



# EASTERN PARTNERSHIP

## Panel on Migration and Asylum

# Discussion Paper for the Expert Meeting on Preventing Facilitation of Irregular Migration

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Compiled by Iryna Rozka, Laura Scorretti, IOM Ukraine.

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## Table of Contents

Table of Contents .....	3
I. Introduction.....	4
II. International legal and policy framework on preventing facilitation of irregular migration (migrant smuggling) .....	6
A. UN framework .....	6
B. EU framework.....	11
III. Liability for facilitation of irregular migration .....	15
A. Definition of “facilitation” (migrant smuggling) .....	15
B. Liability for “facilitation” (migrant smuggling) .....	18
IV. Role of cooperation for effective preventing facilitation of irregular migration .....	23
Annexes .....	28
Annex I. Questionnaire distributed among the participating countries .....	28
Annex II. Status of ratification of the UN Convention against Transnational Organized Crime, the Protocol against the Smuggling of Migrants by Land, Sea and Air and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children .....	29
Annex III. Definition of facilitation of irregular migration (migrant smuggling) in legislation .....	30
Annex IV. Criminal liability for facilitation of irregular migration (migrant smuggling) envisaged by national legislation .....	33
Annex V. Institutional and cooperation framework in the field of preventing facilitation of irregular migration .....	37



## I. Introduction

Facilitation of irregular migration (or migrant smuggling) can be considered as one of the most dangerous and complex aspects of migration in the recent decade. Thousands of migrants from different parts of the world are trying to escape the war or social and economic instability in their home countries and are looking for the way how to reach the “safe banks” of more prosperous and peaceful states. The absence of the sufficient legal migration channels and/or lack of information on them are pushing migrants into the hands of smugglers offering various facilitation services, not only illegal and expensive but in most cases dangerous for the human life.

In 2016 alone, 7,934 migrant deaths were recorded worldwide, many of them while being smuggled<sup>1</sup>. These numbers demand the adequate response of all stakeholders: hosting, transit and home states, the international organizations, civil society and whole international community. Migrant smuggling is recognized as a serious criminal offence by domestic law in many countries as well as by the international law. Given its cross-border nature a strong cooperation between the parties is required in order to ensure effective implementation of preventive and countering measures.

A comprehensive approach to preventing facilitation of irregular migration should take into consideration at least: administrative and criminal law, human rights, border management, cross border cooperation for investigation and prosecution, migration statistics and information policy. Furthermore, the preventive and countering activities should be directed simultaneously at criminal groups or individuals providing facilitation services to irregular migrants as well as at the root causes of irregular migration. Tackling only one of the elements of smuggling “business” could lead in most cases only to modification of routes, change of criminal behavior of smugglers and increase of price for facilitation services.

Therefore, the governments and international community keep trying to develop effective and efficient policies and tools to overcome the multiple challenges related to migrant smuggling phenomenon.

Adopted in 2000, the United Nations Convention against Transnational Organized Crime as well as the Protocol against the Smuggling of Migrants by Land, Sea and Air and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, became the overarching regulatory framework providing definitions of migrant smuggling and human trafficking as well as defining commitments of Member States in the field of combating and preventing these crimes.

At regional level, several legal and policy documents were adopted by the European Union and the Council of Europe (CoE).

As it was stated in the Final Observations for Council of Europe Further Action on the Smuggling of Migrants adopted at the CoE Conference on Smuggling of Migrants held on 23 June 2017 in Strasbourg, the smuggling of migrants is a heinous criminal offence that often involves the serious exploitation of human beings and a gross disregard towards the human rights and fundamental freedoms of victims. Smugglers seek to obtain financial or other benefits from refugees and other migrants in vulnerable situations by taking advantage of discrepancies and gaps in national and international systems in order to avoid accountability.<sup>2</sup>

The Conference recommendations to CoE regarding migrant smuggling are focused on the following key issues: prevention; aspects of criminalization of the smuggling of migrants; promotion and facilitation of international co-operation; protection of rights of smuggled migrants.

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<sup>1</sup> International Organization for Migration (IOM), Missing Migrants Project (Geneva, 2017) <http://missingmigrants.iom.int/>.

<sup>2</sup> <https://rm.coe.int/final-observations-for-council-of-europe-further-action-on-the-smugglin/168072e90e>



The above echoes the issues defined as a priority by the most recent EU policy document in this field - the EU Action Plan against migrant smuggling (2015 - 2020) adopted by the European Commission on 27 May 2015. The EU Action Plan sets out concrete actions to counter and prevent migrant smuggling, while ensuring the protection of human rights of migrants<sup>3</sup>.

The Eastern Partnership (EaP) countries were not affected by the increased irregular migration flows and smuggling activities of criminal networks at the same dramatic level as the EU Member States (EU MS) during the Mediterranean migration crisis of 2015-2016. However, the recent alerts on the activation of a Black Sea migrant route which, according to the opinion of experts, could be even more dangerous for migrants' lives<sup>4</sup> than the Mediterranean one, will definitely require more attention and adequate response of the EaP states.

The importance of effective countering and preventive measures should be recognized by the governments of EaP states as well as the importance of cross border cooperation to ensure the fulfillment of the commitments regarding the operations to counter migrant smuggling according to the international criminal law and the commitments on protection of migrants and refugees, especially migrants in vulnerable situation.

Migrant smuggling was already in focus in the Eastern Partnership Panel on Migration and Asylum (hereinafter the "EaPPMA" or the "Panel") in 2014. The 2017 Panel meeting will provide to the participants a platform for further discussion and exchange of best experience regarding the legal framework, policies and practices on preventing facilitation of irregular migration.

To facilitate the discussion, the present paper was developed as a background and preparatory information basis for the meeting participants. This document covers the following issues: (i) an overview of the existing international legal and policy framework on preventing facilitation of irregular migration (migrant smuggling); (ii) definition of liability for facilitation of irregular migration in national legislation; (iii) role of cooperation at international and national level for effectively preventing facilitation of irregular migration.

The discussion paper is prepared based on the answers received from six EU Member States (MS)<sup>5</sup> and five EaP countries<sup>6</sup> to a questionnaire ([Annex I](#)) specifically designed for this purpose. The questionnaire sent to the participating states comprised seven questions aimed at finding out more on the policies and practices concerning preventing facilitation of irregular migration in the EU MS and EaP countries. Other sources of information on the EU policy and individual countries' programmes were also used, where applicable, including regarding those countries who did not submit their inputs.

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<sup>3</sup> [https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/eu\\_action\\_plan\\_against\\_migrant\\_smuggling\\_en.pdf](https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/eu_action_plan_against_migrant_smuggling_en.pdf)

<sup>4</sup> <http://www.infomigrants.net/en/post/5314/migrant-routes-the-black-sea-is-more-dangerous-than-the-mediterranean>

<sup>5</sup> The following EU MS provided input: Hungary, Latvia, Lithuania, the Netherlands, Poland and Portugal.

<sup>6</sup> The following EaP countries provided input: Armenia, Azerbaijan, Georgia, Moldova and Ukraine.



## II. International legal and policy framework on preventing facilitation of irregular migration (migrant smuggling)

### A. UN framework

Adopted in 2000, the **United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air** (hereinafter the “Smuggling of Migrants Protocol” or the “Protocol”), supplementing the United Nations Convention against Transnational Organized Crime (UNTOC), became the first universal instrument addressing smuggling of migrants in all its complexity<sup>7</sup>.

Article 2 of the Protocol defines its purpose as preventing and combating the smuggling of migrants, as well as promoting cooperation among States Parties to that end, while protecting the rights of smuggled migrants.

The Protocol provides for a clear definition of migrant smuggling as well as defines the obligations of the Parties regarding the scope of its application, criminalization of migrant smuggling activities in national legislation and exemption from criminal liability for migrants being smuggled. It also contains specific obligations and commitments of Parties on measures against the smuggling of migrants by sea and relevant safeguards. Last but not least, there are specific provisions on prevention and cooperation, including information exchange, border measures, security and control of documents, legitimacy and validity of documents, protection and assistance, conducting preventive measures and return of smuggled migrants.

It should be noted that despite some common features characterizing these crimes the migrant smuggling is clearly distinguished in international law from human trafficking. The latter one is regulated by the second supplementing UNTOC document – the **Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children**<sup>8</sup>.

Yet, these two types of crime are too frequently misunderstood and conflated. This confusion can lead to inadequate measures by states, courts and service providers to identify, protect and assist victims of trafficking and migrants in vulnerable situations in the context of smuggling.<sup>9</sup>

Some of the key differences between trafficking and smuggling include:<sup>10</sup>

- Human trafficking is a crime against a person. The criminal purpose is to exploit a person. Victims of trafficking are accorded a number of assistance and protection rights.
- Migrant smuggling is a crime against a state; it is not in itself a human rights violation. The criminal purpose is to retrieve a financial and/or material benefit for the smuggler. The offence may be aggravated when it is perpetrated in a way that endangers lives or safety, or entails ill-treatment of migrants. The rights to protection and assistance are linked to the circumstances endured by migrants in this context, including due to other crimes committed against them by abusive smugglers or other actors.
- Transnationality - smuggling is always transnational, whereas trafficking may not be. Trafficking can occur regardless of whether victims move between states or within a state's borders.
- Source of criminal income - the profits of migrant smuggling are derived from the fee for transportation or facilitation of the irregular entry in another country, while in human

<sup>7</sup> [https://treaties.un.org/doc/source/docs/A\\_RES\\_55\\_25-E.pdf](https://treaties.un.org/doc/source/docs/A_RES_55_25-E.pdf)

<sup>8</sup> Ibid

<sup>9</sup> [http://refugeesmigrants.un.org/sites/default/files/ts5\\_issue\\_brief.pdf](http://refugeesmigrants.un.org/sites/default/files/ts5_issue_brief.pdf)

<sup>10</sup> Ibid



trafficking, profits are derived from exploitation, including for sexual exploitation, forced labour or slavery like practices.

- Consent - trafficking victims have never consented to the intended exploitation. Consent issues can be difficult to define in situations of smuggling. While smuggling initially involves some consent of the migrant, smuggled migrants may also retract their consent on route but may be forced to continue, for example, below deck in overcrowded smuggling vessels. In this sense, a case of smuggling can evolve to a trafficking one.

In spite of the fact that the upcoming Panel meeting and this Discussion Paper is not focusing on human trafficking, it is worth to mention that all states responding to the meeting questionnaire confirmed that, in line with international law, their legislation contains different provisions regulating criminal liability for migrant smuggling and human trafficking. Furthermore, the punishment for human trafficking is stricter than for migrant smuggling considering the higher level of public danger of this crime. At the same time the responding states recognize the challenges existing in identification of victims of human trafficking and distinguishing them from smuggled migrants. More information on legislative and policy framework on human trafficking in responding states is available in the [Matrix Compilation](#).

As of October 2017 there are **146 Parties** to the UN Smuggling Protocol<sup>11</sup>. At the European Union (EU) level relevant commitments on migrant smuggling are reaffirmed even twice considering that the Protocol was approved by the European Parliament and at the same time it was ratified (approved) by all EU Member States. The same situation is in the Eastern Partnership countries – all of them are the parties to the Protocol and the Convention.

