Study on criminal sanction legislation and practice in representative Member States

Final Report
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Authors:

Coordinators:

Mr Kai Ambos  
Ms Lorena Bachmaier Winter  
Ms Theodora Christou  
Mr Luis Francisco Jorge de Mesas  
Mr Nicola Selvaggi

Assistant coordinators:

Mr Mikel Irujo Amezaga  
Ms Teresa Orzáez

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<thead>
<tr>
<th>National Experts</th>
<th>National Contact points</th>
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<tr>
<td>Mr Elias Stephanou (Cyprus)</td>
<td>Ms Theodora Christou (Cyprus)</td>
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<tr>
<td>Mr François Xavier Testu and Mr Cédric Poisvert (France)</td>
<td>Mr Pierre Bellet (France)</td>
</tr>
<tr>
<td>Mr Dieter Dölling and Mr Christian Laue (Germany)</td>
<td>Mr Joachim Ettenhofer (Germany)</td>
</tr>
<tr>
<td>Mr Krisztina Karsai (Hungary)</td>
<td>Mr Balázs Garamvölgyi (Hungary)</td>
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<tr>
<td>Mr Vittorio Fanchiotti (Italy)</td>
<td>Mr Nicola Selvaggi (Italy)</td>
</tr>
<tr>
<td>Ms Elita Nimande (Latvia)</td>
<td>Ms Vineta Lecinska-Krutko (Latvia)</td>
</tr>
<tr>
<td>Mr Łukasz Supera (Poland)</td>
<td>Mr Jacek Bilewicz (Poland)</td>
</tr>
<tr>
<td>Mr Florin Streteanu and Mr Daniel Nitu (Romania)</td>
<td>Mr Florin Razvan (Romania)</td>
</tr>
<tr>
<td>Ms Pilar Otero González and Ms Ana Maria Garrocho Salcedo (Spain)</td>
<td>Ms Carmen Rodríguez-Medel Nieto (Spain)</td>
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<tr>
<td>Ms Maria Bergström (Sweden)</td>
<td>Ms Löfgren Ola (Sweden)</td>
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<td>Ms Jennifer Edwards (UK)</td>
<td>Mr Aled Williams (UK)</td>
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1. Introduction

1.1. Scope and objectives of the project

The European Council considers that a level of approximation of some laws is necessary to foster a common understanding of issues among judges and prosecutors, and to enable the principle of mutual recognition to be applied properly in criminal matter whilst taking into account differences between the legal systems and legal traditions of Member States.

The European Union within the Area of Freedom, Security and Justice (AFSJ) has adopted a number of Framework Decisions and Directives in the field of substantive criminal law. These existing laws provide for a common definition, as well as sanctions of differing levels of specificity. These have been adopted and implemented in different ways by Member States. There therefore appears to be a lack of consistency and coherence across the EU.

The Stockholm Programme invites the European Commission to examine whether the level of approximation among the criminal behaviour, in particularly serious crimes with a cross-border dimension, is sufficient in relation to the adopted Framework Decisions and report on the need to establish common definitions and sanctions and to consider submitting new legislative proposals where further approximation is needed. The EU wants to ensure that when adopting new legislation there is a real added value and that it increases consistency and coherence.

The Lisbon Treaty provides for a clarified legal base for the adoption of substantive criminal law legislation at EU level in Articles 83 (1), 83(2) and 325 TFEU. The focus of these instruments is minimum rules on the definition of criminal offences and on sanctions, respecting the principles of proportionality and subsidiarity and the “different legal systems and traditions of the Member States” (Article 67 TFEU). Regarding sanctions, the existing instruments have followed a certain standard approach, choosing one of three levels of specificity:

- Level 1: A general requirement for effective, proportionate and dissuasive criminal sanctions, leaving the type and level of these sanctions entirely to Member States

- Level 2: Determining the type of effective, proportionate and dissuasive criminal sanctions in EU legislation (in practice so far fines and imprisonment), while leaving their level to
Member States, e.g. the instrument could require the application of imprisonment or of financial penalties; and,

- Level 3: Determining the type and minimum level of effective, proportionate and dissuasive criminal sanctions in EU legislation. So far, all instruments approximating the sanction level have used the concept of minimum maximum penalties. This means they determine which maximum penalties the national criminal codes have to put at least at the disposal of the judges, but leave it to Member States to go further.

Other provisions in some of the instruments exclude, for example, ‘minor cases’ from the scope of application in order to avoid over-criminalization, in other instruments ‘aggravating circumstances’ are defined which are to be taken into consideration when the applicable sanction is determined.

The role of these provisions in national legislation and practice needs to be analyzed. Some earlier work has been done in this field, in particular the Green Paper by the European Commission on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union of 2004. However, the new legal framework under the Lisbon Treaty requires a more in-depth and updated analysis with a stronger focus on the practical implementation of legislation.

Therefore, this study analyzes criminal sanctions legislation and practice in 11 Member States, which approximately represent the major legal systems and traditions of the European Union. These countries are:

- Cyprus
- France
- Germany
- Hungary
- Italy
- Latvia
- Poland
- Romania
- Spain
- Sweden
- United Kingdom
According to the scope of the project, legislation and practice regarding the applicable sanctions should be assessed based on five criminal offences. For the selection of the offences the following criteria are essential:

- The offences must stem from national legislation implementing EU Framework Decisions or Directives on substantive criminal law

- The offences must have significant practical relevance in the practice of prosecutors and courts.

For this purpose and working together with the European Commission, the following 5 criminal offences were selected for consideration. All these criminal offences selected stem from national legislation implementing EU Framework Decisions or Directives on substantive criminal law and have high practical relevance, in terms of large number of cases prosecuted in court and adjudicated in the Member States:

1. **Drug trafficking:**

   The Lisbon Treaty defines drug trafficking as one of the "particularly serious crimes with a cross border dimension". It represents a major challenge for the EU. Eurojust has dealt with more cases of drug trafficking than any other type of crime and this trend still continue. Implementation of EU legislation, namely, Framework Decision 2004/757/JHA, which provides an EU definition of drug trafficking offences and minimum rules on sanctions, has been analyzed.

2. **Money Laundering:**

   It is very useful to know how it is described money laundering conducts in the different national Penal codes, having in mind what it is provided for by the Framework Decision 2001/500/JAI of the Council (26 June 2001), with regard to money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, as well as the confiscation expanded mode chosen by each state to complete prison sentences, according to the Framework Decision 2005 / 212./JAI
3. **Child pornography:**


4. **Support for irregular entry, transit and residence.**

Support for irregular entry, transit and residence: In view of the provisions of the Framework Decision 2002/946/JAI of the Council (November 28, 2002)

5. **Frauds with no cash means of payment:**


In summary, the objective of the study is two-fold:

- Achieve a better understanding of the basic legislative structure and practice of the national criminal law sanction systems in 11 Member States, which approximately represent the major legal cultures of the EU;
- Enable a better assessment of the practical impact of provisions typically included in EU legislative instruments.

The results of the study will assist the EU legislator in ensuring added value and improving consistency and coherence whenever in the future the adoption of substantive criminal law legislation will be considered.

**1.2. Methodology**

The execution of the project was divided into three different phases:
**Phase 1**

The Editorial Team (ET) provided National Experts with some general guidelines concerning the input needed at national level, regarding substantive criminal law, thus allowing their work to be standardized under equal criteria. Questions regarding their national substantive criminal law were next submitted. At the same time, the ET started to analyze the reports forwarded by national experts.

The Editorial Team drafted a complete and unique report for every crime. The report included divergences and similarities among different Member States and a summary with conclusions. The papers written by National Experts were submitted to National Contact Points (mostly members of EJN) for further approval and validation.

**Phase 2**

During this phase, research and analysis of procedural law and court practice issues, was conducted. With reference to the collection of national statistical data, the National Experts completed the tasks following three different steps, as described in the offer:

- **Step 1:** National Experts searched for the corresponding statistics at the National Level; official and public statistics were the target at this point.

- **Step 2:** When statistics were not available, as an extra measure before proceeding with the interviews requested in the technical specifications, data was collected from databases and court decision repositories.

- **Step 3:** Interviews were the final step to complete the requested information when statistical data was not available. When needed, the National Experts have completed the statistical information through in-depth interviews of legal practitioners.

**Phase 3**

Once the National Analysis were done and validated, the Editorial Team drafted the reports concerning the five offenses. In this last step of the study, the main target twofold was:

- To achieve a better understanding of the basic legislative structure and practice of the national criminal law sanction systems in the selected Member States, and

- To enable a better assessment of the practical impact of provisions typically included in EU legislative instruments.

In practical terms, these two targets are embodied in the following two major points:

- a. Diagnosis: conclusions were elaborated on the impact and influence of European Substantive Criminal Law over National Legislations and National Court Practice. Also analyzed was the degree of divergence among the different Member States.

- b. Recommendations and Proposals with regards to moving forward with substantive criminal law legislation at EU level, as foreseen in Articles 83 (1), 83 (2) and 325 TFEU.
1.3. Structure

The study contains five different chapters, containing the five sanctions. The report ends with the diagnosis and recommendations and proposals made by the Editorial Team. It includes as annexes the reports prepared by the National Experts during Phases 1 and 2 of this project.
2. Criminal offenses and sanctions in representative Member States

2.1. Child Pornography
2.2. Drug Trafficking
2.3. Money Laundering
2.4. Frauds with no cash means of payment
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2.1. Child Pornography

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Key Findings

- All jurisdictions except Cyprus (which only punishes conducts relating child pornography in the context of cybercrime) have implemented the Framework Decision.
- All but Romania introduced new provisions into their law to cover aspects of the FD.
- Not all 4 categories of Article 3 conduct are covered by all Member States.
- All protect minors below 18 years.
- The definition of ‘child pornography’ is not consistent across Member States.
- The aggravating circumstances in national legislation fall short of the FD in most Member States.
- The FD (and Directive) do not provide minimum penalties, which may explain the disparity between Member States, which for some conducts are significant.
- Some progress has been made towards consistency amongst the definition of the offence and related sanctions in the different Member States studied. However, there is scope for further approximation of both application of the legislation

1. Relevant EU secondary legislation

Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography aims to provide for a “comprehensive approach” to combat child pornography ensuring that “the constituent elements of criminal law common to all Member States, including effective, proportionate and dissuasive sanctions, form an integral part together with the widest possible judicial cooperation.” (Recital 7). A child is a person below 18 years (Art. 1 (a)). Child pornography is defined under Art. 1 (b) as
“pornographic material that visually depicts or represents: (i) a real child involved or engaged in sexually explicit conduct, including lascivious exhibition of the genitals or the pubic area of a child; or (ii) a real person appearing to be a child involved or engaged in the conduct mentioned in (i); or (iii) realistic images of a non-existent child involved or engaged in the conduct mentioned in (i).”

The Framework Decision distinguishes between “Offences concerning sexual exploitation of children” (Art. 2) and “Offences concerning child pornography” (Art. 3). The pornographic conduct is already contained in Art. 2 in that it is made punishable to coerce or recruit a child “into participating in pornographic performances” (Art. 2 (a) and (b)), or “profiting from or otherwise exploiting a child for such purposes” (Art. 2 (a)).

This report considers only the child pornography offence explicitly set out under Art. 3(1) which declares punishable four categories of conduct of child pornography,

- lit. (a) production
- lit. (b) distribution, dissemination or transmission
- lit. (c) supplying or making available
- lit. (d) acquisition or possession

Art. 3 (2) excludes from criminal liability “where a real person appearing to be a child was in fact 18 years of age or older at the time of the depiction” (lit. (a)); where, in the case of production and possession regarding Art. 1(b)(i) and (ii), the person depicted has reached the “age of sexual consent”, has consented and the respective images are only for “private use” (lit. (b)); and, regarding Art. 1 (b) (iii), pornographic material is produced solely for private use (lit. (c)). Art. 4 provides for the punishment of instigation, aiding, abetting and attempt limiting the latter with regard to Art. 3 (1) to lit. (a) and (b) (Art. 4 (2)).

Art. 5 (2) (b) contains aggravating circumstances, namely

- (i) the victim is a child below the age of sexual consent,
- (ii) the life of the child has been deliberately or recklessly endangered,
- (iii) the offence caused serious violence or harm to the child and
- (iv) the offences are committed within the framework of a criminal organization.
These circumstances apply to child pornography if the perpetrator profits from a child’s participation in pornographic performances or exploits a child for that purpose (Art. 5 (2)(b) referring to Art. 2(a)) and if the performance is carried out or Art. 3 (1)(a), (b) and (c) fulfilled by a child below the age of sexual consent and one of the other aggravating circumstances is fulfilled (Art. 5 (2)(c)).

The Framework Decision has been replaced by Directive 2011/92/EU of 13 December 2011 to provide for a “comprehensive legal framework” “covering the prosecution of offenders, the protection of child victims, and prevention” of sexual exploitation of children and child pornography (recital 6). The Directive “aims to amend and expand the provisions” of the Framework Decision which should therefore be “replaced in its entirety …” (recital 48). The Directive calls upon the Member States to provide for maximum penalties of imprisonment (recitals 12-15) and aggravating circumstances (recital 21). Child pornography is defined as “(i) any material that visually depicts a child engaged in real or simulated sexually explicit conduct; (ii) any depiction of the sexual organs of a child for primarily sexual purposes; (iii) any material that visually depicts any person appearing to be a child engaged in real or simulated sexually explicit conduct or any depiction of the sexual organs of any person appearing to be a child, for primarily sexual purposes; or (iv) realistic images of a child engaged in sexually explicit conduct or realistic images of the sexual organs of a child, for primarily sexual purposes …” (Art. 2 (c)). Further, a “pornographic performance” means “a live exhibition aimed at an audience, including by means of information and communication technology, of: (i) a child engaged in real or simulated sexually explicit conduct; or (ii) the sexual organs of a child for primarily sexual purposes …” (Art. 2 (e)). A child is a person below 18 years (Art. 2 (a)).

The Directive distinguishes between “offences concerning sexual abuse” (Art. 3), “sexual exploitation” (Art. 4) and “child pornography” (Art. 5). The latter provides for the punishment of:

- acquisition or possession of child pornography (para. 2),
- knowingly obtaining access, by means of information and communication technology (para. 3),
- distribution, dissemination or transmission (para. 4),
- offering, supplying or making available (para. 5) and
- production of child pornography (para. 6).

These conducts shall be punishable, however, only “when committed without right” (Art. 5 (1)), i.e., if the national law does not provide for a defence, for example with regard to a “medical, scientific or
similar purpose” or if the conduct occurs in the course of “activities carried out under domestic legal powers ...” (cf. recital 17). Art. 5 further leaves it to the discretion of the Member States to apply these forms of conduct to a child of 18 years or more (para. 7) or to the production or possession only for private use (para. 8).

Further, the proposal, by means of information and communication technology, by an adult to meet a child for the purpose of the production of child pornography (Art. 6 (1)) as well as the attempt to commit the offences of Art. 5 (2) and (3) “by an adult soliciting a child who has not reached the age of sexual consent to provide child pornography depicting that child” shall be punishable (Art. 6 (2)). Also the incitement, aiding and abetting of all forms of child pornography (Art. 7 (1)) as well as the attempt of Art. 5 (4), (5) and (6) shall be punishable (Art. 7 (2)).

As aggravating circumstances, applicable to all offences of Art. 3 to 7, Article 9 enumerates:

(a) commission against a child in a particularly vulnerable situation (e.g. child with a mental or physical disability),
(b) commission by a member of the child’s family, a person cohabiting with the child or a person who has abused a recognised position of trust or authority;
(c) commission by several persons acting together;
(d) commission within the framework of a criminal organisation;
(e) previous conviction of the offender;
(f) deliberate or reckless endangerment of the life of the child has; or
(g) serious violence or harm to the child.

For the purposes of this study reference is made to the Framework decision. However as can be seen above, there are not substantial differences. The key difference between the Directive and Framework Decision is the introduction of “knowingly obtaining access, by means of information and communication technology”, The Directive can be considered as an addenda/addition to the content already regulated in the Framework Decision. It should also be noted that the transposition deadline is 18 December 2013, thus during the period in which the study was carried out the majority of Member States had yet to incorporate the Directive into their own national laws.
2. INCRIMINATED CONDUCT

2.1. Definition of the offences

In Cyprus, Article 11 of Law 22 (III)/2004 sets out the different modalities of the offence, as follows: producing child pornography for the purpose of its distribution through computer system; offering or making available child pornography by using a computer system; distributing or transmitting child pornography through a computer system; procuring child pornography with a computer system for oneself or for another person; possessing child pornography in a computer system or on a computer-data storage medium. A “minor” shall include all persons less than 18 years of age. Only intentional acts are punishable. According to Cyprus law “a consequence is said to be intended when the actor desires that it shall follow from his conduct”. Article 13 of Law 22(III)/2004 establishes that attempting, aiding or abetting the commission of offences including under article 11, are punishable.

In France, the Penal Code, article 227-23, criminalizes the creation of images or representations (“Taking, recording or transmitting a picture or representation”) of a minor (below 18 years) with a view to disseminate it; and providing, making available or distributing such picture or representation, importing or exporting, or to cause it to be imported or exported. Usually consulting, or holding such an image or representation is also punishable. Intention is always required. The offer or promise to offer gifts, presents or advantages to commit the offence or the crime (provocation) are punishable. If the provocation is followed by the commission of the offence, this behaviour is no longer a provocation but becomes complicity under general penal law. Indeed, according to Article 121-7 of French Penal Code (general penal law), “the accomplice to an offence or a crime is the person who knowingly, by aiding and abetting, facilitates its preparation or commission. Any person who, by means of a gift, promise, threat, order, or an abuse of authority or powers, provokes the commission of an offence or gives instructions to commit it, is also an accomplice.”

In Germany, conducts relating to child pornography are punishable according to several provisions of the Criminal Code (Strafgesetzbuch, StGB). Thus, § 176 (4) no. 4 StGB covers confronting a child (a person below 14 years, § 176 (1)) with pornographic illustrations or images, audio recording media with pornographic content or pornographic speech. § 176 (5) punishes offering a child for the purpose of, inter alia, the pornographic conduct of § 176 (4) no. 4, promising to offer it for that purpose or agreeing with another to commit the offence. § 184b criminalizes the distribution, acquisition and possession of written materials on child pornography and § 184c on juvenile
pornography, i.e. regarding persons from 14 to 18 years. The distribution of child pornography is also punishable according to § 27 (1) no. 1 in connection with § 15 (1) Protection of Young Persons Act (Jugendschutzgesetz). As to the subjective side, as a general rule, only intentional conduct is punishable unless the law expressly provides for criminal liability based on negligence (§ 15 StGB). Intentional conduct encompasses dolus directus and dolus eventualis, i.e., a form of conditional intent implying that the perpetrator “reconciles himself” with the result in order to achieve his ulterior goal. In casu, negligent conduct is not punishable. Apart from perpetration of the respective conducts (direct, indirect or co-perpetration, § 25 StGB), secondary participation (instigation/abetting or assistance/aiding, §§ 26, 27 StGB) is also punishable. The attempt is only automatically punishable in case of felonies (Verbrechen); in case of misdemeanours (Vergehen) criminal liability has to be provided for explicitly by the respective offence (§ 23 (1)). In the case of child pornography the attempt is not punishable but the undertaking (“Unternehmen”) is punishable, i.e. the attempt and consummation (§ 11 (1) no. 6), namely in case of supplying someone with child or juvenile pornographic writings (§ 184b (2), § 184c (2)) or of acquiring such writings (§ 184b (4), § 184c (4)).

In Hungary, the Criminal Code (“HCC”) also criminalizes different forms of child (and juvenile) pornography, namely obtaining or possessing pornographic material of persons under 18 years (Art. 204 (1) HCC), offering, transferring, making available this material (Art. 204 (2)), producing, placing on the market, trading with or making public such material (Art. 204 (3)), having a person under 18 years performing in a pornographic programme (Art. 204 (4)), providing financial means for offences of sect. (3) and (4) of Art. 204 (Art. 204 (5)) and calling a person under 18 years to appear or perform in a pornographic setting (Art. 204 (6)). The offences must be committed intentionally, i.e. the perpetrator “wishes the consequences of his conduct or acquiesces in these consequences” (Art. 13 HCC). The perpetrator must, in particular, know the pornographic character of the material he uses. Apart from the perpetrator in its three variations (direct, indirect and co-perpetrator, Art. 20 HCC) accessories to the respective conducts may be liable as instigators or assistants (Art. 21 HCC). Attempt is punishable in all cases of intentional offences (Art. 16 HCC), notwithstanding the character of the offence as felony or misdemeanour, i.e., the attempt is punishable in all cases of child pornography.

In Italy, the offences related to child pornography are foreseen in the articles 600 quater, 600 quater y 600-quater.1 of the Italian Penal Code. The conducts are as follows: recruiting minors for child pornography or pornographic performances; creating pornographic images (real or virtual images) by using minors below 18 years or using them to realize exhibitions or pornographic performances; to produce pornographic material, to commercialize, to distribute, divulgate, diffuse
or advertise pornographic material and to offer it; to consult and to possess pornographic material and even to attend pornographic exhibitions; to incite to these activities (art. 414 bis) and to have profit of them. Virtual images are included, being those “not completely or partially associated to real situations, whose quality of representation make appear non-real situations as if they were true ones”. Always intention is required. The Italian Penal Code does not distinguish among main perpetrators, aiders and abettors and instigators, and foresees the same basic penalty for all of them. Attempting to commit an offence is punished with a reduced sentence.

In Latvia, the punishable conducts are set out under Section 166 of the Criminal Code. These are “downloading, obtaining, importation, production, public demonstration, advertising or other distribution of such pornographic or erotic materials as relate or portray the sexual abuse of children, bestiality, necrophilia or violence of a pornographic nature, or the keeping of such materials”. It is also punishable to commit procurement or utilisation of minors (below 18 years) in the production of pornographic or erotic materials. Different penalties are foreseen for offences committed against minors (below 18 years) or against juvenile victims (below the age of 14 years). Preparation of a crime and an attempted crime are punishable in the Criminal Law of Latvia except the attempt to commit a criminal violation (an offence for which the Criminal Law provides for deprivation of liberty for a term not exceeding two years, or a lesser punishment). Organisers, instigators and accessories are joint participants in a criminal offence. Intention (direct intent) is always required. This means that the person who has committed it has foreseen the consequences and has desired them.

In Poland, Article 202 (3), (4), (4a) and (4b) Criminal Code (PCC) provide for different types of child abuse images offences. Article 202 (3) penalizes the promotion as well as the production, import, preservation or possession of pornography involving minors (persons below 18 years) for the purpose of the promotion. Article 202 (4) penalizes the preservation of pornographic material involving minors below 15 years. Article 202 (4a) penalizes the import, storage and possession of pornographic material involving minors below 15 years. Article 202 (4b) penalizes different acts (producing, promoting, presenting or possessing) relating to child pornographic material artificially generated or processed. As to the mental element, all offences require deliberate conduct, i.e., the perpetrator must at least accept the fact, that the respective material may be considered as pornographic involving minors. In some cases, the volitional element is stressed, i.e., the perpetrator must want or desire (not just accept) the result of his or her actions. Apart from the perpetrator, accessories to the respective conducts may be liable as instigators or assistants (Art. 19 PCC). Attempt is punishable in all cases of intentional offences (Art. 14 PCC), notwithstanding the character of the offence as felony or misdemeanour.
In Romania, the offences are set out in Law no. 678 of 2001 on the prevention and fighting against the trafficking in persons (article 18); Title III on preventing and fighting cyber-crime, from Law no. 161 of 2003 with regard to certain measures to ensure the transparency in the performance of public dignities, of public positions and within the business environment, and to the prevention and punishment of corruption; and Law no. 196 of 2003 on the prevention and combating pornography Law no. 196 of 2003 on the prevention and combating pornography (article 11). The offences include: creating images for the purpose of their distribution; producing, distributing, selling or spreading, renting, transmitting, offering, supplying or holding, including the acquisition or possession aimed to the transfer. Possession and acquisition committed within a computer system or computer data storing device is also foreseen, and in all other cases, the acquisition or possession of child pornography is criminalized only if the aim is dissemination. Minors are defined as those below 18 years old. Consulting is not listed as an offence. Aiding and abetting or instigating are all provided by the General Part of the Criminal Code. The attempt is punishable only when the offense is committed by using a computer system or computer data storing device, it is not punishable for all other child pornography offences. All of the above mentioned offences can only be committed with intention, which means the perpetrator must at least accept the fact, that the materials they produce, possess etc. might be considered as pornographic materials involving minors. In some cases the perpetrator must be willing (not just accepting) the result of his or her actions. This refers to offences which require acting for a particular purpose e.g. dissemination.

In Spain, the punishable conducts are set out under articles 189, 189bis and 190 of the Spanish Penal Code. The conducts are to recruit or to use minors for pornographic purposes; to finance or to profit from these activities; to produce, sell, distribute, display, offer or facilitate the production, sale, distribution or display pornographic material, in the preparation of which minors have been used, or to possess such material for such purposes; to possess pornographic material for personal use, in the preparation of which minors have been used; to produce, sell, distribute, display or facilitate pornographic material in which, minors have not been used directly, but by making use of their altered or modified voice or image. Aiding, and abetting or instigating are all provided by the General Part of the Penal Code. The attempt according to the general provisions is punishable. Intention is required.

In Sweden, Chapter 16 Section 10a para.1 of the Criminal Code (“SCC”) declares punishable the act of portraying a child in a pornographic way, disseminating etc. or in any other way making available child pornographic material, acquiring or offering a pornographic picture, making contact between
buyer and seller or in any other way facilitates dealings with such pictures, possessing or viewing such pictures. A child is a person less than 18 years old (Ch. 16 Sect. 10a para. 3). As a rule all conduct must be committed intentionally. However, a person who in the course of business or otherwise for the purpose of making money negligently disseminates a picture of the kind described in the first paragraph shall also be punishable (Ch. 16 Sect. 10a, fourth paragraph SCC). Other than the perpetrator, accessories to the respective conducts may be liable as instigators or assistants/aiders (Ch. 23 Sect. 4 SCC). Attempt is punishable in normal and gross cases of child pornography (cf. Ch. 16 Sect. 10a para. 1 SCC and Ch. 16 Sect. 17 SCC).

In United Kingdom there are three different legal systems: England and Wales, Scotland and Northern Ireland. In England and Wales, the punishable conducts are as follows: causing or inciting child pornography, controlling a child involved in pornography, arranging or facilitating child pornography, making, taking or disseminating indecent images of children, and possession of indecent photographs of a child. In Scotland and in Northern Ireland the conducts foreseen are not identical to those in England and Wales. They are causing or inciting child pornography, controlling a child involved in pornography and arranging or facilitating child pornography. In England and Wales, Scotland and Northern Ireland, those who aid and abet or instigate offences or commit attempts, are liable under the general criminal law. Intention is always required.

### 2.2. Key common points and differences

Cyprus only punishes conducts relating to child pornography in the context of cybercrime, in other words by using a computer system. The FD is therefore not implemented in Cyprus.

All other systems punish as basic offences the creation, distribution, acquisition and possession of child pornography (except acquisition and possession in Scotland and in Northern Ireland). In addition, a series of other conducts are covered in different jurisdictions: import (France, Latvia, Poland), preservation/storage (Poland), portraying a child (Sweden), offering a pornographic picture (Cyprus, Sweden), making public such material, providing financial means (Hungary). In practice, these conducts can fall under some of the basic conducts, so it is not essential to mention them.

The legislations differ regarding the persons protected by the offence. While in Germany child pornography aims to protect children, i.e. persons below 14 years, the other countries extend the protection generally to “minors” below 15 years (Poland) or 18 years (Hungary, Romania, Poland, Spain, Sweden); the latter are covered in Germany by the offence of juvenile pornography. The
situation is similar in Latvia. Other countries like Spain or Italy use the aggravating circumstances to protect children below 13 years or 14 years.

There is no common definition of child pornography. In Latvia no definition is provided but transfer refers to “materials as relate or portray the sexual abuse of children, bestiality, necrophilia or violence of a pornographic nature”. In Romania it is defined as visual supports that represent sexual positions or acts of a pornographic nature. In Spain and in France there is no definition of “child pornography”. In some countries, the image has to be created with a view to be disseminated (Romania and France).

There are some differences also concerning the virtual representations: in some countries the virtual images are explicitly foreseen (Cyprus, Italy, Poland) whilst other countries use formulas that can cover the virtual representations (France, Germany, Latvia, Romania). In Spain only the completely virtual images are excluded. In Hungary the virtual images are excluded and in Sweden these are not mentioned. Having profit from these activities is explicitly foreseen as an offence in Italy and in Spain.

Gaining a profit is not mentioned, but punishable under the general rules of participation in Cyprus, France, Germany, Hungary, Latvia, Poland, Romania, Sweden and United Kingdom. Possession is punishable in France, Germany, Hungary, Italy, Latvia, Poland, Sweden and England and Wales.

In Cyprus only the possession on a computer or on a computer data storage medium is foreseen. In Romania the possession in a computer or on a computer data storage medium is punishable, but in all other cases the possession is criminalized only if the aim is for it to be disseminated. Consulting is foreseen in Cyprus, France (usually consulting), Hungary, Italy, Latvia, Romania and Sweden. It is not foreseen in Germany, Poland, Spain and the United Kingdom.

