of Section 110 para 3 n°1 lit a and d or n°2 or if the securing purpose can be fulfilled by way of other official means. In these cases the office of public prosecution has to give the necessary orders regarding the seized items and their further custody and revoke the seizure if necessary.

Confiscation (Beschlagnahme)

Section 115.

(1) The confiscation is admitted if the objects seized presumably

1. are required as evidence in the following proceeding,
2. underlie civil claims or
3. will be needed to ensure a judicial decision on confiscation (Section 19a of the Criminal Law Code), forfeiture (Section 20 of the Criminal Law Code), extended forfeiture (Section 20b of the Criminal Law Code), a retraction (Section 26 of the Criminal Law Code) or another propertyrelated measure stipulated by law, whose execution would otherwise be endangered or considerably more difficult.

(2) On request of the office of public prosecution or a person affected by the seizure the court has to decide immediately about the confiscation .

(3) Section 110 para. 4 is to be applied correspondingly. If necessary the confiscation has to be limited to the recordings and copies mentioned there.

(4) For a confiscation via "third party prohibition" and a prohibition to alienate or encumber (section 109 n° 2 lit. b) the provisions of the Austrian Code of Enforcement (Exekutionsordnung - EO) on the preliminary injunction are applicable correspondingly unless this law provides otherwise.

(5) In a decision permitting a confiscation in order to secure a judicial decision on the forfeiture (section 20 StGB) or extended forfeiture (section 20b StGB) an amount of money that will cover the assets which are to be forfeited.

(6) If and as soon as the prerequisites for the confiscation do not or no longer exist or an amount of money mentioned in para. 5 is deposited, the office of public prosecution, after bringing the bill of accusation the court, has to revoke the confiscation.

The relevant provisions of substantial criminal law (StGB) read as follows:

Confiscation (Konfiskation)

Section 19a.

(1) Objects the perpetrator used in order to commit an intentional criminal act, or that were designated by him/her to be used for committing this criminal act or which were produced by the criminal act, have to be confiscated if they were the property of the perpetrator at the time of the decision.

(2) Such objects need not be confiscated if their value is out of proportion regarding the importance of the criminal act or the suspicion against the perpetrator.

Forfeiture

Section 20.

(1) The Court has to declare forfeited assets that were obtained for or by the commission of an act punishable by law.

(2) Forfeiture also refers to the use and substitute value of assets to be declared forfeited according to para. 1.

(3) As far as assets subject to forfeiture according to para. 1 or 2 have not been seized or sequestered (sections 110 para. 1 n° 3, 115 para. 1 n° 3 StPO) the court has to declare an amount of money forfeited that corresponds to the assets obtained according to para. 1 and para. 2.

(4) If the extent of the assets to be declared forfeited cannot be established at all or only with disproportionate efforts, the court has to determine it according to its conviction.

Refraining from forfeiture

Section 20a.

(1) Forfeiture against third persons according to section 20 para. 2 and para. 3 is excluded in so far as this person has obtained the assets unaware of the criminal act punishable by law.

(2) Forfeiture is also excluded

1. against third persons insofar as this person has acquired the assets for a consideration unaware of the criminal act punishable by law,

2. insofar as the person affected satisfies civil claims resulting from the act or has secured their satisfaction or

3. insofar as the effect of forfeiture can also be achieved by other legal measures.

(3) There is no forfeiture if the assets to be declared forfeited or the chance of being able to collect them is out of proportion to the procedural efforts forfeiture or the collection would require.

Extended forfeiture

Section 20b.

(1) Assets at the disposal of a criminal organisation (section 278a) or a terrorist association (section 278b) or that are appropriated or collected as means for financing terrorism (section 278d) have to be declared forfeited.

(2) If a criminal act according to sections 165, 278, 278c, for the commission of which or by which the assets were obtained or such a crime has been committed, also such assets have to be declared forfeited that have been obtained in a time-related connection with such an act if it can be supposed that they derive from a criminal act and their legal origin cannot be proven satisfactorily.

(3) Section 20 para. 2 to para. 4 StGB apply accordingly.

Refraining from extended forfeiture

Section 20c.

(1) Extended forfeiture according to section 20b para. 1 StGB is excluded insofar as there are legal claims regarding the assets affected by persons who do not participate in the criminal organisation or terrorist association or the financing of terrorism.

(2) Section 20a StGB applies accordingly.

Is trafficking in persons defined under national law?

If so, how does this definition differ from that of migrant smuggling?

Section 104a PC reads as follows:

Trafficking in human beings

Sec 104a. (1) A person who recruits, harbours, otherwise receives, transports or offers or transfers to another person an adult using dishonest means (para. 2) against this person with the deliberate intention of the person's exploitation (para. 3), is to be punished with a prison sentence of a minimum of six months up to five years.

(2) Dishonest means are the use of force or severe threats, the deception about facts, abuse of authority, a position of vulnerability, insanity or of defencelessness, intimidation and the receiving or giving of benefits for handing over control over the person.

(3) Exploitation includes sexual exploitation, exploitation through organ transplantation, labour exploitation, exploitation of begging and the exploitation to commit criminal activities.

(4) A person who commits the criminal act in the context of a criminal association, under the use of severe violence or in such a way that the life of the person is severely endangered deliberately or by gross negligence or in such a way that particularly serious harm is caused to the person, is to be punished with a prison sentence of a minimum of one year up to ten years.

(5) With a prison sentence of a minimum of one year up to ten years is also to be punished who recruits, harbours, or otherwise receives, transports or offers or transfers to another person a person under age 18 with the deliberate intention of the person's exploitation.

In relation to your country, are there any international, regional or bilateral agreements which address the issue of migrant smuggling?

For Austria as a MS of the EU the relevant EU instruments (Directive 2002/90/EC and FD 2002/946/JHA) have to be mentioned. Austria has ratified the UN Protocol against the Smuggling of Migrants and is also a Party to the CoE Convention on Action against Trafficking in Human Beings CETS 197.

Does your country have jurisdiction to prosecute crimes related to smuggling of migrants when they are committed outside its territory? If yes, specify the legal framework.

The concerning regulations in Austria are found in section 64 PC (see yellow mark):

Section 64 – Criminal offences abroad being punished irrespective of the laws which are valid for the scene of the crime

(1) The Austrian penal laws are applicable regardless of the penal laws which are valid for the scene of the crime to the following offences being committed abroad:

...

4a. Genital mutilation according to sec 90 para. 3, extortionate kidnapping (sec 102), surrender to a foreign power (sec 103), slavery (sec 104), **trafficking in human beings (sec 104a)**, severe coercion pursuant to sec 106 para. 1 subpara 3, prohibited arranging of adoption (sec 194), rape (sec 201), sexual coercion (sec 202), sexual abuse of a defenceless or mentally ill person (sec 205), gross sexual abuse of minors (sec 206), sexual abuse of minors (§ 207), pornographic presentation with minors pursuant to sec 207a para. 1 and 2, sexual abuse of adolescent persons pursuant to sec 207b para. 2 and 3, abuse of a position of authority pursuant to sec. 212 para. 1, promotion of prostitution and pornographic presentation of minors (sec. 215a), transnational trafficking with prostitution (sec. 217) if a) the perpetrator or the victim is an Austrian citizen,

b) the criminal act has violated other Austrian interests or

c) the perpetrator has been an Austrian citizen at the time of committing the criminal act, is in Austria and cannot be extradited;

6. other criminal offences for which Austria is bound to prosecution even if they have been committed abroad, irrespective of the laws which are valid for the scene of the crime;

7. criminal offences committed by an Austrian against an Austrian if both of them have their domicile or general residence in Austria;

...

(2) If the criminal laws mentioned in para. 1 cannot be applied only because the act constitutes an offence carrying more severe punishment, the act committed abroad nevertheless is to be punished according to the Austrian criminal laws independently from the laws of the foreign state.

Complementary **sec 114 para 7 Aliens' Police Act** sets out that the offences mentioned in sec 114 para 1 to 4 Aliens' Police Act are applicable regardless of the penal laws which are valid for the scene of the crime, if the offence offends interests of Austria.

Do you have a national policy or action plan to address the issue of migrant smuggling?

Since 2007 action plans on trafficking in human beings have been elaborated on a regular basis, on migrant smuggling however no specific action plan has been elaborated yet.

Where possible, please provide information regarding:

- **Number of apprehended smugglers:**
- **Number of investigations instigated against migrant smugglers:**
- **Number of successful prosecutions of migrant smugglers:**

There are no statistics available.

In your country, is international cooperation on smuggling of migrants (specifically on mutual legal assistance and extradition) afforded

- **by statute?**
- **by treaty or other agreement or arrangement (multilateral or bilateral)?**
- **by virtue of reciprocity or comity?**
- **Is the provision of mutual legal assistance subject to the double criminality requirement according to your domestic legal framework?**

International judicial cooperation is afforded in relation to treaty parties according to applicable treaties (primarily European Convention on Mutual Assistance in Criminal Matters CETS 30 and Additional Protocol, European Convention on Extradition CETS 24 and Additional Protocols, etc.). If no treaty is applicable international cooperation is afforded pursuant to the Austrian Federal Law on Extradition and Mutual Legal Assistance by virtue of reciprocity. In order to provide mutual legal assistance double criminality is not required for all measures requested. Coercive measures however always depend on a positive double criminality check.

In your experience, is international co-operation regarding prosecution of migrant smugglers effective? Please specify.

There is positive experience in relation to assistance provided by setting up Joint Investigation Teams. Also the cooperation with neighboring countries with a view to the transfer of proceedings in order to avoid parallel proceedings proves to be effective and efficient.

In terms of international co-operation, what legal and/or practical obstacles have been encountered as regards co-operation with:

- a. **Council of Europe Member States:**
- b. **Third party states:**

The existing Council of Europe instruments on international co-operation in criminal matters prove to be effective also in dealing with migrant smuggling. In relation to third countries international cooperation is much more cumbersome and lengthy due to the lack of a comparable treaty basis.

Do you think existing Council of Europe instruments on international co-operation in criminal matters (Mutual legal assistance, extradition) are effective in dealing with migrant smuggling? If not, please specify.

It would be necessary to extend the existing tools within the CoE on international cooperation in criminal matters to countries outside the CoE. In this respect also a harmonization of criminal offences should be considered.

Danemark

Do you have any laws or legislative measures covering the issue of migrant smuggling?

Yes, both the Aliens Act and the Criminal Code cover the issue of migrant smuggling.

Is the issue set out in general criminal law or are there specific provisions dealing with the problem?

The Aliens Act article 59, paragraph 8, number 1-6 criminalise migrant smuggling. The penalty of an act covered by this provision is a fine or imprisonment for a term not exceeding 2 years.

The Criminal Code article 125 (a) stipulates that any person who is guilty of migrant smuggling under article 59, paragraph 8, number 1-6 of the Aliens Act for the purpose of gain and in other particularly aggravating circumstances is sentenced to imprisonment for a term not exceeding 8 years. Especially situations endangering the lives of others or offences committed in a systematic or organised manner are considered particularly aggravating circumstances.

Is the smuggling of migrants a criminal offence under domestic law?

Yes, it is a criminal offence in both the Aliens Act and the Criminal Code.

Does national law include a definition of migrant smuggling?

The specific definition of migrant smuggling appears from the Aliens Act article 59, paragraph 8, number 1-6:

- (1) Intentionally assists an alien in unlawfully entering or transiting Denmark,
- (2) Intentionally assists an alien in unlawfully staying in Denmark,
- (3) Intentionally assists an alien in entering Denmark for the purpose of entering another country unlawfully from Denmark,
- (4) Intentionally assists an alien in unlawfully entering or unlawfully transiting another country,
- (5) For the purpose of financial gain assists an alien in staying unlawfully in another country, or
- (6) By making shelter or means of transport available to an alien, intentionally assists the alien in working in Denmark without the requisite permit

How is this conduct defined?

See response (2.a)

What are the material elements of the crime?

See response (2.a)

Is “financial gain” an element of the definition of smuggling of migrants?

“Financial gain” is both a material element in the Aliens Act article 59, paragraph 8, number 5 **and** in the Criminal Code article 125 (a)

Could you please provide, if possible, the relevant texts (in English or in French)?

Are the following activities criminalized under national legislation:

- **Attempts to smuggle migrants**

Yes, cf. the Criminal Code article 21, paragraph 1.

- **Participation as an accomplice in the smuggling of migrants;**

Yes, cf. the Criminal Code article 23, paragraph 1.

- **Acting as instigator of the smuggling of migrants**

Yes, furthermore the instigator of the smuggling of migrants will probably often be covered by the Criminal Code article 125 (a) because of the *organised manner*.

- **Migrant smuggling as part of a criminal organization**

Migrant smuggling committed in a *systematic or organised manner* is covered by the Criminal Code article 125 (a).

- **Circumstances that endanger, or are likely to endanger, the lives or safety of smuggled migrants**

Migrant smuggling committed in circumstances that endanger the lives of others (migrants) is covered by the Criminal Code article 125 (a).

Does your domestic legislation permit use of special investigative techniques for the purpose of investigating the smuggling of migrants such as

- **Interceptions of telecommunication;**

The use of interception of telecommunication is permitted both with regard to the Aliens Act article 59, paragraph 8, number 1-6 and the Criminal Code article 124 (a). The possibility to use telecommunication interception appears from the Administration of Justice Act article 780.

- **Undercover operations;**

The use of undercover operations is only permitted in relation to the Criminal Code article 125 (a). The possibility to make use of “agents” appears from the Administration of Justice Act article 754 (a).

- **Financial investigations: including access to bank, financial or commercial records and/or databases;**

Discovery is permitted both with regard to the Aliens Act article 59, paragraph 8, number 1-6 and the Criminal Code article 125 (a). The opportunity to make use of discovery appears from the Administration of Justice Act article 804.

- **specific form of protection for witnesses;**

The presiding judge is authorized to decide that the indicted must leave the court room during the examination of the witness. Furthermore it can be decided that the name, residence and position of the witness must not be disclosed to the indicted. The opportunity to make use of these measures appears from the Administration of Justice Act article 856.

- **others; Please specify.**

As a starting point any investigation technique within the scope of the Administration of Justice Act can be used in relation to the Criminal Code article 125 (a).

Does your domestic legislation enable seizure and/or confiscation:

- **of property, equipment or other instrumentalities used in or destined for use in offences related to smuggling of migrants?**

The Administration of Justice Act article 802, paragraph 1 enables **seizure** if certain conditions are met. The Criminal Code article 75, paragraph 2 enables **confiscation** if certain conditions are met.

- **of proceeds of crime derived from offences related to smuggling of migrants ? If yes specify the main features of the legal framework.**

The Administration of Justice Act article 802, paragraph 2 and 3 enable **seizure** if certain conditions are met.

The Criminal Code article 75 (1) and 76 (a) enables **confiscation** if certain conditions are met.

Is trafficking in persons defined under national law?

Yes, human trafficking is defined and criminalised in the Criminal Code article 262 (a).

If so, how does this definition differ from that of migrant smuggling?

Human trafficking is defined as:

Any person who recruits, transports, transfers, harbours or subsequently receives another person who is or has been subjected to:

- Duress,
- Deprivation of liberty,
- Treats,
- Wrongful creation, confirmation or exploitation of a mistake or
- Any other improper procedure

in order to exploit such other person for prostitution, the taking of pornographic photographs, the recording of pornographic films, pornographic performances, forced labour, slavery, practices similar to slavery, criminal acts or removal of organs.

In relation to your country, are there any international, regional or bilateral agreements which address the issue of migrant smuggling?

- EU directive 2002/90/EC defining the facilitation of unauthorized entry, transit and residence
- Council Decision 2002/946/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence.
- Protocol to The United Nations Convention against Transnational Organised Crime (Palermo, December 2000).

Does your country have jurisdiction to prosecute crimes related to smuggling of migrants when they are committed outside its territory? If yes, specify the legal framework.