Although the vast majority of the United Nations Member States have ratified the Smuggling of Migrants Protocol, most of them do not have dedicated national law to acquire and operationalize it in the national legal framework nor action plans or strategies to respond to the issue. Responses to migrant smuggling should be evidence-based and comprehensive. Where migrants are simply detained and returned to countries of origin without investigating the actors involved in smuggling those migrants, the criminal processes at work continue unchallenged. Where border controls are strengthened without addressing the root causes of irregular migration and demand for smuggling services, the modus operandi of smugglers will simply be adapted. Where opportunities to migrate safely and regularly are not provided as part of a holistic response to migrant smuggling alongside measures to address the root causes of irregular migration, the demand for migrant smuggling services may only increase.<sup>12</sup>

In order to harmonize and coordinate a holistic and global response to the phenomenon in countries of origin, transit and destination the **Framework for Action to implement the Smuggling of Migrants Protocol** has been developed by the United Nations Organization on Drugs and Crimes (UNODC) through a wide consultative process, including an expert group meeting held in Vienna, Austria in 2010. The purpose of the Framework for Action is to assist Member States and non-state actors in identifying and addressing gaps in their response to migrant smuggling in accordance with international standards. The Framework for Action unpacks provisions of the Smuggling of Migrants Protocol, drawing upon international instruments, political commitments, guidelines and best practices to enable the implementation of a comprehensive response to migrant smuggling.<sup>13</sup>

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<sup>11</sup> <https://treaties.un.org/pages/viewdetails>

<sup>12</sup> [http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Framework\\_for\\_Action\\_.pdf](http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Framework_for_Action_.pdf)

<sup>13</sup> <http://www.unodc.org/unodc/en/human-trafficking/migrant-smuggling/international-framework-for-action-to-implement-the-smuggling-of-migrants-protocol.html>



The Framework for Action consists of a narrative section and a set of tables. The Narrative describes the key challenges in the implementation of the Migrant Smuggling Protocol and elaborates guiding principles in responding to them. The set of tables details practical measures that can be taken in response of four key pillars:

- i) Prosecution of migrant smugglers;
- ii) Protection of smuggled migrants and their rights;
- iii) Prevention of migrant smuggling;
- iv) Cooperation to address migrant smuggling.<sup>14</sup>

This document along with other tools developed by the UNODC, including the *Model Law against the Smuggling of Migrants*<sup>15</sup>, are aimed at helping the Member States to frame and adopt the concrete measures needed for more efficient implementation of preventing and countering activities against the migrant smuggling crime.

Furthermore, in the **New York Declaration for Refugees and Migrants** (hereinafter the “New York Declaration”) adopted in 2016<sup>16</sup>, the states reaffirmed the importance of existing international instruments on preventing and combatting trafficking in persons and the smuggling of migrants as well as their obligations under international law, vigorously combat human trafficking and migrant smuggling with a view to their elimination, including through targeted measures to identify victims of human trafficking or those at risk of trafficking. They also committed to review their national legislation to ensure conformity with obligations under international law on migrant smuggling, human trafficking and maritime safety, with a view to disrupting and eliminating the criminal networks involved.

In addition, the New York Declaration welcomes reinforced technical cooperation, on a regional and bilateral basis, between countries of origin, transit and destination on the prevention of human trafficking and migrant smuggling and the prosecution of traffickers and smugglers.

In implementation of the Declaration’s provisions the issues of migrant smuggling and human trafficking have already become a topic for discussion at the fifth informal thematic session conducted under the global compact on migration preparatory process (4-5 September 2017, Vienna)<sup>17</sup>.

The mentioned thematic session suggested a non-exhaustive list of principled, practical and action-oriented commitments, in line with the New York Declaration for Refugees and Migrants, the 2030 Agenda for Sustainable Development and existing frameworks, which could be made by states and other stakeholders within the global compact for safe, orderly and regular migration. In particular, the following recommendations are provided in relation to migrant smuggling<sup>18</sup> :

*Identifying, protecting and assisting migrants in vulnerable situations in the context of smuggling and victims of trafficking and contemporary forms of slavery:*

- Establish and effectively implement national legal frameworks to protect and assist migrants in vulnerable situations in the context of smuggling and victims of trafficking in persons and contemporary forms of slavery, irrespective of their migration status, in compliance with international law and drawing upon the guidance provided in the Global Migration Group

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<sup>14</sup> Ibid.

<sup>15</sup> [https://www.unodc.org/documents/human-trafficking/Model\\_Law\\_Smuggling\\_of\\_Migrants\\_10-52715\\_Ebook.pdf](https://www.unodc.org/documents/human-trafficking/Model_Law_Smuggling_of_Migrants_10-52715_Ebook.pdf)

<sup>16</sup> [https://www.iom.int/sites/default/files/our\\_work/ODG/GCM/NY\\_Declaration\\_ENG.pdf](https://www.iom.int/sites/default/files/our_work/ODG/GCM/NY_Declaration_ENG.pdf)

<sup>17</sup> [http://refugeesmigrants.un.org/sites/default/files/ts5\\_procedural\\_note.pdf](http://refugeesmigrants.un.org/sites/default/files/ts5_procedural_note.pdf)

<sup>18</sup> [http://refugeesmigrants.un.org/sites/default/files/ts5\\_issue\\_brief.pdf](http://refugeesmigrants.un.org/sites/default/files/ts5_issue_brief.pdf)



(GMG) Principles and Guidelines on the human rights protection of migrants in vulnerable situations.

- Establish “firewalls” between immigration enforcement, criminal justice and service providers, to ensure that migrant victims of abuse and exploitation can access justice and assistance.

#### *Enhancing responses to migrant smuggling:*

- Open or diversify effective and accessible regular migration channels including timely family reunification, labour mobility at all skills levels, education opportunities, and humanitarian admission schemes. Strengthen information dissemination about these pathways
- Review national legal and policy frameworks to ensure:
  - that the legislation and enforcement target the activities of organized criminal groups acting for profit, and do not criminalize those who support migrants for humanitarian or familial reasons or migrants resorting to smugglers or who are compelled to smuggle others
  - prioritizing responses to aggravated smuggling, which endangers the lives or safety of migrants or entails ill-treatment, including for their exploitation.

#### *Capacity-building*

- Strengthen capacity of front line actors, criminal justice practitioners, labour inspectors, asylum authorities, social service providers, medical personnel, law enforcement and border authorities as relevant to:
  - more effectively prevent, identify and respond to exploitation and abuse in the context of smuggling, trafficking and contemporary forms of slavery with particular attention to gender and age required responses
  - more effectively combat and prosecute the crimes of migrant smuggling and trafficking in persons through provision of technical assistance in areas such as international law and practice, intelligence gathering, risk analysis, investigative skills and interviewing.

#### *Increasing knowledge and cooperation:*

- Enhance collection, sharing, and analysis of disaggregated data, including on the modus operandi and economic models and conditions driving smuggling and trafficking networks, the number of migrant victims of trafficking in persons and other crimes, the factors that entice and allow criminals to target migrants, and the impacts of anti-trafficking and counter-smuggling measures
- Set up bilateral and multilateral mechanisms among judicial authorities, law enforcement, border control agencies and other relevant actors to share information, coordinate operational activities, and support investigation and prosecution efforts to tackle transnational organized crime.

Besides the legal and policy instruments, the important role for addressing the migrant smuggling belongs to the **research activities**.

As it is stated in recently presented comprehensive report “Migrant Smuggling Data and Research: A global review of the emerging evidence base” produced in collaboration between the International Organization for Migration (IOM) and researchers from a range of backgrounds and academic disciplines, with support of the Government of Turkey, the migrant smuggling is a dynamic and evolving

phenomenon, and research and data collection are critical to informing more effective responses aimed at combating smuggling and protecting migrants.<sup>19</sup>

The report includes a number of suggestions for addressing migrant smuggling by the means of reliable data collection and analysis. These suggestions are grouped by the following directions: strengthening research and analysis partnerships; supporting capacity building; focusing on emerging and priority topics for research and data collection.

All the instruments (legal, policy and research) mentioned above suggest a number of tools for developing and implementing effective policies addressing migrant smuggling. At the same time only a combination of all these tools along with strong cooperation of all stakeholders at global, regional and bilateral levels could lead to comprehensive and efficient response to this dangerous phenomenon.

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<sup>19</sup> [https://publications.iom.int/system/files/smuggling\\_report.pdf](https://publications.iom.int/system/files/smuggling_report.pdf)

## B. EU framework

According to the European Border and Coast Guard Agency (FRONTEX) in the first quarter of 2017 the indicator of illegal border-crossings at the EU's external borders continued to be at a significantly low level (39 716) relative to the first quarter of 2016 (284 525), after which the closure of the Western Balkan route and the EU-Turkey statement ended the unprecedented irregular migration flow into the EU and Schengen area.<sup>20</sup>

Nevertheless, the irregular migration remains one of the most "hot" issues in the agenda of the European Community and particular attention is given by the EU to its facilitation. Various legal, policy and operational measures have been taken at the EU level during the recent years in order to address the challenges related to irregular migration and facilitators' role in this.

In 2002, the EU had adopted a **legal framework** on smuggling (so-called "**Facilitators Package**"): [Directive defining the facilitation of unauthorised entry, transit and residence](#) (Directive 2002/90 or "Facilitators Directive") and [Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence](#) (Council Framework Decision 2002/946/JHA).

The Council Directive 2002/90 presents one of the measures to combat the activities aiding illegal immigration. Its purpose is to provide a definition of the facilitation of illegal immigration and to allow effective implementation of Framework Decision 2002/946/JHA. The Directive requires that every MS adopt appropriate sanctions on all persons who intentionally assist non-nationals of the MS to enter, transit through or reside in the territory of the MS. The MS must sanction every incidence of instigation, participation and attempt to aid illegal migration. The Directive does not provide a list of specific sanctions, but only generally requires that the MS adopt, with regard to this behaviour, their own effective, proportionate and dissuasive sanctions. There is an exception from a general requirement to sanction all the persons assisting the migrants, known as the 'humanitarian clause', included in Article 1(2) of the Directive. According to this exception, the MS may decide not to impose these sanctions in cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned, for example, emergency shelter. This provision thus allows the MS to 'decriminalise' the humanitarian actions of NGOs or individuals. However, this exception clause applies only to facilitation of illegal entry and illegal transit, not to the facilitation of residence.

The Council Framework Decision is intended to strengthen the penal framework for preventing the facilitation of illegal immigration. It requires that the MS take measures that would punish the conduct defined by Directive 2002/90 with effective, proportionate and dissuasive criminal penalties which may entail extradition. The criminal penalties can be accompanied by confiscation of the means of transport used to commit the offence, which is a prohibition on practising the occupational activity in the exercise of which the offence was committed, and deportation. Acts committed for financial gain should be punished by custodial services. Additionally, legal entities can be held responsible for this conduct.<sup>21</sup>

In addition, there are several EU legal acts which are not part of the Facilitators package but at the same time regulate some cross-cutting issues related to facilitation. For instance, the [Council Directive 2009/52/EC](#) of 18 June 2009 defines the minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

At the **operational level** various measures have been undertaken jointly by EU State law enforcement authorities with the support of EU Agencies to disrupt and dismantle organized criminal groups involved in the facilitation of irregular immigration. Intelligence on modus operandi and routes used by smugglers

<sup>20</sup> [http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/FRAN\\_Q1\\_2017.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/FRAN_Q1_2017.pdf)

<sup>21</sup> [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/581391/EPRS\\_BRI%282016%29581391\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/581391/EPRS_BRI%282016%29581391_EN.pdf)



has been collected, including through debriefing of migrants and the [Network of the Immigration Liaison Officers](#).