Recruiting minors and financing are not foreseen in some countries because these conducts are only punished under the general provisions of aiding, abetting and attempting (for example in France or Romania). Using minors for pornographic exhibitions and attending pornographic exhibitions is punished in Hungary, Spain and Italy.

As a rule the offence must be committed intentionally, i.e., knowledge and/or purpose is required; only in Sweden the dissemination of pornographic picture for commercial reasons can be committed negligently. Other than the perpetration of the offence, any other form of (secondary) participation is covered, either by the general rules of criminal law or by a specific conduct in the
respective offence (e.g. providing financial means as special form of assistance/aiding in Hungary). Attempt is punishable in all jurisdictions except Germany.
Table 1. Basic conducts and attempt

<table>
<thead>
<tr>
<th>Country</th>
<th>Creation</th>
<th>Distribution</th>
<th>Acquisition and possession</th>
<th>Using minors for exhibitions</th>
<th>Attempt is punishable</th>
</tr>
</thead>
<tbody>
<tr>
<td>CY</td>
<td>Only in the context of cybercrime</td>
<td>only in the context of cybercrime</td>
<td>Only in the context of cybercrime</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>FR</td>
<td>Only with a view to disseminate it</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>DE</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>HU</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>IT</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>LV</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>PL</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>RO</td>
<td>Only with a view to disseminate it</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>ES</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>SE</td>
<td>Only with a view to disseminate it</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>UK</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes E/W. No Scotland and NI</td>
<td>No</td>
<td>Yes</td>
</tr>
</tbody>
</table>
3. PENALTY LEVELS

3.1. Penalties in the different countries (imprisonment and fines)

The penalties imposed for child pornography offences vary greatly amongst the Member States studied.

Cyprus only provides for child pornography distributed through a computer system. The appropriate penalty is set out in the case of The Republic v Makamian (2007) 2 ΑΑΔ 405 (Ποινική Έφεση Αρ. 258/06, 19 July 2007) adopting the five-point scale set out in the English case of R v (1)Mark David Oliver (2)Michael Patrick Hartrey (3) Leslie Baldwin [2002] EWCA Crim 2766 at §10:

(1) images depicting erotic posing with no sexual activity;
(2) sexual activity between children, or solo masturbation by a child;
(3) non-penetrative sexual activity between adults and children;
(4) penetrative sexual activity between children and adults;
(5) sadism or bestiality.

The case also provides further guidelines as to the appropriate offence: a fine is appropriate where the offender was merely in possession of material solely for his own use; conditional discharge appropriate if the defendant had pleaded guilty and had no previous convictions; community service appropriate where the offender had been in possession of a large amount of material at Level 1 and/or no more than a small number of images at Level 2 as long as the material had not been distributed; custody threshold would usually be passed where any of the material had been shown to others; imprisonment up to 6 months would be appropriate for possessing a large quantity of materials at level 2 alternatively a small quantity of materials at level 3, this would moreover be appropriate for sharing or exchange of materials at level 1; Imprisonment between 6 months and 1 year might be appropriate when possessing a large quantity of materials at level 2 or 3 or whereas the offender possesses a small quantity of materials at level 4 or 5; imprisonment between 12 months and 3 years would be appropriate for possessing a large quantity of materials at Levels 4 or 5 even if there had been no distribution to others; imprisonment for a longer period than 3 years ought to be reserved for cases where the offender had been actively involved in producing the images; and sentences approaching the 10-year maximum were appropriate if the offender had previous convictions.
For attempt, aiding or abetting the commission of offences including under article 11, the penalty is a maximum 5 years imprisonment or to a fine of £20,000 CYP or both. The Courts have the discretion to impose the appropriate sentence taking into account both aggravating and mitigating factors following the Supreme Court guidelines adopted in the *Makamian* case.

In practice, in *Cyprus* according to collected data (source: private databases), there are only three Supreme Court decisions and three District Court decisions reported on sentences of child pornography cases (possession of images and films). Penalties imposed are imprisonments or fines. Courts have applied fines for an amount of max. 2500 Euros (minimum 1700) and imprisonment of 6 or 12 months. In general it is worth observing that under Cyprus criminal legal system (which derives from Common Law) the Courts have always the discretion to differentiate every criminal act and impose the appropriate sentence according to the circumstances of the case and the circumstances of the accused. Moreover, for assistance with finding the appropriate penalty for each crime, the Supreme Court of Cyprus has adopted the English Guidelines, which provide a five-point scale, which can be applied in order to grade the relevant sentencing.

In *France* the penalties are divided into 3 categories. First, ‘taking, recording and transmitting’ the image or the representation of a minor with a pornographic character is punished by up to a 5 years imprisonment and a fine of €75000. The use of communication network service is an aggravating circumstance increasing the maximum sentence to then 7 years imprisonment and a fine of €100000. The penalty is 10 years’ imprisonment and a fine of €150.000, if the minor is under 15 years-old. Next, ‘providing, making available or distributing’ the image or the representation of a minor with a pornographic character is punished by up to 5 years imprisonment and a fine of €75000. Again the use of communication network service is an aggravating circumstance increasing the maximum sentence to 7 years’ imprisonment and a fine of €100000. The penalty is 10 years’ imprisonment and a fine of €150.000, if the minor is under 15 years-old. Finally, ‘consulting or to hold’ the image or the representation of a minor with a pornographic character is punished by up to 2 years imprisonment and a fine of €30000. When committed by a criminal organisation, every offence above is punished by up to 10 years imprisonment and a fine of €500000. Attempted offences under the preceding paragraphs are punishable by the same penalty.

An accomplice is punishable in the same way as the perpetrator. Provoking or inciting the commission of offence against a minor, even where it does not produce any effect is punished by up to 3 years imprisonment and a fine of €45000. Where the minor is less than fifteen years of age the penalty is up to 7 years’ imprisonment and a fine of €100000.
In France, statistics provide information regarding the number of penalties pronounced by the Courts in 2011 (source: National Criminal records, 2011). During the period under observation, 226 sentences of imprisonment were handed down (with regard to any kind of child pornography), of which 204 were suspended. In partially unsuspended sentences, the average duration of the unsuspended part was 5.4 months, 13 fines were imposed. Recent decisions (period 2011-2012) were reviewed where child pornography was concerned: a) taking, recording and transmitting the image or the representation of a minor with a pornographic character with the use of communication network service, 6 years of imprisonment (not suspended); b) Consulting or holding the image or the representation of a minor with a pornographic character, 6 months + probation; c) Consulting or holding the image or the representation of a minor with a pornographic character, 8 months + probation; d) Taking, recording and transmitting the image or the representation of a minor with a pornographic character without aggravating circumstance, 4 months + probation.

In Germany there are 6 categories of offences for child pornography. First for distribution of child pornographic written materials according to § 184b (1) and (2) StGB, the basic offence is liable to imprisonment from 3 months to 5 years. For offences under § 184b (3) StGB, the penalty shall be imprisonment of 6 months to 10 years if the offender acts on a commercial basis or as a member of a criminal organisation whose purpose is the continued commission of such offences and the child pornography reproduces an actual or realistic activity. Possession or undertaking to obtain possession of or possesses child pornographic written materials according to § 184b (4) StGB is liable to imprisonment of not more than 2 years or a fine. Next, distribution, acquisition and possession of juvenile pornography according to §184c (1) and (2) StGB is liable to imprisonment of not more than 3 years or a fine. According to §184c (3) StGB, in cases of § 184c (1) and (2) the penalty shall be imprisonment of 3 months to 5 years if the offender acts on a commercial basis or as a member of a criminal organisation whose purpose is the continued commission of such offences and the juvenile pornography reproduces an actual or realistic activity. Undertaking to obtain possession of or possesses child pornographic written materials according to § 184c (4) shall be liable to imprisonment of not more than 1 year or a fine. Third, distribution of pornography depicting violence or sodomy according to § 184a StGB is liable to imprisonment of not more than 3 years or a fine. Fourth, distribution of pornographic written materials according to § 184 StGB is liable to imprisonment of not more than 1 year or a fine. The offences according to § 27 (3) of the Jugendschutzgesetz (Protection of Young Persons Act) (negligent infringement of distribution prohibitions according to § 15 (1) Protection of Young Persons Act) are liable to imprisonment of not more than 6 months or a fine up to 180 daily rates. Finally, negligent offences according to § 23 of the Jugendmedienschutz-Staatsvertrag (Interstate Treaty on the Protection of Human Dignity and the Protection of Minors in Broadcasting and in Telemedia) are liable to imprisonment of not
more than 6 months or a fine up to 180 daily rates. Regulatory offences according to § 24 of the Interstate Treaty shall be liable to a fine of up to 500,000 Euros.

In Germany, collected data shows the development of the cases of the complete range of sexual crimes (§§ 174 – 184f StGB). In 2008 (the year of the coming into force of the Law implementing the Council FD), convictions for sexual offences were at its maximum (7,988); this number declined by approx. 27 % until 2011. At least 60 % of the 60 – 66 % prison sentences are suspended on probation. In the observation period, the proportion of sentences on probation increased from 61% between 2000 and 2002 to over 72% (2008) and down to 70% in 2010 and 2011. This also shows that prison sentences which are not suspended on probation are only imposed by German Criminal Courts in cases of major crimes and are thus rare: In 2011, only 5.3 % (37,732) of all convictions (705,640) lead to a prison sentence not suspended on probation. Prison sentences up to two years that can be suspended are regularly suspended on probation. According to § 56 StGB, the conditions for probation are more strict depending on the length of the prison sentence. Nevertheless, more than 90 % of all prison sentences of one year up to two years are suspended on probation. Prison sentences of more than two years cannot be suspended on probation were imposed 959 times in 2011 (16.4% of all convictions) and 1,027 times in 2010 (15.5%). This relatively high proportion of high sentences reflects the gravity of the sexual offences. On the one hand, the ranges of penalties for the individual offences are above average and very often include a minimum prison sentence, this, however, does not devoid the possibility of a fine; on the other hand, sexual offences are seen as major crime by the courts so that the assessment of punishment tends to be harsher.

The number of convictions for fines fluctuates between 34 % (2000) and a bit more than 40% (2008). As a tendency it may be stated that the percentage of fines is far above average in those years in which also the total number of convictions is far above average, i.e. in the years 2007 to 2009; however, this percentage decreases in the years with less convictions for sexual offences.

In Hungary, there are five categories of offences. First, ‘possession’ is punishable with up to three years imprisonment. Next, to offer, transfer or make available pornographic material is punishable with up to 5 years. Third, to produce, place on the market, trade in or make available to the general public pornographic material or contains a person under 18 years of age performing in a pornographic programme is punishable with imprisonment between 2 to 8 years. Providing the financial means for committing of the offences is punishable with imprisonment between 2 to 8 years. Fifth, to call any person less than 18 years of age to appear in pornographic material or to perform in a pornographic programme is punishable with up to 2 years. Finally, to sell, purchase, surrender or take, exchange for a third person, recruit for trafficking, transfer or hide anybody, or
give him/her accommodation is punishable is punishable by up to 3 years. If it is committed with the aim of producing illegal pornographic material it is punishable with between 5 and 20 years or life imprisonment.

The preparation of the above crimes is punishable only if the Hungarian Criminal Code specifically prescribes it in certain criminal offences in the Special Provisions. In these cases, the Hungarian Criminal Code provides a lower range of penalty than that provided for completed offences. The fact that the criminal offence has not yet been completed can be regarded as a mitigating circumstance during the infliction of penalty. The penalties provided for perpetrators by the Special Provisions of Hungarian Criminal Code also apply to accessories.

In Hungary, statistical data shows a very high numbers of recorded offences especially in the period between 2004-2009. It is worth noting the methodology of the authorities in recording such offences. In 2004, the authorities started to record the offences under §204 HCC based on the number of the persons in the pictures (other materials) and on the number of the seized objects. According to provisions which came into force in 2008, even if the authorities find thousands of pictures (of hundreds of victims) in possession of one perpetrator, only one criminal procedure is triggered for one offence (the rules on concurrence of the offence were changed). In 2011, 661 cases have been registered, with 357 accusations. In 2012, 168 cases have been registered with 86 accusations.

The focus of the law in Italy is on the creation of pornographic material which utilizes a person under 18 years old. For pornographic exhibitions or the production of pornographic material which utilize persons less than 18 years old, producing such pornographic material, inducing persons less than 18 years old to participate at pornographic exhibitions and commercializing such material all carry the basic penalty of imprisonment from a minimum of 6 months to a maximum of 12 years and a fine from 25822 to 258228 euro. To distribute, disseminate or advertise pornographic material and to distribute, disseminate news or information in order to entice or to sexually exploit persons aged less than 18 years carries a basic penalty of imprisonment for a minimum of 1 year to a maximum of 5 years and a fine from 2582 to 51645 euro. To offer or dispose of, even for free, the pornographic material, the penalty is imprisonment up to three years (no minimum provided) and a fine from 1549 to 5164 euro. Intentionally getting and intentionally keeping pornographic material which has been realized by utilizing persons less than 18 years old both carry a penalty of imprisonment for up to 3 years (no minimum provided) and a fine not less than 1549 euro.
Where the pornographic material represents virtual images achieved by utilizing images of persons (or parts of them) less than 18 years old, the penalties are the same as set out above minus 1 year. Attempting to commit an offence is punished by the same the basic penalty as set out above but reduced by one third or two thirds. The same basic penalty is foreseen for the main perpetrators, aiders and abetters, and instigators.

In **Italy**, statistical data is not available and so the statistical data set out takes into account as a sample only cases from the district of the Appeal Court of Genova. The range of penalties (imprisonment) imposed for main child pornography offences (art. 600-ter and quater) is between from 6 to 48 months.

In **Latvia** sanctions are imposed for both the creation and use of child pornography. The procurement or utilisation of minors in the production (manufacturing) of pornographic or erotic materials attracts a sentence of imprisonment for a term not exceeding 6 years, with or without confiscation of property, and with or without probation supervision for a term not exceeding 3 years. The procurement or utilisation of juveniles in the production (manufacturing) of pornographic or erotic materials attracts a sentence of imprisonment for a term of not less than 3 and not exceeding 12 years, with or without confiscation of property, and with or without probation supervision for a term not exceeding 3 years.

Downloading, obtaining, importation, production, public demonstration, advertising or other distribution of such pornographic or erotic materials as relate or portray the sexual abuse of children, bestiality, necrophilia or violence of a pornographic nature, or the keeping of such materials attracts a sentence of imprisonment for a term not exceeding 3 years, or custodial arrest, or community service or a fine not exceeding 200 times the minimum monthly wage, with or without confiscation of property. The importation, production, distribution, public demonstration, playing or advertising of pornographic writings, printed publications, pictures, films, video and audio recordings or other pornographic materials, where the commission is repeated within a one year period, attracts a sentence of imprisonment for a term not exceeding 1 year, or custodial arrest, or community service, or a fine not exceeding 150 times the minimum monthly wage.

If the above activities are committed by a criminal organisation, the applicable sentence is imprisonment for a term of not less than 5 years and not exceeding 15 years, with confiscation of property, and with probation supervision for a term not exceeding 3 years.
Liability for preparation of the above offences is in accordance with the same Section of the Law which sets out liability for a specific offence. A person shall not be held criminally liable for an attempt to commit an above criminal violation.

In Latvia, according to the available statistics (2004-2012), decided cases in the court of criminal offences provided for by Section 166 of the special part of Criminal law (“Violation of Provisions Regarding Importation, Production and Distribution of Pornographic or Erotic Materials) are: 2004 – 4, 2005 – 2, 2006 – 1, 2007 – 2, 2008 – 5, 2009 – 8, 2010 – 8, 2011 – 12, 2012 – 20. Cases decided by the Prosecutor: 2010 – prosecutor’s order – 3, Termination of Criminal Proceedings, Conditionally Releasing from Criminal Liability – 1, agreement - 3; 2011 - prosecutor’s order – 13, Termination of Criminal Proceedings, Conditionally Releasing from Criminal Liability – 6, agreement - 3; 2012 – agreement - 6, Termination of Criminal Proceedings, Conditionally Releasing from Criminal Liability – 5, prosecutor’s order – 23. Deprivation of liberty (imprisonment from 1 to 3 years or from 3 to 5 years have been imposed) as well as community service and fine are applied.

In Poland the propagation as well as production, import, maintaining or possession of pornography involving minors for the purpose of dissemination carries a term of between 6 months and 8 years. Maintaining pornography involving minors under the age of 15 attracts a penalty of imprisonment for a term of between 1 and 10 years. The import, storing and possession of pornography involving minors under the age of 15 attracts a penalty of imprisonment for a period of between 3 months and 5 years. To produce, propagate, present or possess pornographic materials involving artificially generated or processed images of a minor attracts a penalty imprisonment for a period of up to 2 years or restriction of liberty or a fine. The court imposes a penalty for aiding and abetting, instigating and attempting within the limits of the sanction provided in law for perpetrating a particular offence.

In Poland in 2002, 10 people were found guilty of offences relating to child pornography; in 7 cases perpetrators were sentenced to imprisonment (all of them with suspension of the execution of the penalty; in all cases the imposed sanctions were of a period of under 2 years). In 2007, 118 people were found guilty of offences relating to child pornography. 115 perpetrators were sentenced to imprisonment. In 2011, 220 people were found guilty of offences relating to child pornography. Among these, 205 perpetrators were sentenced to imprisonment. From the available statistics and information it is not possible to identify the average length of imprisonment.

In Romania child pornography is described as exposing, selling or spreading, renting, distributing, manufacturing or producing in any other way, of transmitting, offering, supplying or holding in view
of spreading of objects, films, pictures, slides, emblems or other visual supports that represent sexual positions or acts of a pornographic nature presenting or involving minors under the age of 18, and is punished with imprisonment from 3 to 10 years. Producing for the purpose of its distribution, offering or making available, distributing or transmitting, procuring for oneself or another of child pornography material, or possessing, without right, child pornography material within a computer system or computer data storing device is punished with imprisonment from 3 to 12 years and prohibition of certain rights. The distribution of pornographic material that visually depicts or represents a child involved in sexually explicit conduct will be punished with imprisonment from 1 to 5 years. Attempts are punished only when the child pornography material is within a computer system or computer data storing device. Therefore, in all other cases of child pornography, the attempt is not punishable. Instigators and accomplices are liable to the same penalty provided in the law for the perpetrators.

In Romania the data provided covers all cybercrimes in Law no. 161, and there is no specific data regarding Article 51 (on child pornography). In the year 2011, 38 persons were convicted for cybercrimes. 37 persons were aged 18 years and above and only one person was a minor. 10 convictions were to imprisonment ranging from 1-5 years, 1 was to imprisonment ranging from 5-10 years, 1 was imprisonment ranging from 10-15 years. In rest of the cases, the sentences were suspended (see point II). In the year 2012, 51 persons were convicted for cybercrimes. 49 persons were aged 18 years and beyond and 2 were minors. 2 convictions were to imprisonment ranging from 1-5 years, 3 were imprisonment ranging from 5-10 years. In rest of the cases the sentences were suspended.

In Spain a penalty of imprisonment from 1 to 5 years is imposed for whoever recruits or uses minors or the incapacitated for exhibitionistic or pornographic purposes or shows, both public or private, or to prepare any kind of pornographic material, whatever the media, or who finances or profits from any of these activities; produces, sells, distributes, displays, offers or facilitates the production, sale, diffusion or display by any means of pornographic material, in the preparation of which minors or incapacitated persons have been used, or possesses such material for such purposes, even though the material is of foreign or unknown origin. The penalty is increased to imprisonment from 5 to 9 years in cases where the child is under 13, the acts are particularly degrading or humiliating in nature; the acts are especially serious in view of the financial value of the pornographic material; the pornographic material displays children or the incapacitated who are victims of physical or sexual violence; the offender belongs to an organisation or assembly, even if transitory in nature, with the purpose of perpetrating those activities; the offender is an ascendant, tutor, carer, minder, teacher or any other person in charge, de facto or de jure, of the minor or
incapacitated person. Where the pornographic material is possessed for own use, in the preparation of which minors have been used, the sentence is between 3 months to a 1 of imprisonment or a daily fine for 6 months to 2 years. To produce, sell, distribute, display or facilitate pornographic material by any means in which, while minors have not been used directly, makes use of their altered or modified voice or image, shall be punished with a sentence of imprisonment from 3 months to 1 year or a daily fine for 6 months to 2 years. Criminal attempt is punishable with a sentence one or two degree below that imposed for the consummated crime. Therefore, in the case of article 189.1, the punishment for attempt would be either from six months to one year (if reduced by one degree) or three to six months (if reduced by two degrees). For offences under article 189.1 (a) and (b) the accessory who counsels and procures and the accomplice will be liable to the same sentence as for the perpetrator. An accomplice is normally punished with a lesser sentence whilst financing is elevated to the category of perpetrator.

In Spain collected data (recorded judgments of the Tribunal Supremo and the Audiencias Provinciales – principal court of a Spanish province) 58 judgments from the Tribunal Supremo (Supreme Court) and the Audiencias Provinciales between the years 2002 and 2012 were reviewed. These sentences show that with regard to the offence of preparation and distribution of pornographic material utilizing minors of the basic offence provided for in article 189.1 a) and b) criminal code:

a. when there are no concurring modifying circumstances: 1) the minimum sanction level foreseen legally has been imposed, 1 year imprisonment in two judgments; 2) the minimum sanction level foreseen legally has been surpassed without reaching the maximum sanction level in some cases;
b. when there are concurring generic mitigating circumstances: (1) the maximum level has been imposed in two cases, namely
c. regarding the basic offence when special rules on determining the sanction concur, specifically with continuing offences: 1) maximum level has been surpassed (4 cases: three years of imprisonment; 2½ years);
d. Regarding the aggravated offence of child pornography provided for in article 189.3 (a sanction of 5 to 9 years’ imprisonment, and before the amendment of 2010, 4 to 8 years) without there being any concurring generic aggravating circumstances: 1) the minimum has been surpassed in 5 judgments; 2) the minimum sanction level legally foreseen was imposed (4 years before 2010 and 5 years after 2010);
e. when there are concurring generic aggravating circumstances with the aggravated offence, one judgment surpassing the minimum and almost reaching the maximum level is registered;

f. in case of aggravated offence with concurring generic mitigating circumstances (mental impairment and undue delay), minimum has been surpassed;

g. in case of offence of possession of pornographic material: article 189.2, there are judgments surpassing the minimum level.

In summary, when the basic offence applies in the greatest percentage of judgments sanctions above the minimum level foreseen are imposed. This is due to the fact that penalties are provided for with fixed lower and higher limits which must necessarily be respected by the judges. The minimum penalty is considered not dissuasive and proportionate to the seriousness of the offence. Very few apply the minimum legal level and none have applied the maximum legal level allowed. On the other hand, when the norms on overlapping offences apply or when dealing with the aggravated offence, the percentage of judgments that do not surpass the minimum sanction level is equal to those that do surpass the minimum. In the mitigated offence all of them except one (which imposes the minimum sanction level foreseen) surpass the minimum sanction level foreseen. Finally, one judgment dealing with the mitigated offence imposes the maximum sanction level legally foreseen.

In Sweden child pornography is divided into 3 classifications: Gross (grave) child pornography which is liable for a term of imprisonment of between 6 months to 6 years; “ordinary” child pornography which is liable for a term of imprisonment of between 2 weeks to 2 years; and minor child pornography which is liable for a term of imprisonment of between to 6 months or a fine. In assessing whether the crime is gross special consideration shall be given to whether it was committed in the course of business or otherwise for profit, was a part of criminal activity that was systematically practiced or practiced on a larger scale, or concerned a particularly large number of pictures or pictures in which children are particularly young, exposed to violence or force or are being used by other especially ruthless treatment. The law does not specify what is to be a minor case, however, guidance can be found in the preparatory work. According to the preparatory work, acts with a limited penal value could be assessed as minor cases. Normally, possession offences are expected to have a limited penal value, but it should be possible to assess acts with a somewhat higher penal value as minor cases as well. Normally, minor cases are those which only result in a fine as penalty. Examples include possession of one magazine or film or the production and saving of one child pornographic picture in the computer. In addition, according to Chapter 16, section 10b, first paragraph of the Penal Code, the prohibition in section 10a of portraying and
possession does not apply if the difference in age and development of the depicted person and the producer of the pornographic picture is small and the circumstances in general do not warrant that responsibility is imposed. The crime of attempt of child pornography where it is not petty and attempt or preparation of gross child pornography, is punishable in accordance with the general provisions in Chapter 23 of the Penal Code on attempt, preparation, conspiracy and complicity.

In **Sweden** convictions including court sentence, prosecutor fines and waiver of prosecution have more than doubled between 2002 and 2011 from 44 to 108. Imprisonment is at a similar level (whereas court sentencing for psychiatric care increased in 2011 from 0 or 1 per year to 5). From 2009 onwards, court sentencing involving probation and suspended sentences also increased. The number of court fines is comparably low while prosecutor fines have doubled in the last 10 years. Although number of court convictions leading to imprisonment has not risen much in 10 years and imprisonment was less than 10 % in 2011 of all convictions, the average term of imprisonment has doubled from about 5 to 10 months.

In the **United Kingdom** prostitution and pornography are considered together with the offence of causing or inciting child prostitution or pornography, controlling a child prostitute or a child involved in pornography and arranging or facilitating child prostitution or pornography liable to a maximum of 14 years imprisonment. Indecent images of children are considered as a different group of offences with the offence of making, taking or disseminating indecent images of children liable to a maximum of 10 years and possession of indecent photographs of a child liable to a maximum of 5 years imprisonment.

### 3.2. Key common points and differences

**Minimum penalties**

The Framework Decision does not provide a minimum penalty, which may explain the disparity between Member States. This will probably continue to exist since the Directive does not require such a minimum penalty.

For the above the Framework Decision offences a fine is the only available penalty in **Cyprus** (IT access). A fine is the minimum penalty in, **Germany** (acquisition and possession and of juveniles),
Poland (acquisition, possession and production where artificially generated), Spain (acquisition and possession as an alternative to 3 months imprisonment), Sweden (minor offence).

In Latvia a fine the minimum penalty for all offences is a fine, whereas in Romania it is 3 years for all offences other than for distribution or transmission under the 2003 law.

The minimum penalty for acquisition or possession is set at 3 months in Poland and Spain. For distribution or transmission the minimum penalty is 3 months in Germany and Spain (to sell in the case of non totally real images), 1 year in Italy, Poland (maintaining to distribute) and Spain (for other types of distribution or transmission) and 2 years in Poland (artificially generated).

In Germany it is 3 months for offering, supplying or making available, in Italy it is 6 months, Spain 1 year and Romania 3 years. For production the minimum penalties set are 3 months in Spain (in the case of non totally real images), 1 year in Poland (for distribution) and Spain (for real images), 2 years in Hungary and 3 years in Romania.

**Maximum Penalty**

The Framework Decision provides that the maximum penalty set should be at least 1-3 years imprisonment for the offences. All Member States studied fulfil this requirement apart from Spain who sets a lower maximum sentence where the altered voice or image of a child is used. Latvia sets the maximum penalty at 3 years for all offences.

For acquisition or possession the maximum sentence is 1 year in Germany (juvenile) and Spain, 2 years in France, Germany (child), Poland (artificially generated), 3 years in Hungary, 5 years in Poland (import, store or possess) and the UK, 8 years in Poland (to propagate) and 10 years in Poland (preserving) and Romania.

For distribution or transmission, the maximum penalty is 1 year in Spain (use of altered voice or image), 2 years in Poland (artificially generated), 3 years in Germany (juvenile) and Italy, 5 years in France, Germany (child), Hungary, Romania (2003 law) and Spain for other offences. It is set at 10 years in Poland (maintain to distribute), Romania (2001 law) and the UK and 12 years in Italy (commercializing).
Offering, supplying or making available child pornography is punishable by a maximum of 3 years in Germany (juvenile), 5 years in Germany (child), Hungary and Spain, 10 years in Romania.

The maximum penalty for production is 1 year in Spain (use of altered voice or image), 2 years in Poland (artificially generated), 5 years in Spain (for other offences), 8 years in Hungary, 10 years in Poland (to distribute) and the UK, 12 years in Italy (commercializing).

The following table gives an overview of the different minimum and maximum sanctions in relation to the offences concerning child pornography as defined in the Framework Decision 2004/68/JHA. It should be noted that national law often does not adhere strictly to the categorisation of the Framework Decision. The national offences do not always include exactly the same elements of the offences as defined in the Framework Decision.

<table>
<thead>
<tr>
<th>Offences (FD)</th>
<th>Min/Max</th>
</tr>
</thead>
<tbody>
<tr>
<td>Acquisition or possession (Art. 3(1)(d))</td>
<td>Distribution, dissemination or transmission (Art. 3(1)(b))</td>
</tr>
<tr>
<td><strong>FD 2004/68/HA</strong></td>
<td>Min: None set</td>
</tr>
<tr>
<td>Cyprus</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>France</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>2 years and fine of 30000€</td>
</tr>
<tr>
<td>Germany</td>
<td>Fine</td>
</tr>
<tr>
<td></td>
<td>2 years (child) 1 year (juvenile)</td>
</tr>
<tr>
<td>Country</td>
<td>Hungary</td>
</tr>
<tr>
<td>----------</td>
<td>---------</td>
</tr>
<tr>
<td></td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>3 years</td>
</tr>
<tr>
<td></td>
<td>5 years</td>
</tr>
<tr>
<td></td>
<td>5 years</td>
</tr>
<tr>
<td></td>
<td>8 years</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
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<td></td>
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<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Notes:**
- Hungary: 2 years
- Italy: 12 years and fine 25822-258228€ (commercializing)
- Latvia: Fine not exceeding 200 times min monthly wage
- Poland: Fine (artificially generated or processed)
- Romania: 10 years (holding in view of spreading)
- Spain: 3 months (use of altered voice or image of child)
3.2.1. Minimum Penalties

Cyprus, Latvia, Sweden and the UK do not provide for minimum penalties. In France, there is no minimum penalty for first time offenders whilst for repeat offenders of offences punishable by more than 3 years imprisonment, the scale used to calculate the discretionary minimum penalty is set out in the national report in Annex 1. Whilst Germany, Hungary, Italy and Poland provide minimum penalties for some offences, Romania, Spain and Sweden set minimum penalties for all offences. In addition to the above conclusion, refer to table 1 on the minimum penalties for the different Framework Decision offences. Amongst the minimum penalties other than fines Sweden sets the lowest minimum imprisonment penalty at 2 weeks for ‘ordinary’ child pornography.