- 1) Acts committed **within the territory of another state** by a person who was a Danish national or has his abode or similar habitual residence within the Danish state at the date of the provisional charge are subject to Danish criminal jurisdiction, if the act is also a criminal offence under the legislation of the country in which the act was committed (dual criminality), cf. Criminal Code article 7.
- 2) If the criminality of an act **depends on or is influenced by an actual or intended consequence**, the act is also deemed to have been committed at the place where the effect occurred, or where the offender intended the effect to occur, cf. Criminal Code article 9, paragraph 2.

Do you have a national policy or action plan to address the issue of migrant smuggling?

Special measures have been applied both in relation to police matters and to the processing of cases by the prosecution service

Where possible, please provide information regarding:

- **Number of apprehended smugglers:**
- **Number of investigations instigated against migrant smugglers:**
- **Number of successful prosecutions of migrant smugglers:**

The numbers are difficult to get (without a demanding look into statistics), but as to concluded cases (basically convictions or in smaller cases where the person agrees to pay a fine) the total number as to the Aliens Act cases may be between 100 and 120 since September 2014 and the number of convictions in aggravated cases after the Criminal Code article 125 (a) are in the same timespan approximately 43.

In your country, is international cooperation on smuggling of migrants (specifically on mutual legal assistance and extradition) afforded

- **by statute?**
- **by treaty or other agreement or arrangement (multilateral or bilateral)?**
- **by virtue of reciprocity or comity?**
- **Is the provision of mutual legal assistance subject to the double criminality requirement according to your domestic legal framework?**

Mutual legal assistance on smuggling of migrants is afforded on the basis of an analogy of the provisions in the Administration of Justice Act. Furthermore the assistance is subject to dual criminality.

In your experience, is international co-operation regarding prosecution of migrant smugglers effective? Please specify.

Generally, yes.

In terms of international co-operation, what legal and/or practical obstacles have been encountered as regards co-operation with:

- **Council of Europe Member States:**

No particular information available, but there could be an issue as to possibilities of JIT cooperation (2nd additional protocol to the 1959 Convention)

- **Third party states:**

No information available, the cooperation is presumably very limited.

Do you think existing Council of Europe instruments on international co-operation in criminal matters (Mutual legal assistance, extradition) are effective in dealing with migrant smuggling? If not, please specify.

Generally, yes

Moldova

1. Criminal liability for the smuggling of migrants is provided by the Criminal code of the Republic of Moldova – article 362/1 Organization of illegal migration.
2. a) National legislation provide a definition of the smuggling of migrants.

b) This behavior is defined as “The organization in order to obtain directly or indirectly a financial or material gain from an illegal entry, stay, or transit on the state’s territory or from an exit from this territory of a person who is neither a citizen, nor a resident of this state”.
- c) Material object of the organization of illegal migration crime is:
 - materials from which are made the official forged documents (in the case when the crime imply the forging of documents);
 - forged official documents (in the case when the crime imply holding, selling or using of the forged official documents);
 - authentically official documents (when the crime imply issuing or obtaining in the illegal way or by false declarations, or using of the official documents by the non-true holder).
- d) “Material or financial gain” is an element of the “smuggling of migrants” definition.
3. a) Attempt to migrants smuggling is punishable.
b) Participation as accomplice is punishable.
c) Acting as instigator is punishable.
d) Smuggling of migrants as part of criminal organization is criminalized.
e) Circumstances that endanger or are likely to endanger the lives or safety of smuggled migrants are not expressly criminalized, but some aspects of this are the part of the aggravating circumstance “causing especially large damage to public interests or to the legally protected rights and interests of individuals and legal entities”.
4. In a view to investigate the smuggling of migrants national legislation permit the performing of the special investigating measures as:
 - a) Interception of telecommunications;
 - b) Undercover operations;
 - c) Financial investigations, including access to the banc information;
 - d) Special forms of the witness protection.
5. National legislation permits seizure and confiscation. Criminal code and criminal proceeding code defines seizure and confiscation as follow:

Article 203. Placing under sequester (Criminal proceeding code)

1. The placement under sequester of assets, i.e. of material values, herein included the bank accounts and bank deposits, shall be a procedural coercive measure, implying the inventory of material assets and prohibiting their owner or their possessor to dispose of them, and if necessary, to use them. After the placement under sequestration of bank accounts and deposits, all operations concerning them shall be stalled.
2. The placement of assets under sequester shall be performed in order to secure the reparation of the damage inflicted by the criminal offence, to secure the civil action and the eventual confiscation of assets to be used, used and resulted from committing the criminal offence.

Article 106. Special Confiscation (Criminal Code)

(1) Special confiscation is the forced and free transfer to the state of property or goods used in the commission of a crime or that resulted from crimes. If the goods used in the commission of a crime or that resulted from crimes no longer exist or cannot be found, their monetary equivalent shall be seized.

(2) The following goods shall be subject to special confiscation:

- a) goods resulting from an act set forth in this Code as well as other revenues that accrue from these goods, except for goods and revenues subject to return to their legal owners;
- b) goods used or intended for use in the commission of a crime, if they belong to the criminal;
- c) goods provided to determine the commission of a crime or to pay the criminal;
- d) goods obtained through the commission of a crime, if they are not to be returned to the injured person or not intended for his/her compensation;
- e) goods possessed contrary to legal provisions;
- f) goods converted or transformed, partially or integrally, from goods resulting from crimes and from revenues accrued from such goods;
- g) goods used or intended for financing terrorism.

(2¹) If the goods resulting or obtained through the commission of a crime and revenues accrued from such goods are added to the illegally obtained goods, subject to seizure shall be the part of such goods or their equivalent value to the value of goods resulting or obtained from the commission of the crime and of the revenues accrued from such goods.

(3) Special confiscation shall be applied to persons who commit acts set forth in this Code. Special confiscation may also be applied to goods specified in par. (2), which, however, belong to other persons who accepted them knowing about their illegal origin.

(4) Special confiscation may be applied even in cases when a criminal punishment is not set for the criminal.

(5) Special confiscation shall not be applied for crimes committed through a press agency or any other type of mass media.

6. Criminal code of the Republic of Moldova provide criminal liability for the Trafficking of human beings (art.165 Trafficking of human beings, art.206 Trafficking of children).

Differences between these two are:

- Different scope: the disposition of the article 362/1 CC mention the scope of the permanent or provisory change of the country of residence of the victim. The scope of THB/TC is the exploitation.
- In the illegal migration the physical liberty of the victim does not suffer changes. In the THB the physical liberty of the victim always is limited.
- THB/TC is not always transnational crime, but illegal migration is so.

7. UN Multilateral treaties and conventions

- United Nations Convention against Transnational Organized Crime, New York, 15 November 2000, in force for Moldova from 16.09.2005
- Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children's supplementing the United Nations Convention against Transnational Organized Crime, New York, 15 November 2000, in force for Moldova from 16.09.2005

CoE Multilateral treaties and conventions

- European Convention on Extradition, Paris, 13.12.1957, in force for Moldova from 31.12.1997
- European Convention on Mutual Assistance in Criminal Matters, Strasbourg, 20.04.1959, in force for Moldova from 05.05.1998
- European Convention on the Transfer of Proceedings in Criminal Matters, Strasbourg 15.05.1972, into force from 24.04.2007

Bilateral treaties (general provisions)

- Treaty between the Republic of Moldova and Republic of **Lithuania** on mutual legal assistance in civil, family and criminal matters (09/02/1993, Chisinau).

- Treaty between the Republic of Moldova and **Russian Federation** on mutual legal assistance in civil, family and criminal matters (25/02/1993, Moscow).
- Treaty between the Republic of Moldova and **Latvia** on mutual legal assistance in civil, family and criminal matters (14/04/1993, Riga).
- Treaty between the Republic of Moldova and **Ukraine** on mutual legal assistance in civil and criminal matters (13/12/1993, Kiev).
- Agreement between the Republic of Moldova and **Turkey** on mutual legal assistance in civil, commercial and criminal matters (22/05/1996, Ankara).
- Treaty between the Republic of Moldova and **Romania** on mutual legal assistance in civil and criminal matters (06/07/1996).
- Treaty between the Republic of Moldova and Republic of **Azerbaijan** on mutual legal assistance in civil, family and criminal matters (26/10/2004, Baku).
- Treaty between Republic of Moldova and **Czech Republic** on mutual legal assistance (signed in Moscow, 1982 between USSR and Czechoslovakia, into force for Moldova and Czech Republic from 26.08.2005).

8. Legislation of the Republic of Moldova provide the possibility to investigate the crimes related to smuggling of migrants, when they are committed outside its territory in the following conditions

Article 11. Application of Criminal Law in Space (Criminal Code)

.....

(2) Citizens of the Republic of Moldova and stateless persons with permanent domiciles in the territory of the Republic of Moldova who commit crimes outside the territory of the country shall be liable for criminal responsibility hereunder.

(3) If not convicted in a foreign state, foreign citizens and stateless persons without permanent domiciles in the territory of the Republic of Moldova who commit crimes outside the territory of the Republic of Moldova shall be criminally liable under this Code and shall be subject to criminal liability in the territory of the Republic of Moldova provided that the crimes committed are adverse to the interests of the Republic of Moldova or to the peace and security of humanity, or constitute war crimes including crimes set forth in the international treaties to which the Republic of Moldova is a party.

.....

9. Government Decision nr.1009 from 26.12.2011 for approving of the Action plan for 2011-2015 years on implementation of the National Strategy in the migration and asylum field (2011-2020) in force from 06.01.2012.

10. Statistics in the field of criminal prosecution of the smugglers of migrants:

- In 2014 in the Republic of Moldova were registered 35 crimes of organization of illegal migration (in 2013 – 53). During 2014 were sent to court 14 criminal files on the organization of illegal migration (in 2013 – 13).
- In 2014 were finished by courts 32 cases on the mention crime regarding 42 offenders (in 2013 – 23 cases/29 offenders).
- In first 9 months of 2015 were registered in Moldova 35 cases of organization of illegal migration (in the same period of 2014 – 25).
- In the first 9 months of 2015 were sent to courts 8 cases.
- In 9 month of 2015 courts finish examination of 11 cases of organization of illegal migration regarding 12 offenders (in the same period of 2014 – 19 cases/30 offenders).

11. International cooperation on smuggling of migrants could be afforded:

- By statute.
- By treaty or other agreement or arrangement (multilateral or bilateral).
- By virtue of reciprocity.
- The provision of MLA is the subject to the double criminality requirement.

- 12.** Practice of the international cooperation regarding prosecution of migrant smugglers does not differ from other cases and crimes.
- 13.** No legal obstacles where established. Practical obstacles are referred to the long time period of examination of the requests (when usually offenders are under arrest), different languages and legal frameworks.
- 14.** Yes

Czech Republic

Do you have any laws or legislative measures covering the issue of migrant smuggling?

Is the issue set out in general criminal law or are there specific provisions dealing with the problem?

Yes.

The issue is dealt with by the czech Criminal Code in its Special Part (Part Two), Chapter X: Criminal Offences against Order in Public Matters, Division 4: Other Disruption to the Activities of a Public Authority

Is the smuggling of migrants a criminal offence under domestic law?

Does national law include a definition of migrant smuggling?

How is this conduct defined?

What are the material elements of the crime?

Is “financial gain” an element of the definition of smuggling of migrants?

Yes, the smuggling of migrants is constituted as a criminal offence under czech law, namely in the section 340 of the Criminal Code (Organizing and Facilitating Illegal State Border Crossing).

The national law doesn't include a definition of migrant smuggling.

The national law operates with a term of illegal state border crossing which means an illegal crossing of borders of the Czech Republic or an illegal transport across the territory of the Czech Republic.

The crime is committed by whoever intentionally organizes an illegal crossing of the State border or facilitates or assists another person to illegally cross State borders, or whoever intentionally allows another person or assists them to illegally transport across the territory of the Czech Republic or organizes such transportation.

Committing the crime with in order to receive a financial gain is considered as an aggravating circumstance allowing the court to impose more severe punishment on the perpetrator.

Could you please provide, if possible, the relevant texts (in English or in French)?

Section 340

Organising and Facilitating Illegal State Border Crossing

(1) Whoever organises an illegal crossing of the State border or facilitates or assists another person to illegally cross State borders, or whoever allows another person or assists them to illegally transport across the territory of the Czech Republic or organises such transportation, shall be punished by a prison sentence of up to two years or punishment by disqualification.

(2) An offender shall be punished by a prison sentence of six months to five years, a monetary penalty, or forfeiture of property, if

- a) they committed an act referred to in Subsection 1 as a member of an organised group,
- b) they submitted another person to inhuman or degrading treatment by committing such an act,

- c) they committed such an act for a reward,
- d) they repeatedly committed such an act, or
- e) they committed such an act with the intention of concealing or facilitating another criminal offence.

(3) An offender shall be punished by a prison sentence of two to eight years or forfeiture of property, if

- a) they committed an act referred to in Subsection 1 as a member of an organised group and for a reward,
- b) they submitted another person to the risk of death by committing such an act,
- c) they caused grievous bodily harm by committing such an act,
- d) they procured a substantial benefit by committing such an act for themselves or another person,
- e) they committed such an act with a weapon, or
- f) they committed such an act during a state of national emergency or war.

(4) An offender shall be punished by a prison sentence of five to twelve years or also in conjunction with such punishments by forfeiture of property, if

- a) they caused death by committing an act referred to in Subsection 1 ,
- b) they caused grievous bodily harm to at least two persons by committing such an act,
- c) they procured another large-scale benefit by committing such act for themselves or another person, or
- d) they committed such an act as a soldier during a state of national emergency or war.

(5) Premeditation is punishable.

Are the following activities criminalized under national legislation:

- **Attempts to smuggle migrants**
- **Participation as an accomplice in the smuggling of migrants**
- **Acting as instigator of the smuggling of migrants**
- **Migrant smuggling as part of a criminal organisation**
- **Circumstances that endanger, or are likely to endanger, the lives or safety of smuggled migrants**

Yes.

Yes.

Yes.

Yes. That's even considered as an aggravating circumstance allowing the court to impose more severe punishment on the perpetrator.

Yes. That's even considered as an aggravating circumstance allowing the court to impose more severe punishment on the perpetrator.

Does your domestic legislation permit use of special investigative techniques for the purpose of investigating the smuggling of migrants such as

- **Interceptions of telecommunication;**
- **Undercover operations;**
- **Financial investigations: including access to bank, financial or commercial records and/or databases;**
- **specific form of protection for witnesses;**
- **others; Please specify.**

The use of interceptions of telecommunication in these cases is only allowed if the crime is committed under any aggravating circumstance named in the section 340 paragraph 3 and 4. An order for the interception and recording of telecommunications may however be issued only if it may be reasonably assumed that facts relevant to the criminal proceedings will be obtained in this way and if there is no other way to achieve such purpose or if its achievement would be otherwise significantly reduced.

Undercover operations in these cases are only allowed if the crime is committed under any aggravating circumstance named in the section 340 paragraph 3 and 4 or if it is committed in favour of an organised criminal group.¹⁶

Yes. Generally all public authorities, legal entities and natural persons are required to comply with letters of request from law enforcement authorities for the performance of their actions without undue delay and unless a special regulation stipulates otherwise, to comply without payment. Furthermore, public authorities are also obliged to immediately notify the public prosecutor or the police authorities of facts indicating that a criminal offence has been committed.

If any of the criminal proceedings require a proper investigation of the circumstances suggesting that a criminal offence has been committed or to assess the circumstances of the accused during court proceedings, the public prosecutor (and, after the indictment or a punishment petition, the presiding judge) may request information that is subject to banking secrecy and data from the security register.

d. Yes. According to the Special Witness Protection Act the minister of the interior (on the request of a police officer, a judge or a public prosecutor) is entitled to grant a special protection to a witness or his family members if they appear to be under threat of bodily harm or any other serious risk of violation of their fundamental rights in relation to their testimony and witness protection cannot be safely ensured by some other means. The special protection mostly comprises personal protection, change of location and integration of the witness and/or his or her family members into the new environment and camouflaging of the true identity of the persons in question.