The Operational Action Plan on Illegal Immigration (OAP) was created within the framework of the EU policy cycle for organized and serious internal crime 2014-2017 to disrupt the organized criminal groups involved in the facilitation of irregular migration operating in the source countries, on the main routes and at the main entry points of the EU. The OAP foresees joint operational actions by Member States law enforcement authorities with support of EU Agencies (Europol, Frontex, Cefpol and Eurojust). A dedicated Joint Operational Team (JOT) MARE was established to better identify and track smuggling networks operating in the Mediterranean.<sup>22</sup>

The European Commission is tackling smuggling through various **policies**. The [Communication on the European Agenda on Security](#) published in April 2015, covered terrorism, cybercrime and organized cross-border crime including smuggling.<sup>23</sup> The [European Agenda on Migration](#), which was adopted by the European Commission on 13 May 2015, identified the fight against migrant smuggling as a priority, to prevent the exploitation of migrants by criminal networks and reduce incentives to irregular migration. The Agenda set the goal to transform migrant smuggling networks from 'low risk, high return' operations into 'high risk, low return' ones.<sup>24</sup>

Finally, the [EU Action Plan against migrant smuggling \(2015-2020\)](#) (hereinafter the "EU Action Plan") was adopted on 27 May 2015. The EU Action Plan sets out concrete actions to counter and prevent migrant smuggling, while ensuring the protection of the human rights of migrants. It is based on a multidisciplinary approach, involving actors and institutions at local, regional, national and international level. It covers all phases and types of migrant smuggling, and all migratory routes.<sup>25</sup>

It should be noted that the EU Action Plan not only suggests the counter actions against the migrant smuggling but also emphasizes the importance of addressing the root causes of irregular migration as well as opening more safe, legal ways into the EU.

The specific measures suggested by the EU Action Plan cover the following.

*To enhance police and judicial response:*

- Revision of EU legislation on migrant smuggling by 2016
- Establishment of list of suspicious vessels and monitoring of these vessels
- Support to Member States for towing to shore boats intended to be used by smugglers or disposing of them at sea
- Launching cooperation with financial institutions to step up financial investigations
- Establishment of a single point of contact on migrant smuggling in each Member State
- Setting up of a Contact Group of EU Agencies on migrant smuggling
- Creation of a Eurojust thematic group on migrant smuggling

*To improve gathering and sharing of information:*

- Deployment of European migration liaison officers in key EU Delegations
- Evaluation, in 2016, and possible revision of EU legislation on Immigration Liaison Officers
- Strengthening of JOT MARE as EU information hub on migrant smuggling
- Further development of Africa Frontex Intelligence Community

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<sup>22</sup> [http://europa.eu/rapid/press-release MEMO-15-4544\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-4544_en.htm)

<sup>23</sup> [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/581391/EPRS\\_BRI%282016%29581391\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/581391/EPRS_BRI%282016%29581391_EN.pdf)

<sup>24</sup> [https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/eu\\_action\\_plan\\_against\\_migrant\\_smuggling\\_en.pdf](https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/eu_action_plan_against_migrant_smuggling_en.pdf)

<sup>25</sup> Ibid



- Enhanced monitoring of pre-frontier area with full use of Eurosur
- Stepping up Europol support for detecting internet content used by smugglers
- Including migrant smuggling data within the regular Eurostat collection of crime statistics

*To enhance prevention of smuggling and assistance to vulnerable migrants:*

- Information and prevention campaigns in third countries on risks of smuggling
- Launch of consultation, in 2016, and impact assessment on possible revision of EU Directive 2004/81/EC on residence permits
- Development of handbook on prevention on migrant smuggling by 2017
- Development of guidelines for border authorities and consular services
- Evaluation of the EU legal framework on SIS to explore ways to enhance effectiveness of return and reduce irregular migration
- Proposals to open negotiations on readmission with main countries of origin of irregular migrants
- Define targets as regards the number of inspections to be carried every year in the economic sectors most exposed to illegal employment

*To ensure stronger cooperation with third countries:*

- Launching or enhancing bilateral and regional cooperation frameworks
- Funding of projects to support third countries set up strategies on migrant smuggling, step up police and judicial responses, develop integrated border management
- Setting up of EU cooperation platforms on migrant smuggling in relevant third countries and regions
- Optimizing the use of EU funding through joint or coordinated planning.

As mentioned above, the EU Action Plan suggested the revision of the EU legislation on migrant smuggling among the set of concrete measures. One of the main reasons for a possible revision of the Facilitators Package is the gap between its provisions and provisions of the UN Smuggling of Migrants Protocol.

The recently conducted study “*Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*” finds a substantial “implementation gap” between the UN Smuggling Protocol and the international and EU legal frameworks on people smuggling. Chiefly, the latter differs from the UN Protocol in three main ways: i) *the extent of the inclusion and definition of an element of “financial gain” in the description of facilitation of irregular entry, transit and stay*; ii) *the inclusion of an exemption of punishment for those providing humanitarian assistance*; and iii) *the inclusion of specific safeguards for victims of smuggling*. As a result of the discretionary powers granted to Member States in the implementation of the Facilitators’ Package, the study further finds variation in the way in which laws are implemented in the national legislation of selected Member States. This results in legal uncertainty and inconsistency, and impacts on the effectiveness of the legislation.<sup>26</sup>

Nevertheless, it should be noted that in March 2017 the European Commission issued the Staff Working Document on regulatory fitness and performance programme (REFIT) evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence: the Facilitators Package (Directive 2002/90/EC and Framework Decision 2002/946/JHA)<sup>27</sup>. The document provides extensive overview of the state of play of the implementation of the Facilitators Package in EU MS.

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<sup>26</sup> <https://www.ceps.eu/system/files/Facilitation%20Directive.pdf>

<sup>27</sup> [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/irregular-migration-return/20170322\\_-\\_refit\\_evaluation\\_of\\_the\\_eu\\_legal\\_framework\\_against\\_facilitation\\_of\\_unauthorised\\_entry\\_transit\\_and\\_residence\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/irregular-migration-return/20170322_-_refit_evaluation_of_the_eu_legal_framework_against_facilitation_of_unauthorised_entry_transit_and_residence_en.pdf).



The conclusion of this evaluation is that at this point in time the **Facilitators Package should be maintained in its present form**, while the Commission further pursues the implementation of the Action Plan against migrant smuggling, in cooperation with all relevant actors. In doing so, the Commission can build on the **non-legislative measures** identified by the respondents to the public consultation, such as for instance increased support for operational cooperation, information exchange, or handbooks for stakeholders and operators in specific sectors, in order to step up the fight against migrant smuggling. The need for possible legislative amendments to the Facilitators Package could be re-evaluated, once the implementation of the Action Plan has reached greater maturity.<sup>28</sup>

The analysis of the responses to the questionnaire disseminated between the EaP Panel participants ([Annex I](#)) presented in the following section also shows the absence of unified approach in the participating EU MS and EaP countries to the definition of facilitation of irregular migration (migrant smuggling) despite the fact that all these states are the parties to the UN Smuggling Protocol.

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<sup>28</sup> Ibid



### III. Liability for facilitation of irregular migration

#### A. Definition of “facilitation” (migrant smuggling)

According to the Article 3 (a) of the **UN Smuggling Protocol** the “*Smuggling of migrants*” shall mean the procurement, in order to obtain, directly or indirectly, a 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.

Article 6 of the Protocol requires the Parties to adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit the following actions:

- (a) The smuggling of migrants;
- (b) When committed for the purpose of enabling the smuggling of migrants: (i) Producing a fraudulent travel or identity document; (ii) Procuring, providing or possessing such a document;
- (c) Enabling a person who is not a national or a permanent resident to remain in the State concerned without complying with the necessary requirements for legally remaining in the State by the means mentioned in subparagraph (b) of this paragraph or any other illegal means.

In short, the combination of the following elements constitutes ‘migrant smuggling and related conduct’:

- Either the **procurement** of an **illegal entry** or **illegal residence** of a person;
- **Into or in** a country of which that person is not a national or permanent resident;
- For the **purpose of financial or other material benefit**.<sup>29</sup>

Further, the Article 5 of the Protocol provides for **clear criminal liability waiver for the migrants** for the fact of having been the object of conduct set forth in article 6 of this Protocol.

This article was included to make it explicit that no-one should be penalised with reference to this Protocol for having been smuggled. It should also be noted that refugees often have to rely on smugglers to flee persecution, serious human rights violations or conflict. They should not be criminalized for making use of smugglers and claims for asylum should not be undermined for their having made use of smugglers or for their illegal entry (Article 31 of the 1951 Refugees Convention and Article 19 of the Migrant Smuggling Protocol).<sup>30</sup>

**The Facilitation Directive** defines “*facilitation*” as two different types of behaviour:

- a) intentionally assisting “a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens;” and
- b) assisting intentionally, “for financial gain...a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens”.<sup>31</sup>

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<sup>29</sup>[https://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue\\_Paper\\_-\\_A\\_short\\_introduction\\_to\\_migrant\\_smuggling.pdf](https://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue_Paper_-_A_short_introduction_to_migrant_smuggling.pdf)

<sup>30</sup> Ibid

<sup>31</sup> <https://www.ceps.eu/system/files/Facilitation%20Directive.pdf>



In addition, the Facilitators Package does not provide explicit liability waiver to the migrants being smuggled. The Framework Decision envisages some limited safeguards for migrants who are victims of smuggling. It refers to the need for anti-smuggling provisions to be applied without prejudice to the principle of non-refoulement, in compliance with the 1951 Refugee Convention and the Protocol Relating to the Status of Refugees (the 'New York Protocol') of 1967.<sup>32</sup>

Thus, the main divergences between UN Smuggling Protocol and EU Facilitators Package could be identified as follows:

- the extent of the inclusion and definition of an element of “financial gain” in the description of facilitation of irregular entry, transit and stay;
- the inclusion of an exemption of punishment for those providing “humanitarian assistance”; and
- the inclusion of specific safeguards for victims of smuggling.<sup>33</sup>

As mentioned above, despite the existence of global and regional legal instruments providing definition and scope of facilitation of irregular migration (migrant smuggling), there is no common approach among the EU Member States and EaP countries in defining these terms in **national legislation**.

Although all responding states criminalize the activities constituting the facilitation (smuggling) in understanding of the UN Smuggling Protocol and the EU Facilitators Package, the definitions and scope of this crime may vary significantly.

For instance, in **Armenia, Azerbaijan and Moldova** the Criminal Codes define the crime “Organization of irregular migration”. While in **Georgia and Ukraine** the criminal legislation provides for liability for illegal transfer of persons across the state border. A similar definition exists in such EU MS as **Latvia and Lithuania**. In **Poland**, the legislation separately defines the organization of irregular migration and facilitation of illegal stay. At the same time, the legislation of some EU MS provides for the definition of “facilitation” or “migrant smuggling” (**Hungary, Portugal, and the Netherlands**).

*According to Article 318-1 of the Criminal Code of **Azerbaijan** (Organization of irregular migration): **facilitation (support) of illegal (irregular) migration** includes the acts committed for organizing a foreigner and stateless person’s illegal entry to, illegal stay in, illegal transit through the territories of the Republic of Azerbaijan or illegal exit of any person from the territories of the Republic of Azerbaijan.*

*In **Ukraine** the Article 332 of Criminal Code stipulates criminal liability for "Illegal movement of persons through the state border of Ukraine". Facilitation of the latter crime includes provision of advice and guidance on the most convenient routes to the state border, places and time for illegal border crossing, etc., provision of transportation means, temporary storages, camouflage, means to conceal traces of crimes, provision of maps and charts, diversion of attention of border guards at the border, etc.*

*Criminal Law of **Latvia** does not contain a specific definition of “facilitation of irregular migration”. At the same time, features/elements of these concepts (“facilitation”/ “migrant smuggling”) are included in the national legislation. Illegal movement of persons across the state border and ensuring the possibility to reside in Latvia illegally are offences for which also facilitators are liable.*

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<sup>32</sup> <https://www.ceps.eu/system/files/Facilitation%20Directive.pdf>

<sup>33</sup> Ibid



The **Portuguese** Immigration Act defines the crime of “action to facilitate illegal immigration” on its article 183. It criminalizes whoever favours or facilitates by any means the illegal entry or transit of a foreign citizen in national territory or whoever favours or facilitates by any means the illegal entry or transit of a foreign citizen in national territory, for profit.