Where a minimum sanction is provided, judges cannot impose a lower sentence than that set.

3.2.2. Imposition of Maximum penalty

None of the Member States studied set legislative limitations on the imposition of the maximum sentence. Statute does not dictate when the maximum sentence can be imposed. This is the discretion of the sentencing judge who will determine the appropriate sentence taking into account mitigating and aggravating factors listed above.

In practice, the maximum penalty was not imposed in any cases in Cyprus, Hungary (according to the interview carried out, judges have a very broad margin of appreciation and the maximum penalties are not imposed in the judicial practice), Latvia (no mention of the maximum sanction in

Table 2. Minimum and maximum sanctions

<table>
<thead>
<tr>
<th></th>
<th>1 year</th>
<th>5 years</th>
<th>1 year (use of altered voice or image of child)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sweden*</td>
<td>6 months (Gross)</td>
<td>2 weeks (Ordinary)</td>
<td>Fine (Minor)</td>
</tr>
<tr>
<td></td>
<td>6 years (Gross)</td>
<td>2 years (Ordinary)</td>
<td>6 months (Minor)</td>
</tr>
<tr>
<td>UK</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>5 years</td>
<td>10 years</td>
<td>-</td>
</tr>
</tbody>
</table>

*Sweden does not specify the maximum penalty for child pornography.
the data) and Spain (only in one case, where there were concurring generic aggravating circumstances with the aggravated offence present, the sentence almost reached the maximum level: (aggravating circumstance of being a repeat offender): eight years’ imprisonment).

The maximum penalty is rarely handed down in France, Germany (with a few exceptions, for instance, the offence of sexual abuse of children, including body contact), Italy (no cases found in the data from the Court of Appeal District of Genova. In general, Italian judges rarely use the maximum sanction: this is due to the often very high maximum, and the use of a “special proceeding”, like “patteggiamento” or “giudizioabbreviato”, which concedes a “discount” of up to 1/3), Poland (only in very exceptional cases: in 2007 in no cases, in 2011, in case of an offence provided for in Article 202§4, in one case the court imposed a sanction of imprisonment for over 8 years, the maximum sanction level being 10 years), Sweden (only once in ten years’ time did a conviction result in a prison sentence within the higher prison term of 2-4 years).

As a conclusion, it could be stated that in all systems examined, courts have a very wide discretion. In general, penalties are provided for with fixed lower and higher limits which must be respected by judges (see Germany, Poland, Spain, Italy, Hungary). Judicial discretion allows judges to sentence on the basis of principle of proportionality and individualization in all MS (see, among the others, the case of France, Italy and Spain).

The exercise of that discretion is particularly evident in some domestic laws (for example, Germany and Poland), with reference to provisions in which the range between the minimum and the maximum sanction is significant.

In general, the criteria applied for determining the degree of punishment (for instance, the seriousness of the harm, the degree of the guilty mind, the personality of offender) does not seem to lead to generally heavier sanctioning practice, with respect to other serious offences against persons, even if the assessment of punishment tend to be very rigorous.

4. AGGRAVATING AND MITIGATING CIRCUMSTANCES

The Framework Decision provides that the aggravated offence should be punishable by a maximum of at least between 5-10 years imprisonment. Aggravating factors include: the act of coercing a child to participate in pornographic performances; profiting from the exploitation of the child; where the victim is below the age of sexual consent; where there has been endangerment of the child’s
life; where serious violence or serious harm is involved; and when committed in the framework of a criminal organisation.

4.1. Situation in the different countries

In **Cyprus** the aggravating and mitigating factors are established and set out by the Supreme Court (Court of Appeal), in line with case law approach of the legal system. Examples of aggravating factors include the sophistication of the act, the amount of money acquired, previous criminal record, membership of a criminal organisation. Mitigating factors include no previous convictions, an early guilty plea, showing remorse.

**French** law lists the following aggravating circumstances: organized group and use of communication network service. These circumstances lead to a compulsory increase of the maximum of the sentence. The only existing generic aggravating circumstance, recidivism, leads to a compulsory minimum penalty applicable. There are no generic or specific mitigating circumstances.

**German** law provides for aggravating circumstances if the basic offences of §§ 184b and 184c are committed on a commercial basis or as a member of an organisation (§ 184b (3) and § 184c (3) StGB respectively). Mitigating circumstances are foreseen if a person undertakes [encompassing attempt and completion] to obtain possession of or possesses child pornographic material reproducing an actual or realistic activity (§ 184b (4) and § 184c (4)); punishment is excluded if the respective pornographic material has been produced in mutual consent (§ 184c (4)).

**Hungarian** criminal law does set out the aggravating or mitigating factors in its legislation. These have developed in case law and as such can cover those listed in the Framework Decision.

**Italian** Law distinguishes between specific aggravating circumstances with a special effect and “common” specific aggravating circumstances. There are four special aggravating circumstances with a special effect: if other “common” circumstances are also present, the variation of the penalty as a consequence of the last ones has to be calculated on the penalty as it results after the addition/diminution due to the special effect. The special aggravating circumstances are the quantity of the material, the age of the victim when under 14 years old and the role of the perpetrator (victim’s grandparent, parent, included the adoptive one and the parent’s non married partner, a relative, the guardian or a person to whom the victim has been committed for health care, education, care, custody or professional reasons or is a public officer on duty), and when the
victim is in a situation of psychic illness or disability. The common specific aggravating circumstance is the use of violence or threat. Specific mitigating circumstances are also foreseen: The penalty is reduced by 1/3 to ½ for those who actively work towards securing the release of a child or for them to regain their autonomy. The penalties are reduced by up to ½ for those accused who strives to prevent the criminal activity resulting in further consequences by concretely helping the police or the judicial. There are no generic aggravating circumstances, nor generic mitigating circumstances.

In Latvia, aggravating factors are set out in the General part of the Criminal Law, as follows: the criminal offence was committed repeatedly or constitutes recidivism; the offence was committed by a group of persons; offence committed, taking advantage in bad faith of an official position or the trust of another person; the criminal offence has caused serious consequences; offence committed against a person who has not attained 15 years of age or against a person taking advantage of his or her helpless condition; offence committed against a person taking advantage of his or her official, financial or other dependence on the offender; offence committed especially cruelly or with humiliation of the victim; taking advantage of the circumstances of a public disaster; employing weapons or explosives, or in some other generally dangerous way; the criminal offence was committed out of a desire to acquire property; offence committed under the influence of alcohol, narcotic, psychotropic or other intoxicating substances; the person committing the criminal offence, for purposes of having his or her sentence reduced, has knowingly provided false information regarding a criminal offence committed by another person; racist motive. Concerning practice it could be concluded that basically but not always the mentioned circumstances lead to an increase of the sentence. The generic mitigating circumstances, foreseen in the General part of the Criminal Law, are: the perpetrator of the criminal offence has admitted his or her guilt, has freely confessed and has regretted that which he or she has committed; the offender has voluntarily compensated the offender has actively furthered the disclosure and investigation of the offence; the offender has facilitated the disclosure of the crime of another person; for the loss occasioned or has allayed the harm caused; the criminal offence was committed due to serious personal or family circumstances; the criminal offence was committed under the influence of violence, or on account of financial or other dependence; the criminal offence was committed as a result of the unlawful or immoral behaviour of the victim; the criminal offence was committed exceeding the conditions regarding necessary self-defence, extreme necessity, arrest of the person committing the criminal offence, justifiable professional risk or the legality of the execution of commands and orders; the criminal offence was committed by a pregnant woman; and the criminal offence was committed by a person in a state of diminished mental capacity. Basically but not always the mentioned circumstances can lead to an increase of the sentence.
In **Poland**, only general rules of aggravation and mitigation apply, e.g. regarding aggravating circumstances recidivism (relapse into crime) (Article 64) and commission in an organized or commercial form (Article 65). Under Article 64 the maximum statutory penalty is increased by half if the perpetrator re-offends committing an offence similar to the one for which he/she has been sentenced. According to Article 65 the maximum statutory penalty is increased by half if the perpetrator acts in an organized group, whose aim is to commit offences, or has made the commission of crimes a permanent source of his income.

In **Romania**, there are no specific circumstances. The aggravating and mitigating circumstances are provided in the general part of the Criminal Code. The list thus provided is not exhaustive, and the court may deem as aggravating or mitigating factors any other element or situation, if it considers it relevant for that specific case. There is a list of mitigating circumstances in the general part of the Criminal Code, but the list is not exhaustive, and the court may add any other element or situation, if it considers it relevant for that specific case. Mitigating circumstances lead to a compulsory decrease (reduction) of the legal minimum of the penalty.

In **Spain**, the specific aggravating factors foreseen in the special part of the Criminal Code are as follows: using children under the age of thirteen years; when the acts are particularly degrading or humiliating in nature; when the acts are especially serious in view of the financial value of the pornographic material; when the pornographic material displays children or the incapacitated who are victims of physical or sexual violence; when the offender belongs to an organisation or assembly, even if transitory in nature, with the purpose of perpetrating those activities; when the offender is an ascendant, tutor, carer, minder, teacher or any other person in charge, de facto or de jure, of the minor or incapacitated person. These circumstances lead to a compulsory increase of the applicable penalty. There are not specific mitigating circumstances in the special part. There is a list of the generic aggravating circumstances in the general part of the Criminal Code, but only the following can be applicable to child pornography: abuse of confidence; by using advantages of being an authority or public servant; being a recidivist. The generic mitigating circumstances existing in the list that are applicable are the following: Incomplete exemption causes; drugs addiction; intense passion which reduces the capacity to understand or to decide; confession before knowing the start of the investigation; reparation; undue delay in the procedure. The effects of the generic aggravating and mitigating circumstances are the following: not existing generic circumstances (mitigating or aggravating), the Court can decide a sentence between the minimum and the maximum of the penalty foreseen in the Penal Code. The presence of only two or more mitigating factors the Court can impose a sentence one degree above the “normal” maximum.
foreseen. The presence of one or two aggravating factors the Court has to impose the upper half of
the penalty foreseen in the Penal Code. The presence of more than two aggravating circumstances
the Court can impose the one degree above penalty.

In Sweden, an aggravating factor is foreseen in case of a grave offence, e.g. if committed in the
course of business or otherwise for profit, as part of a criminal activity that was systematically
practiced or practiced on a larger scale, or concerned a particularly large number of pictures or
pictures in which children are particularly young, are exposed to violence or force or are exposed to
especially ruthless treatment (Ch. 16 Sect. 10a para. 5 Penal Code). In assessing penal value, the
following aggravating circumstances shall be given special consideration in addition to what is
applicable to each and every type of crime: whether the accused intended that the crime should
have markedly more serious consequences than it in fact had; whether the accused manifested
especial ruthlessness; whether the accused exploited some other person's vulnerable position or
that person's special difficulties in protecting himself; whether the accused grossly exploited his
position or otherwise abused a special confidence or trust; whether the accused induced another
person to take part in the crime by coercion, deceit or misuse of that person's youthfulness, lack of
understanding or dependent status; or whether the crime was part of a criminal activity which was
especially carefully planned or carried out on a large scale and in which the accused had a
significant role; or whether the motive for the crime was to aggrieve a person, ethnic group or
some other similar group of people be reason of race, colour, national or ethnic origin, religious
belief or other similar circumstance, whether the crime was intended to harm the safety and thrust
of a child within its relationship with a close person. (Chapter 29, Section 2 of the Penal Code).

Mitigation is possible in case of a petty offence (Ch. 16 Sect. 10a para. 2 Penal Code). In assessing
penal value, the following mitigating circumstances shall be given special consideration in addition
to what is prescribed elsewhere, if, in a particular case: the crime was occasioned by the grossly
offensive behaviour of some other person; the accused, in consequence of a mental disturbance or
emotional excitement, or for some other cause, had a markedly diminished capacity to control his
actions; the actions of the accused were connected with his manifestly deficient development,
experience or capacity for judgement; the crime was occasioned by strong human compassion; or
the act, without being free from criminal responsibility, was such as is covered by Chapter 24
(Chapter 29, Section 3 of the Penal Code).

In United Kingdom, for England and Wales, general aggravating and mitigating factors are set out
in the formal sentencing guideline. Some derive from case law; others from statute. Additional,
special aggravating and mitigating factors apply to particular offences. In Scotland general
aggravating and mitigating factors are established through case law. In Northern Ireland general aggravating and mitigating factors are established through case law and secondary legislation. As such those listed in the Framework Decision are capable of being accommodated.

4.2. Key common points and differences

In Cyprus and in Hungary the aggravating circumstances are established in the case law. In United Kingdom, some of them derive from the case law, but other from statute. There are aggravating circumstances specific to the offence foreseen in the Penal Codes in Germany, Italy, Poland and Sweden. In France, there are two specific aggravating circumstances and one generic aggravating factor (a generic aggravating factor is one which is applicable to all offences as opposed to those specific aggravating factors which relate to a particular offence. In Spain there are specific and generic aggravating circumstances. We consider generic aggravating circumstances those that are foreseen in the general part of the Penal Code and that apply to all kind of offences. Specific aggravating circumstances are those that are foreseen in the special part of the Code for a concrete offence, creating an aggravated offence. In Latvia and in Romania, there are only generic circumstances, with a non-exhaustive list in Romania.

The case law in the common law countries (Cyprus, UK) and Hungary, seem to be able to cover all the aggravating circumstances that are foreseen in the FD. None of the other States include in the Law all the aggravating circumstances that are foreseen in the FD. The aggravating circumstances consisting in the age (below the age of sexual consent) is foreseen in different ways in the different countries: Spain (age below 13 years), Germany and Italy (below 14), Latvia (below 15) or even in Sweden and UK it is considered an aggravating factor if the victim was particularly young. The deliberate or reckless endangerment of the life of the child is foreseen as an aggravating circumstance in Latvia. If the offence caused serious violence or harm to the child, this aggravates the sanction in Italy, Latvia, Spain, Sweden and UK. If offences are committed within the framework of a criminal organization this aggravates the sanction in France, Germany, Poland, and Spain.

The effects of the aggravating and mitigating circumstances are very varied. In UK and Cyprus (common law Systems) and in Hungary, the Courts impose the appropriate penalty taking into account the seriousness of the crime as well as any other aggravating and mitigating factors. In France recidivism lead to a compulsory minimum penalty. Italy and Spain, the aggravating and the mitigating circumstances lead to a compulsory increase or reduction of the sentence. In Germany
only the specific aggravating circumstances lead to a compulsory increase of the sentence, and there is an open list of generic circumstances that the court can appreciate, as aggravating or mitigating circumstances and that may increase or reduce the sentence. In Latvia, basically but not always, the aggravating circumstances can lead to an increase of the sentence. In Poland, in some cases the rules are compulsory and in other cases they are not. In Romania the aggravating circumstances lead to an optional increase of the penalty and the mitigating circumstances lead to a compulsory decrease reduction of the legal minimum of the penalty. As set out above, in Sweden, only the specific aggravating circumstances lead to a compulsory increase of the sentence.

Those Member States who specifying aggravating factors in their legislation, do not take into account all those listed in the Framework Decision, although it is likely that the generic factors are capable of accommodating them.

For all offences the presence of vulnerability or membership of a criminal organisation as an aggravating factor in France raises the maximum sanction in France to 10 years and a fine of €150000. For all offences, membership of a criminal organisation raises the sanction in Latvia to 5-15 years. For all offences use of a computer network in Romania increases the sanction to 3-12 years.

For Article 3(1)(b) offence use of a computer network in France raises the sanction to a maximum of 7 years and fine of 100000€.

In Germany, membership of a criminal organisation increases the sanction for an Article 3(1)b) or (c) offence to 6 months-10 years (child) or 3 months – 5 years (juvenile or if acts on a commercial basis).

In Spain the presence of any of the following factors in the commission of an Article 3(1)(b), (c) or (d) offence increases the sanction to 5-9 years, vulnerability, dependence, criminal organisation membership, serious harm caused or use of a computer network.

Although the level of penalties "in law" is generally in line with provisions of the Framework Decision, statistics show that in practice:

a. maximum penalties are almost never imposed, and the penalties imposed are never fully enforced;

b. fines play an important role;
c. sanctions against legal entities, if provided for by domestic law, are never imposed.

<table>
<thead>
<tr>
<th></th>
<th>Organized group</th>
<th>Danger for the life</th>
<th>Age of the victim</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>CY</strong></td>
<td>Case Law</td>
<td>Case Law</td>
<td>Case Law</td>
</tr>
<tr>
<td><strong>FR</strong></td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td><strong>DE</strong></td>
<td>Yes</td>
<td>No</td>
<td>In the definition of the offences</td>
</tr>
<tr>
<td><strong>HU</strong></td>
<td>Case Law</td>
<td>Case Law</td>
<td>Case Law</td>
</tr>
<tr>
<td><strong>IT</strong></td>
<td>No</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td><strong>LV</strong></td>
<td>Yes (generic)</td>
<td>Yes (generic)</td>
<td>In the definition of the offences</td>
</tr>
<tr>
<td><strong>PL</strong></td>
<td>Yes (generic)</td>
<td>Yes (generic)</td>
<td>In the definition of the offences</td>
</tr>
<tr>
<td><strong>RO</strong></td>
<td>Yes (generic)</td>
<td>Yes (generic)</td>
<td>Yes (generic)</td>
</tr>
<tr>
<td><strong>ES</strong></td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td><strong>SE</strong></td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td><strong>UK</strong></td>
<td>Case Law</td>
<td>Case Law</td>
<td>Case Law</td>
</tr>
</tbody>
</table>

Table 3 Aggravating circumstances

5. SANCTIONS OTHER THAN IMPRISONMENT AND FINES

Whilst national laws provide for a varied array of sanctions other than imprisonment and fines, it is either the case that the information is available only on the use of disqualification or that the available data indicates that disqualification is the sanction most used by national courts.

5.1. Community Service

In Cyprus the only other sanction available is a community service sentence, although this has not been used in child pornography cases. Community service is also available in Latvia. In the United Kingdom, community service is available together with one or more of the following requirements: unpaid work; activity; programme; prohibited activity; curfew; exclusion; residence; foreign travel
prohibition; mental health treatment; drug rehabilitation; alcohol treatment; supervision; and attendance centre (restricted to offenders aged under 25).

5.2. Confiscation and Forfeiture

In the Member States studied there is a range of other sanctions available. Confiscation/deprivation orders are available in France, Germany, Hungary, Latvia, Poland, Romania and the United Kingdom. Whilst forfeiture of economic proceeds is an available sanction in Italy and Romania.

In Spain confiscation of all pornographic material concerned in the offence for its destruction and confiscation of the instruments and revenues is decreed in all of the judgments.

5.3. Restricted Movement

In France, an offender can be prohibited from leaving the country. In Hungary, Poland and Spain, a ban can be placed on entering certain areas with the additional prohibition of making contact with certain individuals available in Poland and Spain.

5.4. Restrictions on Work Related Rights

In Italy, the restriction on a person's profession can also include revocation of radio/television license and closure of businesses.

In practice in some countries (France and Hungary), these types of sanctions are of less importance. In France, for instance, that sentence is rarely pronounced.

In Sweden the license to practice medicine can be revoked and a person can under certain circumstances be the object of disciplinary measures, dismissal, or suspension. The statistics from the Medical Responsibility Board has improved from 2011, and now it is specifically stated when the ground for revoking the licence to practice medicine is based on criminal activities. In 2011, 3 licences were revoked on this ground specifically, and in 2012 the number increased to 10. The total number of revoked licences to practice medicine was 24 and 50 respectively in those years. The decisions of the Medical Responsibility Board can be appealed to the administrative courts.
In **Germany, France, Hungary, Latvia, Poland, Romania** and **Spain** offender can also be subject to a prohibition on holding public office.

In **Spain** the accessory penalty of special barring from running for public office for the duration of the sentence, according to article 56.2 of the CP, as well as payment of court costs are applied. When the offence is accompanied by the offence of sexual abuse, a restraining order is also applied for more than the duration of the main sanction applied, and in all of them the payment of compensation for non-material damages is imposed.

In **Poland** one of the penal measures is deprivation of public rights, which includes among others the loss of the right to vote or be elected. The court may impose deprivation of public rights in exceptional cases i.e. in cases case of imprisonment for a period of no less than 3 years for an offence committed out of motivation deserving particular reprobation. In practice, with reference to offences related to child pornography, according to available data, in 2002 Courts imposed only 2 penal measures; in 2007 none; in 2011, 61 penal measures on 52 perpetrators.

### 5.5. Restriction of Other Rights

Parental rights can be subject to restrictions in **France** (where there is a requirement to complete a parental accountability program), **Romania** and **Spain**. Disqualification from driving is an additional sanction available in **France, Hungary** and **Latvia**. In **Hungary** further options include probation and expulsion of non-citizens.

### 5.6. Treatment

Rehabilitation orders can be made in **Germany, France** (therapeutic injunction), **Hungary** and in **Poland** where on offender can be obliged to undergo medical treatment in order to reduce their libido after serving imprisonment term (chemical castration).

The **United Kingdom** also applies a compulsory notification requirement for most of the above offences.
Table 4. Sanctions other than imprisonment and fine

<table>
<thead>
<tr>
<th>Sanction</th>
<th>Community Service</th>
<th>Confiscation/deprivation orders</th>
<th>Forfeiture of economic proceeds</th>
<th>Forbiddance from leaving Country</th>
<th>Forbiddance from entering certain areas</th>
<th>Prohibition from making contact with certain individuals</th>
<th>Prohibition from undertaking certain professions</th>
<th>Prohibition from undertaking certain public office</th>
<th>Restriction of Parental rights</th>
<th>Disqualification from holding public office</th>
<th>Disqualification from driving</th>
<th>Expulsion of non-citizens</th>
<th>Rehabilitation orders</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cyprus</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
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<td></td>
<td></td>
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<tr>
<td>France</td>
<td>✓</td>
<td>✓</td>
<td></td>
<td></td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td></td>
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<tr>
<td>Germany</td>
<td>✓</td>
<td></td>
<td></td>
<td>✓</td>
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<tr>
<td>Hungary</td>
<td>✓</td>
<td></td>
<td>✓</td>
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<td>✓</td>
<td>✓</td>
<td>✓</td>
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<tr>
<td>Italy</td>
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<td></td>
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<td>✓</td>
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<tr>
<td>Latvia</td>
<td>✓</td>
<td>✓</td>
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<tr>
<td>Poland</td>
<td></td>
<td>✓</td>
<td></td>
<td>✓</td>
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<tr>
<td>Romania</td>
<td></td>
<td>✓</td>
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<tr>
<td>Spain</td>
<td></td>
<td></td>
<td></td>
<td>✓</td>
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<tr>
<td>Sweden</td>
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<td></td>
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<tr>
<td>United Kingdom</td>
<td>✓</td>
<td>✓</td>
<td></td>
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</table>

5.7. Conclusion

The lack of comprehensive statistics does not allow the drawing of definitive conclusions on the practice regarding to the sanction of disqualification for child pornography offenders. Collected statistics data mainly refer to disqualifications, arising from convictions, which can be imposed in addition to imprisonment and fine.

The situation in this field varies significantly from one Member State to another since the legislation is not heterogeneous. In some Member State application of disqualifications is a judicial
discretion (France); in other domestic laws there is no provision setting forth this kind of penalty in case of child pornography or sexual exploitation offences; in some cases (Germany and Italy) application of disqualifications is mandatory and qualified as a penal consequence of conviction.

In the other MS disqualifications are very rare (France) or never applied. Only in some MS (Sweden and Spain), is there a specific disqualification imposed, such as the revocation of the licence to practice medicine or disciplinary measures (dismissal, suspension) or restraining order. Generally MS seem to not take into account specific measures to ensure that individuals who have been convicted of child pornography may be temporarily or permanently prevented from exercising activities involving regular contacts with children.

Statistics data suggest that where not compulsory (as set out above) sanctions other than imprisonment and fines do not represent a common sanction for combating child pornography and sexual exploitation.

6. SUSPENDED SENTENCES AND EARLY RELEASE

6.1. Suspended sentences

In all Member States studied suspended sentences are available, provided that the sentence of imprisonment imposed is under a certain number of years as set out in the table. By contrast, such a maximum term of imprisonment is not specified for France, Sweden and the UK.

<table>
<thead>
<tr>
<th>Country</th>
<th>No. Years</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cyprus</td>
<td>3</td>
</tr>
<tr>
<td>France</td>
<td>-</td>
</tr>
<tr>
<td>Germany</td>
<td>2</td>
</tr>
<tr>
<td>Hungary</td>
<td>2-5</td>
</tr>
<tr>
<td>Italy</td>
<td>2</td>
</tr>
<tr>
<td>Latvia</td>
<td>5</td>
</tr>
<tr>
<td>Poland</td>
<td>2</td>
</tr>
<tr>
<td>Romania</td>
<td>3</td>
</tr>
<tr>
<td>Spain</td>
<td>2</td>
</tr>
<tr>
<td>Sweden</td>
<td>-</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>2</td>
</tr>
</tbody>
</table>
Table 5. Suspended Sentences and the maximum no. of years

The statistical data obtained are not uniform as some countries have very detailed statistics (like Germany), whilst the data obtained regarding other countries cover sexual offences in general, and others do not even have statistical data regarding offence type or those data are very vague. We will thus differentiate between those countries who have provided general data, those who provided data on sexual offences in general and those that have specific data on child pornography.

In Cyprus from the three sentences on child pornography before district courts, one was suspended (33%). In France 90% were suspended. In the UK data for sexual offences in general show that the suspension of sentences has increased steadily, however it still remains low at 2% in 1999, 6.2% in 2006, to 9% in 2012.

In Germany sexual abuse offence in general at least 60% of the prison sentences are suspended on probation, with a tendency to increase from 61% in 2002, to 70% in 2011 and more than 90% of the sentences up to two years are suspended on probation. In relation to child pornography offences (only a sample is included here, the complete data can be seen in the Annex). Sexual abuse of children with direct body contact (§ 176 Subs. 1-3 StGB): only approx 4% of all persons convicted for sexual abuse of children according to § 176 (1-3) StGB were punished by a fine. However, the suspension rate is relatively high (80%). Thus, the probability for a prison sentence without probation after a conviction for sexual abuse according to § 176 (1-3) StGB was up to a bit more than 18 % in 2011. For distribution, acquisition and possession of Child Pornography (§§ 184b, 184 subs. 4, 5 StGB, old version) more than 90% are suspended. For distribution of Juvenile Pornography (§ 184c StGB new version) between 100% and 90% of the sentences are suspended.

In Latvia offences of section 166 CC are not suspended and no early release is granted. In Poland 93% were suspended, in Romania art. 18 CC offences sentences were all suspended in 2012, and art. 51 CC offences in 87% of the cases; in Spain there were no statistical data, but practice shows that in the vast majority of child pornography cases that are sanctioned with less than 2 years imprisonment, the execution of the sentence is suspended. This does not apply to Art. 198.1 a) and b) CC, where no suspension is allowed. In Sweden the majority of sentences are suspended, but no specific statistics are available.
The data suggests that the practice varies although there is a tendency in all cases, where the limit of the penalty allows, for the sentence to be suspended.

6.2. Early release

Mandatory or discretionary early release is a possibility in all Member States studied. Early release is subject to the individual having served a certain proportion of their sentence. In Cyprus, the scale is set out in the law, in France it depends on the behaviour, in Germany early release is possible after two thirds of the imposed sentence, but not less than two months, have been served. After one half of a fixed-term sentence of imprisonment, but not less than six months, have been served, the court may grant conditional early release, if the convicted person is serving his first sentence of imprisonment, the term not exceeding two years. In Hungary (in case of up to 3 year sentence after half of the sentence), Italy (after having served at least 30 months and half of the sentence, when the residual part of it is not more than five years with repeat offenders required to serve at least four years of detention and after at least three quarters of the original sentence), Latvia (for less serious crimes has to have served not less than half the sentence imposed, for a serious crime not less than two-thirds and for an especially serious crime not less than three-quarters of the sentence imposed), Poland (after having served at least half of the sentence), Romania (percentage of sentence to be served not specified), Spain (where three quarters of the sentence handed down has been served. When the prison term exceeds 5 years and the victim is under 13 years of age, the offender shall not attain this stage until he has served half of the prison term), Sweden (when two-thirds of the sentence, but at least one month, has been served) and United Kingdom (when ½ the sentence has been served, unconditionally when sentence imposed is less than 12 months and on licence when it is over 12 months). The rehabilitation and behaviour of the individual will be taken into account in Cyprus, France, Italy, Latvia, Spain and Romania.