The section 55 paragraph 2 of the czech Criminal Procedure Code then states, that should the identified condition indicate that the witness or persons close to them appear to be under threat of bodily harm or any other serious risk of violation of their fundamental rights in relation to their testimony and witness protection cannot be safely ensured by some other means, the law enforcement authorities shall take steps to conceal the identity of the witness; the name and surname and other personal information is not in these cases recorded in the transcript but are kept separate from the criminal file and only law enforcement authorities may gain access to such details for the purpose of the case.

Apart from that, if any data on the residence and delivery address, on the place of employment or occupation or the entrepreneurial activity of the victim, witness, legal representative, guardian, agent or confidant are ascertained during the performed action, such data shall not be stated in the report, at the request of such persons, unless it is necessary for attaining the purpose of the criminal proceedings, but shall be kept in a manner allowing only law enforcement authorities and the officials of the Probation and Mediation Service acting in the matter concerned to learn such data; this shall also apply to any data about the personal, family and property situation of the victim and witness; if it is necessary for due exercise of

¹⁶ An organised criminal group according to the section 129 of the Criminal Code is a community of several persons with an internal organisation structure with a division of functions and designation of activities and which is focused on the systematic commission of intentional criminal activities.

An offender of a criminal offence committed in favour of an organised criminal group is a person who committed an intentional criminal offence as a member of an organised criminal group, or whoever knowingly committed such a criminal offence as a member of an organised criminal group, or intended to assist an organised criminal group (section 107 of the Criminal Code).

the right to defence of the person against whom the criminal proceedings are conducted, such person shall be notified of the necessary data;

e. The police authority shall proceed with an investigation on its own initiative so that they obtain evidence as soon as possible and to the required extent to explain the basic facts relevant to the assessment of the case including the offender and the consequences of the criminal offence. Doing that, police authority shall secure the necessary evidence and necessary explanations, and traces of the criminal offence to clarify and verify the facts reasonably suggesting that a criminal offence was committed. As part of it the police authority is particularly entitled to:

- a) require an explanation from natural persons and legal entities and public authorities,
- b) require professional statements from the competent authorities and, if it is necessary for the assessment of the matter, also expert opinions,
- c) secure the necessary documents, in particular the writings and other written materials,
- d) conduct an examination of the items and crime scene,
- e) require the performance of a blood test or other similar actions, including the collection of the required biological material,
- f) take audio and video records of the persons, take fingerprints, perform body examinations and take external measurements by a physician or a member of the same sex, if it is necessary to identify a person or to identify and capture traces or consequences of an action,
- g) detain the suspect,
- h) make decisions and take actions outlined in these provisions under the conditions provided in Section 78 through 81 (seizure of property, impoundage of funds in a bank account, impoundage of booked securities, impoundage of a real estate, impoundage of intangible property)
- i) perform tasks in accordance with the manner set out in Chapter IV (house and personal searches, search of other premises and land property, entry into residence, other premises and land).

Does your domestic legislation enable seizure and/or confiscation:

- **of property, equipment or other instrumentalities used in or destined for use in offences related to smuggling of migrants?**
- **of proceeds of crime derived from offences related to smuggling of migrants ? If yes specify the main features of the legal framework.**

Yes. If the established facts indicate that the property, equipment or other instrumentalities are intended for committing a criminal offence, or that they were used to commit a criminal offence, or are the proceeds of a criminal activity, then the presiding judge and in the preliminary hearing, the public prosecutor or police authority, may decide on the impoundage of the instrumentalities.

The court then shall impose forfeiture of the item obtained by the offender through a criminal offence or as a reward for the criminal offence. Thus the court may impose forfeiture of an item a) that was used for committing a criminal offence or that was intended for committing a criminal offence, or b) that was, even if only partially, acquired by the offender for the item obtained by the offender through a criminal offence or as a reward for the criminal offence if the value of this item is not negligible in relation to the value of the acquired item.

Is trafficking in persons defined under national law?

If so, how does this definition differ from that of migrant smuggling?

The trafficking in persons is not defined under national law however the respective provision (section 168 of the Criminal Code) criminalizes an act by which whoever forces, procures, hires, incites, entices, transports, hides, detains, accepts or gives (or preys on such conduct) a child, or anyone else by using violence, threats of violence or other grievous harm or deceit, or by abusing their error, distress, or addiction, so that they could be used

- a) by another person for sexual intercourse or other forms of sexual abuse or harassment, or for the production of pornographic works,
- b) by another person for the collection of tissue, cell, or organs from their body,
- c) service in the armed forces,
- d) slavery or servitude, or
- e) forced labour or other forms of exploitation.

In relation to your country, are there any international, regional or bilateral agreements which address the issue of migrant smuggling?

The main international document is the Convention on Transnational Organized Crime and its Protocols. The Czech Republic ratified the mother Convention and the Protocol on smuggling of migrants in 2013 and 2014.

Does your country have jurisdiction to prosecute crimes related to smuggling of migrants when they are committed outside its territory? If yes, specify the legal framework.

The section 340 of the Criminal Code applies only to cases of an illegal Czech Republic border crossing or an illegal transport across the territory of the Czech Republic. That means the principle of territoriality (section 4 of the Criminal Code) applies to these cases at all times. According to this principle the Czech Republic has jurisdiction to prosecute crimes committed in its territory. Whereas a criminal offence shall be deemed committed in the territory of the Czech Republic:

- a) if an offender committed the act here, either entirely or in part, even though the violation or endangering of the interest protected by the criminal law occurred or was supposed to occur, either entirely or in part, abroad, or
- b) if the offender violated or endangered an interest protected by criminal law or if such a consequence was supposed to ensue here, if only to a certain extent, even though they committed the conduct abroad.

Thus also the attempt and premeditation of the acts in question are included (“the violation or endangering of the interest protected by the criminal law occurred **or was supposed to occur**”).

Accomplicity (including instigators and committing crime as part of a criminal organization) is committed in the territory of the Czech Republic:

- a) if the act was committed here by an offender or
- b) if the accomplice of the act committed abroad acted, in part, here.

If the accomplice acted in the territory of the Czech Republic, the law of the Czech Republic shall apply to the participation, notwithstanding whether the offender’s act is punishable abroad.

Do you have a national policy or action plan to address the issue of migrant smuggling?

Yes, there is a national strategy on Action against human trafficking, which includes migrant smuggling as well. At the moment there are new policies developed by the Ministry of the Interior reflecting the migration flow in 2014 and 2015.

Where possible, please provide information regarding:

- **Number of apprehended smugglers:**
- **Number of investigations instigated against migrant smugglers:**
- **Number of successful prosecutions of migrant smugglers:**

Unfortunately, we do not have specific information on migrant smuggling, our statistics cover criminal offences of human trafficking in general.

In your country, is international cooperation on smuggling of migrants (specifically on mutual legal assistance and extradition) afforded

- **by statute?**
- **by treaty or other agreement or arrangement (multilateral or bilateral)?**
- **by virtue of reciprocity or comity?**
- **Is the provision of mutual legal assistance subject to the double criminality requirement according to your domestic legal framework?**

By treaty (multilateral or bilateral if available) and by virtue of reciprocity. Yes, the MLA is subject to the double criminality requirement.

In your experience, is international co-operation regarding prosecution of migrant smugglers effective? Please specify.

Unfortunately we only have general information on international co-operation, which is effective, we do not have detailed information covering only prosecution of migrant smugglers.

In terms of international co-operation, what legal and/or practical obstacles have been encountered as regards co-operation with:

- **Council of Europe Member States:**
- **Third party states:**

No obstacles encountered as regards co-operation with CoE MS.

Do you think existing Council of Europe instruments on international co-operation in criminal matters (Mutual legal assistance, extradition) are effective in dealing with migrant smuggling? If not, please specify.

Yes.

Cyprus

Do you have any laws or legislative measures covering the issue of migrant smuggling?

Is the issue set out in general criminal law or are there specific provisions dealing with the problem?

The Republic of Cyprus has ratified the UN Convention on Transnational Organised Crime by virtue of the UN Convention on Transnational Organised Crime and Protocols (Ratification) Law of 2003 [Law 11(III)/2003], published in the Official Gazette of the Republic dated 21.3.2003.

Section 8 of the said Law criminalises the migrant smuggling. Under Section 8, any act prescribed in Section 6 of the Protocol against the Smuggling of Migrants by Land, Sea and Air constitutes criminal offence under domestic law punishable with imprisonment up to 10 years and/or a pecuniary penalty of up to 10.000 pounds.

Is the smuggling of migrants a criminal offence under domestic law?

Does national law include a definition of migrant smuggling?

How is this conduct defined?

What are the material elements of the crime?

Is “financial gain” an element of the definition of smuggling of migrants?

Could you please provide, if possible, the relevant texts (in English or in French)?

Since our national law does not include a definition of migrant smuggling, the definition provided for the term “smuggling of migrants” outlined in Section 3(a) of the Protocol against Smuggling of Migrants is applicable.

Are the following activities criminalized under national legislation:

- **Attempts to smuggle migrants**
- **Participation as an accomplice in the smuggling of migrants**
- **Acting as instigator of the smuggling of migrants**
- **Migrant smuggling as part of a criminal organisation**
- **Circumstances that endanger, or are likely to endanger, the lives or safety of smuggled migrants**

Any act prescribed in Section 6 of the UN Protocol against the Smuggling Migrants constitutes criminal offence under national law (see our answer in question 1).

Moreover, the following legislative provisions in the Cyprus Penal Code (Cap.154) are relevant:

- Section 368, which provides that a person who attempts to commit a felony punishable with imprisonment of minimum ten years is guilty of a felony.
- Section 371, which criminalises the conspiracy to commit a felony.
- Section 20, which provides as follows:

When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say,

 - (a) Every person who actually does the act or makes the omission which constitutes the offence;
 - (b) Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
 - (c) Every person who aids or abets another person in committing the offence;
 - (d) Any person who counsels or procures any other person to commit the offence.

Does your domestic legislation permit use of special investigative techniques for the purpose of investigating the smuggling of migrants such as

Interceptions of telecommunication;

No. Currently there is no legislation in force.

Undercover operations;

Yes.

Financial investigations: including access to bank, financial or commercial records and/or databases;

Yes. Financial investigation can be conducted as a usual process during investigation.

specific form of protection for witnesses;

Yes. The Protection of Witnesses Law of 2001 [Law 95(I)/2001] provides for a comprehensive scheme of protection for witnesses and includes several measures which may be applied before, during and after trial. Moreover, the said Law provides for the establishment of a program for the protection of witnesses under the control and supervision of the Attorney General of the Republic.

others; Please specify.

Does your domestic legislation enable seizure and/or confiscation:

- **of property, equipment or other instrumentalities used in or destined for use in offences related to smuggling of migrants?**
- **of proceeds of crime derived from offences related to smuggling of migrants ? If yes specify the main features of the legal framework.**

Cyprus Criminal Procedure Law (Cap.154) affords the possibility of seizure and confiscation of property by the Police. Under the Section 27, a warrant of search may be issued if the Judge is satisfied that there are reasonable grounds for believing that anything, in respect of which any offence has been or is suspected to have been committed, is to be found in any place. Any object/property of evidential value may be seized under this Section of the Law. According to Section 34, a Judge has the power to order the confiscation or destruction of a document or thing the use or possession of which is prohibited, irrespective of whether any person is prosecuted in respect of such use or possession.

Moreover, the Prevention and Suppression of Money Laundering Activities Law of 2007 [Law 188(I)/2007] criminalises the laundering of the proceeds generated from all serious criminal offences, including all criminal offences punishable with imprisonment exceeding one year, and provides for the confiscation of such proceeds aiming at depriving criminals from the profits of their crimes.

Under the Section 6, a Court which has convicted a person for a prescribed offence shall, before sentencing, proceed with an inquiry in order to determine whether the accused acquired any proceeds from the commission of a predicate offence. The Attorney General shall so decide by submitting a relevant application to the Court.

According to Section 8, where the court, after the conduct of an inquiry, determines that the accused has acquired proceeds, it shall, before sentencing him for the offence for which he has been convicted or for offences which the court can take into consideration in sentencing : (a) make a confiscation order for the recovery of the amount of proceeds and (b) make an order for the confiscation of instrumentalities.

Is trafficking in persons defined under national law?

If so, how does this definition differ from that of migrant smuggling?

Trafficking in persons is defined in the relevant national legislation [Law 60(I)/2014] that is aligned with the Directive 2011/36/EU. The definition of trafficking in persons is the following:

"trafficking in persons" means the recruitment, hiring, transportation, transfer, harbouring or receipt or housing of persons, including exchange or transfer of control and / or power over those persons by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of misleading, of abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits or earnings to achieve the consent of a person having control over another person, for the purpose of exploitation;

The legislation does not define smuggling as a form of trafficking. Smuggling occurs when a person is facilitated to illegally cross the borders of another country. Smuggling is therefore covered by a different legislation and people that were smuggled into a country are usually not victims of trafficking.

The fact that the legislation does not define smuggling as a form of trafficking does not mean that a person that was smuggled into a country cannot also be a victim of trafficking. The relevant authorities examine whether this is the case when they realize that a person is an illegal migrant.

In relation to your country, are there any international, regional or bilateral agreements which address the issue of migrant smuggling?

The UN Convention on Transnational Organised Crime and its Protocols.

Does your country have jurisdiction to prosecute crimes related to smuggling of migrants when they are committed outside its territory? If yes, specify the legal framework.

Section 5 of the Cyprus Penal Code (Cap.154) governs the different bases for establishing criminal jurisdiction of the Cyprus Courts. Under the following provisions of the section 5(1), the Cyprus Courts have jurisdiction over the offences which have been committed:

- (a) within the territory of the Republic ("territory of the Republic" includes its territorial waters, the air space over the Republic and its territorial waters and any ship or aircraft that is registered in the Republic regardless of its location, except if, on the basis of international law, the said ship or aircraft is subject at the relevant time, by reason of its location, to the exclusive jurisdiction of foreign law);
- (b) within the Sovereign Base Areas, by a Cypriot against or in relation to a Cypriot;
- (c) in any foreign country by citizen of the Republic whilst he is in the service of the Republic;
- (d) in any foreign country by a citizen of the Republic, if the offence is punishable in the Republic by imprisonment which exceeds two years and the act or the omission which constitutes the offence, is also punishable according to the law of the country where it was committed.

Cyprus has therefore jurisdiction to prosecute crimes related to smuggling of migrants when they are committed outside its territory in the cases provided for in the above paragraphs (b), (c) and (d).

Do you have a national policy or action plan to address the issue of migrant smuggling?

The current national policy relates to the practical enforcement of the EU Action Plan Against Migrant Smuggling (2015-2020) as the COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS EU, Brussels, 27.5.2015 COM(2015) 285 final. The competent authorities of the Republic are in cooperation in identifying and undertaking specific actions towards the implementation of the Action Plan.

Where possible, please provide information regarding:

Number of apprehended smugglers:

2014

1 case – 4 persons (pending before the court)

2015

1 case – 3 persons (pending before the court)

1 case – 3 persons (pending before the court)

1 case – 1 person is wanted by the Police

1 case – 1 person was convicted by the court

Number of investigations instigated against migrant smugglers:

See 10(a)

Number of successful prosecutions of migrant smugglers:

See 10(a)

In your country, is international cooperation on smuggling of migrants (specifically on mutual legal assistance and extradition) afforded

- **by statute?**
- **by treaty or other agreement or arrangement (multilateral or bilateral)?**
- **by virtue of reciprocity or comity?**
- **Is the provision of mutual legal assistance subject to the double criminality requirement according to your domestic legal framework?**

International cooperation for mutual assistance is afforded by means of Bilateral and Multilateral Agreement, and on the basis of reciprocity.

International Cooperation for extradition is afforded by means of an agreement (bilateral or multilateral).

In your experience, is international co-operation regarding prosecution of migrant smugglers effective? Please specify.

No significant problems have been encountered. Some minor problems (delays) were observed. The delay is considered justified due to the large amount of data requested.

In terms of international co-operation, what legal and/or practical obstacles have been encountered as regards co-operation with:

- **Council of Europe Member States:**
- **Third party states:**

International co-operation is afforded satisfactory, and we have not encountered any significant obstacles with regards to its application.