**In Hungary** the Criminal Code contains a specific definition of “facilitation of irregular migration” according to which “any person who provides aid to another person for crossing state borders in violation of the relevant statutory provisions is guilty of a felony...”. It also defines the activities considered as facilitation, e.g. transit across the state border, instruction (showing the way), giving map illustrating irregular border crossing routs, providing accommodation the night before crossing the border if the perpetrator was aware of the person’s plans.

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It is worth noting that **only two** responding states (**Armenia** and **Moldova**) in compliance with the requirement of the UN Smuggling Protocol included benefit (direct or indirect) into the definition of crime of facilitation of irregular migration. In other states the legislation does not include benefit element in the scope of definition of facilitation of irregular migration at all or, in accordance with EU Facilitation Directive, may define the benefit as a condition for liability for facilitation of illegal stay (**Poland**).

**In Armenia**, the Article 329-1 of Criminal Code of Armenia defines the crime “Organization of Irregular Migration” that includes:

1. Organization, **for material gain, of entry** to the Republic of Armenia, **stay** in the Republic of Armenia **or transit travel (transportation)** at the territory of the Republic of Armenia of a foreign national or a stateless person, in non-compliance with the legislatively set procedures of the Republic of Armenia for entry, stay or transit travel, or with submission of fraudulent documents or with provision of false information to get a requisite permit for entry, stay or transit, shall be punishable by a monetary fine from one hundred to two hundred minimal salaries or by imprisonment for the maximal term of three years.

2. Organization, **for material gain, of departure** from the Republic of Armenia, entry into a foreign country or stay in the foreign country of a citizen of the Republic of Armenia, a foreign national who resides permanently in the Republic of Armenia or a stateless person, in non-compliance with the legislatively set procedures of the Republic of Armenia for departure, entry or stay, or with submission of fraudulent documents or with provision of false information to get a requisite permit for departure, entry or stay.

Article 362/1 of the Criminal Code of the Republic of **Moldova** defines the crime of organization of irregular migration **for direct or indirect finance or material gain** from illegal entry, stay, transit travel or departure from the territory of the country of a person, who is neither a citizen, nor a resident of the country.

At this moment **the Netherlands** has chosen not to include the element ‘financial or other material benefit’ in trans-border smuggling cases because the legislator did not want to complicate the investigations on migrant smuggling.

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More information on definition of facilitation of irregular migration (migrant smuggling) in national legislation can be found in [Annex III](#)



## B. Liability for “facilitation” (migrant smuggling)

When it comes to liability for facilitation of irregular migration (migrant smuggling), the analysis of responses provided by the states shows that all of them fulfill the relevant obligations under the UN Smuggling Protocol and Facilitators Package (in case of EU MS) regarding the punishment of this crime.

The differences appear in the **coercive measures**, which vary from state to state. Some countries may choose to impose a fine or imprisonment, or community service, or/and prohibition to hold certain positions depending on type of facilitation actions (**Armenia, Azerbaijan, Latvia, Lithuania, Moldova, Netherlands**), while others are stricter and define the imprisonment as the principal punishment measure (**Georgia, Hungary, Portugal, Poland, Ukraine**).

The term of imprisonment may also vary in different states with minimal term of **one year and up to six years (Lithuania, Portugal)**.

*In Lithuania, with regard to the criminal sanctions, paragraph 1 of 292 of Criminal Code foresees the sanctions for unlawful transportation of persons across the state border, which can be either a fine, an arrest or imprisonment for a term of up to six years.*

*Migrant smuggling (facilitation of irregular migration) is a criminal offence according to the Hungarian Criminal Code. This crime is punishable by imprisonment from one to five years.*

*Article 344 of the Criminal Code of Georgia criminalizes the illegal transfer of a migrant across the state border of Georgia and/or the creation of the relevant conditions (facilitation) for a migrant's illegal stay in Georgia and imposes imprisonment for such an act from two to five years. The sanctions may be increased based on aggravated circumstances.*

*Paragraph 1 of Article 332 of Criminal Code of Ukraine stipulates that "organizing illegal movement of persons across the state border of Ukraine, coordinating or facilitating any such actions by advice, instructions, provision of means or removal of obstacles, shall be punishable by imprisonment for a term of two to five years.*

Furthermore, the legislation of all responding states envisages the **aggravating circumstances** of the migrant smuggling crime. Such circumstances may be different in each state. Depending on the legislative practice, they may be envisaged specifically for this particular crime (**Armenia, Azerbaijan, Lithuania, Netherlands, Georgia**), or be reflected in separate article applicable to all crimes defined by the criminal law (**Latvia**).

In line with the obligations under the UN Smuggling Protocol, almost all states consider as an aggravating circumstance the commitment of facilitation actions with endangering the human (migrant) life and entailing inhuman or degrading treatment (**Armenia, Azerbaijan, Georgia, Latvia, Lithuania, Hungary, the Netherlands, Portugal**). Among other aggravating circumstances were mentioned, for instance, commitment by the organized group or/and commitment for financial gain (**Armenia, Azerbaijan, Ukraine, Moldova, Latvia, Hungary**).

*In Portugal the aggravating circumstances take place 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.*



*In **Lithuania** unlawful transportation of persons across the state border if the latter is performed for mercenary reasons or where this poses a threat to human life.*

*The general provisions of the Criminal Law of **Latvia** define aggravating circumstances that can be applied by court (also in the cases of smuggling) e.g. commitment of criminal offence with particular cruelty or with humiliation of the victim.*

*In **Georgia** the following is considered as aggravation circumstances in case of migrant smuggling: commitment of crime repeatedly; with respect to two or more persons; by endangering a migrant's life or health by inhuman or degrading treatment of a migrant, including exploitation; or by using forged documents.*

***Armenian** criminal law defines as aggravation when the crime is committed with organization of illegal migration of two or more persons by a group of persons on prior collusion in conditions dangerous for human life and health or humiliating human dignity of a person; with abuse of official position.*

The table below provides details on type of sanctions applied in the responding states for the activities constituting the facilitation of irregular migration as well as the terms of imprisonment.

Country	Type of sanctions	Terms of imprisonment
<b>Armenia</b>	Fine, imprisonment, forfeiture of property, deprivation of rights to hold certain positions or to engage into certain activities	Up to 3 years (up to 8 years when with aggravating circumstances)
<b>Azerbaijan</b>	Fine, imprisonment, community service, deprivation of rights to hold certain positions or to engage into certain activities	Up to 3 years (up to 5 years when with aggravating circumstances)
<b>Georgia</b>	Imprisonment	From 2 to 5 years (could be increased when with aggravating circumstances)
<b>Hungary</b>	Imprisonment	From 1 to 5 years
<b>Latvia</b>	Deprivation of freedom, temporary deprivation of freedom, community service, fine, deprivation of the right to take up a specific office,	Up to 5 years

	confiscation of property	
<b>Lithuania</b>	Fine, an arrest or imprisonment	Up to 6 years (up to 10 years when with aggravating circumstances)
<b>Moldova</b>	Fine, imprisonment, prohibition to hold certain positions or to engage into certain activities (with or without liquidation of the legal entity)	From 1 to 3 years (up to 5 years when with aggravating circumstances)
<b>The Netherlands</b>	Fine, imprisonment	Up to 4 years
<b>Poland</b>	Imprisonment	From 3 months to 5 years
<b>Portugal</b>	Imprisonment	From 1 to 6 years (up to 8 years when with aggravating circumstances)
<b>Ukraine</b>	Imprisonment, prohibition to hold certain positions or to engage into certain activities	From 2 to 5 years (up to 9 years when with aggravating circumstances)

Another important issue being in focus of recent discussions in the EU in the context of possible review of Facilitators Package is the legal safeguards for those **providing assistance (facilitation) to irregular migrants for humanitarian reasons** (the so-called “humanitarian clause”).

The Article 1.2 of the Facilitation Directive allows Member States to decide not to impose sanctions with regard to the persons who intentionally assist a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens by applying its national law and practice for cases, where the aim of the behaviour is to provide humanitarian assistance to the person concerned.

At the same time the Facilitation Directive does not provide a definition of the concept of ‘humanitarian assistance’, leaving considerable discretion to Member States as to the definition of the extent, scope and personal application of conduct to be defined as ‘humanitarian’ in nature. For example, while the Facilitation Directive does not include specific provisions exempting family members assisting irregular migrants from being criminalised, some Member States have nonetheless included these kinds of exemptions. This contributes to increased legal uncertainty in the implementation of the humanitarian clause at national level across the EU. The Directive inaccurately assumes that instances of humanitarian assistance in terms of residence/stay can only occur in the absence of an element of financial gain. It does not contemplate instances of assistance by service providers and landlords requiring non-exploitative remuneration for their services.

Based on Article 1.1.b of the Facilitation Directive, Member States may refrain from punishing facilitation of irregular stay, if this is not done intentionally or for financial gain. Still, the Directive does not impose an obligation on Member States to refrain from punishing the facilitation of irregular stay when an element of intention or financial gain is absent. Therefore, although not explicitly encouraging the punishment of people who provide emergency shelter, food and other basic necessities to migrants in an irregular situation (as long as this is not done for financial gain), the Facilitation Directive does not explicitly discourage or prohibit them from punishing such people. The Framework Decision does not



include general safeguards aimed at mandatorily preventing the punishment of acts performed for humanitarian purposes, rescue at sea or in emergency situations.<sup>34</sup>

Answers provided by the participating states evidently show the existence of different approaches to interpret and implement a “humanitarian waiver”. **None of the states** confirmed availability of relevant clause in national legislation. However, for instance, in **Lithuania** some legislative amendments providing, at some extent, the exemption from liability shall enter into force in 2018. In addition, in some countries the liability waiver can be applied in practice by the decision of law enforcement authorities (**Georgia**).

*In Lithuania according to Article 4 of the Law on the State Border and its Protection Thereof (will come into force in 2018.01.01), persons who have violated the state border crossing procedure and the legal regime of the border due to force majeure or due to necessity or important unforeseen circumstances: accident, faulty vessel towing, rescued people delivery, shall not be held liable under Administrative Offence Code.*

*Legislation of Georgia does not release a facilitator of irregular migration from the criminal liability, however if a person facilitated another one to enter Georgia illegally with the aim of humanitarian assistance, based on the factual circumstances of the case a prosecutor may not start prosecution against the facilitator.*

*In the Netherlands there is no humanitarian clause in the migrant smuggling provision in the Criminal Code because such a clause would lead to difficulties in evidence gathering. It was considered that the Dutch legislation offered enough possibilities (such as verdict of guilt without any kind of punishment).*

The issue of **liability of smuggled migrants** is also regulated by the legislation of the responding states in a different way.

Some states envisaged an exemption from criminal liability for the migrants in their legislation (**Moldova**) but could apply the administrative sanctions to them (**Azerbaijan, Ukraine**). Others do not make a distinction in terms of criminal liability between the smugglers and smuggled (**Hungary, Latvia, Netherlands, Poland**). **Georgian** legislation provides for concrete conditions under which the exemption can be applied. In **Lithuania**, the criminal liability provided by the legislation is not applied in practice.