<table>
<thead>
<tr>
<th>Country</th>
<th>Term to be served before early release</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cyprus</td>
<td>- For a sentence of between 1 month and 2 years imprisonment, the reduction provided is 6 days per month.</td>
</tr>
<tr>
<td></td>
<td>- For a sentence of between 2 years and up to 5 years imprisonment the reduction provided is 8 days per month.</td>
</tr>
<tr>
<td></td>
<td>- For a sentence of between 5 years up to 8 years imprisonment the reduction is 10 days per month.</td>
</tr>
<tr>
<td></td>
<td>- For a sentence of between 8 years and 12 years the reduction</td>
</tr>
</tbody>
</table>
provided is 12 days.
- For a sentence of more than 12 years the reduction is up to 14 days per month.

<table>
<thead>
<tr>
<th>Country</th>
<th>Minimum Term to be served of sentence before early/conditional release is possible</th>
</tr>
</thead>
<tbody>
<tr>
<td>France</td>
<td>-</td>
</tr>
<tr>
<td>Germany</td>
<td>⅔ sentence, but not less than 2 months.</td>
</tr>
<tr>
<td></td>
<td>½ sentence, but not less than 6 months (if the convicted person is serving his first sentence of imprisonment, the term not exceeding 2 years)</td>
</tr>
<tr>
<td>Hungary</td>
<td>½ sentence (up to 3 years sentence)</td>
</tr>
<tr>
<td>Italy</td>
<td>30 months + ½ sentence (less than 5 years)</td>
</tr>
<tr>
<td></td>
<td>4 years + ¾ sentence (repeat offenders)</td>
</tr>
<tr>
<td>Latvia</td>
<td>Not less than ½ sentence (less serious)</td>
</tr>
<tr>
<td></td>
<td>Not less than ¾ sentence (serious crimes)</td>
</tr>
<tr>
<td>Poland</td>
<td>½ sentence</td>
</tr>
<tr>
<td>Romania</td>
<td>-</td>
</tr>
<tr>
<td>Spain</td>
<td>¾ sentence</td>
</tr>
<tr>
<td>Sweden</td>
<td>⅔ sentence at least 1 month</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>½ sentence unconditional release when sentence is less than 12 months</td>
</tr>
<tr>
<td></td>
<td>½ sentence on licence when sentence is over than 12 months</td>
</tr>
</tbody>
</table>

**Table 6. Minimum Term to be served of sentence before early/conditional release is possible**

General data from France do not distinguish between suspension and early release in Italy 20% were released early; in Romania 35.77% of the cases; Spain generally if ¼ up to ½ of the sentence has been served they are released early; UK in sentences of up to 4 years imprisonment, early release is granted at ½ way in around 60 – 70 % of the cases. Specifically related to child pornography offences in Latvia there was no early release for art. 166 offences.

As to the early release, a general conclusion is that the general rules on early release apply in the case of child pornography offences.
7. SANCTIONS FOR LEGAL PERSONS

The Framework Decision suggests the following sanctions, in addition to fines, for imposition against legal persons found guilty of the above offences as set out in the respective national laws.

a) Exclusion from entitlement to public benefits or aid;
(b) Temporary or permanent disqualification from the practice of commercial activities;
(c) Placing under judicial supervision;
(d) Judicial winding-up; or
(e) Temporary or permanent closure of establishments which have been used for committing the offence.

None of the Member States studied include all the sanctions provided for in the Framework Decision. Additional sanctions are imposed by some Member States such as the prohibition to advertise, the revocation of license and the prohibition to make certain payments.

Criminal liability can be found in all Member States studied, except Germany where only a regulatory fine is available. In Hungary, the legal person can be subject to a fine without establishing their criminal liability of the legal person if a natural person was found guilty for intentional commission. On a finding of criminal liability a fine can be imposed in Cyprus, France, Italy (based on a statutory quote scale), Latvia, Poland, Romania, Spain, Sweden (punishment of “entrepreneur” (including legal person) to pay corporate fines) and the United Kingdom (as well as compensation). In Spain the fine is from three to five times the profit obtained, if the offence committed by a natural person has a punishment of imprisonment foreseen exceeding 5 years; or two to four times the profit obtained, if the offence committed by a natural person has a punishment of imprisonment foreseen exceeding 2 years not included in the preceding Section; or two to three times the profit obtained, in the rest of the cases.

7.1. Public Aid

Exclusion from public aid, tenders and funds can be imposed in France, Italy, Poland, Romania and Spain.

7.2. Restriction on Commercial Activity
Disqualification or prohibition from exercising a professional or commercial activity is available as a sanction in France, Hungary, Italy, Romania and Spain. In addition the closure of establishments (either on a permanent or temporary basis) is possible in France, Romania and Spain.

Additionally in France the legal entity can be prohibited from drawing cheques and using payment cards. In Italy and Poland the legal entity can be prohibited from advertising or marketing. Whilst revocation of public licence is possible in Italy.

7.3. Judicial Supervision

A legal person can be placed under judicial supervision in France and Spain (to protect the rights of workers or creditors).

7.4. Judicial Wind-up

In Hungary, Latvia, Romania, Spain and Sweden the legal entity can be wound up, dissolved or liquidated.

7.5. Confiscation and Forfeiture

Confiscation and forfeitures orders can be made in France, Latvia, Spain and Sweden. In practice in France, according to data communicated by the Ministry of Justice, there were no sentences against legal person for child pornography in 2011. With regard to legal persons, the data generally indicates that no legal persons were sanctioned (for example in Spain) for child pornography.
Table 7. Sanctions for legal person

<table>
<thead>
<tr>
<th></th>
<th>Cyprus</th>
<th>France</th>
<th>Germany</th>
<th>Hungary</th>
<th>Italy</th>
<th>Latvia</th>
<th>Poland</th>
<th>Romania</th>
<th>Spain</th>
<th>Sweden</th>
<th>United Kingdom</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
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<td>✓</td>
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<td>✓</td>
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<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
</tbody>
</table>

8. SETTLEMENT OF MINOR CASES

8.1. The definition of “minor case”

With regard to alternative proceedings or other mechanisms when child pornography cases are considered as a minor offence, the first problem encountered is that many of the legal systems analysed lack a definition of “minor case” (Cyprus, France, Italy, Romania or Sweden). In other countries, although there is no formal definition of a petty offence or minor case, the case-law or the sentencing guidelines help identify such a category. In Italy, for example, although a definition of petty offence is lacking, in those cases where a substitute measure to the penalty can be applied, it is considered to be a “minor case”, usually offences with a maximum penalty of 2 years imprisonment. In other countries, the criminal law specifies what is to be considered a petty offence, misdemeanour or minor case (Spain, Germany, or Sweden), but in most cases the offences of child pornography do not fit into the category of petty offences as they are punished with higher penalties or are not defined as misdemeanours.

From the countries studied, only Latvia establishes a division between criminal offences (regulated in the Criminal Code) and administrative offences (regulated in the Code of administrative offences). In such a system, the administrative liability would only apply if criminal liability is not foreseen.
8.2. Special proceedings for minor cases

None of the countries studies provides for special rules applicable to child pornography cases, therefore the discretionary prosecution, the special proceedings, or procedural shortcuts are foreseen in general and not exclusively for these specific offences.

**Spain** has a special procedure for misdemeanours, but it is not applicable to child pornography offences. **Latvia**, as mentioned earlier, deals with minor offences considered as administrative offences in an administrative procedure, although, as we will see, only very few conducts related to child pornography may be considered as administrative offence. **Cyprus, Italy, Romania, Poland** and **Hungary** do not provide for a special proceeding to settle minor cases. However, as we will see later, in some of these countries there are different procedural shortcuts applicable in cases where the social harm is not relevant, or where the defendant enters into an agreement or confesses the crime, and there are also systems that provide for alternatives to the penalty where the penalty does not exceed a certain limit.

As to the mechanisms of diversion, there is a line to be drawn between countries whose criminal justice system follow the so-called principle of legality or mandatory prosecution and those who have introduced different forms of discretionary prosecution. Notwithstanding this difference, some countries apply the principle of legality in a more flexible way, so that the public prosecutor can decide not to prosecute if there is no public interest in prosecuting the case.

**France** applies the principle of discretionary prosecution (*principe d'opportunité des poursuites*). In practice, alternative proceedings are not used for offences against children. Alternatives proceedings could be: a) a reminder of the law by the prosecutor; b) mediation with the victim and the Prosecutor or a representative; and c) a settlement (*"composition pénale"*) if the offence has a penalty not higher than 5 years imprisonment and the offender has confessed the crime. In such cases, the PP can make a proposal for a non-custodial alternative measure, once accomplished the criminal liability is extinguished. If the penalty foreseen for the crime is higher than 5 years imprisonment, the proposal can be a reduced custodial sentence. In this last case, legal counsel is mandatory.

In **Germany**, although the principle of legality still applies, the PP has certain powers to decide on the commencement and discontinuation of the criminal proceedings in minor cases (*Vergehen*) if there is no public interest in the prosecution (Art. 153 German CPC), and in those cases where the punishment would not be useful besides another penalty already imposed to the same offender.
(Art. 154 CPC). Furthermore the PP can decide to impose conditions and instructions upon the defendant (for example, payment of damages, social service, enter into an agreement with the victim), instead of prosecuting. If those conditions are not complied with within the timeframe established, the prosecution of the misdemeanor will continue. This decision requires the approval by the court, unless the consequences of the petty offence are not relevant. All these cases are legally regulated and thus the discretionary power of the PP is quite limited.

The criminal prosecution can also be halted if the offender has already been convicted abroad, has served his sentence and the sentence expected in Germany would be negligible. Moreover, the PP can also decide not to prosecute when the perpetrator is extradited to another country for the same or another offence (Art. 154 b), or when the perpetrator and victim have entered into an agreement compensating the damages caused (Art. 153 a).

Once the criminal proceedings have been instituted, the court can also decide to discontinue the proceedings, in cases of misdemeanours, where there is no public interest upon consent of the PP and of the defendant (Art. 153 (2)).

In Poland the proceedings may not be initiated or may be conditionally discontinued, if the social harm is negligible and the guilt is not significant, and the maximum penalty is not higher than 3 years imprisonment for the offence in abstract. In Romania if the offence does not entail a social danger the criminal court or the PP in the investigative stage can substitute the penalty by an administrative sanction, as for example a reprimand or warning. This alternative sanction, even if theoretically possible in practice is not applied to child pornography, considered as a serious offence.

The Hungarian criminal justice system does not provide for diversionary measures or special proceedings, however regulates procedural short-cuts and fast-track proceedings: first, for simple cases up to 8 years imprisonment (from the point of view of evidence) it provides for an expedited hearing; and second, in cases where the offender has confessed and the maximum penalty is up to 3 years imprisonment, the law provides for a fast-track proceeding. In some cases of extraterritorial jurisdiction, there is also the possibility to decide for the non-prosecution of the crime committed abroad.

Spain provides for a judgment without trial in cases of agreement, where the accused accepts the indictment and the maximum penalty for the offence is not higher than 3 years. In that case, the law provides a reduction of the penalty of one third.
Italy provides for a very similar regulation on the agreement or *patteggiamento* if the penalty, once reduced, does not exceed five years or two years, depending on the offence. These agreements are not exclusively regulated to handle minor cases, as the initial penalty for the offence can be much higher than the reduced one. With regard to child pornography, the agreement within the five years limit is expressly excluded for most offences on child pornography (except offer or dispose of pornographic material, getting or keeping pornographic material and producing, keeping or storing virtual pornography not for commercializing). The agreement within the two-year custodial penalty limit, does rarely apply to child pornography offences. Moreover, the Italian system provides for alternative or substitute sanctions: in cases where the penalty is not higher than 2 years imprisonment, the court may substitute this penalty with the "semi-dentenzione" sanction, where the convicted will be obliged to spend in prison only 10 hours per day; for penalties up to 1 year imprisonment, this penalty can be substituted for controlled freedom, which consists in staying within the territory of the town of residence; and last, for custodial penalties not higher than six months, a substitute pecuniary penalty can be imposed.

In the Latvian legal order, the violation of the requirements of importation, manufacturing or distribution of erotic or pornographic material, is defined as an administrative offence, as long as the conduct is not a criminal offence. If this conduct entails sexual abuse of children, or violence (among other circumstances), it is a criminal offence. Thus, if we are not mistaken, acts of child pornography are always a criminal offence and not an administrative offence. Within the criminal procedure, the Latvian system foresees the possibility of discontinuing the criminal investigation in case of a victim-offender settlement if the penalty is not higher than 5 years imprisonment (which is the case of the offences of child pornography under Art. 166.2 CPC (downloading, obtaining, importation, production, public demonstration, advertising, distribution and possession). The PP can also discontinue the proceedings at the pre-trial stage, and decide for a conditional release according to the circumstances, personal character, risk of committing a new crime, non previous criminal record, consent of the superior PP, and the penalty is not higher than 5 years imprisonment. In cases where the offender cooperates in the disclosure of a more serious crime, the conditional release can also be adopted in cases of serious crimes. Furthermore, the PP can also issue an injunction imposing a fine or community service under the same circumstances, which is widely used in practice. The Latvian system also regulates procedural short-cuts in the form of urgent proceedings and agreements with the prosecution on the guilt and the penalty.

The Swedish system provides for the possibility to sanction minor cases by way of summary orders rendered by the public prosecutor. Usually minor cases are those sanctioned with a fine.
penalty. This would be the case of possession and storage of child pornography without the intention to distribute it. Police summary orders are also foreseen, but apply only in cases of breach of regulations.

In sum, with regard to the existence of special rules or proceedings to settle minor cases and its possible application to child pornography offences, we could conclude on the following classification:

- Systems which provide for the possibility of non-prosecuting or discontinuing proceedings in minor cases at the pre-trial stage by PP: France, Poland, Latvia, Germany, Sweden, Northern Ireland, England and Wales.
- Systems which provide for alternatives to penalty for minor cases: Germany, Italy, Latvia, Romania, Northern Ireland, England and Wales.
- Systems which provide for procedural short-cuts based on confession or admission of guilt and penalty, although not necessarily limited to minor criminal cases: we only include here those countries whose reports mention expressly such procedural measures. We received positive answers for France, Hungary, Italy, Latvia, Spain, Northern Ireland, England and Wales but this list may be incomplete. The questionnaire was focused on settlement of minor cases, thus some of the reports have not mentioned procedural short-cuts or abbreviated procedural forms that are not exclusive of minor cases, but generally applicable.

Since the Framework Decision does not include any special requirement regarding prosecution or settlement it can be said that all states studied are compliant.

If we consider the Directive 2011/92/EU of 13 December 2011, the only Article that may have some incidence with regard to the issue of “settlement of minor cases” is to be found under Article 15(1) of the Directive: “Member States shall take the necessary measures to ensure that investigations into or the prosecution of the offences referred to in Articles 3 to 7 are not dependent on a report or accusation (...) and that criminal proceedings may continue even if that person has withdrawn his or her statements”. This provision of the Directive excludes the possibility that the Member States regulate the offences of child pornography as “private offences” only possible to be prosecuted upon reporting of the victim and as long as the victim does support the accusation.
Several of the countries analysed, although they do not require the victim’s report to prosecute the crime, their legal rules for the possibility to terminate the criminal proceedings upon the agreement or settlement between the victim and the offender. This is the case at present for some of the child pornography offences in Latvia and also in Germany. In such a case, it should be considered if these rules should be revised with a view to the implementation of the Directive.

9. JURISDICTION

In all the eleven countries studied the basic rule on jurisdiction in criminal matters is based upon the principle of territoriality: the criminal law applies to all offences committed within the territory of the State. The territorial principle has a long tradition stemming from the classical concept of State sovereignty and is applied according to the international conventions and agreements. The national territory extends to aircrafts and vessels under the national flag and drilling platforms. The offence is considered committed within the territory of a country when the offender has acted – or should have acted in cases of omission – there, but also when the result is produced or should have occurred according to the intention of the offender in that territory. This general rule seems to apply to all the systems studied, although the terminology may differ. No special rules apply here to child pornography crimes.

With regard to the rules on extra-territorial jurisdiction, the 11 countries studied present some differences, not only with regard to the cases where prosecution of crimes committed abroad is allowed, but also differences regarding the specific conditions.

Regarding the active national principle, where a national commits a crime abroad, all the countries provide for this rule, however different requirements are to be found. According to Article 5 of the Cyprus Criminal Code, CAP.154 and Article 16 of implementing law L.22(III) 2004, cyber crime offences are prosecuted before the Cyprus Courts under the following conditions “ a) If the offence is committed by a Cypriot and the offence is punishable both under the Cypriot criminal law with maximum sentence that of 2 years imprisonment and the law of the state that was committed, or if the offence is committed outside the territorial jurisdiction of any state.” France requires generally also double criminality and a prior complaint by the victim, however these requirements are excluded in cases of child pornography. Germany extends the principle of active nationality to persons who have become German citizens after the commission of the crime, and does not require any double criminality to prosecute Germans abroad; Hungary requires double criminality and the filing of a complaint by the General Public Prosecutor. Italy does not require double criminality, and no complaint is necessary if the offence is punished with more than 3 years
imprisonment, however this minimum penalty does not apply in cases of child pornography. Latvia does not require double incrimination either, and allows not only the prosecution of Latvians who have committed a crime abroad, but also residents in Latvia. Poland requires double criminality and a minimum penalty threshold of 2 years imprisonment. Romania requires double criminality and allows the prosecution of nationals or residents in Romania (except legal persons). In Spain the active nationality principle is foreseen and as a general rule requires double criminality, the filing of a complaint by the victim or the public prosecutor and that the principle of ne bis in idem is respected. However, for offences of child abuse (corrupción de menores) –child pornography is considered included within this category of offences– the universal jurisdiction principle applies. Sweden generally requires double criminality and a minimum of 6 months custodial penalty offence, but these conditions are excluded for moderately serious or serious offences of child pornography. The extra-territorial prosecution based on the active nationality principle applies in this country, not only to nationals and residents in Sweden, but also to Danish, Finnish, Icelandic, or Norwegians if they are in Sweden.

The regulation on extra-territorial jurisdiction for offences of child pornography could be summarized as follows. According to the active nationality principle, child pornography offences will be prosecuted when committed by a national abroad:

- Without the requirement of double criminality in: France, Germany, Italy, Latvia, Spain, and Sweden (in this last country only in cases of moderately and serious crimes) and UK.
- Subject to a minimum penalty for the offence committed: Cyprus (2 years), Italy (3 years, if less, complain of GPP is required), Poland (2 years), Sweden (6 months).
- Subject to filing of complaint: Hungary (by General PP), Italy (complaint by the victim is necessary if penalty less than 3 years); Spain (by victim of PP, if this rule applies and not nexus for universal jurisdiction is present).
- Rule applies also for offender who not national, but is resident: Latvia, Romania, Sweden and UK (in this case subject to double criminality).
- Rule applies also for foreigner who becomes national after committing the crime: Germany, Spain and UK.

The jurisdiction based on the passive nationality principle is specifically foreseen in France, Germany (if offence punishable where offence was committed), in Hungary, in Italy (if the penalty is higher than 1 year imprisonment, the offender is in Italy and there is a complaint by the
Ministry of Justice or the victim), in **Spain** and in **Romania** (if the Romanian citizen has suffered serious injury or harm to his health).

Article 23.4 d) of the Spanish Judiciary Act states that **Spain** has universal jurisdiction to prosecute abroad offences of child prostitution and child abuse (includes child pornography), regardless the nationality of the offender. However, this rule applies only if the offender is in Spain, or any of the victims is Spanish, or there is another relevant nexus with the Spain.

All the countries studied provide rules on the principle of territoriality. The offence is considered to have been committed in a certain territory when the constituent acts of the offence are committed there, and in this sense the legal orders studied comply with the obligations stated under Art. 8(5) Framework Decision (Art. 17(3) Directive). All eleven systems studied allow the prosecution of national offenders abroad. In this sense they comply with Art. 8(1) (and the Directive). According to the national reports it seems that these rules on jurisdiction are also applicable to legal persons, except in **Romania**, where they are specifically excluded.

**10. STATUTE OF LIMITATIONS**

In relation to the statutory period of limitations provided in each of the states analysed as well as the causes for suspension and interruption of that time limit to prosecute, the terminology used in the different national reports is not uniform. For clarity, the term “suspension” refers to the statutory period of limitations in those cases where the time already elapsed is taken into account; and “interruption” for those cases where the time period runs anew.

In **France** the statute of limitations for child pornography offences is 10 years, and is interrupted by any investigative act or prosecution carried out by the authorities with the aim to find evidence and identify the perpetrator. The statute of limitations runs only from the day in which the victim turns 18 years of age. It is also delayed for the time there is a legal impediment or a reason of force majeure.

The statute of limitations for prosecution in **Germany** goes from 3 years to 20 years, depending on the gravity of the offence and the penalty provided. There is a maximum time limit: prosecution is barred when twice the statutory limitation period has elapsed, or three years when the penalty is lower than three years. The statute of limitation is interrupted by the interrogation of the suspect or accused, judicial seizure, or any of the further acts of prosecution, indictment etc. The limitation period is suspended until the victim reaches the age of 18, and in cases of extradition during the
extradition procedure. Furthermore the enforcement of the penalty, measures of rehabilitation, incapacitation, confiscation, etc. that have become final may not be enforced after expiry of the limitation period. Life sentence penalty enforcement is not subject to statute of limitations.

In **Hungary** the period of limitation is equal to the longest duration that can be imposed in abstract for the offence committed, with a minimum range of three years. In case of life imprisonment, the statute of limitations is of 20 years. The statute of limitations is interrupted by any official act carried out within the criminal procedure. Suspension of the limitation period occurs during the time the proceedings are halted due to legal grounds, and recently (as of 2012) a specific rule for child pornography has been approved: the period of the statue of limitations will be extended until the victim has reached the age of 23 years.

**Italy** also establishes a general period of statute of limitations equal to the maximum penalty that can be imposed for the offence, but taking into account the aggravating circumstances (and not the mitigating). The minimum limitation period is 6 years. The ordinary statute of limitations period is doubled in case of child pornography offences (Act of 1.10.2012). As in Germany, the Italian law lists all the possible procedural acts that cause the interruption of the running of the limitation period, in general, any procedural act related to the relevant offence. Grounds for suspension are: request for authorization to prosecute (for example, special immunities), prejudicial questions sent to another judge, existence of a legal impediment.

The **Latvian** criminal law establishes a fixed limitation period according to the category of offence: 2 years for violations, 5 years for less serious crime, 10 years for serious crimes, 15 years for especially serious crimes, 30 years upon decision of the court when the penalty is of life imprisonment, and crimes against humanity which are not subject to statute of limitations. The pressing of charges, the issuing of a search of warrant and the request for extradition of perpetrator, cause the interruption of the limitation period. The statute of limitations is also interrupted by the commission of a new offence, while the previous limitation period has not expired. The report does not mention the suspension of the statute of limitations until the victim has reached the majority of age.

The statute of limitations periods in **Poland** are: 20 years for offences with penalty higher than 15 years, 15 years when penalty is higher than 5 years, 10 years when penalty is higher than 3 years, 5 years if penalty less than 3 years. Crimes against humanity, genocide etc., are not subject to statute of limitations. The commencement of the criminal proceeding does not interrupt the running
of the limitation period, but causes its prolongation for the double. The statute of limitations is suspended until 5 years after the minor has reached the majority of age (23 years old).

The statute of limitations in Romania goes from 5 years to 10 years, depending on the gravity of the offence. Any procedural act that has to be notified to the defendant interrupts the running of the limitation period. However, regardless of the interruptions there is a maximum fixed time of the limitations period, which is the double of the initial one. The statute of limitations will be suspended when there is an impediment on the commencement or continuation of the criminal proceedings. No mention is made on other causes of suspension in the report.

The offences of child pornography in Spain are subject to a statute of limitations of five years, except the cases where one of the specific aggravating circumstances of Art. 189-3 CC (children under 13, violence, organized crime, etc.) applies. In such cases the statute of limitations is 10 years. It is interrupted by the beginning of a criminal investigative procedure regarding the particular offence. Since 2011 the Spanish CC provides for the suspension of running of the limitation period, until the victim is 18 years old.

The statute of limitations for criminal prosecution in Sweden goes from 2 years for minor offences to 10 years for serious crimes, and this limitation period starts running when the victim reaches the age of 18 years (except for minor offences). Furthermore, no penalty will be imposed if following time periods have elapsed: 5 years if the sanction was a fine, 15 years if penalty higher than 2 years and 30 years in higher penalties. The statute of limitations is interrupted when the criminal prosecution starts or when the suspect is remanded in custody. If the defendant has been remanded in custody, but no further prosecution takes place, there is no interruption of the limitation period.

The two common law countries studied (UK and Cyprus) do not provide for any statute of limitations for the prosecution of child pornography offences.

From a comparative perspective, the following conclusions can be drawn, the statute of limitations period in the majority of the countries studied (except UK and Cyprus where there is no time bar to prosecute) depends generally on the gravity of the offence and the penalty provided for it, ranging from a minimum of 2 years to a maximum of 30 years in general (not specifically child pornography offences) and begins to run at the moment when the crime was committed. In all countries studied the statute of limitations is interrupted by the commencement of the criminal investigation, but the different legislations identify this moment in a variegated way: either
generally by mentioning “any investigative act” or by listing every possible procedural act that can cause the interruptive effect.

As to the suspension of the limitation period, there are different reasons that can cause the expiring of the limitation period to be delayed: the request for extradition, the procedure to lift immunity, grounds of *force majeure* or other legal obstacles that prevent the criminal procedure to advance. With a view to the compliance with the Framework Decision (Art. 8(6)) special attention has been paid to the suspension of the statute of limitations until the age the victim has reached the age of majority. France, Germany, Spain and Sweden establish that the statute of limitations is suspended and does not begin to run, until the victim is 18 years old. Hungary and Poland extend the time until the victim is 25 years old. Italy states that the statute of limitations period is doubled for offences of child pornography. Many of these rules on extension or suspension of the statute of limitations in order to ensure that the crime can be prosecuted also after the victim has reached the age of majority have been introduced quite recently (for example, Italy: 2012, Spain: 2011, Hungary: 2012). The reports of Latvia, Romania do not provide information on this point. With regard to UK and Cyprus, as there is no statute of limitations for child pornography offences, the implementation of the FD as well as the Directive does not pose any problems.

**B. IMPACT OF EU LEGISLATION**

All jurisdictions except **Cyprus** have, in one way or other, implemented the Framework Decision. **Cyprus** only punishes conducts relating child pornography in the context of cybercrime. In **Germany** the FD was implemented by the Law of 31 October 2008 (in force 5 November) which newly introduced § 184c into the StGB. In **France**, the main contributions were made by the Act 2004-204, March 9, 2004. In **Hungary** the implementation came into force on 1 July 2007; it introduced Art. 204 HCC in its current form and is also reflected in the new CC of 2012 (in force 1 July 2013). In **Italy**, the FD was implemented by the Act 38/2006, and some changes were made later by Act 172/2012. In **Latvia**, the Criminal Code was amended in 2007 and in 2011. In **Poland**, the FD was implemented by an Act of 24 October 2008 introducing Art. 202 (4n) PCC, establishing the liability of legal persons and extending the statute of limitations period. In **Romania** the legislation in cases of child pornography pre-existed the Framework Decision. A new Romanian Criminal Code was approved by the Parliament in 2009, but the date of its entering into force has not yet been established. In **Spain**, the FD was implemented by the act LO 5/2010 which modified the Spanish Criminal Code. In **Sweden**, the implementation of the FD entailed a change in the penalty levels.
While most legislations do not provide for all of the four categories of conduct contained in Art. 3 Framework Decision all criminalize the basic conducts of distribution, acquisition and possession of child pornographic material, except acquisition and possession in Scotland and in Northern Ireland, and some criminalize additional conducts in line with the FD. All legislations protect minors below 18 years (Germany distinguishing between child and juvenile pornography). Similarly, all legislations provide for the punishment of all forms of (secondary) participation in child pornography and almost all (except Germany) the attempt. In France taking, recording or transmitting a picture or representation of a minor is punishable only when it is intended to disseminate it. This exclusion of the creation for the personal use does not comply with the Framework Decision. Article 3 of the Framework Decision permits the exclusion but only "where, in the case of production and possession, images of children having reached the age of sexual consent are produced and possessed with their consent and solely for their own private use."

The concept of pornographic character is not always correctly defined. In Latvia the punishable traffic consists in "downloading, obtaining, importation, production, public demonstration, advertising or other distribution of such pornographic or erotic materials as relate or portray the sexual abuse of children, bestiality, necrophilia or violence of a pornographic nature, or the keeping of such materials". This definition does not refer to the definition content in the Framework Decision. Virtual representations are not foreseen. In Romania the definition does not comply entirely with the Framework Decision. There is no reference to virtual images. In this country, the punishable possession is only the one aimed to the traffic, but this reduction is not foreseen in the Framework Decision. Article 3 Framework Decision, permits the exclusion but only "where, in the case of production and possession, images of children having reached the age of sexual consent are produced and possessed with their consent and solely for their own private use." There is no definition of "child pornography" in the Spanish Criminal Code.

In the Romanian legislation in force, the attempt is punishable only when the offence is committed by using a computer system or computer data storing device, but the Framework Decision requests all Member States to take all necessary measures to ensure than an attempt is punishable in all the cases.