Do you think existing Council of Europe instruments on international co-operation in criminal matters (Mutual legal assistance, extradition) are effective in dealing with migrant smuggling? If not, please specify.

Although we have small experience in applying the existing Council of Europe instruments with regards to migrant smuggling, we consider its contents as effective in principle.

Estonia

1. Do you have any laws or legislative measures covering the issue of migrant smuggling?
 - a. Is the issue set out in general criminal law or are there specific provisions dealing with the problem?

There is no special act about migrant smuggling and the issue of migrant smuggling is set out in general criminal law. Migrant smuggling is criminalised in the Penal Code of Estonia as illegal transportation of aliens across state border or temporary border line of Republic of Estonia. An act covering the issue of migrant smuggling and adding new criminal offence to the Penal Code (facilitation of the stay of an alien without legal basis in Estonia) very recently (26.11.2015) passed by the Parliament of Estonia (Riigikogu) and will soon enter into force.

2. Is the smuggling of migrants a criminal offence under domestic law?
 - a. Does national law include a definition of migrant smuggling?
 - b. How is this conduct defined?
 - c. What are the material elements of the crime?
 - d. Is “financial gain” an element of the definition of smuggling of migrants?

Could you please provide, if possible, the relevant texts (in English or in French)?

Estonian national law does not include a definition of migrant smuggling. Estonia has criminalised migrant smuggling in the Penal Code of Estonia as illegal transportation of aliens across state border or temporary border line of Republic of Estonia.

Material elements of illegal transportation of aliens across state border or temporary border line of Republic of Estonia are the following: illegal transportation of an alien across the state border or temporary border line as a conduct and an alien as an object of the offence. The subjective element necessary to constitute this offence is intent. In Estonian criminal law intent is deliberate intent, direct intent or indirect intent. An act adding a section to this paragraph that imposes more serious sanctions if the conduct was committed by placing an alien to a situation which is life-threatening or likely to cause serious damage to the health of the person soon enters into force.

Facilitation of the stay of an alien without legal basis in Estonia for financial gain as a criminal offence will soon enter into force. Material elements of this offence are the following: facilitation of the stay of an alien without legal bases if the act does not contain the necessary elements of an offence provided for in § 133, 133¹, 175, 259 or 260¹ of the Penal Code as a conduct and alien as an object of the offence. The subjective elements necessary to constitute this offence is intent (at least indirect intent) and financial gain as an aim of the offence.

The relevant text in English:

Penal Code § 259. Illegal transportation of aliens across state border or temporary border line of Republic of Estonia

(1) Illegal transportation of an alien across the state border or temporary border line of the Republic of Estonia is punishable by a pecuniary punishment or up to three years' imprisonment.

(2) The same act, if committed by a legal person, is punishable by a pecuniary punishment.

Text of the new legislation that will soon enter into force:

Penal Code § 259. Illegal transportation of aliens across state border or temporary border line of Republic of Estonia

(1) Illegal transportation of an alien across the state border or temporary border line of the Republic of Estonia is punishable by a pecuniary punishment or up to three years' imprisonment.

(2) *The same act, if committed by placing an alien to a situation which is life-threatening or likely to cause serious damage to the health of the person is punishable by a pecuniary punishment or one to seven years' imprisonment.*

(3) *The same act, if committed by a legal person, is punishable by a pecuniary punishment.*

Penal Code § 259¹. Facilitation of the stay of an alien without legal basis in Estonia

(1) *Facilitation of the stay of an alien without legal basis in Estonia for financial gain if the act does not contain the necessary elements of an offence provided for §§ 133, 133¹, 175, 259 or 260¹ of this Code is punishable by a pecuniary punishment or up to one year of imprisonment.*

(2) *The same act, if committed by a legal person, is punishable by a pecuniary punishment.*

3. Are the following activities criminalized under national legislation:

- a. **Attempts to smuggle migrants**
- b. **Participation as an accomplice in the smuggling of migrants**
- c. **Acting as instigator of the smuggling of migrants**
- d. **Migrant smuggling as part of a criminal organisation**
- e. **Circumstances that endanger, or are likely to endanger, the lives or safety of smuggled migrants**

An attempt to smuggling migrants (illegal transportation of aliens across state border or temporary border line of Republic of Estonia) is punishable by Estonian criminal law.

In Estonian criminal law if at least two persons agree to commit an offence jointly, each of them shall be held liable as a principal offender (joint principal offenders). An offence is deemed to be a joint offence also if an act committed by several persons jointly and in agreement comprises the necessary elements of an offence. If a person does not commit the offence jointly, but intentionally provides physical, material or moral assistance to an intentional unlawful act of another person, then this person will be held criminally liable as an aider to the offence. Penal Code states that a person intentionally inducing another person to commit an intentional unlawful act will be held criminally liable.

Illegal transportation of aliens across state border or temporary border line of Republic of Estonia as part of a criminal organisation is punishable by Penal Code. However the criminal offence of facilitation of the stay of an alien without legal basis in Estonia that will soon enter into force will not be criminalised when conducted as part of a criminal organisation as this offence is punishable by a pecuniary punishment or up to one year of imprisonment. Penal Code states that the activities of the criminal organisation have to be directed at the commission of criminal offences in the second degree for which the maximum term of imprisonment is at least three years, or criminal offences in the first degree.

When the changes to current legislation enter into force, the act of illegal transportation of aliens committed by placing an alien to a situation which is life-threatening or likely to cause serious damage to the health of the person, will be followed by more serious sanctions.

4. Does your domestic legislation permit use of special investigative techniques for the purpose of investigating the smuggling of migrants such as

- a. **Interceptions of telecommunication;**
- b. **Undercover operations;**
- c. **Financial investigations: including access to bank, financial or commercial records and/or databases;**
- d. **specific form of protection for witnesses;**
- e. **others; Please specify.**

All of the named investigative techniques are allowed for the purpose of investigating the smuggling of migrants (criminal offences specified in Penal Code § 259 and § 259¹).

5. Does your domestic legislation enable seizure and/or confiscation:

- **of property, equipment or other instrumentalities used in or destined for use in offences related to smuggling of migrants?**
- **of proceeds of crime derived from offences related to smuggling of migrants ? If yes specify the main features of the legal framework.**

Confiscation of the object used to commit offence related to smuggling of migrants is possible in Estonian criminal law. Penal Code states that a court may apply confiscation of the object used to commit an intentional offence if it belongs to the offender at the time of the making of the judgment or ruling. As an exception, a court may confiscate the objects or substance if it belongs to a third person at the time of the making of the judgment or ruling and the person:

- 1) has, at least through recklessness, aided in the use of the objects or substance for the commission or preparation of the offence,
- 2) has acquired the objects or substance, in full or in the essential part, on account of the offender, as a present or in any other manner for a price which is considerably lower than the normal market price; or
- 3) knew that the objects or substance was transferred to the person in order to avoid confiscation thereof.

A court shall confiscate of the assets acquired through an offence object if these belong to the offender at the time of the making of the judgment or ruling.

6. Is trafficking in persons defined under national law?

a. If so, how does this definition differ from that of migrant smuggling?

Penal Code § 133 defines trafficking in human beings as placing a person in a situation where he or she is forced to work under unusual conditions, engage in prostitution, beg, commit a criminal offence or perform other disagreeable duties, or keeping a person in such situation, if such act is performed through deprivation of liberty, violence, deceit, threatening to cause damage, by taking advantage of dependence on another person, helpless or vulnerable situation of the person. This act is punishable by one to seven years' imprisonment.

Penal Code § 259 states that illegal transportation of an alien across the state border or temporary border line of the Republic of Estonia is punishable by a pecuniary punishment or up to three years' imprisonment. There is no explicit definition of migrant smuggling in national law. However, in legal theory it has been explained that illegal transportation of an alien across the state border or temporary border line of the Republic of Estonia means any kind of activities, which result in transporting an alien across the state border or temporary border line.

The difference between trafficking in human beings and migrant smuggling (illegal transportation of aliens) is that trafficking in human beings involves forcing a person to perform some disagreeable duties and/or keeping a person in such situation, by taking advantage of the situation of the person, whereas illegal transportation of aliens does not necessarily involve those activities. It is possible that these two offences are committed at the same time and in that case, the offender will be prosecuted both of trafficking of human beings and illegal transportation of aliens.

7. In relation to your country, are there any international, regional or bilateral agreements which address the issue of migrant smuggling?

There are several agreements between different states and Estonia which aim to fight illegal migration, including migrant smuggling (e.g. Cooperation protocol of the Border Guard Board of the Republic of Estonia and Federal Border Guard Service of Russian Federation (1994)).

8. Does your country have jurisdiction to prosecute crimes related to smuggling of migrants when they are committed outside its territory? If yes, specify the legal framework.

Yes, Estonia has jurisdiction to prosecute crimes related to smuggling of migrants when they are committed outside Estonia's territory. Penal Code § 7 (1) states that the penal law of Estonia applies to an act committed outside the territory of Estonia if such act constitutes a criminal offence pursuant to the penal

law of Estonia and is punishable at the place of commission of the act, or if no penal power is applicable at the place of commission of the act and if:

- 1) the act is committed against a citizen of Estonia or a legal person registered in Estonia; or
- 2) the offender is a citizen of Estonia at the time of commission of the act or becomes a citizen of Estonia after the commission of the act, or if the offender is an alien who has been detained in Estonia and is not extradited.

9. Do you have a national policy or action plan to address the issue of migrant smuggling?

Ministry of Interior of Estonia is responsible for Development Plan of Internal Security for 2015-2020, which is aimed at preventing, stopping and investigating illegal migration and cross border crime. Estonia is also taking into account EU Action Plan Against Migrant Smuggling 2015-2020 as a model for its policies and actions in this area.

10. Where possible, please provide information regarding:

- a. **Number of apprehended smugglers:**
- b. **Number of investigations instigated against migrant smugglers:**
- c. **Number of successful prosecutions of migrant smugglers:**

a. Number of apprehended smugglers

2010	2011	2012	2013	2014
2	4	15	11	1

	2010	2011	2012	2013	2014
Number of accused persons, whose case was sent to the court	7	2	5	13	7
Number of convicted offenders (according to the year the offender was convicted which can differ from the year the case was sent to the court)	6	2	6	6	1

b. Number of investigations instigated against migrant smugglers

2010	2011	2012	2013	2014
8	6	10	9	8

c. Number of successful prosecutions of migrant smugglers

11. In your country, is international cooperation on smuggling of migrants (specifically on mutual legal assistance and extradition) afforded

- **by statute?**
- **by treaty or other agreement or arrangement (multilateral or bilateral)?**
- **by virtue of reciprocity or comity?**
- **Is the provision of mutual legal assistance subject to the double criminality requirement according to your domestic legal framework?**

International judicial co-operation is based generally on multilateral agreements and according to Estonian domestic legislation it is subject to the double criminality requirements.

12. In your experience, is international co-operation regarding prosecution of migrant smugglers effective? Please specify.

No practical experiences in particular area so far.

- 13. In terms of international co-operation, what legal and/or practical obstacles have been encountered as regards co-operation with:**
- a. Council of Europe Member States:**
 - b. Third party states:**

No practical experiences in particular area so far.

- 14. Do you think existing Council of Europe instruments on international co-operation in criminal matters (Mutual legal assistance, extradition) are effective in dealing with migrant smuggling? If not, please specify.**

Existing instruments are effective and sufficient.

Lithuania

1. Do you have any laws or legislative measures covering the issue of migrant smuggling?

Yes.

- a. Is the issue set out in general criminal law or are there specific provisions dealing with the problem?

Smuggling of migrants is criminalized by Article 292 of the Criminal Code:

Article 292. Unlawful Transportation of Persons across the State Border

1. A person who unlawfully transports across the state border of the Republic of Lithuania an alien not having a permanent place of residence in the Republic of Lithuania or transports or conceals in the territory of the Republic of Lithuania such an alien who has illegally crossed the state border of the Republic of Lithuania shall be punished by a fine or by arrest or by imprisonment for a term of up to six years.

2. A person who commits the acts provided for in paragraph 1 of this Article for mercenary reasons or where this poses a threat to human life, shall be punished by imprisonment for a term of up to eight years.

3. A person who organises the acts provided for in paragraph 1 of this Article shall be punished by imprisonment for a term of four up to ten years.

4. A legal entity shall also be held liable for the acts provided for in this Article.

2. Is the smuggling of migrants a criminal offence under domestic law?

Yes, see above.

- a. Does national law include a definition of migrant smuggling?

It defines the elements of crime of unlawful transportation of persons across the state border.

- b. How is this conduct defined?

See above.

- c. What are the material elements of the crime?

Actus reus – transportation of an alien via Lithuanian border or transporting or concealing of such a person within Lithuania.

Mens rea – intent.

- d. Is “financial gain” an element of the definition of smuggling of migrants?

No. However, it is an aggravating element under Paragraph 2 of Article 292 (“mercenary reasons”).

Could you please provide, if possible, the relevant texts (in English or in French)?

See above.

3. Are the following activities criminalized under national legislation:

- a. Attempts to smuggle migrants

Yes. Attempt is punishable under general provisions of the Criminal Code.

Article 22. Attempt to Commit a Criminal Act

1. An attempt to commit a criminal act shall be an intentional act or omission which marks the direct commencement of a crime or misdemeanour where the act has not been completed by reason of the circumstances beyond the control the offender.

2. An attempt to commit a criminal act shall also occur when the offender is not aware that his act cannot be completed, because his attempt is directed at an inappropriate target or he is applying improper means.

3. A person shall be held liable for an attempt to commit a criminal act according to paragraph 1 or 2 of this Article and an article of this Code providing for an appropriate completed crime. A penalty imposed upon such a person may be commuted under Article 62 of this Code.

b. Participation as an accomplice in the smuggling of migrants

Yes. Participation as an accomplice is punishable under general provisions of the Criminal Code.

Article 24. Complicity and Types of Accomplices

1. Complicity shall be the intentional joint participation in the commission of a criminal act of two or more conspiring legally capable persons who have attained the age specified in Article 13 of this Code.

2. Accomplices in a criminal act shall include a perpetrator, an organiser, an abettor and an accessory.

3. A perpetrator shall be a person who has committed a criminal act either by himself or by involving legally incapacitated person or the persons who have not yet attained the age specified in Article 13 of this Code or other persons who are not guilty of that act. If the criminal act has been committed by several persons acting together, each of them shall be considered a perpetrator/co-perpetrator.

4. An organiser shall a person who has formed an organised group or a criminal association, has been in charge thereof or has co-ordinated the activities of its members or has prepared a criminal act or has been in charge of commission thereof.

5. An abettor shall be a person who has incited another person to commit a criminal act.

6. The accessory shall be a person who has aided in the commission of a criminal act through counselling, issuing instructions, providing means or removing obstacles, protecting or shielding other accomplices, who has promised in advance to conceal the offender, hide the instruments or means of commission of the criminal act, the traces of the act or the items acquired by criminal means, also a person who has promised in advance to handle the items acquired or produced in the course of the criminal act.

Article 25. Forms of Complicity

1. Forms of complicity shall be a group of accomplices, an organised group or a criminal association.

2. A group of accomplices shall be one in which two or more persons agree, at any stage of the commission of a criminal act, on the commission, continuation or completion of the criminal act, where at least two of them are perpetrators.

3. An organised group shall be one in which two or more persons agree, at any stage of the commission of a criminal act, on the commission of several crimes or of one less serious, serious or grave crime, and in committing the crime each member of the group performs a certain task or is given a different role.

4. A criminal association shall be one in which three or more persons linked by permanent mutual relations and division of roles or tasks join together for the commission of a joint criminal act – one or several less serious, serious and grave crimes. An anti-state group or organisation and a terrorist group shall be considered equivalent to a criminal association.

Article 26. Criminal Liability of Accomplices

1. Accomplices shall be held liable solely for the criminal acts as committed by the perpetrator which are covered by their intent.

2. Where a perpetrator's criminal act was discontinued at the stage of preparation for commission of or an attempt to commit it, an organiser, an abettor and an accessory shall be held liable for complicity in preparation or attempt to commit the criminal act.