*According to paragraph (4) of Article 362/1 of the Criminal Code of the Republic of Moldova, a victim of illegal migration shall be discharged of criminal liability for illegal entry, stay, transit travel or departure from the territory of the country, as well as for possession and use of fraudulent official documents for organisation of his/her illegal migration.*

*In Ukraine, administrative liability is stipulated for illegal crossing (attempted illegal crossing) of the state border of Ukraine under Article 204-1 of the Code of Ukraine on Administrative Offences, as well as non-compliance of foreigners and stateless persons with the rules of stay in Ukraine and transit travel via the territory of Ukraine (Article 203 of the Code of Ukraine on Administrative Offences).*

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<sup>34</sup> <https://www.ceps.eu/system/files/Facilitation%20Directive.pdf>



The **Hungarian** aliens policing law makes no distinction between smuggled migrants and migrants arrived in an illegal way – they both are subject to the same policing regulations.

The Criminal Code of **Georgia** releases an irregular migrant from criminal liability if the following conditions are cumulatively satisfied: a) he/she has entered Georgia directly from the territories where his/her life or freedom was endangered under Article 1 of the 1951 UN Convention on the Status of Refugees, b) he/she is staying in Georgia illegally and seeks asylum from the authorities of Georgia and c) he/she immediately appears before the public authorities and provides adequate explanation about his/her illegal entry or unauthorized stay in Georgia. In such case the irregular migrant's act shall not contain elements of any other crime.

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Similar situation could be observed with granting the liability waiver to those smuggled migrants who agree to cooperate with national law enforcement and judicial authorities.

The expulsion from the territory of the Republic of **Azerbaijan** in an administrative order is not applied to the foreigners and stateless persons who assist the prosecuting authorities until the end of prosecution.

In **Hungary**, irregular migrants cooperating with the authorities in individual cases may be subject to the following facilities:

- in the absence of residence conditions – on the basis of significant law enforcement or national security interest and upon proposal of the prosecutor, the court, the law enforcement or national security agency or the investigative unit of the National Tax and Customs Authority – the third country national cooperating with the authorities in detecting a crime and significantly facilitating the proving or, having regard to him/her, other third country national shall be furnished with a residence permit for humanitarian purposes;
- the aliens policing authority furnishes the third country national, in case of revocation of the decision on aliens policing expulsion and prohibition on entry and stay affecting him or her (revocation for the elapsing of the 12 months deadline), with a residence permit for humanitarian purposes in the absence of conditions set by law if the person has cooperated with the aliens policing authority in the carrying out of the expulsion.

In **Latvia and Lithuania**, no special conditions for smuggled migrants, who agree to cooperate with law enforcement authorities, are defined in the national legal acts. However, the cooperation is considered a mitigation circumstance under the criminal law.

In **Poland** there are not any special conditions for smuggled migrants who agree to cooperate with authorities but a prosecutor has an ability to file in his indictment about lower penalty.

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More information on national practices regarding the liability for facilitation of irregular migration is contained in [Annex IV](#).



## IV. Role of cooperation for effectively preventing facilitation of irregular migration

The main recent legal and policy documents both at global and regional level mention the cooperation as one of the essential elements for effectively preventing facilitation of irregular migration (migrant smuggling). Article 10 of the UN Smuggling Protocol requires States, in particular those with common borders or located on routes along which migrants are smuggled, to exchange among themselves relevant information for the purpose of achieving the objectives of the Protocol.

As stated in the UNODC International Framework for Action to Implement the UN Smuggling Protocol, national efforts to counter the smuggling of migrants are often undermined by the lack of effective bilateral and multilateral mechanisms for information sharing and coordination of operational activities among law enforcement agencies, border control authorities and other relevant actors. National and bilateral responses to migrant smuggling often have the effect of merely displacing smuggling routes to other countries. This, in turn, can lead to an increase in demand for smuggling services to circumvent visa regimes and border controls—often at increased risk to the safety of smuggled migrants. The transnational crime of migrant smuggling requires a transnational response.<sup>35</sup>

The EU Action Plan against migrant smuggling states that strong cooperation at the EU level, as well as with third countries of origin and transit, strategic partners, international organizations and civil society, is essential for disrupting the activities of smugglers, bringing them to justice and seizing their assets.<sup>36</sup> The information gathering and sharing is also mentioned by the Plan as an issue requiring further improvement.

Furthermore, the presence of specific chapter in the EU Action Plan dedicated to stronger cooperation with third countries underlines the need of multi stakeholder approach to addressing the challenges related to migrant smuggling.

Close cooperation with third countries along the entire smuggling route is essential for targeting migrant smuggling and for ending impunity through effective investigation and prosecution. This should be seen in connection with persistent EU efforts to address the root causes of irregular migration, in cooperation with countries of origin and transit. The focus should be on support on border management, youth and employment, mobility.<sup>37</sup>

Considering the cross-cutting nature of the migrant smuggling phenomenon the effective cooperation should involve participation of various players, e.g. law enforcement agencies, judicial authorities, finance intelligence, international organizations, civil society, including organizations dealing with human rights, protection of victims of trafficking and refugees etc.

At the **institutional level**, establishing the specialized agencies or joint teams dealing with various aspects of migrant smuggling at EU level has already proved its efficiency in countering migrant smuggling. The Europol, Frontex, EU Agency for Law Enforcement Training (CEPOL), Eurojust's thematic group on migrant smuggling, the EU Fundamental Rights Agency and other institutions have good capacities for tackling migrant smuggling. However, if acting in close cooperation they could achieve stronger results.

One of the most successful examples of the interagency cooperation in the field of preventing facilitation of irregular migration is the launch in 2015 of the Joint Operational Team (JOT) Mare. Hosted

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<sup>35</sup> [http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Framework\\_for\\_Action\\_Smuggling\\_of\\_Migrants.pdf](http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Framework_for_Action_Smuggling_of_Migrants.pdf)

<sup>36</sup> [https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/eu\\_action\\_plan\\_against\\_migrant\\_smuggling\\_en.pdf](https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/eu_action_plan_against_migrant_smuggling_en.pdf)

<sup>37</sup> Ibid



at Europol headquarters in The Hague, JOT Mare was aimed at tackling the organized criminal groups who are facilitating the journeys of migrants by ship across the Mediterranean Sea to the EU.

JOT Mare combines Europol's unique intelligence resources and Member States' capabilities to carry out coordinated and intelligence-driven actions against the facilitators. As well as ensuring an intensified exchange of intelligence with Frontex and close cooperation with Interpol, national experts seconded to JOT Mare facilitate the necessary cooperation between Europol and the services of the participating EU Member States.<sup>38</sup>

JOT Mare was incorporated by the establishing in 2016 the Europol's European Migrant Smuggling Center (EMST) which became a platform to help Member States to improve the exchange of information and coordinate their operations in the fight against migrant smuggling. EMST also facilitates increased cooperation among Member States themselves, and between them and international organizations, national stakeholders and other European agencies.<sup>39</sup>

Regarding the cooperation of EU and Eastern Partnership states it should be mentioned the European Union Border Assistance Mission to Moldova and Ukraine (EUBAM) launched in 2005. EUBAM is funded by the EU and implemented under the coordination of IOM Ukraine. It is an advisory, technical body based in Odesa (Ukraine). EUBAM works with Moldova and Ukraine to harmonize border control, customs and trade standards and procedures with those in EU MS as well as to improve cross-border cooperation between the border guard and customs agencies and other law enforcement bodies; facilitate international coordinated cooperation.<sup>40</sup>

An important role to strengthen the cooperation could also be played by the **global and regional consultative mechanisms**. As mentioned in the EU Action Plan, the European External Action Service (EEAS) and the European Commission will launch or enhance the bilateral and regional cooperation frameworks with relevant partners focusing on practical measures to address the smuggling of migrants, including through the Rabat, Khartoum, Budapest and Prague Processes, the ACP-EU Dialogue, the EU-Africa Migration and Mobility Dialogues and the Malta Summit devoted to migration.<sup>41</sup>

The EaP Panel on Migration and Asylum which was recently included into the list of regional consultative processes<sup>42</sup> shall also use its capacities more effectively to promote and strengthen the bilateral and multilateral cooperation between EaP countries and EU MS in order to improve existing policies and practices in the field of preventing facilitation of irregular migration.

Although the international and cross-border cooperation is a great instrument which could be used by the states dealing with migrant smuggling and related issues, it cannot be used properly without existing relevant **cooperation mechanisms at the national level**. Each state decides on its own institutional framework in relation to preventing facilitation of irregular migration depending on the structure of the government as well as existing law enforcement and judicial practice. Ensuring fast and efficient interaction, including real time exchange of information, between all authorities is essential for adequate response to the migrant smuggling.

The analysis of responses provided by the EaP and EU MS shows that in most cases the Border Guard (or Border Police) is the main responsible authority for the issue of preventing facilitation of irregular

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<sup>38</sup> <https://www.europol.europa.eu/newsroom/news/joint-operational-team-launched-to-combat-irregular-migration-in-mediterranean>

<sup>39</sup> <https://www.europol.europa.eu/about-europol/european-migrant-smuggling-centre-emsc>

<sup>40</sup> <http://eubam.org/who-we-are/>

<sup>41</sup> [https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/eu\\_action\\_plan\\_against\\_migrant\\_smuggling\\_en.pdf](https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/eu_action_plan_against_migrant_smuggling_en.pdf)

<sup>42</sup> <https://www.iom.int/rcps-region>



migration (**Georgia, Latvia, Lithuania, Moldova, Poland**). In other countries the Border Guard is participating in counter migrant smuggling activities in cooperation with other principal law enforcement authorities, which could be Police authorities (**Hungary, the Netherlands and Ukraine**), Migration Service (**Azerbaijan**), Prosecutor's office (**Portugal**) or State Security Service (**Armenia**). It worth to mention that in some countries special law enforcement units were created dealing with migrant smuggling (**the Netherlands**).

*Migrant smuggling cases are being investigated by the Operative-Investigative Bureau of the Border Police of **Georgia**, while being supervised during this process by the Prosecutor's office. In this regard, the Operative-Investigative Bureau cooperates, with different structural subdivisions of the Ministry of Internal Affairs of Georgia, namely: the Patrol Police Department, Migration Department, Information-Analytical Department, as well as other state institutions, such as State Security Service and the Ministry of Foreign Affairs of Georgia.*

*In **Hungary**, the national-wide coordination between local and regional units being responsible for investigating human smuggling cases is carried out by the National Bureau of Investigation (NBI) Illegal Migration Unit. All investigations commenced or taken over by the NBI Illegal Migration Unit is closely monitored and led by the respective prosecutor offices.*

*In **Armenia**, the criminal cases under Article 329.1 of Criminal Code (Organisation of Illegal Migration) detected by law enforcement authorities are initiated by the Investigation Directorate of the National Security Service of the Republic of Armenia.*

Several countries also mentioned that the finance intelligence authorities are involved in investigation of migrant smuggling (**Latvia, Poland and Portugal**).

*Border Guard is main and the most important law enforcement authority in **Poland** responsible to countering irregular migration. The service cooperates with national and foreign stakeholders by sharing information, coordinating of actions within the framework of Europol, Interpol or liaison's officers. The Border Guard collaborates as well with the General Inspector of Financial Information. Investigations are conducted under the supervision of the prosecutor's office*

There are also some examples of establishing the specialized interagency mechanisms (**Lithuania, the Netherlands**).