As to the aggravating circumstances the national legislation falls short of the Framework Decision's demands in that all listed circumstances are not covered (only, basically, the commission in an organized form) nor are all specific child pornography offences contain aggravating circumstances. In the Common Law countries (England and Wales, Northern Ireland, Scotland and Cyprus) the circumstances are totally or partly established by the case law.
In sum, it can clearly be concluded that the relevant EU legislation has produced considerable harmonization of the legislation of the Member States, but some differences in definition and some inadequate implementation still exist. With a view to the correct implementation of Directive 2011/92/EU, special attention should be paid to the existing gaps in the implementation of FD so that these gaps will be closed.
2.2. Drug Trafficking

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Drug Trafficking

Key Findings

- All jurisdictions cover the basic conduct of the offence as set out in the Framework Decision.
- The aggravating circumstances in national legislation largely cover those of the FD. Inclusion of mitigating factors is not as extensive.
- Although Member States respect the minimum maximum penalties of the FD, the penalties vary greatly, ranging from 3 years up to 20 years.
- All Member States had existing provisions for drug trafficking and so few made substantial amendments to their national laws following the adoption of the FD.
- Progress has been made towards consistency, amongst the definition of the basic offence, whereas substantial differences exist in relation to the sanctions imposed. There is scope for further approximation of both.

A. ASSESSMENT ON THE LEVEL OF COINCIDENCE / DIVERGENCE OF NATIONAL SYSTEMS

1. Relevant EU Secondary Legislation

The relevant instrument is Council Framework Decision 2004/757/JHA of 25 October 2004 (FD) on laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking. The FD aims to focus on “the most serious types of drug offence” (preamble para. 4) and to introduce “effective, proportionate and dissuasive” penalties taking into account, on the one hand, quantity and type of drugs and, on the other, a possible cooperation of the suspect as aggravating or mitigating factors (ibid., para. 5, 6). “Drugs” and “precursors” are defined with a view to the 1961 Single Convention and the 1971 Vienna Convention (Art. 1). As incriminated conduct the FD lists all forms of conduct from production to distribution of drugs, concretely: production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport,
importation or exportation (Art. 2 (1)(a)), cultivation of opium poppy, coca bush or cannabis plant
(Art. 2 (1)(b)) and the possession or purchase with a view to production, distribution in the sense of
lit. a (Art. 2 (1)(c)). As to precursors the "manufacture, transport or distribution ... knowing that they
are to be used in or for the illicit production or manufacture of drugs" shall be made punishable
(Art. 2 (1)(d)). However, all these forms of conduct shall not be covered if they are only committed
for the perpetrator's "own personal consumption" (Art. 2 (2)).

Apart from direct commission incitement, aiding and abetting and attempt shall also be punishable
(Art. 3 (1)); attempt to offer or prepare or merely possess drugs may be exempted, though (Art. 3
(2)). Penalties shall be "effective, proportionate and dissuasive" (Art. 4 (1)), at least between 1 and
3 years of imprisonment (Art. 4 (2)). As aggravated circumstances are listed large quantities of or
especially harmful drugs (imprisonment of "at least" 5 and 10 years, Art. 4 (2)) and commission
within the framework of a criminal organization (imprisonment of "at least" 10 years, Art. 4 (3), or,
with regard to precursors, 5 and 10 years, Art. 4 (4)). The substances object of these offences and
the instrumentalities used shall be confiscated (Art. 4 (5)). As mitigating circumstances renouncing
the criminal activity and cooperation with the authorities providing relevant information is listed
(Art. 5). Art. 6 and 7 provide for the liability and sanction of legal persons, Art. 8 for (extraterritorial)
jurisdiction.

2. INCRIMINATED CONDUCT

2.1. Definition of the offences

In Cyprus, the illicit drug trafficking is foreseen in the Narcotic Drugs and Psychotropic Substances
law of 1977, amended in 1992 and in 2010. The different modalities of the offence covered by the
1977 Law are:

a. Drug trafficking: producing and manufacturing controlled drugs, supplying or offering to
sale, distributing or selling, importing and exporting controlled drugs.
b. Possession and use: possession of drugs with intention to supply illicit drugs or even for the
own use; smoking or taking cannabis, opium, cocaine or derivatives.
c. Promoting the use: to promote or encourage illegal use of illicit drugs (with printouts,
photographs, movies, videotapes or with any other method of promoting, advertising or
providing information for manufacturing or supplying or distributing testers).
d. Precursors and cultivation of plants: cultivating, planting or growing any kind of cannabis plant, opium poppy, coca bush; preparation or distribution of substances or equipment from which drugs can be manufactured or selling cannabis plant seeds.

The Law of 1977 classifies controlled substances as Class A, Class B and Class C according to their abuse potential, etc. Class A drugs have the highest abuse potential and risk of harm to public health whereas Class C drugs have the lowest. Amongst others, cocaine, heroin and Ecstasy pills are ranked as Class A drug. Cannabis is a Class B drug and anabolic drugs are Class C drugs.

The required mens rea for all these offences is intention.

In France, the French Penal Code defines as punishable, the following:

a. Drug trafficking: 1) Directing or organizing a group whose purpose is the production, manufacture, import, export, transport, possession, supply, transfer, acquisition or use of narcotic drugs. 2) The production or manufacture of drugs. 3) The importation or exportation of drugs, supply, transfer, facilitation, by any means whatsoever, of the illicit use of narcotic drugs; to deliver narcotic drugs after presentation of prescriptions knowing these prescriptions are fictitious or convenient; and the sale or offer to sale of illicit drugs to a person for his personal use.

b. Possession and use: 1) Possession, acquisition or use of narcotics. 2) Obtaining narcotic drugs by fictitious or convenient prescriptions.

c. Provocation: Provocation of a minor to possess, supply, transfer, acquire or use narcotics; and provocation to use of narcotic or any product presented with the same effects as narcotics.

d. Precursors: In France the Act n° 96-542 19 June1996 foresees fines in case of failing to carry out some duties concerning certain substances that can be used to produce drugs. Furthermore the importation of the precursors or supplying them can be punishable as complicity.

The narcotics or psychotropic drugs are defined in the French Public Health Code and in an ordinance issued by the Minister of Health upon proposal by the General Director of the National Agency of Security of Medicines and Health Products. A decree dated February 5th, 2007, has created specific provisions in the French public Health Code concerning the Khat and any parts or any products from or containing any parts of Cannabis. Furthermore, substances or products listed by international treaties ratified by France are all deemed to be narcotics under the provisions of
the French Penal Code prohibiting Drug trafficking, since Article 55 of the French Constitution provides that International treaties have authority upon national law. Intention is always required. The complicity for the offences of drug trafficking is governed by the general provision of the French Penal Code. According to this code, the accomplice to an offence or a crime is the person who knowingly, by aiding and abetting, facilitates its preparation or commission. Any person who, by means of a gift, promise, threat, order, or an abuse of authority or powers, provokes the commission of an offence or gives instructions to commit it, is also an accomplice. The French Penal Code provides that the penalties are applicable even if the offences mentioned at Articles 222-36 to 222-39 (import/export, sale or offer to sale and facilitation of use) have not been completed since the attempt to commit is punished with the same penalties.

In Germany, § 29 (1) Narcotics Act (Betäubungsmittelgesetz, BtMG) criminalizes a series of conducts, namely cultivating, producing, trading, importing, exporting, selling, supplying, otherwise bringing into traffic, acquiring, or procuring in any other way narcotic substances (no. 1), producing an “exempt preparation” (no. 2), possessing without written permission (no. 3), transporting through German territory (no. 5), prescribing or making available without licence (nos. 6, 7), advertising (no. 8), providing wrong information to obtain a prescription (no. 9) providing, granting or publicly communicating another an opportunity to acquire etc. (nos. 10, 11), publicly calling for the consumption (no. 12), providing pecuniary or other resources for one of the above mentioned acts (no. 13) and infringing an executive decree which refers to this offence (no. 14).

As to the subjective side, as a general rule, only intentional conduct is punishable unless the law expressly provides for criminal liability based on negligence (§ 15 StGB). Intentional conduct encompasses dolus directus and dolus eventualis, i.e., a form of conditional intent implying that the perpetrator “reconciles himself” with the result in order to achieve his ulterior goal. Negligent conduct is punishable with regard to the conducts encompassed in § 29 (1) Nos. 1, 2, 5, 6 (b), 10 and 11 (§ 29 (4)). Apart from perpetration of the respective conducts (direct, indirect or co-perpetration, §25 StGB), secondary participation (instigation/abetting or assistance/aiding, §§26 and 27 StGB) is also punishable. The attempt is automatically punishable in case of felonies (Verbrechen), i.e., offences with a minimum punishment of 1 year (in casu this is the case for all aggravated offences mentioned below). In case of misdemeanours (Vergehen) criminal liability has to be provided for explicitly by the respective offence (§23 (1)). This is done by §29 (2) with regard to §29 (1) Nos. 1, 2, 5 and 6 (b).

In Hungary, the Criminal Code (“HCC”) criminalizes – as “misuse” of drugs – cultivating, producing, obtaining, possessing, importing, exporting or transporting drugs through the territory of Hungary
Art. 282 (1)), offering, delivering, distributing or dealing with drugs (Art. 282/A (1)), persuading a person under 18 years to engage in the pathological indulgence of a substance or agent with narcotic effect (not classified as a drug), or offering a person under 18 years assistance to such activity (Art. 282/B (5)), providing financial means to the offences of Art. 282/B (1) to (5) (Art. 282/B (6)) and commission of Art. 282 (1) or 282/A (1) by a drug addict (Art. 282/C (1) and (2)). In addition, Art. 283/A (1) CC criminalizes the misuse of drug precursors by possessing, distributing, importing into the EU or exporting them from there, or being engaged in transfer activity without permission. Art. 282 (3)(b) covers producing, supplying, distributing etc. materials or accessories for the production of drugs.

The offences must be committed intentionally, i.e., the perpetrator “wishes the consequences of his conduct or acquiesces in these consequences.” (Art. 13 HCC). In case of Articles 282 to 282/C HCC, the perpetrator has to be aware of the nature of the respective object as a drug, i.e., he has to be aware of the substance's physiological, narcotic effects. If the quantity of drugs is a relevant circumstance, the perpetrator has to be aware of the real quantity of the substance and whether it is a pure substance or not. Apart from the perpetrator in its three variations (direct, indirect and co-perpetrator, Art. 20 HCC) accessories to the respective conducts may be liable as instigators or assistants (Art. 21 HCC). Attempt is punishable in all cases of intentional offences (Art. 16 HCC), notwithstanding the character of the offence as felony or misdemeanour, i.e., the attempt is punishable in all cases of misuse of drugs. As to Articles 282 to 282/B, not only attempt but also preparatory acts are punishable (Art. 282 (3)(a), 282/B(4)), that is, the five different preparatory conducts provided for by Article 18 HCC.

In Italy, these offences are contained, not in the Italian Penal Code, but in a specific comprehensive act (“Testo Unico de lleleggi in material di disciplina degli stupefacenti e sostanze psicotrope”), since 1990. The original has been modified in 2005, 2006, 2010 and 2011. Different modalities of drug trafficking are foreseen. The Articles 73 and 74, foresee:

a. Drug trafficking:
   1. Producing, manufacturing, extracting; refining, selling, offering or putting up for sale, ceding, distributing, putting in commerce, transporting, getting for other people, sending, giving or sending in transit for another final addressee, delivering for any purpose without a legal authorization, any stupefying or psychotropic substance which is contained in the list I, provided for in art. 14 of the same Act.
2. Importing, exporting, buying, receiving for whatever purposes stupefying or psychotropic substances which due to their quantity (in particular if they exceed the maximum amount fixed by the Ministry of Health and the Ministry of Justice, or due to the modalities of presentation, taking in consideration the total weight or other circumstances of the conduct) appear as not to be aimed at an exclusively personal use; or medicines containing stupefying or psychotropic substances whose quantity exceeds the authorized one in a medical prescription.

3. Being authorized by the Ministry of Health to cultivate, produce, manufacture, utilize, commercialize or detain in order to commercialize stupefying or psychotropic substances, illegally ceding, putting, or letting another person to put in commerce them.

4. Producing, manufacturing stupefying or psychotropic substances which are different from those from those authorized by a specific order of the Ministry of Health.

5. Acting, without the required special authorization of the Ministry of Health, when related some specific medicines, in particular the ones included in List II sect. A, B, C and D) that are used for therapeutic exigencies.

6. Promoting, setting up, directing, organizing, funding one association aimed at the traffic of stupefying or psychotropic substances and participating in such association.

b. Drug precursors and cultivating drugs:

1. Cultivating stupefying or psychotropic substances which are different from those from those authorized by a specific order of the Ministry of Health.

2. The Italian Law punishes whoever, without the corresponding licence, makes an operation of putting in the market, importing or exporting a category 1 scheduled substance included in the annex I of the Regulation (EC) 273/2004 and in the annex to the Regulation (EC) 111/2005, or whoever detains such substance. It also punishes the persons which have the duty to register themselves at the Ministry of Health, according to Regulations (EC) 273/2004, 111/2005 and 1277/2005, but don't register themselves, in violation of the law, when they make operations of putting in the market, importing or exporting a category 2 scheduled substance included in the annex of the Regulation (EC) 273/2004 and in the annex to the Regulation (EC) 111/2005. For the category 3 substances only exportation is punished. It is foreseen as well the offence of making operations of exportation or importation without the specific due authorization by the Ministry of Health required for categories 1 (exportation and importation) and 2 substances
(exportation), according to Regulations (EC) 111/2005 and 1277/2005, and for the exportation of category 3 substances (exportation) included in the annex I of the Regulation 273/2004 and in the annex to the Regulation 111/2005, toward one of the Countries included in annex IV, point 2 to the Regulation 1277/ 2005.

The Italian classification of drugs Act, establishes two lists: List I, containing volutuary drugs, without distinguishing “hard” and “light” ones, i.e. including cannabis indica, and List II containing medicines stricto sensu, which have also stupefying or psychotropic effects, and whose selling is legally, but needs a medical doctor’s prescription. Both lists are not exactly the same as the UN classification, but anyway they contain all kind of substances (and perhaps some additional ones) defined by the international conventions as prohibited drugs. The lists are kept up to date, according to the changes at the official international level and also to new scientific acquisitions. For all the conducts intention is required. The Italian general penal law does not distinguish among modality of participation in committing the crime among main perpetrators, aiders and abetters, and instigators, and foresees the same basic penalty for all of them, attempting to commit any offence is punishable.

In Latvia, the drug trafficking offences are included in the Special part of the Criminal Law (Chapter XIX, Chapter XX and Chapter XXIII). Different modalities of the offences, with different forms of guilt are foreseen:

a. Violation of provisions: violation of provisions regarding the production, acquisition, storage, registration, dispensation, transportation or forwarding of narcotic or psychotropic substances. Forms of guilt: direct intent, indirect intent and negligence.

b. Drug trafficking:
   1. Moving narcotic or psychotropic substances or the source materials (precursors) for the preparation of such substances across the State border of the Republic of Latvia in any illegal way.
   2. Unauthorised manufacture, acquisition, storage, transportation or forwarding of narcotic or psychotropic substances without the purpose of selling such substances.
   3. Unauthorised manufacture, acquisition, storage, transportation or forwarding of narcotic or psychotropic substances for the purpose of sale, or who commits unlawful sale of narcotic or psychotropic substances.
   4. Unauthorised acquisition, or storage in small amounts of narcotic or psychotropic substances without the purpose of sale thereof, or who commits use of narcotic or
psychotropic substances without a physician’s designation, if commission thereof is repeated within one year.

5. Providing of narcotic or psychotropic substances or receiving of such from, persons who are confined in places of short-term detention or prisons.

6. Issuing prescriptions where not medically necessary, or illegal issue of other documents for the obtaining of narcotic or psychotropic substances, or who commits dispensation of narcotic or psychotropic substances without a prescription or other document or with knowledge that a prescription or other document is fictitious or issued illegally, if commission of such acts is for purposes of acquiring property or for other personal interests, or if commission of such acts is repeated within a one year period. Form of guilt: direct intent in all the cases.

c. Administering and inducing:
   1. Administering narcotic or psychotropic substances to another person or adding such substances to the food or drink of another person against the will of such person or without his or her knowledge.
   2. Inducing use of narcotic or psychotropic substances, or providing premises for using such substances. Form of guilt: direct intent.

d. Precursors: Manufacture, acquisition, storage, transportation or forwarding of equipment, devices, objects, materials or substances (precursors) intended for the unauthorised manufacture of narcotic or psychotropic substances or for the purposes of sale of such equipment, devices, objects, materials or substances (precursors), or the sale of equipment, devices, objects, materials or substances (precursors) intended for unauthorised manufacture of narcotic or psychotropic substances; unauthorised sowing or growing of plants containing narcotic substances, if commission thereof is repeated within a one year period or over a large area. Form of guilt: direct intent.

According to the Criminal Law of Latvia an offence shall be considered to have been committed deliberately (intentionally) if the person who has committed it has foreseen the consequences of the offence and has desired such (direct intent) or, even if such consequences have not been desired, nevertheless has knowingly allowed these to result (indirect intent). A criminal offence shall be considered to be committed through negligence if the person who committed it foresaw the possibility that the consequences of his or her act or failure to act would result and nevertheless carelessly relied on these being prevented (criminal self-reliance), or did not foresee the possibility that such consequences would result, although according to the actual circumstances of the offence he or she should and could have foreseen such (criminal neglect). An offence shall not be criminally punishable if the person did not foresee and should not and could not have
foreseen the possibility that the consequences of his or her act or failure to act would result. It is provided for in the General part of the Criminal Law that preparation for a crime and an attempted crime are uncompleted criminal offences. The locating of, or adaptation of, means or tools, or the intentional creation of circumstances conducive for the commission of an intentional offence, shall be considered to be preparation for a crime if, in addition, it has not been continued for reasons independent of the will of the guilty party. Criminal liability shall result only for preparation for serious or especially serious crimes. Organisers, instigators and accessories are joint participants in a criminal offence.

In Poland, Chapter VII of the Special Drugs Act of 29 July 2005 provides for a series of offences related to narcotic drugs and psychotropic substances. Article 53 of the Act criminalizes the illicit production and processing of narcotic drugs, psychotropic substances or poppy straw. Article 54 declares punishable the production, possession, buying and selling of items which might be used for the purposes of production, processing of narcotic drugs, psychotropic substances and poppy straw. Article 55 provides for an offence related to illicit import, export, transportation, intra-community supply or intra-community acquisition of narcotic drugs, psychotropic substances and poppy straw. Article 56 provides for an offence of marketing or taking part in the marketing of narcotic drugs, psychotropic substances or poppy straw. Article 58 criminalizes supplying other persons with or facilitating the use of, or inducing to the use of a narcotic drug or psychotropic substances. Article 59 provides for an offence of supplying, facilitating, or inducing to the use of a narcotic drug or psychotropic substances in order to gain financial or personal benefit. Article 60 punishes the owner, administrator or manager for failing to inform the law enforcement agencies about offences provided for in articles 56, 58 and 59 taking place on their premises (failure of tipping-off). Article 61 provides for an offence of illicit trafficking of drug precursors with an aim of illicit production of narcotic drug or psychotropic substance. Article 62 provides for an offence of illicit possession of a narcotic drug or psychotropic substance. Article 63 (1) declares punishable the illicit cultivation of some sorts of poppy and some sorts of cannabis or coca bush. Article 63(2) provides for an offence of illicit gathering of poppy milk, opium, poppy straw, coca leaves, resin and cannabis herb. Article 64 provides for an offence of theft of narcotic drugs, psychotropic substances, milk poppy or poppy straw. Article 65 criminalizes, as a summary offence, the illicit cultivation of low-morphine poppy or cannabis sativa, Art. 66 the illicit trafficking of drug precursors. Article 68 provides for an offence of illicit advertising or promotion of narcotic drugs or psychotropic substances. This Article provides also for an offence of advertising or promoting of any products by implying that their use may lead to the same effects as the use of narcotic drugs or psychotropic substances.
As to the mental element, all offences require intent except the summary offences which may also be committed with negligence. Apart from the perpetrator in its three variations (direct, indirect and co-perpetrator) accessories to the respective conducts may be liable as instigators or assistants (Art. 19 PCC); in the case of summary offences the respective Act must provide so. Attempt is punishable in all cases of intentional offences (Art. 14 PCC), notwithstanding the character of the offence as felony or misdemeanour; in the case of summary offences the respective Act must provide so. In case of Art. 55 and 56 preparatory acts are punishable.

In Romania, the offences of drug trafficking are contained in the Act no. 143/2000 on the prevention and control of illicit drug traffic and consumption, and the offences concerning precursors are contained in the Government’s Urgent Ordinance no. 121/2006 (revised in 2007). The following conducts are considered offences:

a. Drug trafficking: growing, production, manufacture, experimentation, extraction, preparation, processing, offering, putting up for sale, sale, distribution, delivery either free of charge or for a consideration, dispatching, transportation, procurement, purchase, holding or other operations related to drug circulation, without legal right; and bringing drugs into the country or taking them out of the country, as well as their import or export, without legal right.

b. Precursors: any operation that involves marketing of precursors, import, export and other intermediate activities and illicit possession of precursors.

c. Possession or other activities for personal use of drugs: growing, producing, manufacturing, experimenting, extracting, preparing, processing, buying or holding for one’s own consumption. It is foreseen a different penalty for these activities depending on the kind of the drug (risk drugs - marijuana, cannabis, etc- or heavy risk drugs - cocaine, heroin, etc).

In the Act no. 143/2000, the term drug means “narcotic drugs or psychotropic plants or substances or mixtures containing such plants and substances, listed in Tables no. I – III” (annex to the Act). According to Act no. 339/2005 (regarding the legal regime of plants, narcotic drugs and psychotropic substances), psychotropic substance refers to the substances found in the annexes to the 1971 Vienna Convention on Psychotropic Substances, while narcotic drugs means the substances found in the annexes to the 1961 Single Convention on Narcotic Drugs, as amended by the 1972 Protocol. Intention is always required. Incitement, aiding or abetting, according to the Criminal Code, are punishable. The Act no. 143/2000 provides that the mere preparatory acts such as production or procurement of means or instruments, as well as taking steps aimed at committing the offences foreseen in this Act shall also be deemed an attempt. Attempting one of
these offences is a criminal offence in Romanian law. Still, regarding crimes linked to trafficking precursors, the attempt is not a criminal offence. The organization, management or funding of the actions stipulated under Articles 2 to 9 of the Act 143/2000 shall be punishable by the punishments provided by the law for such actions.

In **Spain**, the offences related to drug trafficking are foreseen in the articles 368 to 371 of the Spanish Penal Code. The punishable conducts are:

a. Drug trafficking and favouring unlawful consumption: Preparation or trafficking, or otherwise favouring or facilitating the unlawful consumption of toxic drugs, narcotics or psychotropic substances, or to possess them for those purposes.

b. Precursors and cultivation: To carry out acts of cultivation for the traffic; to manufacture, transport, distribute, trade or possess equipment, materials or substances listed in Schedule I and Schedule II of the United Nations Convention, signed in Vienna on 20 December 1988, against illegal traffic in narcotic drugs and psychotropic substances, and any other products added to the aforesaid Convention or that may be included in future Conventions ratified by Spain being aware that they shall be used for the unlawful cultivation, production or manufacture of toxic drugs, narcotics or psychotropic substances, or for those purposes.

Any activity directed at self-consumption does not constitute a criminal offence. All the substances included in the lists of the international conventions ratified by Spain, are considered drugs. For a new product to be considered a narcotic consideration will be given to the toxicity of the substance (meaning the capacity to cause adverse effects to health). Intention is required. Criminal attempt in these offences, according to the General Provisions, is punishable. However, the very broad wording of the offence of drug trafficking makes it difficult to determine if there is criminal attempt, insofar as that mere possession implies consummation of the offence. Spanish case law considers offer, agreement to buy and sale, or supplying money so that another can buy and transport to be trafficking, acts of encouraging and facilitating and so are also punishable. The preparatory acts of provocation, conspiracy and solicitation to commit the offence are expressly punishable.

In **Sweden**, Sect. 1 of the Narcotics Act criminalizes transferring narcotics (para. 1), manufacturing intended for misuse (para. 2), acquiring for the purpose of transfer (para. 3), procuring, processing, packaging, transporting, keeping or in some other similar way handling (not for personal use) (para. 4), offering for sale, keeping or conveying payment for narcotics, mediating contacts between seller and purchaser or taking any other such measure, designed to promote narcotics traffic (para. 5), or possessing, using or otherwise handling narcotics (para. 6). Further, the Smuggling Act punishes the
smuggling of narcotic drugs (section 6). The perpetrator must act "wilfully" (sect. 1 Narcotics Act). However, a person who through gross carelessness commits an act referred to in Section 1 shall be sentenced for negligence in drugs. Also, under the Smuggling Act, gross negligence is punishable. Apart from the person who committed the act (direct or other perpetrator) accessories to the respective conducts may be liable as instigators or assistants/aiders (Ch. 23 Sect. 4 SCC). Attempt, preparation and conspiracy are punishable in normal and (moderately) grave drug offences unless the act concerns possessing, using or otherwise handling narcotics according to Section 1 paragraph 6 of the Narcotics Act. Attempt, preparation and conspiracy are also punishable regarding (grave) smuggling.

In the **United Kingdom** the primary pieces of legislation that govern drug trafficking are the Drug Trafficking Act 1994 and the Misuse of Drugs Act 1971. The drug related offences, all of them applying in England and Wales, Scotland and Northern Ireland. These are:

a. **Drug trafficking:**
   1. Fraudulent evasion of a prohibition by bringing into or taking out of the UK a controlled drug contrary.
   2. Production of a controlled drug contrary to sections.
   3. Supplying or offering to supply a controlled drug.

b. **Possession:**
   1. Possession of a controlled drug for personal use.
   2. Possession of a controlled drug with intent to supply it to another.

c. **Cultivation:** Cultivation of a cannabis plant.

d. **Articles for administration of drugs:**
   1. Supplying or offering to supply any article which may be used to prepare a controlled drug for administration believing that the article is to be so used in circumstances where the administration is unlawful.
   2. Supplying any article which may be used or adapted to be used in the administration of a controlled drug believing that the article is to be so used in circumstances where the administration is unlawful. As an exception, it is not an offence to supply or offer to supply a hypodermic syringe.

The drugs are listed in sections I, II and III of schedule 2 of the Misuse of Drugs Act, and includes cannabis and opium. The *mens rea* of these offences are found within the definitions of each offence, and are all either 'knowingly' or 'with intent'. A person who aids, abets, counsels or procures the commission by another person of a summary offence shall be guilty of the like
offence. If, with intent to commit one of these offences a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence.

2.2. Key common points and differences

All systems punish the basic conducts for the purpose of trafficking, from the cultivation and the production to the possession for the purpose of trafficking and distribution of drugs. In most of the countries, the cultivation for the own use is punishable (Cyprus, France, Germany, Hungary, Italy, Poland, Romania, Sweden and UK). In Latvia the cultivation is punishable only if it is repeated within one year or within a large area. In Spain only the cultivation for traffic is punishable. Possession for personal use and/or the use of drugs are punishable in all of the countries except in Spain. In Spain the use and the simple possession for personal consumption are not punishable. The traffic of precursors is foreseen in most countries (Cyprus, Italy, Latvia, Poland, Romania and Spain). In Spain, Romania and Latvia the possession of precursors is also punishable. In France failing to carry out some duties (declarations) concerning certain substances, is an offence. In Germany providing pecuniary or other resources for the elaboration of the drugs is punishable. In Sweden punishment for the traffic of precursors is not foreseen. However, providing precursors can always be punished as a form of participation under the general rules of the drug trafficking offence.