3. Where there are the circumstances eliminating, mitigating or aggravating the liability of one of accomplices, they shall not be taken into account when determining the criminal liability of other accomplices

4. An organiser, an abettor or an accessory shall be held liable under an article of the Code which provides for liability for an act committed by a perpetrator and under paragraph 4, 5 or 6 of Article 24 of this Code.

5. Members of a criminal association shall be held liable under Article 249 of this Code as perpetrators regardless of their roles in the commission of a criminal act which is covered by their intent.

- c. Acting as instigator of the smuggling of migrants

Yes. See above in Paragraph 5 of Article 24.

- d. Migrant smuggling as part of a criminal organisation

Yes. Members of a criminal association would be held liable under Article 249 of the Criminal Code as perpetrators regardless of their roles in the commission of a criminal act which is covered by their intent and under Article 292 of the Criminal Code as perpetrators.

An organiser would be liable under more stringent provisions of both Article 249 Paragraph 3 and Article 292 Paragraph 3.

Article 249. Criminal Association

1. A person who participates in the activities of a criminal association shall be punished by imprisonment for a term of three up to fifteen years.

2. A person who participates in the activities of a criminal association armed with firearms, explosives or explosive materials shall be punished by imprisonment for a term of six up to twenty years or by life imprisonment.

3. A person who organises the criminal associations provided for in paragraph 1 or 2 of this Article or is the leader thereof shall be punished by imprisonment for a period of ten up to twenty years or by life imprisonment.

4. A legal entity shall also be held liable for the acts provided for in this Article.

- e. Circumstances that endanger, or are likely to endanger, the lives or safety of smuggled migrants

Yes. Commission of an offence in a manner “where this poses a threat to human life” is an aggravating element under Paragraph 2 of Article 292.

4. Does your domestic legislation permit use of special investigative techniques for the purpose of investigating the smuggling of migrants such as

- a. Interceptions of telecommunication;

Yes, under provisions of the Code of Criminal Procedure.

For offences under Paragraph 2 and 3 of Article 292 also available under the Law on Criminal Surveillance.

- b. Undercover operations;

Yes, under provisions of the Code of Criminal Procedure.

For offences under Paragraph 2 and 3 of Article 292 also available under the Law on Criminal Surveillance.

- c. Financial investigations: including access to bank, financial or commercial records and/or databases;

Yes. Fully.

- d. specific form of protection for witnesses;

Yes.

Available for witnesses of offences under Paragraph 2 and 3 of Article 292.

Some elements of witness protection (e. g. partial anonymity) is also available for witnesses of offences under Paragraph 1 of Article 292.

- e. others; Please specify.

For all offences: search and seizures, crime imitation model, secret observation under provisions of the Code of Criminal Procedure.

For offences under Paragraph 2 and 3 of Article 292: controlled delivery, secret surveillance, electronic surveillance, front store operations, etc. under provisions of the Law on Criminal Surveillance.

5. Does your domestic legislation enable seizure and/or confiscation:

- of property, equipment or other instrumentalities used in or destined for use in offences related to smuggling of migrants?

Yes, under provisions of Article 72 of the Criminal Code:

Article 72. Confiscation of Property

1. Confiscation of property shall be the compulsory uncompensated transfer into State ownership of any form of property subject to confiscation held by the offender or another person.

2. Property which is subject to confiscation shall mean property used as an instrument, means to commit a crime or the result of a criminal act prohibited by this Code. Any form of property received directly or indirectly from a criminal act prohibited by this Code shall be considered as a result of such criminal act.

3. Property which is subject to confiscation and belongs to the offender shall be confiscated in all cases.

4. Property subject to confiscation which belongs to another natural or legal person shall be confiscated regardless of the fact whether or not this person has been convicted for the commission of the criminal act in the following cases:

1) when such a natural or legal person at the moment of transferring the property to the offender or any other person was or must have been and could have been aware of the fact that such property will be used to commit an act prohibited by this Code;

2) when the property has been transferred to that person on the grounds of a bogus transaction;

3) when the property has been transferred to that person as a family member or close relative of the offender;

4) when the property has been transferred to a legal person whose director, member of a managing body or participants controlling at least 50 per cent of shares (stocks, contributions etc.) of such legal person are the offender, his family members or close relatives;

5) when acquiring the property, this person or other persons, while holding an executive position in the legal person and entitled to represent it, to take decisions on behalf of the legal person or to control the activities of the legal person, were aware, or must have been aware and could have been aware that this property was used as an instrument or a means to commit a crime or was a result of a criminal act prohibited by this Code.

5. When the property which is subject to the confiscation is concealed, consumed, owned by third parties or if it cannot be taken away for other reasons, or it would be inappropriate for the court to confiscate the property, the court shall recover from the offender or other persons indicated in paragraph 4 of this Article a sum of money equivalent to the value of the property subject to confiscation.

6. When imposing the confiscation of property, a court must specify the items subject to confiscation or the monetary value of the property subject to confiscation.

- of proceeds of crime derived from offences related to smuggling of migrants ? If yes specify the main features of the legal framework.

Yes. See above in Article 72.

6. Is trafficking in persons defined under national law?

Yes. It is criminalised under Article 147 and Article 157 of the Criminal Code:

Article 147. Trafficking in Human Beings

1. A person who sells, purchases or otherwise conveys or acquires a person or recruits, transports or holds in captivity a person by using physical violence or threats or by otherwise depriving him of a possibility of resistance, or by taking advantage of the victim's dependence or vulnerability, or by resorting to deceit, or by accepting or paying money or by obtaining or granting any other benefit to a person who actually has the victim under his control, where the offender is aware of or seeks exploitation of the victim, irrespective of the latter's consent, for the purposes of slavery or under the conditions similar to slavery, prostitution, pornography or any other forms of sexual exploitation, forced labour or services including begging, or for the commission of a criminal offence or for any other exploitative purposes shall be punished by imprisonment for a term from two to ten years.

2. A person who commits the act provided for in Paragraph 1 of this Article in respect of two or more victims or by endangering the victim's life, or by participating in an organised group, or by being aware of or seeking the acquisition of the victim's organ, tissue or cells, or while acting in his capacity as a civil servant or a person fulfilling public administration functions and performing his duties shall be punished by imprisonment for a term from four to twelve years.

3. The victim of the criminal offence provided for in this Article may be released from criminal liability for the criminal offence which he has been directly forced to commit because of the criminal offence provided for in this Article committed against him.

4. A legal entity shall also be held liable for the acts provided for in Paragraphs 1 and 2 of this Article.

Article 157. Purchase or sale of a child

1. A person who offers to purchase or otherwise acquire a child or sells, purchases or otherwise conveys or acquires a child, or recruits, transports or holds in captivity a child, while being aware of or seeking that the child, irrespective of the latter's consent, be illegally adopted or exploited for the purposes of slavery or under the conditions similar to slavery, prostitution, pornography, any other forms of sexual exploitation, forced labour or services including begging, or for the commission of a criminal offence or for any other exploitative purposes shall be punished by imprisonment for a term from three to twelve years.

2. A person who commits the act provided for in Paragraph 1 of this Article in respect of two or more children or against young children, or by endangering the victim's life, or by participating in an organised group, or by being aware of or seeking the acquisition of the victim's organ, tissue or cells, or while acting in his capacity as a civil servant or a person fulfilling public administration functions and performing his duties shall be punished by imprisonment for a term from five to fifteen years.

3. The victim of the criminal offence provided for in this Article may be released from criminal liability for the criminal offence which he has been directly forced to commit because of the criminal offence provided for in this Article committed against him.

4. A legal entity shall also be held liable for the acts provided for in Paragraphs 1 and 2 of this Article.

- a. If so, how does this definition differ from that of migrant smuggling?

Trafficking is committed when there is an exploitative purpose and, in case of trafficking of adult victims, when certain means enabling to gain control over the victim (e. g. force, deceit, abuse of vulnerable position, etc.) are employed.

7. In relation to your country, are there any international, regional or bilateral agreements which address the issue of migrant smuggling?

Yes:

1. **Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime.**
2. **Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence and Council framework Decision 2002/946/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence.**

8. Does your country have jurisdiction to prosecute crimes related to smuggling of migrants when they are committed outside its territory? If yes, specify the legal framework.

In principle yes, in accordance with principle of “active personality” under Article 5 of the Criminal Code:

Article 5. Criminal Liability of Citizens of the Republic of Lithuania and Other Permanent Residents of Lithuania for the Crimes Committed Abroad

Citizens of the Republic of Lithuania and other permanent residents of Lithuania shall be held liable for the crimes committed abroad under this Code.

However, the description of criminal conduct of offence under Article 292 directly refers to acts of crossing of Lithuanian border or of transportation or concealment within Lithuanian territory, thus limiting the geographical scope of application of this Article.

9. Do you have a national policy or action plan to address the issue of migrant smuggling?

No, we don't have such a national policy or action plan.

10. Where possible, please provide information regarding:

- a. Number of apprehended smugglers:

2013	2014	2015
25 smugglers	54 smugglers	98 smugglers

- b. Number of investigations instigated against migrant smugglers:

2013	2014	2015
20	50	68

- c. Number of successful prosecutions of migrant smugglers:

2013	2014	2015
21	24	60

11. In your country, is international cooperation on smuggling of migrants (specifically on mutual legal assistance and extradition) afforded

- by statute?
- by treaty or other agreement or arrangement (multilateral or bilateral)?
- by virtue of reciprocity or comity?
- Is the provision of mutual legal assistance subject to the double criminality requirement according to your domestic legal framework?

Mutual legal assistance in Lithuania shall be carried out in accordance with the provisions of Criminal Procedure Code and ratified international agreements (multilateral and bilateral), provided that this neither contravenes the Constitution and the national laws nor is against

the fundamental principles of the criminal procedure of Lithuania (Article 66 of the Criminal Procedure Code).

Regarding the double criminality principle it should be stressed that in cases where the assistance required is not covered by the Criminal Procedure Code, or in cases of MLA subject to restriction of human rights, the requirement of double criminality is assessed, as well as whether or not it violates the Constitution, the domestic legislation and the fundamental principles of criminal procedure (Part 1 of Article 67 of the Criminal Procedure Code). Mutual legal assistance is carried out strictly according to international obligations and national laws, therefore, neither the principle of reciprocity nor comity is considered to be a mere ground for execution of MLA.

The Prosecutor General's Office for MLA in criminal proceedings and the Ministry of Justice for MLA in post-conviction matters shall be designated central authorities to receive MLA requests. The MLA can be transmitted through diplomatic channels, or in urgent cases, through Interpol. In urgent cases the requests could be accepted made by mail or via fax. The request by e-mail can be accepted only if its authenticity (proved by a signature of competent officer and seal of its office) is preserved (Part 2 of Article 67 of Criminal Procedure Code).

The requests for legal assistance and documents pertaining thereto, shall be submitted to in Lithuania or should be accompanied by respective translations into English, Russian or Lithuanian, in case the aforementioned documents are not in one of these languages; and in default, the Republic of Lithuania will require compensation for all expenses incurred in translation.

12. In your experience, is international co-operation regarding prosecution of migrant smugglers effective? Please specify.

In the total workload of the Lithuanian prosecution service in the field of international cooperation the prosecutions of migrant smugglers comprise a relatively low number of cases and relate to mainly unlawful transportation of persons across the state border from the neighbouring non-Schengen countries. In these cases Lithuania is chosen as a transit country with a further destination in the Scandinavian or other EU countries (UK, Ireland, Germany etc.).

13. In terms of international co-operation, what legal and/or practical obstacles have been encountered as regards co-operation with:

- a. Council of Europe Member States:
- b. Third party states:

None problems have been encountered so far.

14. Do you think existing Council of Europe instruments on international co-operation in criminal matters (Mutual legal assistance, extradition) are effective in dealing with migrant smuggling? If not, please specify.

Yes.

Poland

1. **Do you have any laws or legislative measures covering the issue of migrant smuggling?**
 - a. **Is the issue set out in general criminal law or are there specific provisions dealing with the problem?**

In Poland the migrant smuggling is covered by the Penal Code. There is no specific provisions dealing with the problem.

2. **Is the smuggling of migrants a criminal offence under domestic law?**
 - a. **Does national law include a definition of migrant smuggling?**
 - b. **How is this conduct defined?**
 - c. **What are the material elements of the crime?**
 - d. **Is “financial gain” an element of the definition of smuggling of migrants?**

Could you please provide, if possible, the relevant texts (in English or in French)?

Poland does not have a legal definition of “smuggling”. Due to the signing of the Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime, Poland uses the definition of “smuggling” as it is stated in the art. 3 therein, where “smuggling of migrants” means the procurement, in order to obtain, directly or indirectly, financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident”.

Taking into account the above mentioned definition of term “smuggling of migrants”, as well as provisions of the Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorized entry, transit and residence and Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence, the Penal Code provides for the following infringements:

- art. 264 § 3 (organizing illegal border-crossing for other persons), and

- art. 264a § 1 (allowing for and facilitating to the other person’s illegal stay on the territory of Poland for the purpose of achieving financial or personal gain).

Moreover, Act of 20 May 1971 - Misdemeanor Code, provides in art. 49a § 2 that aiding and abetting an illegal border crossing are punishable as well [Journal of Laws 2015 item 1094].

Penal Code

“Article 264. § 1. (repealed).

§ 2. Whoever in violation of the provisions of law crosses the border of the Republic of Poland using violence, threat or subterfuge an involvement of other persons, shall be subject to the penalty of the deprivation of liberty of up to 3 years.

§ 3. Whoever arranges for other persons crossing the border of the Republic of Poland in violation of the provisions of law, shall be subject to the penalty of the deprivation of liberty for a term of between 6 months and 8 years.”.

“Article 264a. § 1. Whoever contrary to the provisions of law enables or facilitates another person to stay on the territory of the Republic of Poland for the purpose of deriving material or personal benefit, shall be subject to the penalty of the deprivation of liberty for a term of between 3 months and 5 years.

§ 2. In exceptional cases, in which the perpetrator has not derived any material profit, the court may apply extraordinary mitigation of penalty or even wave the imposition of the penalty.”.

Misdemeanor Code

“Art. 49a. § 1. Whoever in violation of the provisions of law crosses the border of the Republic of Poland shall be subject to the fine.

§ 2. An attempt and aiding and abetting shall be subject to penalty.”.

3. **Are the following activities criminalized under national legislation:**
 - a. **Attempts to smuggle migrants**
 - b. **Participation as an accomplice in the smuggling of migrants**
 - c. **Acting as instigator of the smuggling of migrants**
 - d. **Migrant smuggling as part of a criminal organisation**

e. Circumstances that endanger, or are likely to endanger, the lives or safety of smuggled migrants

In Polish Penal Code an attempt is always subject to penalty. In the Misdemeanor Code it is punishable if expressly provided (as in Article 49a § 2, quoted above). Thus, an attempt to smuggle migrants is fully criminalised.

An accomplice and an instigation is always criminalised. It pertains also to the smuggling of migrants.

Taking part in an organised group or a criminal organisation intending to commit any crime or a fiscal crime is always criminalised. It pertains also to the smuggling of migrants.

The endangerment the life or health of man is treated as a separate offence.

4. Does your domestic legislation permit use of special investigative techniques for the purpose of investigating the smuggling of migrants such as

- a. Interceptions of telecommunication;**
- b. Undercover operations;**
- c. Financial investigations: including access to bank, financial or commercial records and/or databases;**
- d. specific form of protection for witnesses;**
- e. others; Please specify.**

Act of 12 October 1990 on Border Guard provides use of certain types of special investigative techniques for the purpose of investigating the crime referred to in art. 264 § 3 , such as operational control (art. 9e § 1 point 1), acquiring of information constituting a banking secret under the provisions of banking law (art. 10c § 1 and 2), and operational working methods (undercover operations) (art. 9f § 1 point 1a and art. 9g § 1).

Moreover, under art. 9c § 2 of the above mentioned act, while performing operational and exploratory activities, Border Guard officers are allowed to make use of documents preventing from unveiling data which would enable their identification.