*Criminal Information Analysis Centre set up in **Lithuania** which consists of the Customs Department under the Ministry of Finance, the State Border Guard Service under the Ministry of the Interior, the Police Department under the Ministry of the Interior and the Financial Crime Investigation Service under the Ministry of the Interior. In addition, the agreement (renewed) was signed in 2017 between principal criminal intelligence agencies (i.e. between the Financial Crime Investigation Service under the Ministry of the Interior, the Prisons Department under the Ministry of Justice, the Customs Department under the Ministry of Finance, the Police Department under the Ministry of the Interior, the Special Investigation Service, VIP Protection Department under the Ministry of the Interior, the State Border Guard Service under the Ministry of the Interior, the Second Investigation Department under the Ministry of National Defense, the State Security Department) and the Prosecutor General's Office on cooperation and coordination of criminal intelligence activities.*



*In the **Netherlands**, an Expertise Centre for Human Trafficking and Smuggling was established in May 2005, consisting of employees from the National Crime Squad (NR), Royal Military Constabulary (Kmar), Immigration and Naturalization Service (IND) and the Social Security Intelligence and Investigation Service (SIOD). Information is collected, analysed and disseminated to all partners.*

*The State Migration Service of **Azerbaijan** cooperates with local executive authorities and municipalities on revealing irregular migrants. Relevant investigations are conducted in all residential area of the Republic and information on irregular migrants is obtained. In order to combat violation of migration legislation the State Migration Service of the Republic of Azerbaijan signed separate Action Plans with State Border Service of the Republic of Azerbaijan and Ministry of Interior of the Republic of Azerbaijan and ensures regular implementation of the measures in this direction.*

The responding states also provided the information on good practices of international and cross-border cooperation in preventing facilitation of irregular migration. Several countries mentioned successful operations on detection and suspension of smugglers' activities conducted with the neighboring states (**Hungary Latvia, Lithuania, Poland and Ukraine**) or together with the partner states not having common border (**Portugal**). Conclusion of international agreements on cooperation was mentioned as a good practice by some respondents (**Azerbaijan, Georgia, Lithuania, Moldova**) as well as establishing joint operation or patrolling teams (**Hungary, Latvia, Lithuania, the Netherlands**). The cooperation is also could be conducted through the posting abroad of liaison police officers (**Georgia and the Netherlands**).

*Starting from 2013 Ministry of Internal Affairs of **Georgia** has increased the number of Georgian police attaché abroad. Currently, Georgia has 13 police attachés deployed in the following eleven countries: Armenia, Austria, Azerbaijan, Belarus, France, Germany, Greece, Italy, Poland (covering also Estonia, Latvia and Lithuania), Spain, Sweden, Turkey and Ukraine.*

*In **Hungary**, numerous successful cases had been investigated by the NBI Illegal Migration Unit under the framework of EMPACT (EU Serious and Organized Crime Policy Cycle) Illegal Immigration Priority between 2014-2017, as co-drivers and also as action-leaders, in the course of the different actions organized by the unit. In the course of the preliminary investigations, which is solely based on operation work and intelligence received from various (human or technical) sources, Hungary mainly cooperate with our neighbouring countries (SK, SRB, RO, SLO, CRO) located along the illegal immigration route, but also with those central units of our partner countries, which hold reliable and useful information on the target persons and vehicles.*

*In 2016 an operational group was established within the State Border Guard of **Latvia** with the aim to collect, analyse and exchange information about the organization of the illegal movement of third-country nationals (mostly Vietnamese citizens) across the state border. Such information is collected by all three Baltic States (Latvia, Lithuania and Estonia) and then sent to the Criminal Investigation Unit of the Polish Border Guard for a comprehensive regional analysis.*

*In August 2017 an international operation was completed initiated by the State Border Guard Service of **Ukraine** for disclosure and elimination of activities of a criminal group with international connections that organised a transnational human trafficking*



*channel, engaged into recruitment of Ukrainian nationals and their illegal transportation through Poland - Germany - France and through Poland - Lithuania - Latvia to the United Kingdom for labour exploitation. The operation was implemented with participation of officers of the Counter-trafficking Department of the National Police of Ukraine, the Border Guard Service of Poland, the UK National Crime Agency, the State Border Guard Service of Lithuania, and the finance intelligence unit of WESTERN UNION.*

The effective and efficient cooperation both at national and international level can't be achieved without **proper information gathering and sharing**. The challenges related to collection of information on migrant smuggling are widely recognized by the governments, international organizations and research institutions. This relates both to the statistics on number of smuggled migrants, smugglers routes as well as on the crime statistics (arrests, prosecutions, convictions). Unfortunately, the unified approach to collection of statistics data does not exist neither in the EU MS nor in EaP states.

The different format of statistics submission by the states responding to the meeting questionnaire does not allow to prepare aggregated information with common indicators. Thus, all available data can be found in the [Matrix Compilation](#) for each responding state. In addition, some crime statistics of EU MS is available in the European Migration Network (EMN) sources, in particular in the EMN Ad-Hoc Query on COM AHQ on updating the publically available crime statistics on migrant smuggling.<sup>43</sup>

[Annex V](#) contains the detailed information on institutional mechanisms existing in the responding states dealing with migrant smuggling at national level as well as the best practices of cross-border and international cooperation in this field.

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**Possible topics for discussion**

*How should the legislative framework be improved in order to ensure that commitments of states under UN Smuggling Protocol are fulfilled? Should the humanitarian aspect of facilitation of irregular migration be taken more into account to ensure due protection of human rights of migrants and receiving communities? Should the benefit be considered as an essential element of facilitation actions for its criminalization?*

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*What can be done to enhance interagency cooperation at national and international level to improve common response to the “deadly business” of migrant smuggling? What are the gaps that should be addressed to improve the cooperation between the law enforcement and the judiciary sector and how the cooperation between the two sectors should be enhanced to improve the investigation and prosecution of smuggling cases?*

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*How the migrant smuggling data collection methods could be improved to ensure evidence- based policy development and implementation?*

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<sup>43</sup> [www.emnnetherlands.nl](http://www.emnnetherlands.nl)



## Annexes

### Annex I. Questionnaire distributed among the participating countries

1. Has your country ratified: a) the United Nations Convention against Transnational Organized Crime, b) the Protocol against the Smuggling of Migrants by Land, Sea and Air and c) the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children?
2. Does your national legislation contain a specific definition of “facilitation of irregular migration” (hereafter the “facilitation” or “migrant smuggling”)? What activities are considered as facilitation?
3. What liability your legislation envisages for various types of criminal conducts, which could constitute facilitation (e.g. facilitation of illegal entry (border crossing), transit, or stay/residence, provision of forged documents, assistance in abuse of benefits system etc.)?
4. Do facilitators need to derive benefits to have committed an offence? Does your legislation allow for sanctions to be waived if facilitation to irregular migrants is provided as humanitarian assistance?
5. In case your legislation provides for a criminal liability for facilitation of irregular migration, does it provide for aggravating circumstances, e.g. endangering migrants' life or entail inhuman or degrading treatment?
6. Does your legislation envisage a liability for smuggled migrants for irregular entry and stay/residence per se? Are there any special conditions for smuggled migrants who agree to cooperate with authorities?
7. Please provide available statistics for 2014 - 2016 on detected cases of migrant smuggling (detected smugglers). What was the rate of cases reached to the court and rate of judgements of conviction in these cases?
8. Please describe how your national law enforcement and judicial authorities cooperate to prevent, investigate and prosecute cases of migrant smuggling. Are any other authorities involved in this process, e.g. financial intelligence units tracking and investigating financial flows related to migrant smuggling?
9. Please provide recent examples of effective international cooperation and cross-border operations to detect facilitators/smugglers. Which authorities have been involved? What challenges did you face in coordinating with counterparts?
10. What initiatives exist in your country in the field of preventing facilitation of irregular migration? Are specific information campaigns conducted? Does your country implement or is it considering implementing programs of regular migration as a tool to prevent irregular migration?
11. Does your country apply two distinct legal frameworks to migrant smuggling and trafficking in human beings, in line with the international legal framework? How do you address the risks of smuggled migrants becoming victims of human trafficking? What challenges exist in the identification of smuggled persons and victims of human trafficking?



**Annex II. Status of ratification of the UN Convention against Transnational Organized Crime, the Protocol against the Smuggling of Migrants by Land, Sea and Air and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children<sup>44</sup>**

<b>Country</b>	<b>United Nations Convention against Transnational Organized Crime (signature/ratification)</b>	<b>Protocol against the Smuggling of Migrants by Land, Sea and Air (signature/ratification)</b>	<b>Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (signature/ratification)</b>
<b>Armenia</b>	15.11.2001/01.07.2003	15.11.2001/01.07.2003	15.11.2001/01.07.2003
<b>Azerbaijan</b>	12.12.2000/30.10.2003	12.12.2000/30.10.2003	12.12.2000/30.10.2003
<b>Belarus</b>	14.12.2000/25.06.2003	14.12.2000/25.06.2003	14.12.2000/25.06.2003
<b>EU</b>	12.12.2000/21.05.2004 (approval)	12.12.2000/06.09.2006 (approval)	12.12.2000/06.09.2006 (approval)
<b>Georgia</b>	13.12.2000/05.09.2006	13.12.2000/05.09.2006	3.12.2000/05.09.2006
<b>Hungary</b>	14.12.2000/22.12.2006	14.12.2000/22.12.2006	14.12.2000/22.12.2006
<b>Latvia</b>	13.12.2000/07.12.2001	10.12.2002/21.04.2003	10.12.2002/25.05.2004
<b>Lithuania</b>	13.12.2000/09.05.2002	25.04.2002/12.05.2003	25.04.2002/23.06.2003
<b>Moldova</b>	14.12.2000/17.02.2005	14.12.2000/17.02.2005	14.12.2000/16.09.2005
<b>The Netherlands</b>	12.12.2000/26.05.2004	02.12.2000/27.07.2005 (acceptance)	04.10.2001/26.09.2003
<b>Poland</b>	12.12.2000/12.11.2001	04.10.2000/26.09.2003	04.10.2000/26.09.2003
<b>Portugal</b>	12.12.2000/10.05.2004	12.12.2000/10.05.2004	12.12.2000/10.05.2004
<b>Ukraine</b>	12.12.2000/21.05.2004	15.11.2001/21.05.2004	15.11.2001/21.05.2004

<sup>44</sup> Full information on the status of ratification of UNTOC and Supplementing Protocols to it is available here <https://treaties.un.org/pages/>