As a rule the offence must be committed intentionally, i.e., knowledge and/or purpose is required; yet, (gross) negligence is punishable in various jurisdictions for varying forms of conduct (Germany, Poland and Sweden). Apart from the perpetration of the offence, any other form of (secondary) participation is covered, either by the general rules of criminal law or by a specific conduct in the respective offence (e.g. promoting or advertising the use of drugs). Attempt is punishable in all jurisdictions, in some jurisdiction even preparatory acts (Hungary, Poland, and Sweden) and/or conspiracy (Sweden, Spain). In Spain, the wide concept of favouring can cover the preparatory acts.
<table>
<thead>
<tr>
<th>Country</th>
<th>Cultivation and production are punishable</th>
<th>Possession/use is punishable</th>
<th>Trafficking is punishable</th>
<th>Mens rea</th>
<th>Attempt is punishable</th>
</tr>
</thead>
<tbody>
<tr>
<td>CY</td>
<td>Even for the own use</td>
<td>Possession and use are punishable</td>
<td>Yes</td>
<td>Direct intent</td>
<td>Yes</td>
</tr>
<tr>
<td>FR</td>
<td>Even for the own use</td>
<td>Possession and use are punishable</td>
<td>Yes</td>
<td>Direct intent</td>
<td>Yes</td>
</tr>
<tr>
<td>DE</td>
<td>Even for the own use</td>
<td>Possession is punishable</td>
<td>Yes</td>
<td>Direct intent, dolus eventualis, negligence in some cases</td>
<td>No</td>
</tr>
<tr>
<td>HU</td>
<td>Even for the own use</td>
<td>Possession is punishable</td>
<td>Yes</td>
<td>Direct intent or dolus eventualis)</td>
<td>Yes</td>
</tr>
<tr>
<td>IT</td>
<td>Even for the own use</td>
<td>Possession</td>
<td>Yes</td>
<td>Direct intent</td>
<td>Yes</td>
</tr>
<tr>
<td>LV</td>
<td>Cultivation, only if repeated or within large area. Production, even for own use</td>
<td>Possession and use are punishable</td>
<td>Yes</td>
<td>Direct intent</td>
<td>Yes</td>
</tr>
<tr>
<td>PL</td>
<td>Even for the own use</td>
<td>Possession is punishable</td>
<td>Yes</td>
<td>Intention or negligence</td>
<td>Yes</td>
</tr>
<tr>
<td>RO</td>
<td>Even for the own use</td>
<td>Possession is punishable</td>
<td>Yes</td>
<td>Direct intent</td>
<td>Yes</td>
</tr>
<tr>
<td>ES</td>
<td>Only for the traffic</td>
<td>Only possession for the traffic</td>
<td>Yes</td>
<td>Direct intent</td>
<td>Yes</td>
</tr>
<tr>
<td>SE</td>
<td>Even for the own use</td>
<td>Possession and use are punishable</td>
<td>Yes</td>
<td>Direct intent, gross negligence</td>
<td>Yes</td>
</tr>
<tr>
<td>UK</td>
<td>Even for the own use</td>
<td>Possession is punishable</td>
<td>Yes</td>
<td>'knowingly' or 'with intent'</td>
<td>Yes</td>
</tr>
</tbody>
</table>

Table 1. Basic conducts and attempt
3. PENALTY LEVELS AND MINIMUM PENALTIES

3.1. Penalties in the different countries (imprisonment and fines)

In Cyprus, the use, possession producing, manufacturing, preparing, extracting or supplying, offering, offering to supply, offering for sale, distributing, dealing or delivering any illicit drug or acting as an intermediary for supplying illicit drugs to third parties of a class A or B drug is punishable with a maximum of a life sentence. For use or possession of class C drugs the maximum sentence is 8 years. Encouraging or promoting or forwarding the illegal use of illicit drugs with printouts, photographs, movies, videotapes or with any other method of promoting, advertising or providing information for manufacturing or supplying or distributing testers regardless of the quantity, with the intention to illegally spread these illicit drugs is guilty of a criminal offence punishable with 4 years of imprisonment. Importing or exporting any illicit drugs of class A and B is punishable with life imprisonment or fine or both. If the illicit drugs are classified in class C the maximum penalty is 8 years or fine or both. For supply or distribution of precursors the maximum sentence is life imprisonment and or fine for illicit drugs class A and B, and for class C a maximum of 8 years and or fine. The penalty for the possession of precursor substances is up to 2 years imprisonment or a €10,000 fine.

Being supplied with, purchasing or possessing illicit drugs is a criminal offence punishable with a maximum sentence of 12 years imprisonment or and fine for drugs class A, 8 years imprisonment or and fine for drugs class B, and 4 years imprisonment or and fine for drugs class C. Purchasing or possessing illicit drugs with intention of supplying it to other persons is a criminal offence punishable with a maximum sentence of life imprisonment for drugs class A and B and 8 years imprisonment or and fine for drugs class C.

Cultivating or planting any kind of cannabis plant, opium poppy, coca bush, all class C drugs, is an offence punishable a maximum sentence of life imprisonment or fine or both. Property owners in whose properties activities involving illicit drugs take place are liable to the maximum sentences for class A and B drugs of life imprisonment or fine or both penalties. For class C drugs the maximum is 8 years imprisonment or fine or both penalties.

Illegal activities involving drugs as opium, cocaine, cannabis or cannabis resin or their derivatives are an offence with the maximum sentence life imprisonment or fine or both penalties (article 10 of the Act 1977).
In France, the penalties are set out as follows: life imprisonment and a fine of €7.5 million for directing or organizing a group whose purpose is narcotic drug trafficking; 30 years’ imprisonment and a fine of €7.5 million for import or export narcotics committed by an organized gang; 20 years’ imprisonment and a fine of €7.5 million for illicit production or manufacture of narcotics; 30 years’ imprisonment and a fine of €7.5 million for illicit production or manufacture of narcotics committed by an organized gang. For the import or export of narcotics not committed by an organized gang, transport, possession, supply, transfer, acquisition or use of narcotics and the facilitation of use by fictitious or convenient prescription of narcotics, the penalty is 10 years’ imprisonment and a fine of €7.5 million.

In practice, from data corresponding to 2011, the most frequent sentence for drugs is the fine, in general terms, but excluding the sentences for use of drugs or possession for the personal use, we can realize that the most frequently used penalty is the imprisonment, normally not exceeding some months. The average duration of the penalty corresponding to drug trafficking seems to be 5 months of imprisonment. Although, some sentences of 4, 5, 6, 10 and even 12 years of imprisonment can be seen in cases where the drug offence was not the sole offence or one or more aggravating circumstances exist, especially recidivism.

In Germany, the penalties range from imprisonment of up to 1 year or a fine for negligent illicit drug trafficking to imprisonment up to not less than 5 years (the highest minimum punishment in the German criminal law) for the statutory offences of drug trafficking in not insignificant quantities as a member of a gang. The maximum penalty for drug trafficking offences is 15 years. For illicit trading in narcotics, produces an exempt preparation without a licence, transports, makes available for direct use, advertises, the sentence is imprisonment of up to 5 years, in especially serious cases imprisonment of 1 year up to 15 years (if the perpetrator acts on a commercial basis or endangers the health of several human beings by the offence) and if the perpetrator acts negligently, the punishment shall be imprisonment of up to 1 year or a fine. Whoever without having a licence cultivates, produces, or trades with narcotics and acts as a member of a gang, supplies, administers, or makes available for direct use narcotics to another and negligently causes his death, illegally imports narcotics in a not insignificant quantity shall be liable to imprisonment for not less than 2 years. In less serious cases is imprisonment of three months up to 5 years. Whoever, without having a licence, cultivates, manufactures, traffics in, imports or exports narcotics in not insignificant quantity and acts as a member of a gang or who illicitly traffics in narcotics in a not insignificant quantity or, without engaging in commercial traffic, imports, exports, sells or acquires them without trafficking and carries a firearm or other objects which are suitable and
destined to cause bodily harm to persons, shall be punished with imprisonment of not less than 5 years. In less serious cases, punishment shall be imprisonment from 6 months up to 10 years.

In practice, from the data for 2011, generally 67% of all punishments for narcotics offences are fines, however, imprisonment sentences without suspension on probation (12%) and imprisonment sentences of more than 2 years (6.4%) are also important. Focusing on the specific drug trafficking offences:

a. Illicit Trade etc. with Narcotics: The most frequent sentence was imprisonment between 6 and 9 months (741 of 19,155 sentences). Almost all of the penalties from 6 months to 1 ½ year imprisonment are suspended.

b. Illicit Trade etc. with Narcotics in not Insignificant Quantity
   The most frequent sentence was imprisonment between 1 and 2 years (2,766 among 5,334), but it is important the number of sentences pronounced that legally cannot be suspended – prison sentences of more than 2 years– (26%).

c. Illegal Import of Narcotics in not Insignificant Quantity
   The most frequent sentence was imprisonment between 1 and 2 years (715 among 1,964), but here it is very important the number of sentences pronounced that cannot be suspended: 26% are imprisonment sentences of more than 2 years, even reaching 10 or 15 years of imprisonment. These data show that that this offence is a major crime which, in fact, is severely punished by German courts.

d. Illicit Trade etc. with Narcotics in not Insignificant Quantity Acting as a Member of a Gang

The most frequent sentence was imprisonment between 5 and 10 years (96 among 233 sentences). The majority of punishments were prison sentence of more than 2 years which cannot be suspended on probation.

In Hungary, any person who cultivates, produces, obtains, possesses drugs, imports drugs into or exports drugs from Hungary, or transports drugs through the territory of Hungary is punishable by imprisonment up to 5 years. Imprisonment from 2 to 8 years if the offence is committed for gain or in a criminal association or by using a person who is addicted to drugs and imprisonment from 5 to 10 years if the offence is committed in respect of a considerable quantity of drugs. If the criminal offence is committed in respect of a small quantity of drugs, the punishment shall be imprisonment up to 2 years for criminal conducts. Any person who engages in any preparatory act for the perpetration of one of the above criminal conducts; or who produces, supplies, distributes, sells, imports or exports materials, equipment or accessories for the production of drugs, or
transports such items through the territory of the country, if his/her conduct does not constitute a criminal offence of greater gravity is punishable by imprisonment up to three years. If the criminal offence is committed in respect of a small quantity of drugs, the punishment shall be imprisonment up to 3 years for the above criminal conducts.

Any person who offers, delivers, distributes or deals with drugs is punishable by imprisonment from 2 to 8 years. If the criminal offence is committed in respect of a small quantity of drugs, the punishment shall be imprisonment up to 2 years. The punishment shall be imprisonment from 5 to 10 years if the offence is committed in a criminal association or by using a person who is addicted to drugs; an official or a person performing public duties, if s/he is acting in such capacity; any facility of the Hungarian Armed Forces, the Police or the Penal Execution. If the criminal offence is committed in respect of a small quantity of drugs, the punishment shall be imprisonment up 5 years. The punishment shall be imprisonment from 5 to 20 years or life imprisonment if the criminal offence is committed in respect of a considerable quantity of drugs.

Hungary has a separate provision for when a person under the age of 18 is used for the above offences (punishable by imprisonment from 2 to 8 years) or drugs are offered or delivered to a person under 18 years old (imprisonment from 5 to 10 years). Dealing in close proximity to schools or other establishments for child welfare is also singled out. It also separately provides for where the offender is a drug addict (up to 2 years or up to 3 years where they offer, deliver, distribute or deal and up to 8 years if a criminal organisation is involved or a considerable quantity). Aggravating factors such as a considerable quantity, when committed in a criminal association or by an official or a person performing public duties attracts imprisonment between 5 to 20 years or life imprisonment. Possession or cultivation for own consumption will not be punished.

To possess or distribute drug precursors, imports precursors or export, or being engaged in transfer activity, is punishable by imprisonment up to 5 years.

In Italy, for production, traffic and detention the penalty is imprisonment from a minimum of 6 to a maximum of 20 years and with a fine from 26.000 to 260.000 euro. A criminal association aimed at the traffic of drugs, the minimum penalty is not less than 20 years.

In practice the statistical data from Ministry of Justice show that there were 60 in 2009, 57 in 2010 and 60 in 2011 convictions for drug trafficking; as to convictions for use or possession of drug 4 in 2009, 19 in 2010 and 43 in 2011 have been recorded. In addition to these statistics, a survey was conducted by selecting and analysing a sample of judgements on a random basis from
those pronounced by the Court of Appeal of Genova, so perhaps they are not completely representative of the sentences pronounced by the Courts of first instance. In the Court of Appeal of Genova, the most frequent sentence for drugs was imprisonment from 5 to 6 years 20.8%. Sentences of imprisonment between 6 and 7 years were the 14.3%, and from 4 to 5 years of imprisonment were 14.3%. There is one interesting remark in the national report no case related to precursors was found. In interviews judges and prosecutors explained that art. 70 refers to a very complicatedly drafted norm, and that is very difficult to prove that the precursor was finalized to be used for illicit drug “producing”.

In Latvia, the trafficking of narcotic or psychotropic substances or the source materials (precursors) for the preparation of such substances across the State border of the Republic of Latvia in any illegal way, the punishment is deprivation of liberty for a term not exceeding 5 years or community service, or a fine not exceeding one hundred times the minimum monthly wage, with or without confiscation of property (less serious crime). For a person who commits the same acts, if the commission thereof is repeated, or where committed in a group of persons pursuant to prior agreement, or if such is committed on a large scale, the applicable punishment is deprivation of liberty for a term of not exceeding 10 years, with or without confiscation of property (serious crime). For a person who commits the same acts, where committed in an organised group, the applicable punishment is deprivation of liberty for a term of not exceeding 12 years, with confiscation of property, and with police supervision for a term not exceeding three years (especially serious crime). For a person who commits the offence of production, acquisition, storage, registration, dispensation, transportation or forwarding of narcotic or psychotropic substances, the applicable punishment is deprivation of liberty for a term not exceeding 3 years, or custodial arrest, or community service, or a fine not exceeding fifty times the minimum monthly wage, with or without deprivation of the right to engage in specific employment for a term not exceeding 3 years (less serious crime) For a person who commits the same acts, if such have been committed repeatedly or by a group of persons pursuant to prior agreement, the applicable punishment is deprivation of liberty for a term not exceeding 5 years or community service, or a fine not exceeding eighty times the minimum monthly wage (less serious crime) For a person who commits issuing of prescriptions where not medically necessary, or illegal issue of other documents for the obtaining of narcotic or psychotropic substances, or who commits dispensation of narcotic or psychotropic substances without a prescription or other document or with knowledge that a prescription or other document is fictitious or issued illegally, if commission of such acts is for purposes of acquiring property or for other personal interests, or if commission of such acts is repeated within a one year period, the applicable punishment is deprivation of liberty for a term of
not less than one and not exceeding 5 years, with deprivation of the right to engage in specific employment for a term not exceeding 5 years (less serious crime).

For a person who commits unauthorised manufacture, acquisition, storage, transportation or forwarding of narcotic or psychotropic substances without the purpose of selling such substances, the applicable punishment is deprivation of liberty for a term not exceeding 5 years, with or without confiscation of property, and police supervision for a term not exceeding 3 years (less serious crime) For a person who commits the same acts, if commission thereof is repeated or in a group of persons pursuant to prior agreement, or by a person who has previously committed stealing of narcotic or psychotropic substances, or such have been committed regarding large amounts of narcotic or psychotropic substances, the applicable punishment is deprivation of liberty for a term of not less than 5 and not exceeding 10 years, with or without confiscation of property and police supervision for a term not exceeding three years (serious crime). For a person who commits this offence for the purpose of sale, the applicable punishment is deprivation of liberty for a term of not less than 5 and not exceeding 10 years, with or without confiscation of property and police supervision for a term not exceeding three years (serious crime) For a person who commits the same acts, if commission thereof is repeated or in a group of persons pursuant to prior agreement, or by a person who has previously committed stealing of narcotic or psychotropic substances, the applicable punishment is deprivation of liberty for a term of not less than 5 and not exceeding 12 years, with or without confiscation of property and police supervision for a term not exceeding 3 years. For a person who commits the same acts, if commission thereof is in an organised group, or such have been committed regarding large amounts of narcotic or psychotropic substances, as well as commits sale of narcotic or psychotropic substances to minors, in educational institutions or the territory thereof, in restaurants, cafeterias, bars, places of public recreation or holiday events, the applicable punishment is deprivation of liberty for a term of not less than 8 and not exceeding 15 years, with confiscation of property and police supervision for a term not exceeding three years.

For a person who commits unauthorized sowing or growing of plants containing narcotic substances, if commission thereof is repeated within a one year period, the applicable punishment is deprivation of liberty for a term not exceeding 2 years or community service, or a fine not exceeding fifty times the minimum monthly wage. For a person who commits unauthorised sowing or growing of plants containing narcotic substances, over a large area, the applicable punishment is deprivation of liberty for a term of not less than 1 and not exceeding 5 years, with or without confiscation of property (less serious crime).
In Poland, for production and processing there is a penalty of imprisonment of up to 3 years. In case of a significant amount or when the offence was committed in order to gain financial or personal benefit the applicable penalty is a penalty of imprisonment the minimum is 3 years and a fine. The import, export, transportation, intra-community supply or intra-community acquisition there is a penalty of deprivation of liberty of up to 5 years. In minor cases the applicable penalty is a fine, imprisonment of up to 1 year. In case of a significant amount or when the offence was committed in order to gain financial or personal benefit the applicable penalty is a penalty deprivation of liberty of minimum 3 years and a fine. For marketing or taking part in the marketing penalty there is a fine and imprisonment for a period of between 6 to 8 years. In minor cases the applicable penalty is a fine, restriction of liberty, deprivation of liberty of up to one year. In case of a significant amount the applicable penalty is a fine and a penalty of deprivation of liberty for a period of between 2 and 12 years. Supplying, facilitating, or inducing to the use in order to gain financial or personal benefit is a penalty of imprisonment for a period of between one and 10 years. When the final user is a person under 18 years old, the applicable penalty is imprisonment for a period of minimum 3 years. In minor cases the applicable penalty is penalty of a fine, imprisonment for up to two years. For production, possession, buying and selling of precursors which might be used for the purposes of production and processing the penalty is a fine or imprisonment for up to 2 years. Illicit trafficking of drug precursors with an aim of illicit production penalty is a fine or deprivation of liberty for a period of up to 5 years. Possession the penalty is imprisonment for up to 3 years. In case of a significant amount of drugs the applicable penalty is imprisonment for a period between 1 and 10 years. In minor cases the applicable penalty is a penalty of a fine, or imprisonment for up to one year. Possession of not significant amount for personal use criminal proceedings might be discontinued. Cultivation is a penalty of imprisonment for up to three years. In case of a significant amount of drugs, which could be produced from illicitly cultivated plants, the applicable penalty is a penalty of deprivation of liberty for a period of between 6 months and 8 years. Illicit gathering is a penalty of deprivation of liberty for up to 3 years.

In 2011 14,471 people were sentenced to imprisonment for drug related offences. Only 2,198 of them received punishment of imprisonment without suspension of its execution. It means that only the 15.1% of the sentences for imprisonment exceeded from 2 years of imprisonment. So the most frequent imprisonment penalty is deprivation of liberty for a period of less than 2 years. An important part of the sentences exceeding 2 years of imprisonment went from 2 years to 4-5 years and very rarely exceeded 8 years. In case of the liability of collective entities in the period between 2006 and 2011 there were 50 sentences issued (with reference to all offences for which such liability might be imposed).
In **Romania**, there is a distinction between “national” trafficking in drugs for which the penalty is imprisonment from 3 to 15 years or when the drugs involved are of “high risk” the penalty is imprisonment from 10 to 20 years; and “international” trafficking where the penalty is 10 to 20 year or when “high risk” drugs are involved 15 to 25 years. Offences linked to trafficking in precursors, imprisonment from 1 to 5 years.

According to the statistics provided by the Romanian Ministry of Justice, in 2011, 723 persons were convicted of drug trafficking offences. The most frequent sentences were imprisonment from 1 to 5 years (194 sentences, 26%) and imprisonment from 10 to 15 years (109 15%). There are also a considerable number of sentences above 10 years.

In **Spain**, the penalty foreseen for the basic offence is between 3 to 6 years and a fine for triple the amount of the value of the drugs if the drugs in question cause serious harm to health (hard drugs) and a prison sentence of 1 to 3 years and a fine for double the amount of the value in the remaining cases (soft drugs). The aggravated offence sentences of a higher degree and a fine four times the basic offence, between 6 to 9 years (hard drugs) and from 3 to 4 and a half years (soft drugs). When the acts have been carried with a criminal organisation the sentence for members of the criminal organisation shall be 9 to 12 years imprisonment and a fine four times the value of the drugs concerned if they are hard drugs. If they are soft drugs, the prison sentence shall be 4 ½ to 10 years and the same fine for trafficking. The penalty shall be increased for the bosses, managers or directors of the criminal organisation. In the case of hard drugs, the prison sentence is between 12 and 18 years and in the case of soft drugs, between 10 and 15 years.

There are no general statistics available; the report for this part was compiled by selecting and analysing a sample of sentences (113) on a random basis. The selected sample does not include the sentences pronounced by the Juzgados de lo penal neither by the Juzgados de Instrucción in “immediate trials”, which are often negotiated with the Prosecutor. These sentences can go from 6 months to 3 years of imprisonment.

The most frequent sentences in the sample are imprisonment between 1 year and 1 ½ years (24 sentences among 113) and imprisonment of 3 years (23 sentences). There is a considerable number of sentences of imprisonment between 4 and 4 ½ years (16) and to imprisonment between 9 years and 9 ½ years (16). There are sentences between 10 and 17 years of imprisonment.
In **Sweden**, for a narcotic drug offence (the transfer, manufacture, acquisition for transfer, procurement, process, package, transport, offer for sale, possession) the penalty is imprisonment for not more than 3 years. A fixed term of imprisonment may not be shorter than 14 days. Where the offence with respect to the nature and quantity and the circumstances in general is judged to be petty, the sentence shall be a fine or imprisonment for at most 6 years. If the offence is judged to be grave, the sentence shall be imprisonment for at least 2 years and at most 10 years. In judging whether an offence is grave, particular consideration shall be given to whether or not it has been part of large-scale or professional activities, has involved especially large quantities of narcotics or has in any other way been of a particularly dangerous or unscrupulous nature. Smuggling considered petty, the sentence shall be a fine or imprisonment for a maximum 6 months and smuggling judged to be grave, the sentence shall be imprisonment of at least 2 and at most 10 years. Particular consideration shall be given to whether the act related to a particularly large quantity of narcotics, whether the act formed part of a step in an activity that was conducted on a large scale or professionally, or whether the activity or act was otherwise of a particularly dangerous or unscrupulous nature.

There were in 2011 18,623 petty drug crimes, of these, 29 resulted in a sentence of imprisonment. For aggravated drug offences, 309 of the totally of 314 offences, resulted in imprisonment. For drug offences of the normal grade, 1,018 of the totally of 2,545, resulted in imprisonment. In 2011 the average time spent in prison for drug crimes of the normal scale was 6 months, for petty drug offences, 2 months and for grave crimes 51 months. The 22% of all the sentences had an average duration of 51 months. The maximum sanction level is 120 months if the narcotic crime is judged to be grave.

In the **United Kingdom**, penalties depend on the class of the drugs concerned. Bringing into or taking out of the UK: Class A maximum: Life imprisonment; Class B maximum: 14 years custody and/or unlimited fine; Class C maximum: 14 years custody and/or unlimited fine. The role played is a factor playing a leading role or a significant role is an aggravating factor and the sentencing guidelines provide guidance as to the starting point and a range for penalties to be considered. For example for this offence the suggested starting point is 14 years for a person who took a leading role where the Class A drugs fall within Category 1, the range is 12-16 years. For those who took a significant role it is 10 years (9-12 years range) and those with a lesser role it is 8 years (6-9 years range). The category also plays a role in determining the sentence and is based on the harm that can be caused by the drug in question, so for those playing a leading role, where Category 2 drugs are involved the starting point is 11 years and for Category 3 it is 8 years 6 months. Additional
guidance is provided by the case law which provides that the weight of the drugs (rather than the street value) is a factor.

The guidelines (as set out in the following table), are the same for importing and exporting, supplying, possession with intent to supply and production. A similar table exists for Class B and C drugs (see the national report for the UK for full details).

<table>
<thead>
<tr>
<th>CLASS A</th>
<th>Leading role</th>
<th>Significant role</th>
<th>Lesser role</th>
</tr>
</thead>
<tbody>
<tr>
<td>Category 1</td>
<td>Starting point 14 years' custody</td>
<td>Starting point 10 years' custody</td>
<td>Starting point 7 years' custody</td>
</tr>
<tr>
<td></td>
<td>Category range 12 – 15 years' custody</td>
<td>Category range 9 – 12 years' custody</td>
<td>Category range 6 – 9 years' custody</td>
</tr>
<tr>
<td>Category 2</td>
<td>Starting point 11 years' custody</td>
<td>Starting point 8 years' custody</td>
<td>Starting point 5 years' custody</td>
</tr>
<tr>
<td></td>
<td>Category range 9 – 13 years' custody</td>
<td>Category range 6 years 6 months – 10 years' custody</td>
<td>Category range 3 years 6 months – 7 years' custody</td>
</tr>
<tr>
<td>Category 3</td>
<td>Starting point 8 years 6 months' custody</td>
<td>Starting point 4 years 6 months' custody</td>
<td>Starting point 3 years' custody</td>
</tr>
<tr>
<td></td>
<td>Category range 6 years 6 months – 10 years' custody</td>
<td>Category range 3 years 6 months – 7 years' custody</td>
<td>Category range 2 – 4 years 6 months' custody</td>
</tr>
<tr>
<td>Category 4</td>
<td>Starting point 5 years 6 months' custody</td>
<td>Starting point 3 years 6 months' custody</td>
<td>Starting point 18 months' custody</td>
</tr>
<tr>
<td></td>
<td>Category range 4 years 6 months – 7 years 6 months' custody</td>
<td>Category range 2 – 5 years' custody</td>
<td>Category range High level community order – 3 years' custody</td>
</tr>
</tbody>
</table>

Table 2: UK sentencing guidelines for Class A drugs
For supplying or offering to supply a controlled drug or possession of a controlled drug with intent to supply it to another: Class A maximum: Life imprisonment (community order can be passed); Class B maximum: 14 years custody and/or unlimited fine; Class C maximum: 14 years custody and/or unlimited fine. For production the sentence shall be: Class A maximum: Life imprisonment (community order can be passed); Class B maximum: 14 years; Class C maximum: 14 years custody. For cultivation the maximum is 14 years custody.

For possession: Class A maximum 7 years custody; Class B maximum: 5 years custody; Class C maximum: 2 years custody.

3.2. Key common points and differences

At the low end of the scale the maximum term of imprisonment available for Article 2(1)(a) is 3 years in Poland and Sweden. At the high end, Cyprus and the UK provide for a maximum of life imprisonment and 20 years in France, Italy and Romania. All Member States studied satisfy the requirements of the Framework Decision to provide maximum penalties as specified.

The analysis of the statistics was very difficult because the data obtained from the statistics are very heterogeneous and there is no statistics recorded in an important number of states. The lightest sentences seem to be given in France where the average duration of the imprisonment for drug trafficking is 5 months and the most frequent penalty – excluding use and possession for personal use – is imprisonment from a few months to 1 year. A few months to 1 year imprisonment seems to be the most frequent sentence in Poland too. In Sweden the most frequent penalty is 6 months of imprisonment, but there are an important number of sentences (22%) with an average duration of about 4 years of imprisonment. Imprisonment from 1 year to 4 years is the most frequent sentence in Germany, Italy, Romania and Spain, but at the same time a considerable number of severe sentences (5, 10 or more years) can be found in Spain and Germany. These two countries seem to pass the most severe sanctions.
<table>
<thead>
<tr>
<th>Offence</th>
<th>Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 2(1)(a): the production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of drugs.</td>
<td>At least between 1 and 3 years imprisonment</td>
</tr>
<tr>
<td>Article 2(1)(b): the cultivation of opium poppy, coca bush or cannabis plant</td>
<td>At least between 1 and 3 years imprisonment</td>
</tr>
<tr>
<td>Article 2(1)(c): the possession or purchase of drugs with a view to conducting one of the activities listed in (a)</td>
<td>At least between 1 and 3 years imprisonment</td>
</tr>
<tr>
<td>Article 2(1)(d): the manufacture, transport or distribution of precursors, knowing that they are to be used in or for the illicit production or manufacture of drugs</td>
<td>At least between 1 and 3 years imprisonment</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Country</th>
<th>FD</th>
<th>Cyber</th>
<th>Article 2(1)(a)</th>
<th>Article 2(1)(b)</th>
<th>Article 2(1)(c)</th>
<th>Article 2(1)(d)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cyprus</td>
<td></td>
<td></td>
<td>life imprisonment (Class A or B); 8 years (Class C); or fine or both (for importing or exporting)</td>
<td>life imprisonment and/or fine</td>
<td>life imprisonment (Class A or B); 8 years (Class C)</td>
<td>life imprisonment or fine or both (Class A or B); 8 years and/or fine (Class C) (supply or distribution) 2 years and/or 10 000 euro fine. (possession)</td>
</tr>
<tr>
<td>France</td>
<td>10 years and fine 7.5 million euro</td>
<td>20 years and fine 7.5 million euro (production or manufacture)</td>
<td>-</td>
<td>-</td>
<td>10 years and fine 7.5 million euro</td>
<td>-</td>
</tr>
<tr>
<td>Germany</td>
<td>- 5 years</td>
<td>- 5 years (production, trade, sale and negligently causes death)</td>
<td>- 5 years</td>
<td>- 5 years (negligently causes death)</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Hungary</td>
<td>8 years</td>
<td>8 years</td>
<td>8 years</td>
<td>8 years</td>
<td>5 years</td>
<td></td>
</tr>
<tr>
<td>Italy</td>
<td>20 years with a fine between 26 000-260 000 euro</td>
<td>-</td>
<td>20 years with a fine between 26 000-260 000 euro</td>
<td>-</td>
<td>-</td>
<td></td>
</tr>
<tr>
<td>Poland</td>
<td>- 3 years (Production and processing)</td>
<td>- 5 years (Import, export, transportation, intra-community supply or intra-community acquisition)</td>
<td>3 years</td>
<td>3 years</td>
<td>2 years</td>
<td></td>
</tr>
</tbody>
</table>
(Preparation)  
– 10 years  
(Supplying other person with or facilitating the use of, or inducing to the use)  
– 10 years  
(Supplying, facilitating, or inducing to the use in order to gain financial or personal benefit)

<table>
<thead>
<tr>
<th>Country</th>
<th>National Penalty</th>
<th>International Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Romania</td>
<td>15 years</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>20 years</td>
<td>-</td>
</tr>
<tr>
<td>Spain</td>
<td>6 years (hard drugs which cause serious harm to health)</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>3 years (soft drugs)</td>
<td>-</td>
</tr>
<tr>
<td>Sweden</td>
<td>3 years</td>
<td>-</td>
</tr>
<tr>
<td>UK</td>
<td>life imprisonment (Class A); 4 years and/or fine (Class B or C)</td>
<td>7 years (Class A); 5 years (Class B); 2 years Class C</td>
</tr>
</tbody>
</table>

Table 3 - Maximum sanctions

3.2.1. Minimum Penalties

Cyprus, France, Latvia and the United Kingdom do not provide minimum sentences; the other Member States provide minimum sentences for only some of the offences. Amongst the minimum sentences other than fines Sweden sets the lowest minimum imprisonment penalty at 2 weeks.