5. Does your domestic legislation enable seizure and/or confiscation:

- **of property, equipment or other instrumentalities used in or destined for use in offences related to smuggling of migrants?**
- **of proceeds of crime derived from offences related to smuggling of migrants ? If yes specify the main features of the legal framework.**

Both questions should be answered positively. The general legal basis for the Polish confiscation regime (known as "forfeiture") can be found in the Penal Code which provides for both general forfeiture measures. The general confiscation system is mainly based on Articles 44 and 45 of the Penal Code.

Courts are obliged to impose the forfeiture of items directly derived from an offence. They are also required to order the forfeiture of the proceeds of crime, including that related to smuggling of migrants, where the offence brought "material benefits", whether directly or indirectly acquired as a result of the offence. Courts are not required to order forfeiture if all or part of the proceeds are due as restitution to another party.

Especially noteworthy is the regime reversing the burden of proof with regard to convicted person's property.

In addition, courts may also decide on the forfeiture of the items which served or were designed for committing the offence, including that related to smuggling of migrants

Article 217. § 1 of the Criminal Procedure Code and subsequently Articles 291 to 295 of the Criminal Procedure Code provide provisional measures against the property of the suspect and/or accused.

6. Is trafficking in persons defined under national law?

- a. If so, how does this definition differ from that of migrant smuggling?**

Trafficking in persons is defined in the Article 115 § 22 of the Penal Code, which reads as follows:

"§ 22. Human trafficking means recruitment, transportation, transfer, harbouring or receipt of persons with the use of the following:

- 1) violence or unlawful threat,
- 2) abduction,
- 3) deception,
- 4) use of a deceit or taking advantage of inability for proper understanding of taken actions,

5) abuse of dependence in the relationship, abuse of critical situation or a state of helplessness,

6) provision or acceptance of material or personal benefit or promise thereof to a person taking care or having custody of another person

- in order to abuse such person even if such abuse is performed upon the consent of such abused person, specifically in prostitution, pornography or other forms of sexual abuse, in forced labour or services, begging, slavery or other forms of abuse of human dignity or for the purpose of acquiring cells, tissues or organs in violation of the provisions of this law. If the conduct of the perpetrator is directed against a juvenile, it constitutes human trafficking, even if methods or measures mentioned in sections 1-6 have not been applied.”.

The hallmark of this definition, differentiating it from the migrants smuggling is an abusive purpose of human trafficking. On the contrary, the definition of the migrants smuggling does not provide any purpose of criminal activity, as a condition of liability.

7. In relation to your country, are there any international, regional or bilateral agreements which address the issue of migrant smuggling?

The issue of smuggling of persons is also addressed in some bilateral treaties on cooperation in the fight against crime¹⁷. However, in relation to Poland there are no international regional or bilateral agreements which exclusively address the issue of judicial cooperation in the cases of migrant smuggling. General instruments of national and international law are applicable (see answer to question 11). For example judicial legal cooperation can be based on *United Nations Convention against Transnational Organized Crime*.

8. Does your country have jurisdiction to prosecute crimes related to smuggling of migrants when they are committed outside its territory? If yes, specify the legal framework.

Polish courts have jurisdiction if the offence was committed:

- on the Polish territory, or on a Polish vessel or aircraft (Article 5 of Penal Code),

- abroad by a Polish citizen (Article 109 of Penal Code),

- abroad by foreign citizen, if committed against the interests of the Republic of Poland, a Polish citizen, a Polish legal person or a Polish organizational unit not having legal personality (Article 110 of Penal Code),

- abroad by foreigner who have committed a terrorist offence or an offence being subject to a penalty exceeding 2 years of deprivation of liberty where the perpetrator remains within the territory of the Republic of Poland and no decision on his extradition has been taken (Article 110 of the Penal Code).

In general, double criminality is the condition for criminal liability for offences committed abroad. However, notwithstanding the provisions applicable at the place of committal of an offence, a Polish court has jurisdiction in case of committing it by a Polish national or an foreigner, whose surrender has not been decided if such a foreigner has committed an offence abroad and the Republic of Poland is obliged to prosecute such offence under an international treaty or if an offence committed by such an foreigner is specified in the Rome Statute of the International Criminal Court, drawn up in Rome on 17 July 1998 (Article 113 of the Penal Code).

The obligation to prosecute the migrants smuggling stems from the Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime. As a consequence Polish authorities have jurisdiction to prosecute trafficking regardless of the place of its commitment or the nationality of a perpetrator.

9. Do you have a national policy or action plan to address the issue of migrant smuggling?

Comprehensive interpretation of the state policy in the area of migration management is included in the document “Migration Policy of Poland - the Current Stay of Play and Further Actions” adopted by the Council of Ministers in 2012 and then developed in its Action Plan prepared within the framework of the inter-ministerial Committee for Migration (advisory body to the Prime Minister). The document refers also to the activities taken in order to prevent illegal migration.

¹⁷ The agreements with Austria, Belgium, Chile, India, Indonesia, Ireland, Mexico, Sweden, Turkey and Ukraine.

In addition, the tasks to be carried out by each of the institutions involved are separately specified in the dedicated laws which regulate their activity. In case of the Border Guard, these tasks include, among others: the prevention and combating of illegal migration as well as recognition, prevention and detection of crimes and infractions and prosecution of perpetrators thereof within the scope of its competence, and in particular:

- crimes and infractions concerning compliance of crossing the state border with law, (...) and concerning the reliability of documents entitling the holder to cross the state border;
- crimes and infractions specified in the Act of 12 December 2013 on foreigners and the Act of 13 June 2003 on the granting protection to foreigners within the territory of the Republic of Poland;
- crimes defined in Article 264a of the Penal Code (aggravated type of crossing the border against the law) and also Article 9 and Article 10 of the Act of 15 June 2012 on the consequences of entrusting the performance of work to foreigners residing unlawfully in the territory of the Republic of Poland;
- crimes defined in Article 189a of the Penal Code (...) (trafficking in human beings).

10. Where possible, please provide information regarding:

- a. Number of apprehended smugglers: 33**
- b. Number of investigations instigated against migrant smugglers: 60**
- c. Number of successful prosecutions of migrant smugglers: 7**

See also: Statistic attachment

11. In your country, is international cooperation on smuggling of migrants (specifically on mutual legal assistance and extradition) afforded

- **by statute?**
- **by treaty or other agreement or arrangement (multilateral or bilateral)?**
- **by virtue of reciprocity or comity?**
- **Is the provision of mutual legal assistance subject to the double criminality requirement according to your domestic legal framework?**

There is no specific framework determining cooperation on smuggling of migrants. Nevertheless, Border Guard is taking part in various initiatives aiming to further improve the effectiveness of actions taken in order to identify and prevent illegal migration to and through the territory of Poland. The activities in this regard are implemented in bilateral cooperation with other countries' relevant services. Moreover, Border Guard cooperates with Europol, in particular in the framework of AWF SOC (combating organized crime) and under-project FP CHECKPOINT (organizing illegal migration prevention).

International cooperation in general is afforded in Poland by: statute, international treaties or virtue of reciprocity in case of absence of international instruments. According to the Polish legal framework provision of mutual legal assistance is not subject to the double criminality requirement, whereas extradition is. However, according to Article 588 §3 of the Polish Code of Criminal Procedure the court and the state prosecutor may refuse to give judicial assistance if: (1) the performance of the requested action lies beyond the scope of activity of the court or state prosecutor under Polish law, (2) the foreign state in which the rogatory letters have originated, does not guarantee reciprocity in such matters, or (3) the request is concerned with an act which is not an offence under Polish law. Thus, lack of the double criminality constitutes an optional ground for refusal of execution of MLA request.

12. In your experience, is international co-operation regarding prosecution of migrant smugglers effective? Please specify.

In order to fulfill the obligation to secure external border of the European Union, Poland focuses in particular on bilateral cooperation with non-EU countries, e.g. with Ukraine. In opinion of prosecutors investigating on smuggling of migrants, international cooperation in this area has been effective so far. Execution of Polish requests has been proceeded smoothly, especially by countries as Ukraine, Germany, Austria, Slovakia and Hungary.

We can't see any particular reasons for claiming that international cooperation regarding prosecution of migrant smugglers is ineffective.

13. In terms of international co-operation, what legal and/or practical obstacles have been encountered as regards co-operation with:

- a. Council of Europe Member States:**
- b. Third party states:**

As stated above, Polish services (Border Guard) take part in various activities concerning illegal migration prevention. The priority in this regard, however, is given to bilateral cooperation with non-EU states in order to perform the entrusted task of securing external border of the European Union. In addition, Polish and Ukrainian border guards collaborate on a daily basis e.g. through expert meetings and bilateral trainings which focus on preventing illegal border-crossing and smuggling of migrants.

It must be noted, however, that more emphasis should be put on ensuring synergies between actions taken by the Council of Europe and the European Union in the field of international cooperation on preventing smuggling of migrants.

In terms of international cooperation there some obstacles have been encountered, namely: problems with accurate translations and problems with finding competent authority in a country we cooperate with, especially in urgent cases for working contacts via e-mail.

14. Do you think existing Council of Europe instruments on international co-operation in criminal matters (Mutual legal assistance, extradition) are effective in dealing with migrant smuggling? If not, please specify.

We cannot see any particular reasons for claiming that existing Council of Europe or international instruments on cooperation in criminal matters are ineffective in dealing with migrant smuggling. In our opinion existing legal framework seems to be sufficient. However, one may think of continuing works in the area of the substantive laws with the aim of eliminating existing discrepancies in available international tools tackling illegal migration, taking into account the scope of criminalization, definitions of crimes, protection of smuggled persons and exclusions of their liability.

Italy

1. Do you have any laws or legislative measures covering the issue of migrant smuggling?
 - a. Is the issue set out in general criminal law or are there specific provisions dealing with the problem?

Legislation on migration is contained in the *Testo Unico* (consolidated text) of the Law on Immigration¹⁸ modified by the Bossi-Fini Law and which entered into force in August 2002.

The *Testo Unico* is the whole legislative source for various offences on migrants smuggling because it sets out (article 12 "*Disposizioni contro le immigrazioni clandestine*", Provisions against illegal immigration) the penalties for offences such as facilitating illegal entry into and out of the country ("acts intended to procure illegal entry into another State of which the person is not a citizen of for which s/he does not have a legal residence permit").

Besides the *Testo Unico* also deals with the administrative aspects of immigration (residence permit, expulsions, employment of immigrants, family reunification, treatment of minors, etc.) not directly connected with the fight against human smuggling and trafficking.

2. Is the smuggling of migrants a criminal offence under domestic law?
 - a. Does national law include a definition of migrant smuggling?

Yes, as mentioned, the criminal law definition of migrant smuggling contained in article 12, paragraph 1, *Testo Unico* on Immigration has been modified by the Bossi-Fini Law.

- b. How is this conduct defined?

The current provision states:

"Unless the behavior is part of a more serious offence, those who violate the provisions contained in this Testo Unico by engaging in any activity with the purpose of bringing a foreign national into the national territory, or any activity aimed at procuring the illegal entry in another State of a person not a citizen thereof or who does not possess a legal permanent residence permit, violating the provisions contained in this Testo Unico, may be subject to imprisonment for up to three years and a fine amounting to a maximum of Euro 15.000 for each person".

Besides, the procurement of illegal entry, which was also envisaged by the previous version of the provision, a further criminal offence related to so-called "Illegal expatriation" has been added, thus extending punishment to offences committed to the detriment of other countries.

The third paragraph of article 12 has been revised to envisage a crime punished with more severe sanctions when specific features are present, such as:

- *Mens rea* specifically intended to gain profits even indirectly from the crime;
- Participation of three or more persons in the criminal act;
- The use of international transport services or of false or illegally obtained documents.

Aggravating circumstances for this crime have been introduced by article 3-bis (i.e. having facilitated the entry or the stay in the national territory for five or more persons; having acted in manner to endanger the

¹⁸ Legislative decree, 25 July 1998, no. 286 "Testo Unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero", published in the *Gazzetta Ufficiale*, no. 191, 18 August 1998.

life and physical well-being of the person; illegally smuggled into the country, or in respect to minors, having smuggled them for the purpose of their exploitation in unlawful activities).

The balance of circumstances, too, has been substantially modified from a more repressive perspective, in that paragraph 3 *quater* states that mitigating circumstances other than age (article 98 criminal code) cannot be considered as equivalent to or overriding the aggravating ones described above.

Finally, article 12 paragraph 3 *quinquies* introduces a “reward” for those migrants who cooperate with the police or the judicial authorities in order to prevent the criminal activity from giving rise to further consequences by helping with the gathering of crucial evidence, the identification or arrest of the perpetrators, or the elimination of resources important for the commission of the crimes.

The objective elements of the conduct punished do not include the behavior of the migrant. Simple illegal or irregular entry into the country is not punished as a crime in itself, but is considered to be a merely administrative offence to be punished with expulsion and/or with a fine.

c. What are the material elements of the crime?

The offence is described by the provision as a conduct in any form, so that the crime is committed regardless of the occurrence of any particular event: not even necessary is the actual entry of the foreign national on the territory of the state. It is a mere endangerment crime (presume or concrete) characterized by a generic *mens rea*.

d. Is “financial gain” an element of the definition of smuggling of migrants?

Financial gain is not directly contained in the definition of smuggling of migrants in the current provision, but the crime is punished with more severe sanctions when is specifically intended to gain profits even indirectly.

Could you please provide, if possible, the relevant texts (in English or in French)?

Art. 12 Provisions against illegal immigration (Law n. 40 dated 6 March 1998, art. 10)

1. Unless the fact constitutes a more serious crime, whoever, infringing the provisions of this consolidated act, promotes, directs, organizes, finances or transports aliens in the State’s territory or carries out other acts aimed at their illegal entry in the State’s territory, or in another State of which the person is not citizen or does not have the right to permanent residence, is punished with imprisonment from one to five years and with a 15,000 Euro fine for each person.

2. Withstanding what provided for by article 54 of the code of criminal procedure, aid and humanitarian assistance carried out in Italy toward aliens in state of need, however present on the State’s territory, do not constitute crime.

3. Unless the fact constitutes a more serious crime, whoever, infringing the provisions of this consolidated act, promotes, directs, organizes, finances or transports aliens in the State’s territory or carries out other acts aimed at the illegal entry in the State’s territory, or in another State of which the person is not citizen or does not have the right to permanent residence, is punished with imprisonment from one to fifteen years and with a 15,000 Euro fine for each person in the following

cases: a) the fact concerns the entry or the illegal permanence in the State's territory of five or more persons; b) the life of the person transported was placed at risk or was exposed to danger to obtain his entry or illegal permanence; c) the person transported underwent inhuman or demeaning treatment to obtain his entry or illegal permanence d) the fact was carried out by three or more persons in agreement among each other or using international transportation services or counterfeited or modified documents or in any case obtained illegally; e) the authors of the fact have the availability of weapons or explosives.

3-bis. If the facts as mentioned under paragraph 3 are committed occurring two or more of the hypothesis as mentioned under letters a), b), c), d) and e) of the same paragraph, the sentence provided for is increased.

3-ter. Imprisonment is increased from one third to half and a 25,000 Euro fine is imposed on every person if the facts as mentioned under paragraphs 1 and 3 are committed: a) with the aim to recruit persons to destine to prostitution or however sexual or labour exploitation, or concern the entry of minors for favouring their exploitation in illegal activities; b) are committed for profit, even indirect.

3-quater. The extenuating circumstances, different from those provided for by articles 98 and 114 of the code of criminal procedure, concurring with the aggravating circumstances as mentioned under paragraphs 3-bis and 3-ter, cannot be considered equivalent or prevalent and the reductions of the sanction are carried out on the quantity of sentence resulting from the increase consequent the above mentioned aggravating circumstances.

3-quinquies. For the crimes provided for by the previous paragraphs, the sentences are decreased up to half for the defendant that works toward avoiding that the criminal activity has further consequences, helping in actual fact the police or judicial authority in collecting evidence decisive for reconstructing the facts, for finding or capturing one or more authors of crimes and for subtracting resources relevant for carrying out said crimes.