### Annex III. Definition of facilitation of irregular migration (migrant smuggling) in legislation

Country/International legal instrument	Definition
UN Protocol against the Smuggling of Migrants by Land, Sea and Air	<ul style="list-style-type: none"> <li>Article 3 of the Protocol: “Smuggling of migrants” shall mean the procurement, in order to obtain, directly or indirectly, a <b>financial or other material benefit</b>, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.</li> </ul>
<b>Armenia</b>	<ul style="list-style-type: none"> <li><b>Article 329<sup>1</sup></b> of Criminal Code of Armenia defines the crime “Organisation of Irregular Migration” that includes:           <ol style="list-style-type: none"> <li>1. Organisation, <b>for material gain</b>, of entry to the Republic of Armenia, stay in the Republic of Armenia or transit travel (transportation) at the territory of the Republic of Armenia of a foreign national or a stateless person, in non-compliance with the legislatively set procedures of the Republic of Armenia for entry, stay or transit travel, or with submission of fraudulent documents or with provision of false information to get a requisite permit for entry, stay or transit, shall be punishable by a monetary fine from one hundred to two hundred minimal salaries or by imprisonment for the maximal term of three years.</li> <li>2. Organisation, <b>for material gain</b>, of departure from the Republic of Armenia, entry into a foreign country or stay in the foreign country of a citizen of the Republic of Armenia, a foreign national who resides permanently in the Republic of Armenia or a stateless person, in non-compliance with the legislatively set procedures of the Republic of Armenia for departure, entry or stay, or with submission of fraudulent documents or with provision of false information to get a requisite permit for departure, entry or stay.</li> </ol> </li> </ul>
<b>Azerbaijan</b>	<ul style="list-style-type: none"> <li>Article 318-1 of the Criminal Code of the Republic of Azerbaijan: facilitation (support) of illegal (irregular) migration includes the acts committed for organizing a foreigner and stateless person’s illegal entry to, illegal stay in, illegal transit through the territories of the Republic of Azerbaijan or illegal exit of any person from the territories of the Republic of Azerbaijan.</li> </ul>
<b>Georgia</b>	<ul style="list-style-type: none"> <li>Article 3441 of the Criminal Code of Georgia (CCG) criminalizes Illegal transfer of a migrant across the state border of Georgia and/or creation of the relevant conditions (facilitation) for a migrant's illegal stay in Georgia.</li> </ul>
EU	<ul style="list-style-type: none"> <li>According to Article 1 of the Council Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence each Member State shall adopt appropriate sanctions on:           <ol style="list-style-type: none"> <li>(a) any person who <b>intentionally</b> assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens;</li> <li>(b) any person who, <b>for financial gain, intentionally</b> assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens.</li> </ol> </li> </ul>
<b>Hungary</b>	<ul style="list-style-type: none"> <li>The Criminal Code of Hungary contains a specific definition of “facilitation of irregular migration”; „353.§ (1) Any person who provides aid to another person for crossing state borders in violation of the relevant statutory provisions is guilty of a felony...”</li> <li>Activities considered as facilitation, e.g.: transition across the state border, instruction (showing the way), giving map illustrating irregular border crossing routes,</li> </ul>



	<p>providing accommodation the night before crossing the border <b>if the perpetrator was aware of the person's plans.</b></p>
Latvia	<ul style="list-style-type: none"> <li>▪ Criminal Law of Latvia does not contain a specific definition of “facilitation of irregular migration”. At the same time, features/elements of these concepts (“facilitation”/ “migrant smuggling”) are included in the national legislation. Illegal movement of persons across the state border and ensuring the possibility to reside in Latvia illegally are offences for which also facilitators are liable.</li> </ul>
Lithuania	<ul style="list-style-type: none"> <li>▪ Article 292 of the Criminal Code “Unlawful Transportation of Person across the State Border” defines what activities are considered as migrant smuggling, namely:           <ul style="list-style-type: none"> <li>- The act of <b>unlawful transportation</b> of an alien not having a permanent place of residence in the Republic of Lithuania <b>across the state border</b> of the Republic of Lithuania;</li> <li>- The act when a person <b>unlawfully transports</b> (i.e. the alien is transferred/moved from one place to another) an alien <b>within the territory of the Republic of Lithuania</b>, who has already illegally crossed the state border of the Republic of Lithuania</li> <li>- The act when a person <b>unlawfully conceals an alien within the territory of the Republic of Lithuania</b>, who has already illegally crossed the state border of the Republic of Lithuania.</li> </ul> </li> </ul>
Moldova	<ul style="list-style-type: none"> <li>▪ Article 362/1 of the Criminal Code of the Republic of Moldova defines the crime of organisation of irregular migration <b>for direct or indirect finance or material gain</b> from illegal entry, stay, transit travel or departure from the territory of the country of a person, who is neither a citizen, nor a resident of the country.</li> </ul>
The Netherlands	<ul style="list-style-type: none"> <li>▪ According to article 197a of the Dutch Penal Code “any person who provides assistance to another person to obtain entry to the Netherlands or to transit the Netherlands, another member state of the European Union, Iceland, Norway or any 103 state which has acceded to the Protocol against the Smuggling of Migrants by Land, Sea and Air concluded in New York on 15 November 2000 supplementing the Convention against Transnational Organised Crime concluded in New York on 15 November 2000, or provides that person with opportunity, means or information enabling him to do so, while he knows or has serious reason to suspect that such entry or transit is unlawful, shall be guilty of the smuggling of human beings..”.</li> </ul>
Poland	<ul style="list-style-type: none"> <li>▪ The Polish legislation does not contain a specific definition of ‘facilitation of illegal migration’. The organization of illegal migration is stated in art. 246 § 3 Penal Code: “Whoever organises the crossing of the border of the Republic of Poland for other persons, in violation of the relevant regulations...”</li> <li>▪ Furthermore, in the art. 264a is stated: “whoever, in <b>order to obtain financial or personal gain</b>, enables or facilitates another person to stay in the territory of the Republic of Poland in violation of the relevant regulations...”</li> </ul>
Portugal	<ul style="list-style-type: none"> <li>▪ The Portuguese Immigration Act defines the crime of “<b>action to facilitate illegal immigration</b>” on its article 183. It practices the crime of “action to facilitate illegal immigration” whoever favours or facilitates by any means the illegal entry or transit of a foreign citizen in national territory or whoever favours or facilitates by any means the illegal entry or transit of a foreign citizen in national territory, for profit.</li> </ul>
Ukraine	<ul style="list-style-type: none"> <li>▪ The Article 332 of Criminal Code of Ukraine stipulates criminal liability for “Illegal movement of persons through the state border of Ukraine”. Facilitation of the</li> </ul>



latter crime includes provision of advice and guidance on the most convenient routes to the state border, places and time for illegal border crossing, etc., provision of transportation means, temporary storages, camouflage, means to conceal traces of crimes, provision of maps and charts, diversion of attention of border guards at the border, etc.



#### Annex IV. Criminal liability for facilitation of irregular migration (migrant smuggling) envisaged by national legislation

Country	Liability for facilitation of irregular migration (migrant smuggling) in national criminal law	Aggravating circumstances	Benefit as a condition of criminal liability for facilitation of irregular migration (migrant smuggling)	Waiver of liability in case if facilitation is provided for humanitarian reasons
Armenia	+	<ul style="list-style-type: none"> <li>▪ <b>Commitment of crime:</b></li> <li>- with organisation of illegal migration of two or more persons;</li> <li>- by a group of persons on prior collusion;</li> <li>- <b>in conditions dangerous for human life and health or humiliating human dignity of a person;</b></li> <li>- with abuse of official position</li> </ul>	Yes	n/a
Azerbaijan	+	<ul style="list-style-type: none"> <li>▪ <b>Commitment of crime:</b></li> <li>- by organized group;</li> <li>- by official with the use of his/her service position;</li> <li>- repeated;</li> <li>- <b>with dangerous means for human life</b></li> </ul>	No	No
Georgia	+	<ul style="list-style-type: none"> <li>▪ The crime is committed:</li> <li>- repeatedly;</li> <li>- with respect to two or more persons;</li> <li>- by <b>endangering a migrant's life or health;</b></li> <li>- <b>by inhuman or degrading treatment of a migrant, including exploitation;</b> or</li> <li>- using forged documents</li> </ul>	No	<ul style="list-style-type: none"> <li>▪ Legislation of Georgia does not release a facilitator to irregular migration from the criminal liability, however if a person facilitated another one to enter Georgia illegally with the aim of humanitarian assistance, based on the factual circumstances of the case a</li> </ul>



				prosecutor may not start prosecution against the facilitator
Hungary	+	<ul style="list-style-type: none"> <li>▪ There are following aggravating circumstances in connection to this crime:               <ul style="list-style-type: none"> <li>- carried out <b>for financial gain or advantage</b>;</li> <li>- involving several persons for crossing state borders;</li> <li>- carrying out <b>by tormenting the smuggled person</b>, or on a commercial scale</li> </ul> </li> </ul>	No	No
Latvia	+	<ul style="list-style-type: none"> <li>▪ The general provisions of the Criminal Law define aggravating circumstances that can be applied by court (also in the cases of smuggling) e.g. commitment of criminal offence <b>with particular cruelty or with humiliation of the victim</b></li> <li>▪ Furthermore, the Criminal Law also prescribes that if the criminal offence has been committed out of desire to <b>acquire benefits</b>, it may also be considered as one of the aggravating circumstances</li> </ul>	No	
Lithuania	+	<ul style="list-style-type: none"> <li>▪ Unlawful transportation of persons across the state border if the latter is performed <b>for mercenary reasons or</b></li> </ul>	No	<ul style="list-style-type: none"> <li>▪ There is no direct liability waiver under criminal law</li> <li>▪ According to Article 4 of the</li> </ul>





		<p>where this poses a threat to human life</p>		<p>Law on the State Border and its Protection Thereof (will come into force in 2018.01.01), persons who have violated the state border crossing procedure and the legal regime of the border due to <b>force majeure</b> or due to necessity or important unforeseen circumstances: accident, <b>faulty vessel towing, rescued people delivery</b>, shall not be held liable under <b>Administrative Offence Code</b></p>
Moldova	+	<p>▪ Criminal Code of Moldova provides for the following aggravating circumstances:</p> <ul style="list-style-type: none"> <li>- commitment in respect to two or more persons;</li> <li>- commitment by two or more persons;</li> <li>- commitment by a public figure, an official, a person holding an important position in state authorities, a foreign public figure or an international official;</li> <li>- commitment by an organised criminal group or a criminal organisation;</li> <li>- if caused particularly high damages to public interests or to legitimate rights of</li> </ul>	Yes (direct or indirect finance or material gain)	n/a



		physical persons and legal entities		
Netherlands	+	<ul style="list-style-type: none"> <li>Art. 197a of the Criminal Code further broadens the scope of criminalisation by include aggravated offenses acts that lead e.g. to <b>grievous bodily harm, grave danger or result in death</b></li> </ul>	No	No
Poland	+	<ul style="list-style-type: none"> <li>The Polish legislation does not provide additional criminal responsibility for the facilitators for e.g. endangering migrants' life or entail inhuman or degrading treatment. Human life or dignity is protected in other articles</li> </ul>	Yes in case of facilitation of illegal stay	No
Portugal	+	<ul style="list-style-type: none"> <li>If on the course of an action to facilitate illegal immigration the facts are carried out by <b>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</b></li> </ul>	No	No
Ukraine	+	<ul style="list-style-type: none"> <li>Commitment by organized group or commitment <b>for material gain</b></li> </ul>	No	No



**Annex V. Institutional and cooperation framework in the field of preventing facilitation of irregular migration**

Country	National authorities responsible for preventing facilitation of irregular migration (migrant smuggling)	Examples of cooperation with other states/international organizations
<b>Armenia</b>	<ul style="list-style-type: none"> <li>▪ Investigation Directorate of the <b>National Security Service</b> of the Republic of Armenia in cooperation with other law enforcement authorities</li> </ul>	<ul style="list-style-type: none"> <li>▪ Close cooperation was organised between law enforcement bodies of Armenia and their international counterparts, as well as with local NGOs, including the Collective Security Treaty Organization, Bureau of the Coordination of the fight against organized crime (CIS), IOM, UN, etc.</li> </ul>
<b>Azerbaijan</b>	<ul style="list-style-type: none"> <li>▪ <b>State Migration Service and State Border Service</b> in cooperation with other law enforcement authorities</li> </ul>	<ul style="list-style-type: none"> <li>▪ “Consolidation of Migration and Border Management Capacities in Azerbaijan” Project implemented by International Organization for Migration, “Support to the Implementation of the Mobility Partnership with Azerbaijan (MOBILAZE)” Project implemented by the International Centre for Migration Policy Development, as well as “Better Coordination of Protection of the Land Border Between Azerbaijan and Georgia” project implemented via UNDP</li> <li>▪ The Republic of Azerbaijan negotiates with the governments of the Republic of Turkey, Russian Federation and Georgia to sign bilateral agreement on cooperation in the migration field</li> </ul>
<b>Georgia</b>	<ul style="list-style-type: none"> <li>▪ Migrant smuggling cases are being investigated by the Operative-Investigative Bureau of the Border Police of Georgia, while being supervised during this process by the Prosecutor’s office. In this regard, the Operative-Investigative Bureau cooperates, with different structural subdivisions of the Ministry of Internal Affairs of Georgia, namely: the Patrol Police Department, Migration Department, Information-Analytical Department, as well as other state institutions, such as State Security Service and the Ministry of Foreign Affairs of Georgia</li> </ul>	<ul style="list-style-type: none"> <li>▪ Conclusion of Cooperation Agreements with partner countries, which, among other issues, regulate and provide legal basis for planning and implementing cross-border operations</li> <li>▪ Cooperation with counterparts through police attaché (starting from 2013 Ministry of Internal Affairs of Georgia has increased the number of Georgian police attaché abroad. Currently, Georgia has 13 police attachés deployed in the following eleven countries: Armenia, Austria, Azerbaijan, Belarus, France, Germany, Greece, Italy, Poland (covering also Estonia, Latvia and Lithuania), Spain, Sweden, Turkey and Ukraine</li> <li>▪ Meeting of working groups consisting of criminal police representatives with partner countries in order to discuss issues related to and share information on organized crime</li> </ul>