3.2.2. Imposition of Maximum penalty

None of the Member States studied set legislative limitations on the imposition of the maximum sentence. The appropriate sentence is to be determined by the sentencing judge taking into account mitigating and aggravating factors listed in the above section.

Other than Cyprus and the United Kingdom additional penalties are set out for when certain aggravating circumstances exist. The Framework Decision specifies aggravating circumstances and the respective maximum penalties. For Article 2(1)(a)-(c) where the involvement of large quantities of drugs and the involvement of those drugs which cause the most harm to health, or has resulted in significant damage to health, the maximum penalty should be of at least between 5 and 10
years imprisonment. Where the offence is committed within the framework of a criminal organisation, the maximum penalty should be at least 10 years. For offences under Article 2(1)(d) where committed in the framework of a criminal organisation the maximum penalty should be at least between 5-10 years imprisonment.

The maximum penalty is rarely pronounced, in **France, Italy, Poland, Romania** (2011 in 2 cases out of 723 and in 2012 in 25 cases out of 981) and **Sweden**.

In **Germany**, the maximum range of penalties is handed down quite often. As the different statistic tables show, it seems to be more frequent than in other countries to reach the maximum penalty of every drug related offence.

In **Latvia**, judges never impose the maximum sanction level.

In **Spain**, it’s necessary to point out that the penalties are strictly established in the Penal Code and the judges, in general terms, do not have a wide discretionary power. From the sample of the case law analysed, we can guess that when no aggravating circumstance concurs there is a tendency to impose sanctions from the lower half of the legal framework. But it has to be stressed that it occurs only not existing aggravating circumstances. Existing aggravating circumstances it is compulsory to impose the upper half of the foreseen penalty or even the one grade above penalty. It can be said that in these cases (existing aggravating circumstances); the judges use in practice the maximum penalties, because there is no other possibility.

In most of the countries the maximum penalty is never used (Latvia, Italy), or it is used rarely or very rarely (Romania, Poland, France or even Sweden). Only in Spain and Germany the use of the maximum penalties is not rare. In Spain its use is compulsory when certain aggravating circumstances exist.

In most of the States the Judges have a wide discretionary power: the range of the penalties contained between the maximum and the minimum limit is very wide or even extremely wide (for example in France or in Cyprus). If we put this information together with the data concerning the real penalties, we can conclude that the penalties are difficult to predict in some countries. This is not the case of Spain, which is the other extreme: the Penal Code establishes quite detailed penalties, corresponding to the different drug trafficking offences (basic and aggravated offences). The effect of the generic circumstances is also strictly established in the Penal Code. Germany, with a detailed scale of penalties really applied in practice, seems to be close to Spain, but giving a
wider discretionary power to the courts and to the prosecutors than in Spain. The penalties in Spain and Germany seem to be more severe in practice but at the same time more predictable.

4. AGGRAVATING AND MITIGATING CIRCUMSTANCES

4.1. Situation in the different countries

In Cyprus the Law provides for the aggravating and mitigating factors for sentences. Aggravating factors include: organized group, international organized criminal activities, involvement of the defendant in other illegal activities which facilitated the commission of the offence, use of violence, firearms or offensive weapons, and having a public office or position. Mitigating factors include: the age, any fact that influenced the accused to do the crime, the accused's dependence on drugs, existing only a charge of use of drugs, the remorse and cooperation with the police, and the type and quantity of drugs.

In France the Penal Code foresees two aggravating circumstances: criminal organization, the sale or the offer to sell made to minor, or in or near a school, an educational establishment or administration buildings. If the offence is stopped due to the offender's help, then the penalty could be mitigated. If the offence is prevented due to offender's help, then he could be exempted from a penalty.

German law provides for a series of aggravating circumstances. First, § 29 (3) Narcotics Act provides for a higher punishment in especially serious cases of § 29 (1), especially if the perpetrator acts on a commercial basis or endangers the health of others. Secondly, §29a(1) establishes a minimum punishment of 1 year if a person over 21 years makes available drugs to a person under 18 years (no. 1) and if trafficking, producing, supplying, possessing occurs with not small quantities (no. 2). Third, according to §30(1), higher punishment is meted out if acting as member of a gang and on a permanent basis (no. 1), in case of §29a(1) no.1 if acting on a commercial basis (no. 2), causing gross negligently the death of another by supplying drugs (no. 3) and importing in a not small quantity (no. 4). Fourth, punishment is increased according to §30a(1), in case of §29(1) no.1 if cultivating, producing, commercializing drugs of a not small quantity and acting as member of a gang or, according to §20a(2), if involving person under 18 years in drug trade or trading with not a small quantity carrying weapons or other dangerous instruments. There is also some mitigation within the just mentioned aggravating factors. First, the punishment is mitigated in less serious cases of §29a(1) (§29a(2)). Secondly, the general mitigation of §49(1) StGB applies if the offender reveals knowledge and thereby contributes to detect or prevent other
offences ("crown witness" rule). Apart from that, the law also provides for an exemption from punishment (at the discretion of the court) in case of §29(1) nos. 1, 2 and 4 if the perpetrator only cultivates, produces etc. drugs in small quantities for personal use (§29(5)) or in case of the perpetrator’s collaboration if he has not been convicted previously to more than 3 years (§31).

**Hungarian** criminal law provides for a series of aggravations and mitigations. As to the former, this is the case if Art.282 CC is committed “for gain or in a criminal association or by using a person who is addicted to drugs” (Art.282(2)(a)); if Art.282 is committed with “considerable quantity” (Art.282 (2)(b)); if Art.282/A is committed in a criminal association or by using a drug addict (Art.282/A(2)(a)); or by a public official (Art.282/A(2)(b)); or in a facility of the Armed Forces, Police or prison (Art.282/A(2)(c)); if Art.282/A is committed with considerable quantity (Art.282/A(3)); if Art. 282 is committed by using a person under 18 years (Art.282/B(1)); if Art.282/A is committed with regard to a person under 18 years (Art. 282/B (2)(a)) or inside or close to institutions of education, child welfare etc. (Art. 282/B (2)(b)) or if Art.282/B(1) is committed within the framework of a criminal association (Art.282/B(2)(c)); if Art.282/B(1) is committed with considerable quantity (Art.282/B (3)(a)) or if Art.282/B(2)(a) or (b) is committed in criminal association or by public official (Art.282/B(3)(b)); regarding Art.282/C(1) or (2) if committed for gain or in criminal association (Art.282/C(3)); and, last but not least, regarding Art.282/C(1) or (2) if committed with considerable quantity (Art.282/C(4)). As to mitigations the sentence is reduced if Arts.282(1), 282(2)(a), 282/A(1), 282/A(2), 282/B(1) and Art.282/B(2) or (3)(b) CC are committed with small quantities (Arts.282(5)(a), 282(5)(b), 282/A(6)(a), 282/A(6)(b), 282/B(7)(a), 282/B(7)(b)); or if Art.282/C(1) and (2) or (3) are committed by a drug addict (Art.282/C(5)). Finally, an exclusion of punishment is possible with regard to drug addicts in cases of cultivation, production, possession of small quantity for own consumption (Art.283(1)(a)) or in a small quantity (Art.283(1)(e)) on the condition that he is in a treatment. Also, if an assistant to production of precursors confesses, surrenders precursors and identifies other persons involved he shall not be punishable (Art.283/A(2)).

In **Italy** some specific aggravating circumstances are foreseen:

1. when the offence is committed by three or more person; when the drug is given or is intended to be given to a juvenile;
2. when the perpetrator has promoted or organized the cooperation in the criminal activity, or when he has directed the activity of the others concurring in committing the same offence;
3. when the perpetrator, during his running of authority, direction or vigilance, has determined the person subjected to him to commit the offence;
4. when the perpetrator has determined to commit the offence a person less than 18 years old or a person in a state of psychical illness or deficiency, but not legally incompetent or non punishable, or has however availed himself of the same persons in committing the offence; 4) when the perpetrator has induced to commit the offence, or to cooperate in the commission of it, a person addicted to drug.

5. When the perpetrator is armed or camouflaged when acting;

6. when the drug is mixed with other substances so that its harmful potential is augmented;

7. when the perpetrator offers or transfers drug with the purpose of obtain sexual performances from an addict person;

8. when the perpetrator offers or transfers drug within or in the surroundings of a school, a juvenile community, a military barrack, a prison, an hospital, or a structure for care and rehabilitation of drug addicts;

9. when the number of the associated is ten or more;

10. when among the associated, there is at least one of them who, although not clinically addicted, uses on a continuative basis stupefying or psychotropic substances;

11. when the association is an armed one.

There are as well specific mitigating circumstances:

1. when, considering the means, modalities or circumstances of the conduct or the quality or quantity of the substances involved when acting in any of the modalities (as described above) of the offence, the fact is of slight entity;

2. when the perpetrator avoids that the criminal activity can reach further consequences, also by cooperating with the police or the judicial authority in subtracting resources that are relevant for the commission of the crime;

3. when a participant cooperates in order to collect evidence of the crime or to subtract resources that are decisive for the commission of the crime.

In Latvia, the aggravating and the mitigating circumstances are foreseen in the General part of the Criminal Law. The generic aggravating circumstances are:

1. The criminal offence was committed repeatedly or constitutes recidivism.

2. The criminal offence was committed while in a group of persons.

3. The criminal offence was committed, taking advantage in bad faith of an official position or the trust of another person.

4. The criminal offence has caused serious consequences.
5. The criminal offence was committed against a woman, knowing her to be pregnant.
6. The criminal offence was committed against a person who has not attained fifteen years of age or against a person taking advantage of his or her helpless condition or of infirmity due to old-age.
7. The criminal offence was committed against a person taking advantage of his or her official, financial or other dependence on the offender.
8. The criminal offence was committed especially cruelly or with humiliation of the victim.
9. The criminal offence was committed taking advantage of the circumstances of a public disaster.
10. The criminal offence was committed employing weapons or explosives, or in some other generally dangerous way.
11. The criminal offence was committed out of a desire to acquire property.
12. The criminal offence was committed under the influence of alcohol, narcotic, psychotropic or other intoxicating substances.
13. The person committing the criminal offence, for purposes of having his or her sentence reduced, has knowingly provided false information regarding a criminal offence committed by another person.
14. The criminal offence was committed with racist motive.

The mitigating Circumstances are the following:

1. The perpetrator of the criminal offence has admitted his or her guilt, has freely confessed and has regretted that which he or she has committed.
2. The offender has voluntarily compensated the offender has actively furthered the disclosure and investigation of the offence.
3. The offender has facilitated the disclosure of the crime of another person for the loss occasioned or has allayed the harm caused.
4. The criminal offence was committed due to serious personal or family circumstances.
5. The criminal offence was committed under the influence of violence, or on account of financial or other dependence.
6. The criminal offence was committed as a result of the unlawful or immoral behaviour of the victim.
7. The criminal offence was committed exceeding the conditions regarding necessary self-defence, extreme necessity, arrest of the person committing the criminal offence, justifiable professional risk or the legality of the execution of commands and orders.
8. The criminal offence was committed by a pregnant woman; and
9. The criminal offence was committed by a person in a state of diminished mental capacity.

10. Other circumstances which are not provided for in this Law and which a court finds to be mitigating circumstances.

In Poland, apart from the general rules of aggravation and mitigation, e.g. regarding aggravating circumstances recidivism (relapse into crime) (Article 64) and commission in an organized or commercial form (Article 65), the Drugs Acts foresees some special aggravating circumstances: in case of a significant amount of narcotic drugs, psychotropic substances or poppy straw or when the offence was committed in order to gain financial or personal benefit (Art. 53, 55); in case of a significant amount (Art. 56, 58 and 62); if the person supplied with drugs is under 18 years (Art. 58 and 59); in case of Art.64 a commission of a burglary. As mitigations Arts 55, 56, 59, 62 and 64 all refer to minor cases. In case of Art.62 (possession) proceedings may be discontinued if the amount is not significant (Art. 62a).

In Romania there is one specific aggravating circumstance foreseen in the Act no. 143/2000: when the drugs were mixed with other substances that increased their risk to human life and integrity. The cooperation of the offender is foreseen as a mitigating circumstance or even a cause of non-punishment:

1. No punishment shall be applied to a person who, before the investigation starts, denounces to the competent authorities his or her participation in an association or in an agreement aimed at committing one of the offences provides by Articles 2 – 10 of the Act no. 143/2000, thus allowing the competent authorities to identify and hold the other participants criminally accountable.

2. The person who has committed one of the crimes stipulated under Articles 2 – 10 of this Act and who, during the investigation, denounces and facilitates the identification and holding criminally accountable of other persons who have committed drug-related crimes shall benefit from a reduction by half of the sentence limits stipulated by law.

A list of aggravating and other of mitigating circumstances are provided in the general part if the Criminal Code. The lists are not exhaustive, and the court may deem as aggravating or mitigating circumstance any other element or situation, if it considers it relevant for that specific case.

In Spain, specific mitigating and aggravating circumstances are foreseen in the Spanish Penal Code. The Specific aggravating circumstances are:
1. The offender is an authority, civil servant, medical practitioner, social worker, teacher or educator and acts while carrying out the duties of his office, profession or trade.

2. The offender participates in other organized activities, or those whose carrying out is facilitated by committing the offence.

3. The acts are perpetrated in establishments open to the public by those in charge or the employees thereof.

4. The substances to which the preceding article refers are provided to persons under the age of eighteen years, to the mentally disabled or to persons subject to detoxification or addiction treatment.

5. The quantity of the substances the acts to which the preceding article refers is notoriously large.

6. Such substances are adulterated, manipulated or mixed together or with others, increasing possible damage to health.

7. The actions take place at teaching centres, at military centres, establishments or units, within penitentiary institutions or at detoxification or addiction treatment centres, or in the surrounding areas thereof.

8. The offender uses violence or displays or uses weapons to commit the offence.

9. Persons under the age of eighteen years or the mentally disabled are used to commit those offences.

10. The offender is the boss, director or manager of the organisation.

11. The action is extremely serious.

The specific mitigating circumstances are:

1. The scarce importance of the facts and the personal circumstances of the offender.

2. The subject has voluntarily abandoned his criminal activities and has actively collaborated with the authorities.

3. The offender who, being addicted to drugs at the moment of committing the acts, sufficiently accredits that he has successfully completed detoxification treatment.

There is also a list of generic aggravating circumstances and a list of generic mitigating circumstances in the general part of the Penal Code.

In Sweden, an aggravation is foreseen in case of a grave offence, e.g. if it is part of large-scale professional activities or particularly dangerous (sect. 3 and sect. 6 Smuggling Act). In case of a petty offence with regard to nature and quantity mitigation is foreseen ((Sect. 2; sect. 6 Smuggling Act).
In **United Kingdom**, the law on sentencing is elucidated through numerous sources: the primary source, that which defines what the law is, is the body of statutes created by Parliament; the main secondary source is the published guidance provided by the Sentencing Council; and the third source is case law. As a result of it, the sentence is established depending on some elements like the level of the offender's involvement in the crime, the class of drug, the street value, the purity, etc. Some circumstances are taken into consideration as aggravating factors, like previous convictions for drugs offences, and some other are considered as mitigating factors, like if the offender pleaded guilty or rendered assistance to the prosecution, when the amount was small and for personal use, when the offender was a relatively small-time dealer who fed his addiction by selling to others, etc. All these circumstances are found in the case law.

### 4.2. Key common points and differences

All jurisdictions provide for a series of aggravating circumstances mostly in connection with a not small amount of drugs, the supply to minors and the commission within the framework of an organisation and/or for financial reasons. Mitigation or even exemption from punishment is provided for case of possession for personal consumption.

Whilst under Article 5 the Framework Decision provides specific mitigating factors for the reduction of penalties, some Member States have adopted their own mitigating factors for offences under Article 2(1)(a) as set out in the following table.

<table>
<thead>
<tr>
<th>Group or association</th>
<th>Offering to sell to minors or educational centres</th>
<th>Big quantity</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>CY</strong></td>
<td>Organised group</td>
<td>Yes (Case Law)</td>
</tr>
<tr>
<td><strong>FR</strong></td>
<td>Organised group</td>
<td>Yes</td>
</tr>
<tr>
<td><strong>DE</strong></td>
<td>Organised group</td>
<td>To minors</td>
</tr>
<tr>
<td><strong>HU</strong></td>
<td>Criminal association (Case Law)</td>
<td>Yes</td>
</tr>
<tr>
<td><strong>IT</strong></td>
<td>Group</td>
<td>Yes</td>
</tr>
<tr>
<td><strong>LV</strong></td>
<td>Group (generic)</td>
<td>No</td>
</tr>
<tr>
<td><strong>PL</strong></td>
<td>Organised group (generic)</td>
<td>No</td>
</tr>
</tbody>
</table>
Table 4. Aggravating circumstances

<table>
<thead>
<tr>
<th>RO</th>
<th>Association</th>
<th>Generic open list</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>ES</td>
<td>Organised group</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>SE</td>
<td>No</td>
<td>No</td>
<td>Particularly dangerous</td>
</tr>
<tr>
<td>UK</td>
<td>Yes (Case Law)</td>
<td>Yes (Case Law)</td>
<td>Yes (Case Law)</td>
</tr>
</tbody>
</table>

5. SANCTIONS OTHER THAN IMPRISONMENT AND FINES

5.1. Community Service

In Cyprus the only other sanction available is a community service sentence. In the United Kingdom, community service is available together with one or more of the following requirements: unpaid work; activity; programme; prohibited activity; curfew; exclusion; residence; mental health treatment; drug rehabilitation; alcohol treatment; supervision; and attendance centre (restricted to offenders aged under 25).

5.2. Confiscation and Forfeiture

In the Member States studied there is a range of other sanctions available. Confiscation orders are available in Germany, Spain and England and Wales. Whilst forfeiture of economic proceeds, objects used for the offence or the narcotics are an available sanction in France, Italy, Latvia and Poland.

5.3. Restricted Movement

In France, an offender can be prohibited from leaving the country. In Hungary and Latvia a ban can be placed on entering certain areas. In practice, Prohibition from making contact with certain individuals is available in France, Latvia and Poland. In France, Hungary and Italy, non-nationals can also be expelled. In France in 2010, some of the legally foreseen disqualifications were imposed in the 31.5% of the cases. The most frequent one was banning of the French territory.
5.4. Restriction on Work Related Rights

Prohibition from undertaking certain professions can be ordered in France, Hungary, Italy, Romania and Spain. In France, Hungary, Italy and Spain the offender can be disqualified from their profession. In France and Italy, the restriction on a person’s profession can also include revocation of a public license.

In France and Spain the offender can also be subject to a prohibition on holding public office. In Italy there were no available statistics for thus a sample analysis was made by selecting judgments pronounced by the Court of Appeal of Genova. In the 80% of cases a disqualification was imposed.

In Romania in 2011, from a number of 359, disqualification was applied in about 300 cases. In Spain disqualifications are compulsory, when a sentence of imprisonment is imposed. In Sweden there is information only available concerning revocation of licences to practice medicine, in 2011, 3 licences were revoked on this ground specifically, and in 2012 the number increased to 10.

5.5. Restriction of other Rights

Parental rights can be subject to restrictions in France, Romania and Spain. Disqualification from driving is an additional sanction available in France, Germany and Hungary.

Loss of civic rights is available in France, Hungary, Latvia, Poland, Romania and Spain.

5.6. Treatment

Rehabilitation orders for treatment can be made in Germany, Poland, England and Wales and Scotland.

It is difficult to obtain useful conclusions from the available statistics. Only in 4 countries is the relevant information available. Disqualifications appear to be applied in practice to varying degrees from one state to another. Different kinds of disqualifications seem to be often imposed in practice in Spain, Italy and Romania.
<table>
<thead>
<tr>
<th>Sanction</th>
<th>Cyprus</th>
<th>France</th>
<th>Germany</th>
<th>Hungary</th>
<th>Italy</th>
<th>Latvia</th>
<th>Poland</th>
<th>Romania</th>
<th>Spain</th>
<th>Sweden</th>
<th>England &amp; Wales</th>
<th>Northern</th>
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<tr>
<td>Community Service</td>
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<td>Confiscation/deprivation</td>
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<td>Forfeiture of economic</td>
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<td>Prohibition on holding</td>
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<td>Loss of public licence</td>
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<td>Expulsion of non-citizens</td>
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<td>Ireland</td>
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<tr>
<td>Scotland</td>
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</table>
6. SUSPENDED SENTENCES AND EARLY RELEASE

6.1. Suspended sentences

In all Member States studied suspended sentences are available, provided that the sentence of imprisonment imposed is under a certain number of years as set out in the table 10. By contrast, such a maximum term of imprisonment is not specified for France, Germany, Sweden and the UK.

<table>
<thead>
<tr>
<th>Country</th>
<th>No. Years</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cyprus</td>
<td>3</td>
</tr>
<tr>
<td>France</td>
<td>-</td>
</tr>
<tr>
<td>Germany</td>
<td>-</td>
</tr>
<tr>
<td>Hungary</td>
<td>2</td>
</tr>
<tr>
<td>Italy</td>
<td>2</td>
</tr>
<tr>
<td>Latvia</td>
<td>-</td>
</tr>
<tr>
<td>Poland</td>
<td>2</td>
</tr>
<tr>
<td>Romania</td>
<td>3</td>
</tr>
<tr>
<td>Spain</td>
<td>2</td>
</tr>
<tr>
<td>Sweden</td>
<td>-</td>
</tr>
<tr>
<td>England and Wales</td>
<td>51 weeks</td>
</tr>
<tr>
<td>Northern Ireland</td>
<td>2</td>
</tr>
<tr>
<td>Scotland</td>
<td>-</td>
</tr>
</tbody>
</table>

Table 6. Suspended Sentences and the maximum no. of years

In France, 61.3% of the sentences pronounced for all kind of drugs offences were suspended in 2011.

In Germany, 63.9% of the sentences pronounced for all kind of drugs offences were suspended in 2011.

In Italy, in practice, all the sentences not exceeding 2 years of imprisonment are suspended on an automatic basis.
In Latvia, for convictions for importation/exportation of drugs 85% of sentences were suspended. For unauthorised manufacture, acquisition, storage, transportation and forwarding of drugs 66% were suspended.

In Poland, in 2011 14,471 people were sentenced to imprisonment for drug related offences, 84% of them received punishment of imprisonment with suspension of its execution.

In 2011 in Romania 50.3% of the total sentences were suspended.

In practice, in Spain all the sentences not exceeding 2 years of imprisonment are suspended on an automatic basis.

In Sweden, in 2011 20.7% of the sentences for drug offences were suspended.

6.2. Early Release

Early release is a possibility in all Member States studied. Early release is subject to the individual having served a certain proportion of their sentence as set out in the table 5. In France it depends on the behaviour. The requisite proportion is not specified for Germany, Hungary, Latvia and Romania. Early release can be either unconditional or on licence.

<table>
<thead>
<tr>
<th>Country</th>
<th>Term to be served before early release</th>
</tr>
</thead>
</table>
| Cyprus        | - For a sentence of between 1 month and 2 years imprisonment, the reduction provided is 6 days per month.  
                - For a sentence of between 2 years and up to 5 years imprisonment the reduction provided is 8 days per month.  
                - For a sentence of between 5 years up to 8 years imprisonment the reduction is 10 days per month.  
                - For a sentence of between 8 years and 12 years the reduction provided is 12 days.  
                - For a sentence of more than 12 years the reduction is up to 14 days per month. |
<p>| France        | -                                      |
| Germany       | -                                      |</p>
<table>
<thead>
<tr>
<th>Country</th>
<th>Minimum Term to be served of sentence before early/conditional release is possible</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hungary</td>
<td>-</td>
</tr>
<tr>
<td>Italy</td>
<td>30 months + ½ sentence (less than 5 years)</td>
</tr>
<tr>
<td>Latvia</td>
<td>-</td>
</tr>
<tr>
<td>Poland</td>
<td>½ sentence (on probation for a period no shorter than 2 years and no longer than 5 years)</td>
</tr>
<tr>
<td>Romania</td>
<td>-</td>
</tr>
<tr>
<td>Spain</td>
<td>¾ sentence</td>
</tr>
<tr>
<td>Sweden</td>
<td>⅔ sentence at least 1 month</td>
</tr>
<tr>
<td>England and Wales</td>
<td>½ sentence unconditional release when sentence is less than 12 months</td>
</tr>
<tr>
<td></td>
<td>½ sentence on licence when sentence is over than 12 months</td>
</tr>
<tr>
<td></td>
<td>½-⅔ sentence when serving 25 years or more</td>
</tr>
<tr>
<td></td>
<td>Expiry of tariff for life sentences</td>
</tr>
<tr>
<td>Northern Ireland</td>
<td>At least 4 weeks and at least ½ sentence served (minimum custodial period at least 6 weeks)</td>
</tr>
<tr>
<td>Scotland</td>
<td>½ sentence (unconditional release) for short-term prisoners</td>
</tr>
<tr>
<td></td>
<td>⅔ sentence (on licence) for long-term prisoners</td>
</tr>
</tbody>
</table>

Table 7. Minimum Term to be served of sentence before early/conditional release is possible

In France, suspension of imprisonment and early release, as any type of adjustment of sentences, are governed by general provisions of the French Code of criminal procedure, regardless of the type of offence concerned. There is no specific statistics focused on the offenders convicted for illicit drug trafficking. However, there is general information which can also reflect the situation concerning the drug trafficking offenses. On 1 March 2013, the offenders who benefited from an adjustment of the sentence were 19.8%.

According to the statistics provided by the Romanian Ministry of Justice, regarding all crimes, for 2011, 32.61% were given early release.

In Spain after serving 3/4 of the sentence, in practice early release is granted on an automatic basis.
In Sweden after serving 2/3 of the sentence, in practice early release is granted on an automatic basis.

Poland and Latvia have the highest number of suspended sentences at 84% and 85%-66% respectively, followed by Germany at 63’9% and France at 61’3%. In the rest of the countries the general percentages of suspended sentences tend to be between 20% and 30%. The suspension of sentences does not appear to raise any issues in the countries studied.

It is difficult to draw useful conclusions from the statistics because the percentages refer to the total number of sentences without separating out very minor offences (like use of drugs) from serious offences. This is added to by the fact that the proportion of minor and serious offences is very different in each country. It would be useful for Member States to record statistics focusing on specific offences of drug trafficking and to also record the respective percentages of cases where early release occurs or where the sentence is suspected.

7. SANCTIONS FOR LEGAL PERSONS

In Cyprus, where a crime took place in the knowledge or the assistance of the director, the secretary or a person holding a similar post in the legal entity, then that legal entity can be prosecuted for the same offence as the director or other post holder. However, the law does not specifically refer to the sanctions that are mentioned in article 7 of the FD.

In Germany legal persons cannot be sanctioned under criminal law. In the UK a legal entity can be held criminally liable. The available sanctions for a legal person in the remaining Member States vary and not all sanctions set out in the Framework Decision are provided for, whilst almost all Member States include the imposition of a fine (apart from Latvia).

7.1. Public Aid

Exclusion from public aid, tenders and funds can be imposed in France, Italy, Latvia, Poland, Romania and Spain.

7.2. Restriction on Commercial Activity
Disqualification and prohibition from exercising a professional or commercial activity is available as a sanction in France, Hungary, Italy, Romania and Spain. In addition the closure of establishments (either on a permanent or temporary basis) is possible in France, Romania and Spain. Whilst revocation of public licence is possible in Italy.

7.3. Judicial Supervision

A legal person can be placed under judicial supervision in France and Spain (to protect the rights of workers or creditors).

7.4. Judicial Wind-up

In Hungary, Romania and Spain the legal entity can be wound up, dissolved or liquidated.

7.5. Confiscation and Forfeiture

Confiscation and forfeitures orders can be made in France, Spain and Sweden. Whilst in Latvia and Poland any gains from the offence can be ordered to be returned. From the statistical data obtained it appears that no prosecutions of legal persons were taken.
8. SETTLEMENT OF MINOR CASES

8.1. The Definition of a “Minor Case”

In order to avoid unnecessary reiterations, we refer to what was already mentioned under the report on child pornography for the definition of what is considered a “minor case” in the criminal justice system of the countries studied. Here, it is only added that in the UK according to the Misuse of Drugs Act “summary offences” are those petty or less serious offences that are tried in the Magistrates’ Court and accrue a lesser punishment, but no special procedure is foreseen for them. To identify a minor offence following elements, among others, are taken into account: that

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Table 8. Sanctions for legal person

<table>
<thead>
<tr>
<th>Sanction</th>
<th>Country</th>
<th>Fine</th>
<th>Professional or commercial activity</th>
<th>Fine</th>
<th>Closure of establishment (permanent/temporary)</th>
<th>Exclusion from public aid, tenders, funds, etc</th>
<th>Exclusion from public aid, tenders, funds, etc</th>
<th>Prohibition related to making payments</th>
<th>Confiscation / forfeiture</th>
<th>Publication of Decision</th>
<th>Revocation of license</th>
<th>Liquidation/Judicial Wind-up/Dissolution</th>
<th>Prohibition from advertising</th>
<th>Judicial supervision</th>
<th>Return of gains</th>
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the loss or harm can be described as minor and was the result of a single incident or that the suspect played a minor role in the commission of the offence.