3-sexies. Under article 4-bis, paragraph 1, third period, of law n. 354 dated 26 July 1975, and following amendments, after the phrase: "609-octies of the code of criminal procedure" the following statement has been added: "as well as by article 12, paragraphs 3, 3-bis and 3-ter, of the consolidated act as mentioned under legislative decree n. 286 of 25 July 1998."

3-septies. PARAGRAPH ABROGATED BY L. N. 146 DATED 16 MARCH 2006.

4. In the cases provided for by paragraphs 1 and 3, when in flagrancy, arrest is mandatory. 4-bis. When there is serious proof of culpability as regards the crimes provided for by paragraph 3, preventive detention in prison is enforced unless elements have been acquired from which there is evidence that there is no need for preventive measures. ((41)) 4-ter. In the cases provided for by paragraphs 1 and 3, the confiscation of the means of transport used for committing the crime is always provided for, also when implementing the sentence upon the parties' request.

5. Excepting the cases provided for by the previous paragraphs, and unless the fact does not constitute a more serious crime, whoever, in order to obtain an illegal profit from the alien's condition of illegality or within the ambit of activities punished in compliance with this article, favours the permanence of said aliens on the State's territory in violation of the regulations of this consolidated act, is punished with imprisonment up to four years and with a fine up to thirty million Euros. When the fact is committed in complicity by two or more persons, or it concerns the permanence of five or more persons, the sentence is increased from one third to half.

5-bis. Unless the fact constitutes a more serious crime, whoever, under remuneration in order to obtain an illegal profit, gives shelter or transfers a real estate, also in tenancy, to an alien that is lacking a residence permit when signing a rent contract or the renewal of said contract, is punished with imprisonment from six months to three years. The sentence with irrevocable provision or the implementation of the sentence upon the parties' request is regulated by article 444 of the code of criminal procedure, even if the conditional suspension of the sentence was granted, and entails the

confiscation of the real estate, unless it belongs to a person not involved in the crime. The provisions implemented, as they are applicable, are those in force concerning the management and destination of the goods confiscated. The amounts of money obtained by the sale, where provided for, of the goods confiscated are destined to strengthening the prevention and repression activities of crimes connected to illegal immigration.

6. The air, maritime or land carrier must make sure that the alien being transported is in possession of the documents required for entering the State's territory, as well as refer to the border police concerning the possible presence on board his means of transport of aliens in an illegal position. In case of noncompliance with even just one of the obligations as mentioned under this paragraph, an administrative sanction is imposed from 3,500 Euros to 5,500 Euros for each of the aliens transported. In the most serious cases, the suspension of the authorization or concession of the licence issued by the Italian administrative authority is ordered from one to twelve months, or its revocation, with reference to the professional activity carried out and the means of transport used. The provisions implemented are those as mentioned under law n. 689 dated 24 November 1981.

7. During police operations aimed at fighting against illegal immigration, provided for within the ambit of the directives as mentioned under article 11, paragraph 3, public security officials and agents operating in provinces along the border and in territorial waters can control and inspect means of transport and what transported, even if in the presence of subjects under special customs regime, when, also as regards specific circumstances of place and time, there are founded reasons to believe that they are being used for any of the crimes provided for by this article. On the basis of the outcome of the controls and inspections, a report is written on specially provided forms, which is transmitted within forty-eight hours to the public prosecutor who, if there are the conditions, validates the report within the following forty-eight hours. In the same circumstances, the judicial police officials can also carry out a search, in compliance with the provisions as mentioned under article 352, paragraphs 3 and 4, of the code of criminal procedure.

8. The goods impounded during police operations aimed at preventing and repressing the crimes provided for by this article, are entrusted by the judicial authority in judicial custody, unless there are procedural needs, to the police bodies that submit request for their use in their activities or other bodies of the State or other public bodies due to justice, civil protection or environmental protection purposes. The means of transport cannot be in any way whatsoever alienated. The provisions of article 100, paragraphs 2 and 3 of the consolidated act of the laws regulating drugs and psychotropic substances are implemented, as they are compatible, approved with decree n. 309 of the President of the Republic dated 9 October 1990.

8-bis. Should no requests be submitted for the entrusting of the means of transport impounded, the provisions to be applied are those of article 301-bis, paragraph 3, of the consolidated act of the legislative provisions as regards customs, as mentioned under decree n. 43 of the President of the Republic dated 23 January 1973, and following amendments.

8-ter. Destruction can be provided for directly by the President of the Council of Ministers or by the authority delegated by the same, upon the issuing of a no impediment document by the acting judicial authority.

8-quater. The measure regulating the destruction pursuant to paragraph 8-ter also establishes the execution modalities.

8-quinquies. The goods acquired by the State following the definitive confiscation measure are, upon request, appointed to the administration or transferred to the body that had their use pursuant to paragraph 8 or are alienated or destroyed. The means of transport not appointed, or transferred for purposes as mentioned under paragraph 8, are however destroyed. The provisions implemented, as they are applicable, are those in force as regards the management and destination of confiscated goods. In order to establish possible indemnity, paragraph 5 is implemented of article 301-bis of the

mentioned consolidated act as provided for by decree n. 43 of the President of the Republic dated 23 January 1973, and following amendments.

9. The money confiscated following the sentence for one of the crimes provided for by this article, as well as the money obtained from the sale of the goods confiscated, where ordered, are destined to strengthening the prevention and repression activities of the mentioned crimes, also at international level through interventions aimed at the collaboration and technical operational assistance with the police of the Countries involved. To this end, the amounts are placed on a specially provided revenue item of the State's budget to be appointed, on the basis of specific requests, to pertinent forecast items of the Ministry of Interior, in the section "public security."

9-bis. The Italian police patrol meeting in territorial waters, or in contiguous zones, a ship of which there are founded reasons to believe that it is equipped or involved in illegal transportation of migrants, can stop it, subject it to inspection and, if finding elements that confirm the involvement of the ship in trafficking of migrants, sequester it taking the same to the State's harbour.

9-ter. Withstanding the institutional competences as regards national defence, the ships of the Navy can be used to concur to the activities as mentioned under paragraph 9-bis.

9-quater. The powers as mentioned under paragraph 9-bis can be executed outside the territorial waters, besides the Navy, also by police patrols, within the limits provided for by law, by international law or by bilateral or multilateral agreements, if the ship exhibits national flag or also that of another State, or if it is a ship without flag or with a convenience flag.

9-quinquies. The modalities of intervention of the Navy's ships as well as those collaborating in activities carried out by the other police naval units are defined with inter-ministerial decree of the Ministry of Interior, of Defence, of Economy and Finance and of Infrastructure and Transport.

9-sexies. The provisions as mentioned under paragraphs 9-bis and 9-quater are implemented, as the are compatible, also for controls concerning air traffic.

UPDATE The Constitutional Court, with ruling n. 331 dated 12 - 16 December 2011 (in the Official Gazette, the special series dated 21 December 2011, n. 53) stated the "the constitutional illegitimacy of article 12, paragraph 4-bis, of legislative decree n. 286 dated 25 July 1998, (Consolidated act of provisions concerning the measures on immigration and rules on the alien's conditions), added by article 1, paragraph 26, letter f), of law n. 94 dated 15 July 2009, (Provisions concerning public security), in the part in which – when there is serious proof of culpability as regards crimes provided for by paragraph 3 of the same article, precautionary custody in prison is implemented, unless elements have been acquired which show that there are no precautionary needs – it does not withstand the case in which specific elements have been acquired concerning the actual case, which prove that precautionary needs can be satisfied with other measures."

3. Are the following activities criminalized under national legislation:
 - a. Attempts to smuggle migrants
 - b. Participation as an accomplice in the smuggling of migrants
 - c. Acting as instigator of the smuggling of migrants
 - d. Migrant smuggling as part of a criminal organization
 - e. Circumstances that endanger, or are likely to endanger, the lives or safety of smuggled migrants

Regarding different activities connected with smuggling, paragraph 5 of article 12 envisages a further criminal offence: "*Facilitation of the foreign national's stay on the territory of the state*". This is expressly treated as a residual offence and is applicable "*when the cases described in the previous paragraph are not present and except when the behavior constitutes a more serious crime.*" The offence consists in facilitating the illegal residence of the foreigner on national territory. It is committed with the mere performance of the

conduct described and does not require occurrence of the event described (residence). The subjective element of the *mens rea* is pursuit of “unlawful profit from the foreigner’s position of illegality of from the activities punished by this article”. It has been argued that this specification brings the criminal offence in question more with the scope of trafficking in persons for exploitation than within that of migrant smuggling, given that it has been applied to conduct intended to facilitate the migrant’s stay in Italy for the purpose of recruitment into prostitution or the exploitation of minors in illicit activities.

Applicable offences provided by the criminal code are:

- Facilitating illegal immigration (article 12 d.lgs. 286/1998 – Immigration Act)
 - Reduction to servitude (article 600 criminal code) “Whoever induce another person to servitude, or to a similar condition, shall be punished with imprisonment for between five fifteen years”
 - Trafficking and the slave trade (article 601, par. 1, criminal code) “Whoever engages in trafficking or any form of trading in slaves or persons in a condition similar to slavery shall be punished with imprisonment for between five and twenty years”
 - Conveyance and purchase of slaves (article 602 criminal code)
 - Trafficking in under-age persons (article 601, par. 2, criminal code)
 - Inducement to move to another country or place for the purpose of prostitution (article 3, no. 6, law no. 75, 20 February 1958)
 - Conspiracy to recruit persons for the purpose of prostitution (article 3 no.7, law no. 75, 20 February 1958)
 - Assistance in or exploitation of prostitution (article 3, no. 8, law no. 75, 10 February 1958)
 - Juvenile prostitution (article 600 bis criminal code)
 - Sexual assault (article 609 bis criminal code)
 - Conspiracy to commit crime (article 416 criminal code) with the specific aim of smuggling of people (art. 416 comma 6 criminal code)
 - Mafia-type association (article 416-bis criminal code)
 - Abduction (article 605 criminal code)
 - Kidnapping for ransom (article 630 criminal code)
4. Does your domestic legislation permit use of special investigative techniques for the purpose of investigating the smuggling of migrants such as
- a. Interceptions of telecommunication;
 - b. Undercover operations;
 - c. Financial investigations: including access to bank, financial or commercial records and/or databases;
 - d. specific form of protection for witnesses;
 - e. others; Please specify.

Law 228/2003 enlarges the range of instruments available to the agencies investigating smuggling of people and related crimes.

Moreover, the offence of criminal conspiracy to commit crime with the specific aim of smuggling of people (art. 416 comma 6 criminal code) falls under the provision of article 51 comma 3 bis criminal procedural code that envisages the competence of the Special Antimafia Directorate of the Prosecutor's Office and the application of the special rules for Mafia-type proceedings.

Basically, all the investigative tools mentioned above can be used in the investigations on smuggling of people.

"Controlled delivery" and under-cover activity are by now indispensable assets for investigations into organised crime. These techniques are specifically mentioned in article 20 of the Palermo Convention, and they also figure among other instruments against offences frequently committed by organised criminal groups.

These instruments, in fact, enable investigators to go beyond the final links in the organisational chain (for example, the *passeurs* in the case of trafficking in persons) and determine the structure that directs the criminal activity.

Given the usually associative nature of the crimes related to the smuggling of people, law 228/2003 allows the prosecutor to delay the execution of precautionary measures, arrest seizure, or police detention when this is necessary to acquire important evidence and to identify or arrest the perpetrators of the crimes envisaged by articles 600, 601 and 602 criminal code, as well as those related to prostitution ex article 3 of law no. 75, 20 February 1958.

The same ratio inspires the extension of the provisions of article 4, paragraph 1, 2, 4, 5, 6 and 7 of legislative decree no. 374, 18 October 2001 on under-cover activities, converted with amendment by law no. 438 15 December 2001, which provides urgent measures for combating international terrorism.

Finally, prosecutors have greater powers to use interceptions in the case of crimes covered by articles 600, 601 and 602 criminal code, as well as crimes relating to prostitution as envisaged by article 3 of law no. 75, 20 February 1958 (see article 9 of law 288/2003). In particular, the exemption already provided for offences relating to organised crime (article 13, legislative decree no. 152, 13 May 1991, converted into law no. 203, 12 July 1991) is extended to these cases as well, facilitating the use of this instrument.

The role of associate witnesses (so called "collaboratori di giustizia") may be crucial in the prosecution of smuggling offences. Article 11 of law 228/2003 provides for a series of penal benefits and specific protection measures aimed to facilitate cooperation.

Further internationally recognized instruments for the fight against organized crime are those that enable the competent authorities to attack the economic interests of criminal groups.

Law 228/2003 greatly extends the scope of application of confiscation and pecuniary preventive measures (article 7 and 16, paragraph 3). In particular, the confiscation of the tantundem (i.e. of goods belonging to the defendant of equivalent value) becomes "compulsory" if confiscation of the proceeds or the price of the crime is impossible. This provision is also reflected in the extension of the possibility for judges to use the provision contained in article 321, paragraph 2, criminal procedure code, concerning the preventive seizure of goods subject to confiscation.

5. Does your domestic legislation enable seizure and/or confiscation:
- of property, equipment or other instrumentalities used in or destined for use in offences related to smuggling of migrants? Yes, see what said above.
 - of proceeds of crime derived from offences related to smuggling of migrants ? If yes specify the main features of the legal framework.

See paragraph above.

6. Is trafficking in persons defined under national law?
- a. If so, how does this definition differ from that of migrant smuggling?

The article 601 punishes at least the following three types of conduct:

- The trafficking (by which is meant any form of transfer from the national territory or within it) of persons in the situations described by article 600;
- Inducement by deceit to enter, stay within, or exit from the national territory, or to move within it, with the purpose of reducing or keeping a person in slavery or servitude;
- Forcing a person by means of violence, threats or abuse of authority, or by taking advantage of a situation of psychological inferiority or a situation of necessity, or by promising money or other benefits to the person with power over the victim, to enter, stay within, or exit from the national territory or to move within it, for the purpose of reducing or keeping him/her in slavery or servitude.¹⁹

The difference between the first of these forms of conduct and the other two is the situation of the victim. The first case occurs when the victim is already in the condition of subjugation referred to in article 600 criminal code; the second and the third cases occur when the person is free and is induced or forced to subject him/herself to the trafficking. The difference from the conduct described in the article 602 (*“Acquisition and disposition of slaves”*) criminal code resides in the latter’s lack of reference to transfer of the victim within or out of national territory.

The differentiation among the offences envisaged by article 600, 601, 602 allows charges for a variety of crimes to be brought against the same person. This may happen, for example, when the trafficker of the subjugated person is the person who initially placed him/her in the state of subjugation defined by article 600. Moreover, if the trafficking has been committed by bringing an illegal migrant into national territory, this constitutes a case of concurrence with the offence provided for by article 12 of legislative decree no. 286, 25 July 1998, as amended by law no. 189, 30 July 2002 (Bossi-Fini Law).

7. In relation to your country, are there any international, regional or bilateral agreements which address the issue of migrant smuggling?

Italy has signed and implemented all the most relevant international conventions on this topic.

8. Does your country have jurisdiction to prosecute crimes related to smuggling of migrants when they are committed outside its territory? If yes, specify the legal framework.

¹⁹ The terminology to describe trafficking in persons is to the same as that used by the United Nations Protocols on trafficking, in article 3, letter a.

9. Do you have a national policy or action plan to address the issue of migrant smuggling?

Over time, Italy has established a set of rules that have made the prevention and suppression of illegal migration by sea more effective. These provisions are set in the framework of the general policy for the management of migratory flows and are aimed at developing international cooperation with countries of origin and transit.

10. Where possible, please provide information regarding:

- a. Number of apprehended smugglers:
- b. Number of investigations instigated against migrant smugglers:
- c. Number of successful prosecutions of migrant smugglers:

11. In your country, is international cooperation on smuggling of migrants (specifically on mutual legal assistance and extradition) afforded

- by statute?
- by treaty or other agreement or arrangement (multilateral or bilateral)?
- by virtue of reciprocity or comity?
- Is the provision of mutual legal assistance subject to the double criminality requirement according to your domestic legal framework?