Hungary	<ul style="list-style-type: none"> <li>▪ National-wide coordination between local and regional units being responsible for investigating human smuggling cases is carried out by the <b>National Bureau of Investigation (NBI) Illegal Migration Unit</b></li> <li>▪ All investigations commenced or taken over by the NBI Illegal Migration Unit is closely monitored and led by the respective prosecutor offices</li> </ul>	<ul style="list-style-type: none"> <li>▪ Numerous successful cases had been investigated by the NBI Illegal Migration Unit under the framework of EMPACT (EU Serious and Organized Crime Policy Cycle) Illegal Immigration Priority between 2014-2017, as co-drivers and also as action-leaders, in the course of the different actions organized by the unit</li> <li>▪ In the course of the preliminary investigations, which is solely based on operation work and intelligence received from various (human or technical) sources, Hungary mainly cooperate with neighbouring countries (SK, SRB, RO, SLO, CRO) located along the illegal immigration route, but also with those central units of partner countries, which hold reliable and useful information on the target persons and vehicles</li> <li>▪ The Hungary-led action (the so-called TranSEEt under the OAP 2017) focuses on strengthened operational cooperation between the competent law enforcement agencies seated in core states (EU and third countries) in relation to the Western-Balkan channel and is intended to fight jointly against the illegal immigration to EU facilitated by organized crime groups. The main goal of the action is identify and arrest as much organized crime group (OSG) members through the Western-Balkan and dismantle as many OSGs as possible.</li> </ul>
Latvia	<ul style="list-style-type: none"> <li>▪ National law enforcement and judicial authorities have established a successful cooperation in preventing, investigating and prosecuting migrant smuggling cases. For example, if other law enforcement authorities (e.g. <b>State Police or the Customs Police Department of the State Revenue Service</b>) have information on smuggling cases, the information is passed on to the <b>State Border Guard</b> for it to take the necessary actions. Furthermore, State Border Guard, in the case of necessity related to the investigation of the specific smuggling case, cooperates also with the <b>Prosecution Office and the Office for Prevention of Laundering of Proceeds Derived from Criminal Activity (FIU Latvia)</b>, which operates under the Prosecution Office</li> </ul>	<ul style="list-style-type: none"> <li>▪ Successful cooperation with relevant competent authorities of <b>Lithuania (Border Guard Service), Estonia (Police and Border Guard Board)</b> and <b>Poland (Border Guard)</b></li> <li>▪ In 2016 (first five months) in cooperation with <b>Lithuanian and Polish</b> counterparts, the State Border Guard of Latvia has stopped the operation of the international criminal group that organized and implemented smuggling of irregular migrants from Vietnam through Russia and Baltic States to Poland. During these operations, 111 irregular migrants from Vietnam, and citizens of Russia and Poland, involved in smuggling, were detained (Latvian State Border Guards detained 38 Vietnamese citizens and 10 Russian citizens –smugglers). Similarly, joint operations have been carried out in cooperation with Estonian Police and Border Guard Board in</li> </ul>



		<p>2016 and 2017, leading to the detention of irregular migrants (from Vietnam) and their smugglers</p> <ul style="list-style-type: none"> <li>In 2016 an <b>operational group was established</b> within the State Border Guard with the aim to collect, analyze and exchange information about the organization of the illegal movement of third-country nationals (mostly Vietnamese citizens) across the state border. Such information is collected by all <b>three Baltic States</b> and then sent to the <b>Criminal Investigation Unit of the Polish Border Guard</b> for a comprehensive regional analysis</li> </ul>
Lithuania	<ul style="list-style-type: none"> <li><b>State Border Guard Service</b> cooperates with <b>Police</b> and <b>Customs</b> to prevent, investigate and prosecute cases of migrant smuggling</li> <li><b>Criminal Information Analysis Centre</b> set up in Lithuania which consists of the Customs Department under the Ministry of Finance, the State Border Guard Service under the Ministry of the Interior, the Police Department under the Ministry of the Interior and the Financial Crime Investigation Service under the Ministry of the Interior</li> <li>On 9 February 2017 <b>agreement</b> (renewed) was signed <b>between principal criminal intelligence agencies</b> (i.e. between the Financial Crime Investigation Service under the Ministry of the Interior, the Prisons Department under the Ministry of Justice, the Customs Department under the Ministry of Finance, the Police Department under the Ministry of the Interior, the Special Investigation Service, VIP Protection Department under the Ministry of the Interior, the State Border Guard Service under the Ministry of the Interior, the Second Investigation Department under the Ministry of National Defense, the State Security Department) and the Prosecutor General's Office <b>on cooperation and coordination of criminal intelligence activities</b></li> </ul>	<ul style="list-style-type: none"> <li>Information on a systematic basis is exchanged between <b>Lithuanian</b> and <b>Latvian</b> as well as Lithuanian and <b>Polish</b> border guards, especially between criminal intelligence/investigation units.</li> <li>Furthermore, a <b>bilateral agreement on joint patrolling</b> between <b>Lithuanian</b> State Border Guard Service, the Police Department and the <b>Latvian</b> State Border Guard and the State Police of Latvia was signed on 27 September 2016. According to this bilateral agreement, operations are to be carried out on a regular basis in order to prevent smuggling of migrants from Latvia to Lithuania.</li> </ul>
Moldova	<ul style="list-style-type: none"> <li><b>Border Police Department</b> with cooperation with other law enforcement authorities</li> </ul>	<ul style="list-style-type: none"> <li>Cooperation with the EU Border Assistance Mission to Ukraine and Moldova (EUBAM) and FRONTEX for:</li> </ul>



		<ul style="list-style-type: none"> <li>- Exchange of knowledge and experience in the sphere of integrated border management;</li> <li>- Improvement of border control efficiency;</li> <li>- Improvement of exchange of operational information;</li> <li>- Identification of potential risks and threats;</li> <li>- Support of local personnel in the sphere of operational information exchange.</li> </ul> <ul style="list-style-type: none"> <li>▪ Moldova signed several bilateral agreements on cooperation in combating organised crime and other types of crime, and agreements on cooperation in the sphere of migration, that contain provisions on mutual assistance in combating irregular migration (with Poland, Austria, Azerbaijan, Bulgaria, Czech Republic, Croatia, Romania, Ukraine, Slovakia, Bosnia-Herzegovina, Spain)</li> </ul>
Netherlands	<ul style="list-style-type: none"> <li>▪ Within the <b>Royal Marechaussee</b> 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</li> <li>▪ An <b>Expertise Centre for Human Trafficking and Smuggling</b> was established in May 2005, consisting of employees from the National Crime Squad (NR), Royal Military Constabulary (Kmar), Immigration and Naturalisation Service (IND) and the Social Security Intelligence and Investigation Service (SIOD). Information is collected, analysed and disseminated to all partners</li> </ul>	<ul style="list-style-type: none"> <li>▪ Dutch liaison magistrate is stationed in Italy.</li> <li>▪ Besides the Expertise centre on human trafficking and people smuggling, a <b>special operational multidisciplinary team was established</b> 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 <b>within Impact projects of Europol</b>. 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</li> </ul>
Poland	<ul style="list-style-type: none"> <li>▪ <b>Border Guard</b> is main and the most important law enforcement authority in Poland responsible to countering irregular migration. The service cooperates with national and foreign stakeholders by sharing information, coordinating of actions within the framework of Europol, Interpol or liaison's officers. The Border Guard collaborates as well with the General Inspector of Financial Information. Investigations are</li> </ul>	<ul style="list-style-type: none"> <li>▪ Polish Border Guard conducted an investigation against an international organized crime group responsible for organization of irregular migration of Ukrainian citizens in connection with trafficking in human being and forging documents. The group was acting on the Ukrainian, Latvian, Polish and British territory. That case was investigated by law enforcement authorities from Poland,</li> </ul>



	conducted under the supervision of the prosecutor's office	<b>Ukraine, Lithuania and the United Kingdom</b>
Portugal	<ul style="list-style-type: none"> <li>▪ The direction of a criminal investigation is the responsibility of the <b>Public Prosecutor's Office</b>, assisted by the Criminal Police authorities - such as the <b>Portuguese Immigration and Borders Service [SEF]</b></li> <li>▪ In 2011 it was created the <b>Asset Recovery Office</b>, under de dependency of the <b>Portuguese Judiciary Police</b>. Its mission is to identify, locate and seize goods or products related to crimes, internally and internationally, and its competence is to carry out the financial or patrimonial investigation by decision of the Public Prosecutor's Office</li> </ul>	<ul style="list-style-type: none"> <li>▪ Several organized criminal groups that help to encourage illegal immigration through the marriage or partnership of convenience have been investigated involving foreign citizens of Bangladesh, India and Pakistan, associated with Portuguese citizens, and some of those investigations had connections with investigations in other EU countries, such as Belgium and Ireland. These marriages either occurred in Portugal or in other EU countries – namely Belgium or Ireland – and these investigations were possible only with <b>international cooperation established mainly through Europol</b></li> </ul>
<b>Ukraine</b>	<ul style="list-style-type: none"> <li>▪ Cooperation of law enforcement and judicial bodies for prevention, investigation and prosecution of illegal migration is regulated by the due legislation of Ukraine (the Constitution of Ukraine, the Code of Criminal Procedure of Ukraine, the Criminal Code of Ukraine, the Code of Ukraine on Administrative Offences, agency-specific and inter-agency regulations, etc.)</li> <li>▪ Arrangements were introduced to exchange information on relevant crimes between structural units of the <b>National Police of Ukraine, the Security Service of Ukraine, the State Border Guard Service of Ukraine, the State Migration Service</b> and the <b>Foreign Intelligence Service of Ukraine</b></li> </ul>	<ul style="list-style-type: none"> <li>▪ In August 2017 an international operation was completed initiated by the State Border Guard Service of Ukraine for disclosure and elimination of activities of a criminal group with international connections that organised a transnational human trafficking channel, engaged into recruitment of Ukrainian nationals and their illegal transportation through Poland - Germany - France and through Poland - Lithuania - Latvia to the United Kingdom for labour exploitation. The operation was implemented with participation of officers of the Counter-trafficking Department of the <b>National Police of Ukraine, the Border Guard Service of Poland, the UK National Crime Agency, the State Border Guard Service of Lithuania</b>, and the <b>finance intelligence unit of WESTERN UNION</b></li> </ul>