Italy has promoted the conclusion and implementation of international agreements to facilitate the readmission of illegal foreign national and has engaged in advanced forms of police cooperation to combat criminal organizations. At the same time, it has supported a strategy intended to reinforce the capacity of the countries concerned.

This policy involves:

- 1) Exchanges of liaison officers;
- 2) Granting of goods and services;
- 3) Joint training;
- 4) Assistance in developing policies in relations with the European Union;
- 5) Implementation of programs to facilitate the issuing of visas;
- 6) Granting of privileged entry quotas for certain kinds of work.

Actually, the Consolidating Act on immigration and Foreign National's Status (Legislative Decree No. 286 of July 25, 1988, as subsequently amended) regulates the implementing procedures of migratory policies with respect to relations with third countries and lays down the possibility of establishing privileged quotas for entry for work for those states with which international cooperation against illegal immigration is most effective.

12. In your experience, is international co-operation regarding prosecution of migrant smugglers effective? Please specify.

13. In terms of international co-operation, what legal and/or practical obstacles have been encountered as regards co-operation with:

- a. Council of Europe Member States:
- b. Third party states:

The concrete experience of international cooperation can be considered effective and fruitful inside European Union, particularly in the framework of Eurojust and Europol, and with the CoE MS. Much less positive is the cooperation with the States where the smuggling of people originates, particularly in Africa and in Asia due to the difficult political and institutional situation there and the difficulty to find adequate counterparties for exchange of information and operational activities.

14. Do you think existing Council of Europe instruments on international co-operation in criminal matters (Mutual legal assistance, extradition) are effective in dealing with migrant smuggling? If not, please specify.

Yes, even if they should be used more and in a more effective way.

Liechtenstein

Nothing particular to inform about.

Andorra

15. Avez-vous des lois ou des mesures législatives couvrant la question du trafic de migrants ?

- a. Cette question est-elle traitée au sein du droit pénal général ou existe-t-il des dispositions spécifiques traitant du problème ?

Oui. Le Code Pénal définit dans son article 252 le trafic d'immigrants clandestins.

Par ailleurs, la Loi d'Immigration du 31 mai 2012, sanctionne l'immigration clandestine : par une amende de 3.000€ à 6000€ le patron qui fait travailler une personne sans autorisation de séjour ou en situation irrégulière, ou toute autre personne que induira, promouvra, favorisera ou facilitera, directement ou indirectement, individuellement ou appartenant à une organisation, l'immigration clandestine, ou le séjour irrégulier de personnes en Principauté d'Andorre, quand le fait ne sera pas constitutif d'infraction pénale ; par une amende et/ou par expulsion de la personne qui séjourne ou travaille irrégulièrement dans le pays, ou en contravention de son permis de séjour ou de travail.

16. Le trafic de migrants est-il une infraction en vertu du droit interne ?

- a. Le droit national comprend-il une définition du trafic de migrants ?

Oui. Article 252 du Code Pénal.

- b. Comment ce comportement est-il défini ?

« Quiconque, par finalité lucrative, promouvra ou interviendra au recrutement ou au transport d'immigrants clandestins en transit en Principauté d'Andorre ou étant l'Andorre l'origine ou la destination de ce trafic, encourra une peine de 3 mois à 3 ans d'emprisonnement et une amende jusqu'à 60.000€, sans préjudice de la responsabilité pénale encourue pour la commission d'autres délits. »

- c. Quels sont les éléments matériels du crime ?

La promotion ou l'intervention au recrutement ou au transport d'immigrant clandestins en transit en Principauté d'Andorre ou étant l'Andorre l'origine ou la destination de ce trafic.

- d. Le « gain financier » est-il un élément de la définition du trafic de migrants ?

Oui, selon les dispositions de l'article du Code Pénal précité.

Pourriez-vous, si cela est possible, fournir les textes pertinents s'il vous plaît (en français ou en anglais) ?

Article 252 du Code Pénal (traduction libre) :

1.- Quiconque, par finalité lucrative, promouvra ou interviendra au recrutement ou au transport d'immigrants clandestins en transit en Principauté d'Andorre ou étant l'Andorre l'origine ou la destination de ce trafic, encourra une peine de 3 mois à 3 ans d'emprisonnement et une amende jusqu'à 60.000€, sans préjudice de la responsabilité pénale encourue pour la commission d'autres délits.

2.- La peine d'emprisonnement sera de 2 à 5 ans et l'amende jusqu'à 180.000€, quand concourent les circonstances suivantes : que l'auteur appartienne à une organisation dédiée, entre autres, de manière occasionnelle ou permanente, à cette activité, ou qui agira en relation avec celle-ci ; que l'auteur utilise le mensonge ; que l'auteur utilise la violence ou l'intimidation ; que l'auteur mette en danger la vie, ou cause un risque grave pour la santé ou l'intégrité des victimes ; que les victimes soit mineures ou incapables.

3.- La peine privative de liberté prévue aux alinéas 1 et 2 de cet article sera imposée dans sa moitié supérieure, respectivement, à quiconque réalisera les conduites prévues à ces alinéas quand concourra une des circonstances suivantes : que l'auteur soit fonctionnaire et agisse en l'exercice de ses fonctions. Dans ce cas, en plus des peines prévues antérieurement, doit être imposée la peine d'inhabilitation pour l'exercice de fonction publique jusqu'à huit ans. Que l'auteur soit le chef, l'administrateur ou la personne chargée de l'organisation délictuelle.

17. Les activités suivantes sont-elles incriminées en vertu de la législation nationale ?
- a. Tentatives de trafic de migrants

Selon les dispositions de l'article 16.2 de notre Code Pénal « la tentative de délit ou de contravention pénale est seulement punissable dans les cas où la loi le dispose expressément » et étant donné que l'article 252 du Code Pénal ne prévoit pas la tentative punissable, nous pouvons affirmer que la tentative de trafic de migrants n'est pas prévue par notre législation comme forme imparfaite de commission du délit.

Toutefois, et tenant compte la définition du délit prévue par notre Code Pénal, celle-ci prévoit comme forme complète de commission de l'infraction, certains actes -comme la promotion du recrutement d'immigrants clandestins- qui dans d'autres types de délits s'engloberaient dans la définition de la tentative.

- b. Participation en tant que complice au trafic de migrants.

Notre code pénal fait une définition générale de la complicité et ne prévoit pas de restriction à son application, c'est pourquoi la complicité au trafic de migrants est prévu en vertu de notre législation. Il faut noter que la peine pour le complice sera jusqu'à la moitié de celle prévue par la loi pour l'auteur.

- c. Etre instigateur du trafic de migrants

L'instigation est prévue par notre législation comme une forme de participation assimilable à l'auteur, avec les mêmes peines, et donc est prévue par notre Code Pénal dans son article 21.

- d. Le trafic de migrants comme faisant partie d'une organisation criminelle.

Notre Code Pénal non seulement prévoit l'association de malfaiteurs comme délit autonome (article 359-360 de Code Pénal) pour le groupe de personnes organisées qui -entre autres- aura comme finalité commettre un délit ou en promouvra la commission, englobant donc tous les actes antérieurs à la forme complète de la commission de l'infraction, mais aussi dispose dans le même article 252 du Code Pénal comme circonstance aggravante de la peine du trafic de migrants (de 2 à 5 ans d'emprisonnement et jusqu'à 180.000€ d'amende), que l'auteur appartienne à une organisation dédiée, entre autres, de manière occasionnelle ou permanente, à cette activité, ou qui agira en relation avec celle-ci.

- e. Les circonstances qui mettent en danger, ou sont susceptibles de mettre en danger, la vie ou la sécurité des migrants qui font l'objet du trafic.

L'alinéa 2 de l'article 252 du Code Pénal, aggrave la peine de 2 à 5 ans d'emprisonnement et jusqu'à 180.000€ d'amende, pour l'auteur qui mettra en danger la vie, ou qui causera un risque grave pour la santé ou l'intégrité des victimes du trafic de migrants.

Il faut ajouter aussi que l'alinéa premier de cet article, prévoit que tout autre délit commis, comme par exemple les atteintes à l'intégrité ou à la vie des migrants, sera sanctionné de manière autonome.

18. Votre droit interne permet-il l'utilisation de techniques spéciales d'enquête en vue d'enquêter sur le trafic de migrants comme

- a. L'interception des communications ;

L'article 87.2 du Code de procédure Pénale dispose que le Juge d'Instruction peut ordonner ce type de mesures d'investigations en vue d'enquête, pour tous les délits majeurs et pour certains délits mineurs énoncés limitativement dans le texte. Étant donné que le trafic d'immigrants est dans tous les cas un délit majeur dans notre Code Pénal, cette technique spéciale d'enquête est possible en vue d'investigation de ce type d'infraction.

- b. Les opérations secrètes ;

Notre législation ne prévoit pas ce type d'opération ni en vue d'investigations criminelles, ni en vue d'autre finalités.

- c. Les enquêtes financières : y compris l'accès aux enregistrements et/ou bases de données bancaires, financiers ou commerciaux ;

L'alinéa 4 de l'article 87 prévoit l'accès à ce type de données, après accord du juge d'instruction par ordonnance motivée.

- d. Une forme spécifique de protection des témoins ;

Si bien la législation andorrane ne prévoit aucune mesure de protection particulière aux témoins, et seules les identités des agents de police et les agents pénitenciers, bénéficieront du secret, lesquels ne seront identifiés que par leur numéro de matricule, sauf intérêt légitime ou cause justifiée, pouvant être appliquées les mêmes dispositions aux victimes définies dans l'article 114 du Code Pénal comme victimes de violences domestiques, toutefois dans la pratique les services de police et les autorités judiciaire mettent en œuvre des mesures de protections concrètes, si nécessaire, aux fins de protection des témoins et des victimes.

- e. Autres ; merci de préciser.

Néant.

19. Votre droit interne permet-il la saisie et/ou la confiscation :

- De biens, équipements ou instruments utilisés ou destinés à être utilisés pour des infractions liées au trafic de migrants ?

Oui, cela est prévu par l'article 70.1 du Code Pénal.

- Des produits du crime issus d'infractions liées au trafic de migrants ? Si oui, merci de préciser les caractéristiques principales du cadre juridique.

Oui, cela est prévu par les deuxième, troisième et quatrième alinéas de l'article 70 du Code Pénal, qui prévoient :

- *la saisie des biens de la personne condamnée quand il apparaîtra des indices suffisants que ceux-ci procèdent directement ou indirectement des activités délictueuses d'association de malfaiteurs liée au trafic de migrants, et quel origine ne sera pas accrédité comme licite;*
- *la saisie des biens ou leur éventuelle transformation, transmis ou acquis par un tiers, quand ces tierces personnes ont eu connaissance ou avait dû avoir connaissance de la finalité de non saisie de la transmission, sauf acquisition de bonne foi.*
- *La saisie par équivalent, quand les biens n'ont pu être localisés ou n'ont pu être rapatriés de l'étranger.*

20. La traite de personnes est-elle définie en vertu de votre droit national ?

- a. Si tel est le cas, comment cette définition diffère-t-elle de celle du trafic de migrants ?

Oui : les articles 121 bis, 134 bis et 157 bis du Code Pénal prévoient el trafic d'êtres humains aux vues d'extractions d'organes, aux vues d'esclavage ou servitude et aux vues d'exploitation sexuelle, lequel trafic est défini comme le recrutement, le transport, le transfert, et le logement d'une ou plusieurs personnes pour l'une de ces finalités, quand sont utilisés les moyens suivants :

- *Le recours à la violence ou à d'autres formes d'intimidation ou coaction, ou sous la menace d'hi recourir.*
- *Le recours à la fraude, au mensonge, à l'abus d'autorité ou à une situation de vulnérabilité.*
- *Que soit proposés ou acceptés des paiements ou avantages pour obtenir le consentement d'une personne qui exerce l'autorité de fait ou de droit, sur une autre personne.*
- *N'est pas nécessaire la concurrence d'un de ces moyens quand la victime est un mineur.*

La tentative est prévue pour le trafic d'êtres humains ayant comme finalité l'extraction d'organes.

Si la victime, majeure ou mineure, est spécialement vulnérable tenant compte de sa condition physique ou psychique ou d'une incapacité, la peine sera imposée dans sa moitié supérieure.

Est une circonstance aggravante dans tous les cas la mise de danger de la vie de la victime.

21. En ce qui concerne votre pays, existe-t-il des accords internationaux, régionaux ou bilatéraux qui abordent la question du trafic de migrants ?

L'Andorre a signé uniquement le 17 novembre 2005 et ratifié le 23 mars 2011 la Convention du Conseil de l'Europe sur la lutte contre la traite des êtres humains du 16 mai 2.005, qui est entré en vigueur le 1r Juliet 2.011.

22. Votre pays a-t-il compétence pour poursuivre les infractions liées au trafic de migrants lorsqu'elles sont commises hors de son territoire ? Si tel est le cas, merci de préciser le cadre juridique.

Il faut tenir compte tout d'abord, que l'article 252 du Code Pénal, prévoit comme infraction pénal le trafic de migrants ayant son origine ou sa destination l'Andorre, ou en transit par le pays.

Par ailleurs, l'article 8 du Code Pénal dispose que le principe de territorialité de l'application de la loi pénal est élargi aux infractions connexes ou indivisibles que ont été tentées ou commises hors du territoire andorran, ainsi que sur les aéronefs i navires de pavillon andorran, ou sur l'espace aérien andorran, ainsi que quand l'aéronef atterrit en Andorre. De la même façon, la loi andorrane est applicable quand l'auteur ou la victime sont de nationalité andorrane, sous certaines conditions.

23. Avez-vous une politique nationale ou un plan d'action pour aborder la question du trafic de migrants ?

Il n'y a pas de politique nationale concernant la question du trafic de migrants : toutefois, notre service de Police travaille dans ce domaine en collaborant de la manière la plus efficace avec les autorités policières de nos états voisins, et avec les autres membres d'Interpol. Il faut préciser aussi que notre Gouvernement travaille pour compléter de façon satisfaisante les recommandations du GRETA.

24. Lorsque cela est possible, merci de fournir des informations concernant :

a. Le nombre de trafiquants arrêtés ;

Aucun.

b. Le nombre d'enquêtes entreprises à l'encontre des trafiquants de migrants ;

Aucune.

c. Le nombre de poursuites de trafiquants de migrants qui ont abouti.

Aucune.

25. Dans votre pays, la coopération en matière de trafic de migrants est-elle permise :

- Statutairement ?
- Par un traité ou un autre accord ou arrangement (multilatéral ou bilatéral) ?
- En vertu de la réciprocité ou par un comité ?
- Est-ce que la fourniture de l'entraide judiciaire est sujette à l'exigence de double incrimination en vertu de votre cadre juridique interne ?

La coopération pénale internationale dans cette matière, et d'ailleurs dans toutes les autres, est sujette aux exigences de la Convention Européenne d'entraide en matière pénale et à notre Loi de coopération pénale internationale et de lutte contre le blanchiment d'argent et de valeurs produits par la délinquance internationale et contre le financement du terrorisme du 29 décembre 2.000, qui exige en effet la double incrimination.

26. D'après votre expérience, la coopération internationale concernant la poursuite des trafiquants de migrants est-elle effective ? Merci de préciser.

Il n'y a pas eu de demandes en cette matière dans mon pays, nous ne pouvons donc pas en évaluer son effectivité.

27. En termes de coopération internationale, quels obstacles juridiques et/ou pratiques ont été rencontrés en ce qui concerne la coopération avec :

- a. Des Etats membres du Conseil de l'Europe ;
- b. Des Etats Parties tiers.

Même réponse que pour la question antérieure.

28. Pensez-vous que les instruments existants du Conseil de l'Europe sur la coopération internationale en matière pénale (entraide judiciaire, extradition) sont effectifs pour traiter du trafic de migrants ? Si non, merci de préciser.

Oui.