**8.2. Special proceedings for minor cases**

In order to avoid repetition of the general rules on case settlement or discretionary discontinuation, in this session the focus will be on the special rules applicable to minor cases of drug trafficking. The general proceedings are described at length in the national reports and have been analysed from a comparative law perspective in the comprehensive report on child pornography. Despite attempts to avoid repetition, some inevitable overlapping exists.

**Spain** has a special procedure for misdemeanours, but it is generally not applicable to illicit drug-trafficking offences. However, there are several conducts that are subject to administrative regulatory sanctions. They are considered administrative violations, not criminal offences, and thus are handled within the administrative procedure. These conducts are: tolerating illicit consumption or lack of diligence in impeding the trafficking in public establishments (such as bars, discos, etc.) by the owner; consuming in public spaces illicit drugs and also leaving instruments utilized for the consumption. The sanctions imposed for these serious administrative infringements (which can be a fine, the suspension of the driving licence, the seizure of instruments and/or drugs) can be suspended if the offender undergoes a detoxification treatment.

**Latvia**, as mentioned earlier, deals with minor offences considered as administrative offences in an administrative procedure, which will be seen later.

The Report on **Cyprus** states that the Attorney General has a general discretion in all criminal cases to give directions for non-prosecution, if it considers that the circumstances of the case justify such a decision. However, this power is only rarely used. With regard to drug-trafficking offences, following general instructions of the General Attorney minor and young offenders (under 25 years age) with no previous conviction who are found in possession of drugs will not be prosecuted, provided they participate in special seminars on drug abuse. However if within two years they commit a second drugs offence they are prosecuted for both cases. There is also the possibility of non-prosecuting addicted offender that voluntarily agree to undertake treatment. Furthermore, for addicted who are convicted there is also the possibility to serve the sentence in a detoxification centre.

In **France**, the same alternative proceedings described for offences against children can be used in cases of illicit drug trafficking, although it has to be noted that the agreement ("composition
pénale") is only possible for the offence of "sale or offer to sale illicit drugs for personal use" as this offence is the only one within drug trafficking that is punished with equal or less than 5 years imprisonment.

In **Germany**, as was already stated in the report on child pornography the PP has certain powers regarding the decision on the commencement and discontinuation of the criminal proceedings in minor cases (Vergehen) if there is no public interest in the prosecution (Art. 153 German CPC), and in those cases where the punishment would not be useful besides another penalty already imposed to the same offender (Art. 154 CPC). Furthermore the PP can decide to impose conditions and instructions upon the defendant (for example, payment of damages, social service, enter into an agreement with the victim), instead of prosecuting. Once the criminal proceedings have been instituted, the court can also decide to discontinue the proceedings, in cases of misdemeanours, where there is no public interest upon consent of the PP and of the defendant (Art. 153 (2)). These general rules apply also to cases of illicit drug trafficking. The law on drug offences specifically provides that in cases of petty offences, where the guilt is minor, no public interest in prosecution is present and "the perpetrator cultivates, produces, imports, exports, transits, acquires or otherwise procures or possesses the narcotics only for personal use in an insignificant quantity", the PP can refrain from prosecuting and if charges have already been pressed the court can, with consent of the PP, discontinue the proceedings.

In **Poland** the proceedings may not be initiated or may be conditionally discontinued, if the social harm is negligible and the guilt is not significant, and the maximum penalty is not higher than 3 years imprisonment for the offence in abstract. Additionally it is precisely stated that in case of possession of a non-significant quantity of drugs for personal use, there is the possibility to discontinue the proceedings.

In **Romania** if the offence does not entail social danger the criminal court or the PP in the investigative stage can substitute the penalty by an administrative sanction, as for example a reprimand or warning. No special rules seem to apply to drug-trafficking cases.

The **Hungarian** criminal justice system does not provide for diversionary measures or special proceedings, however regulates procedural short-cuts and fast-track proceedings. The general rules are applicable to drug-trafficking offences. There is a special provision regarding the possibility of postponement of the pressing of charges if the suspect agrees to undergo a detoxification treatment. If carried out successfully the criminal procedure shall be terminated without imposing any penalty.
In Spain, apart from the administrative infringements related to allowing the consumption or sale of drugs in certain places, the general diversionary proceedings (judgment without trial in cases of agreement, where the accused accepts the indictment and the maximum penalty for the offence is not higher than 6 years) as explained in the report on child pornography are applicable here.

Italy provides for a very similar regulation on the agreement or patteggiamento if the penalty, once reduced, does not exceed five years or two years, depending on the offence. What was explained in the report on child pornography offences applies here. There is only one special rule for minor drug-trafficking offences ("lieveentità") according the circumstances and the quantity of drugs, where the imprisonment penalty goes from 1 to six years: in such cases if the perpetrator is an addict or a consumer, he can, upon his own request and by the advice of the prosecutor, be sentenced, instead to imprisonment, to the substitutive penalty of community work.

In the Latvian legal order, the illegal acquisition or storage of small quantities of narcotic and psychotropic substances and medicinal products as well as substances, which may be used as precursors, or the use of narcotic and psychotropic substances without medical prescription is considered an administrative offence which entails the imposition of a fine. This administrative sanction is to be imposed by the Health Inspectorate. Furthermore the use of drugs by minors, the use of drugs in public spaces and driving under the effects of drugs will be dealt either local administrative commissions or by police institutions. At the court level, the rules on simplified proceedings and on the termination or discontinuing of proceedings when a significant harm is absent, apply here as explained for child pornography offences.

The Swedish administrative law provides for the possibility that a specially appointed officer at the Customs Administration imposes a sanction if it is manifest that a fine would cover the penal value of the offence and that the offence will not result in any other sanction. However, this administrative procedure does not prevent the public prosecutor to prosecute.

The possibility to sanction minor cases by way of summary orders rendered by the public prosecutor is also foreseen here as already explained for child pornography cases. In the criminal substantive law, minor drug trafficking cases (according to the quantity and the circumstances in general), will get a reduced sanction of a fine or imprisonment for a maximum of six months.

The national report for the UK does not describe any specific diversionary measures for drug-trafficking related offences, thus the general rules apply.
8.3. Key common points and differences

In sum, with regard to the existence of general rules or proceedings to settle minor cases and its possible application to drug trafficking related offences, we could conclude that the same general rules described for child pornography offences apply, although specific circumstances are taken into account:

1. Systems which provide for the possibility of non-prosecuting or discontinuing proceedings in minor cases at the pre-trial stage by PP: France, Poland, Latvia, Germany, Sweden, Cyprus and England and Wales. With regard to drug-trafficking related cases, in order to consider it a minor offence following circumstances are generally considered: when the quantity and danger of the drugs is not significant and when the possession is for own consumption.

2. Systems which provide for alternatives to penalty for minor cases: Germany, Italy, Latvia, Romania, England and Wales. Specifically, for drug-trafficking related offences some countries provide the possible substitution of the penalty by carrying out a detoxification treatment, if the offender is an addict. Such possibilities are found, for example, in Cyprus or Germany.

3. Systems which provide for procedural short-cuts based on confession or admission of guilt and penalty, although not necessarily limited to minor criminal cases: we only include here those countries whose reports mention expressly such procedural measures. We received positive answers for France, Hungary, Italy, Latvia, Spain, but this list may be incomplete (for example, England and Wales, where summary proceedings exist). The questionnaire was focused on settlement of minor cases, thus some of the reports have not mentioned procedural short-cuts or abbreviated procedural forms that are not exclusive of minor cases, but generally applicable.

The following rules apply specifically to drug-trafficking related cases; systems which provide for administrative sanctions outside the criminal justice system for certain conducts related to drug-trafficking: Spain, Latvia.

As to the fulfilment with the requirements set out in the FD 2004/757 (JHA of 25 October 2004), as this instrument does not include any special requirement regarding prosecution or settlement, there is no need to adjust the national legislations to the FD at this point.
9. JURISDICTION

In all the eleven countries studied the basic rule on jurisdiction in criminal matters is based upon the principle of territoriality: the criminal law applies to all offences committed within the territory of the State. In general, no special rules appear to apply with regard to offences of drug-trafficking. However, identifying when the offence has been committed in the territory may present certain particularities. For example, in England and Wales, Section 20 of the Misuse of Drugs Act 1971 states that a person commits an offence if in the UK he assists in or induces the commission in any place outside the United Kingdom of an offence punishable under the provisions of a corresponding law in force in that place.

With regard to the rules on extra-territorial jurisdiction, the countries studied provide rules on extraterritorial jurisdiction based on the active nationality principle and the passive nationality principle; although the conditions to exercise such extraterritorial jurisdiction vary (we refer here again to the report on child pornography).

No special provisions are found as to the application of the extraterritorial jurisdiction based on the nationality principle to drug-trafficking related offences, although the jurisdiction based on the passive nationality principle is hardly applicable to the drug-trafficking offences, as there is not an individual to be identified as a victim.

Germany and Hungary also foresee the possibility to prosecute drug-trafficking related crimes outside their territory and regardless the nationality of offenders, on the basis of the International Treaties applicable in this area. Furthermore, Spanish law specifically states that the principle of universal jurisdiction is applicable to the offence of illegal drug-trafficking, however a connection to the Spanish territory or interests is required to base the jurisdiction on this principle and, additionally that no other competent country or international court has initiated the investigation or prosecution of such a crime.

All the countries studied provide rules on jurisdiction based on the principle of territoriality, and in this sense the legal orders studied seem to fulfil the requirements set out under Art. 8.1 EU FD 2004/757 of 25 October 2004. All eleven systems studied allow the prosecution of national offenders abroad. In this sense they comply with Art. 8.1 FD of 2004/757. According to the national reports it seems that these rules on jurisdiction are also applicable to legal persons, except in Romania, where they are specifically excluded.
10. STATUTE OF LIMITATIONS

As already explained under the report of child pornography, for clarity reasons, we will use the term “suspension” of the statutory period of limitations in those cases where the time already elapsed is taken into account; and “interruption” for those cases where the time period runs anew.

The national report on Cyprus states that there is no statute of limitations that governs offences related to drug-trafficking.

In France the statute of limitations for drug-trafficking related crimes is 30 years and for drug-trafficking related offences 20 years and is interrupted by any investigative act or prosecution carried out by the authorities. The general rules on suspension are applicable here: the statute of limitations will be suspended by legal impediments as mediation, settlement proceedings, or force majeure.

The statute of limitations for prosecution of drug-trafficking offences in Germany is governed by the general rules with no special time bar or period for drug trafficking offences. However, according to German law the statute of limitation for these offences starts to run once the individual offence is completed, so that there may be different limitation periods for every accomplice of a drug business.

As was stated in the report of child pornography in Hungary the period of limitation is equal to the longest duration that can be imposed in abstract for the offence committed, with a minimum range of three years.

In case of life imprisonment, the statute of limitations is of 20 years, which applies to drug-trafficking offences.

Italy also establishes a general period of statute of limitations equal to the maximum penalty that can be imposed for the offence, but taking into account the aggravating circumstances (and not the mitigating). The minimum limitation period is 6 years. There are no special provisions for drug-trafficking offences.

The Latvian criminal law establishes a fixed limitation period according to the category of offence: 2 years for violations, 5 years for less serious crime, 10 years for serious crimes, 15 for especially serious crimes, 30 years, upon decision of the court, when the penalty is of life imprisonment, and
crimes against humanity which are not subject to statute of limitations. No special rules are applicable to drug-trafficking related offences, thus we refer to the report on child pornography.

**Poland** does not provide for special rules on statute of limitations for the offences analysed here nor for special rules on suspension or interruption.

No special rules seem to apply to the statute of limitations for drug-trafficking in **Romanian** Law. No special rules are applicable in **Spain** regarding statute of limitations of drug-trafficking offences, general rules set out under Art. 131 CC apply. As an example, the basic offence of drug-trafficking is sanctioned with 10 years imprisonment and drug-trafficking by organized criminal association, 20 years.

The statute of limitations for criminal prosecution in **Sweden** for drug-trafficking offences ranges from fifteen years for grave crimes, ten years for moderately grave crimes and two years for minor crimes and starts the date when the crime was committed. General rules on suspension, interruption and maximum periods apply here.

The national report for the **UK** states that there is no statute of limitations which concerns offences relating to drug trafficking in England and Wales and Northern Ireland.

From a comparative perspective view it can be concluded that the statute of limitations period in the majority of the countries studied depends generally on the gravity of the offence and the penalty provided for it, ranging from a minimum of 2 years to a maximum of 30 years in general and begins to run at the moment when the crime was committed, with a special rule in Germany stating that it starts to count when the offence is completed. Cyprus and England and Wales and Northern Ireland do not seem to provide for any statute of limitations for drug-trafficking offences.

As to the suspension and interruption of the running of the periods of limitation, no special rules are foreseen with regard to this type of offence. Thus it will generally be interrupted by the commencement of a criminal investigation and can be suspended by legal reasons as the request for extradition, the procedure to lift immunity, the proceedings for settlement or ground of force majeure.

As regards the compliance with the EU FD 2004/757 of 25th October 2004, it has to be recalled that this EU instrument does not contain any rule on limitation periods and thus there is no need to analyse this issue.
B. IMPACT ASSESSMENT AND CONCLUSIONS

All jurisdictions comply, a *grosso modo*, with FD2004/757/JHA, i.e., in many cases (e.g. Germany) an explicit implementation was not necessary. Younger Member States, e.g. Poland, implement the FD explicitly. Apart from that the list of prohibited narcotic drugs or precursors is constantly updated due to relevant EU regulations (see for example the reform by the German *Grundstoffüberwachungsgesetz* [GÜG, Precursors Monitoring Act] of 11 March 2008 because of Regulation No. 273/2004 of EP and Council of 11 February 2004 on drug precursors or Art. 283/A HCC re precursors referring to Council Regulation (EC) No 111/2005).

All national legislations provide for the forms of conduct listed in FD 2004/757/JHA, i.e., they criminalize the basic conducts from the cultivation/production to the possession and (large) distribution of drugs. It is important to note the existing convergence which is not only due to EU legislation on the issue, but because of the real convergence of the policies among ‘western’ States about drugs and also due to international conventions on drugs.
2.3. Money Laundering

A. ASSESSMENT ON THE LEVEL OF COINCIDENCE/ DIVERGENCE OF NATIONAL SYSTEMS AND PRACTICAL APPLICATION OF THE LEGISLATION

1. RELEVANT EU SECONDARY LEGISLATION

2. INCRIMINATED CONDUCT
   2.1. Definition of the offences
   2.2. Key common points and differences

3. PENALTY LEVELS AND MINIMUM PENALTIES
   3.1. Penalties in the different countries (imprisonment and fines)
   3.2. Key common points and differences

4. AGGRAVATING AND MITIGATING CIRCUMSTANCES
   4.1. Situation in the different countries
   4.2. Key common points and differences

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   5.3. Restricted Movement
   5.4. Restriction on Work Related Rights
   5.5. Restriction of other Rights
   5.6. Other sanctions

6. SUSPENDED SENTENCES AND EARLY RELEASE
   6.1. Suspended sentences
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7. SANCTIONS FOR LEGAL PERSONS
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   7.2. Restriction on Commercial Activity
   7.3. Judicial Supervision
   7.4. Judicial Wind-up
   7.5. Confiscation and Forfeiture
   7.6. Publication of the Decision
   7.7. Other sanctions

8. SETTLEMENT OF MINOR CASES
   8.1. The definition of “minor case”
   8.2. Special proceedings for minor cases
   8.3. Key common points and differences

9. JURISDICTION

10. STATUTE OF LIMITATIONS

B. IMPACT ASSESSMENT AND CONCLUSIONS
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Table 3: France penalties imposed (2011)
Table 4: France penalties imposed (2011/12)
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Table 6: Money Laundering (§ 261 subs. 2 StGB) Range of Penalties: 3 months – 5 years
Table 7: Especially Serious Cases of Money Laundering (§ 261 subs. 4 StGB) Range of Penalties: 6 months – 10 years
Table 8: Money Laundering through Gross Negligence (§ 261 subs. 5 StGB) Range of Penalties: up to 2 years or a fine
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Table 12: Sanctions other than imprisonment and fines
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Table 18: Sanctions for legal person
A. ASSESSMENT ON THE LEVEL OF COINCIDENCE/ DIVERGENCE OF NATIONAL SYSTEMS AND PRACTICAL APPLICATION OF THE LEGISLATION

Key Findings

- All jurisdictions have an offence of money laundering, with all of them including the conduct of concealment.
- The *mens rea* requirement varies across the Member States.
- The Directive does not list aggravating or mitigating circumstances and may explain the discrepancies that exist at national level between Member States.
- The Directive does not provide any minimum maximum penalties, which may explain the disparity between Member States, which is significant between some Member States.
- Progress has been made towards consistency amongst the definition of the offence and some progress has been made with the related sanctions in the different Member States studied. There is however scope for further approximation of both.

1. RELEVANT EU SECONDARY LEGISLATION

The relevant instrument is the Directive 2005/60/EC of the European Parliament and of the Council of 26th of October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing. The Directive outlaws various forms of money laundering (Art. 1 (1) and (2)) and obliges the Member States to introduce *effective, proportionate and dissuasive* sanctions for money laundering (Art. 39 (1)).

Article 1 (2) (a)-(d) enumerates the conduct that is to be considered as money laundering. All forms of commission require intent (Art. 2). The incriminated conduct is the conversion or transfer of property, in the knowledge that it originates from a criminal activity and with the intent to conceal its illicit origin (Art. 1 (2) (a)); further, the concealment or disguise of the nature, source, disposition, movement of or rights with respect to the property with knowledge of the criminal origin of the
property (Art. 1(2)(b)); the acquisition, possession and use of property, in the knowledge of its origin from criminal activity at the time of the acquisition (Art. 1(2)(c)). Also, the attempt of the aforementioned activities and various forms of participation, such as direct participation, aiding others, abetting and counselling is punishable (Art. 1(2)(d)). The “criminal activity” required as predicate offense is any kind of offense that qualifies as a serious crime (Art. 3(4)). Serious crimes are, in any case, the acts defined in Art. 1-2 of the Council Framework Decision 2002/475/JHA on combating terrorism (Art. 3(5)(a)), the drug trafficking-related crimes defined in Art. 3 (1) (a) of the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Art. 3(5)(b)) and the crimes related to activities of criminal organizations as defined in Art. 1 of the Council Joint Action 98/733/JHA of 21th of December 1998 on making it a criminal offence to participate in a criminal organization in one of the Member States of the EU (Art. 3(5)(c)) as well as fraud and corruption (Art. 3(5)(d), 3(5)(e)). According to Art. 3(5)(f), sufficient predicate offences are also all criminal offences which are punishable by detention for more than one year or by at least one year of detention.

The Directive does not provide for specific mitigating or aggravating circumstances.

2. INCriminated CONDUCT

2.1. Definition of the offences

In Cyprus, these offences are foreseen in the Prevention and Suppression of Money Laundering and Terrorist Financing Law of 2007, Law 188(I)/2007, as amended by Laws 58(I)/2010 and 80(I)/2012. The Law defines the laundering offences and the predicate offences.

The predicate offences are: 1) all criminal offences punishable with imprisonment exceeding one year; 2) financing of terrorism offences as well the collection of funds for the financing of persons or organisations associated with terrorism; 3) drug trafficking offences.

There are two groups of punishable conducts: general money laundering and terrorism. The offences of general money laundering are: to convert, transfer or remove any property that constitutes proceeds of a predicate offence for the purpose of concealing or disguising its illicit origin or of assisting any person who is involved in the commission of the predicate offence to evade the legal consequences of his actions; to conceal or disguise the true nature, the source, location, disposition, movement of and rights in relation to, property or ownership of this property; to acquire, possess or use such property. The offences related to terrorism are: not disclosing the
information to the authorities, knowing or reasonably suspecting that another person is engaged in laundering or financing of terrorism offences, if the information is obtained in the course of the trade, profession, business or employment.

The *mens rea* requires that the author knows or ought to have known that any kind of property constitutes proceeds from the commission of a predicate offence. In the case of not disclosing the information to the authorities, the *mens rea* requires that the author knows or reasonably suspects that another person is engaged in laundering or financing of terrorism offences. Participation, collaboration or attempt are punishable: to participate in, associate, co-operate, conspire to commit, or attempt to commit and aid and abet and provide counselling or advice for the commission of any of the offences referred to above; to provide information in relation to investigations that are carried out for laundering offences for the purpose of enabling the person who acquired a benefit from the commission of a predicate offence to retain the proceeds or the control of the proceeds from the commission of the said offence. Instigating any of the above crimes is punishable under the general rules of the Penal Code.

In **France**, these offences are foreseen in the French Penal Code and in the Customs Code. The predicate offences are: 1) drug trafficking offence; 2) all kind of customs offences; 3) all summary or indictable offences that may give to the perpetrator a direct or indirect benefit or generate a direct or indirect benefit. The money laundering offences related to drug trafficking are: facilitating by any means the false justification of the origin of the asset or income and providing assistance for the investment, or conversion of the fruits of one of these offences. The offences related to custom laundering are: to export, import, transfer or clear, process or attempt to conduct a financial transaction between France and abroad on funds knowing that they come directly or indirectly, from an offence under the Penal Code or from an offense under the law on poisonous substances or plants classified as narcotics. The offences of general laundering are: facilitating by any means the false justification of the origin of the property or income of the perpetrator of an indictable or summary offence by which he has reaped a direct or indirect benefit; and providing assistance in investing, concealing or converting the direct or indirect products of an indictable or summary offence. Money laundering is an intentional offence, which excludes any concept of negligence.

French Courts infer *mens rea* from a bundle of objective factual circumstances, including a lifestyle which does not correspond to his professional activity. The attempt is punishable under the general rules. Complicity of offence of money laundering is also governed by the general provision of the French Penal Code.
In **Germany**, money laundering is punishable pursuant to § 261 (1) *Strafgesetzbuch* (German Criminal Code – StGB). § 261 (1) StGB penalizes the hiding and concealing of an object and obstructing the investigation of its origin and its detection. The object has to be a proceeds of one of the predicate offences enumerated in § 261 (1) nos. 1-4 StGB. These offences are felonies (defined in § 12 (1) StGB as crimes with a minimum sentence of at least one year) (§ 261 (1) no. 2 StGB, bribery (§ 261 (1) no. 2a StGB), production, trade and selling of narcotics or precursors (§ 261 (1) no. 2b StGB), smuggling and tax evasion (§ 261 (1) no. 3StGB). A series of other offences (counterfeiting of debit cards, controlling prostitution, human trafficking, theft , unlawful appropriation , blackmail , handling stolen goods, fraud, subsidy fraud, embezzlement, forgery, forgery of data intended to provide proof, causing wrong entries to be made in public records, organizing unlawful gaining , unlawful disposal of dangerous waste and unlawful handling of radioactive substances) are only predicate offences when committed on a commercial basis or as a member of a gang whose purpose is the continued commission of such offences (§ 261 (1) no. 4 StGB). Finally, several crimes related to terrorism and state endangering criminal activities are predicate offences (§ 261 (1) no. 5 StGB).

According to § 261 (1) StGB this form of money laundering is punishable by a minimum of three months and a maximum of five years of detention. The same penalty applies to those who procure an object mentioned above for themselves or a third person (§ 261 (2) no. 1) or keep those objects knowing of their origin from one of the aforementioned predating offences (§ 261 (2) no. 2StGB).

Both kinds of commission require intent (according to § 15 StGB only intent is punishable unless the law explicitly provides for criminal liability based on negligence). The subjective element of § 261 does not require a specific kind of intent, therefore either *dolus directus* (direct intent; aiming at fulfilling the *actus reas* or being aware of that) or *dolus eventualis* (approving or reconciling himself with the criminal result). With regard to the criminal origin of the objects it suffices that the perpetrator acts with gross negligence; however, in this case the sentence is reduced to maximum two years (§ 261 (5) StGB).

As to the forms of participation perpetration (§ 25), secondary participation, i.e., instigation (§ 26 (1) StGB) and aiding (§ 27 (1)StGB) are punishable. The attempt is also incriminated (§ 261 (4)StGB).

In **Hungary**, the conversion, transfer or use of an object, the concealment or suppression of a right attached to the object and performing financial transactions in connection with the object is punishable by up to 5 years imprisonment, if these actions are performed in order to conceal the object's criminal origin (Art. 303 (1) Hungarian Criminal Code (HCC)). If the object is derived from a
criminal offence punishable by at least 1 year imprisonment, obtaining the object for oneself or a third person (Art. 303 (2) (a) HCC) and handling, using or consuming the object (Art. 303 (2) (b) HCC) the punishment is up to 5 years imprisonment when the perpetrator is aware of the criminal origin of the object (Art. 303 (2) HCC). The use of the object in business activities or financial transactions related to the object is punishable, when the perpetrator acts in order to conceal the origin of the object in criminal activities carried out by him and punishable by at least one year of prison (Art. 303 (4) HCC). Performing business activities and financial transactions related with such object is also punishable if the perpetrator is negligently unaware of the criminal origin of the object (Art. 303A (1) HCC). The failure to comply with the obligations on reporting financial transactions is also penalized by up to two years of detention (Art. 303B HCC). Except negligent money laundering as mentioned above (Art. 303 (4), 303A (1) HCC), all forms of money laundering require intent in the sense of dolus eventualis, i.e., the perpetrator has to foresee that the consequence of his behaviour will be the fulfilment of the actus reus and has at least accepted this outcome. The direct participation in one of the aforementioned offenses is punishable (Art. 20 HCC), as well as aiding and instigating (Art. 21 HCC) and attempt (Art. 16 HCC).

In Italy these offences are foreseen in the Penal Code. The predicate offence can be any intentional offence. The punishable conducts are: transferring money, goods or other profits which are the proceeds of the offence or making in connection with them other operations in a way to hinder the identification of their illicit origin. Intention is required. Aiding, instigating and abetting are punishable under the general rules. Attempting is also punishable under the general rules, but for to the modality consisting in making operations in order to hinder the identification of the illicit origin of money, attempt seems to be configurable only in cases of operations characterized by a negotiated nature, such as of “smurfing” and “loan back”.

In Latvia money laundering is foreseen in the special part of the Criminal Law. Any offence can be a predicate offence. The following conducts are considered money laundering, if they are carried out for the purpose of concealing or disguising the illicit origin of funds or assisting any person who is involved in committing of a criminal offence in evading the legal liability: the conversion of proceeds of crime into other valuables, transfer of their location or ownership; the concealment or disguise of the true nature, origin, location, disposition, movement, ownership of proceeds of crime; the acquisition, possession or use of proceeds of crime, if at the time of acquisition of such rights it is known that these are proceeds of crime; or the participation in any of the activities mentioned before. Intention is required. Preparation is punishable only in the aggravated modalities. The locating of, or adaptation of, means or tools, or the intentional creation of circumstances conducive for the commission of the offence, shall be considered to be preparation if, in addition, it has not
been continued for reasons independent of the will of the guilty party. Attempting is punishable. Organisers, instigators and accessories are liable as joint participants in the offence.

In **Poland**, Art. 299 (1) Polish Penal Code ("PCC") criminalizes the acceptance, transfer, forwarding and assistance in transfer of possession or property, financial instruments, property rights or movable objects that origin in a criminal offence. Further, it criminalizes the commission of any activities which may prevent the detection of the criminal origin, deposition or forfeiture of the object. The same sentence applies to employees of financial institutions, who transfer or exchange significant amounts of foreign currencies or provide services to conceal their origin although there are reasons to suspect their criminal origin (Art. 299 (2)PCC). Art. 299 (3) PCC penalizes with up to three years imprisonment the violation of the duty to inform the management or financial supervising authorities about the undertaking of financial transactions under circumstances which trigger a justified suspicion of the criminal origin of the respective financial objects. The same punishment applies to persons who appoint the aforementioned persons and ignore the applicable provisions (Art. 299 (4) PCC).

According to Art. 35 of the Act on Counteracting Money Laundering and Financing Terrorism the violation of several obligations regarding the control of financial transactions, e.g. informing the Inspector General of Financial Information about suspicious transactions or to register transactions on behalf of the financial institution, is punishable by up to three years imprisonment. The refusal to provide such information to the Inspector of Financial Information or providing false or incomplete information on behalf or for the benefit of the competent institution is punishable by imprisonment between three months and five years.

The subjective element of these offences requires, besides the knowledge specific to each offence, intent (Art. 8 PCC). Persons who participate in one of the aforementioned acts, abet others to commit such offences or aid others in their commission are also liable (Art. 18 (1)-(3) PCC). The attempt of those offences is also incriminated (Art. 13 PCC).

In **Romania** these offences are foreseen in the Criminal Code and in the Law 656/2002 for preventing and combating the financing of terrorism. All kind of offences can be the predicate offence. The punishable conducts are: 1) acquiring, possessing or making use of property, knowing that such property is proceeds of an offence; 2) the conversion or transfer of property, knowing that such property is proceeds, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of the predicate offence to evade the legal consequences of his actions; 3) the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property, knowing
that such property is proceeds. The necessary mens rea is intent. Aiding, abetting, instigating and attempt are punishable under the general rules.

In Spain these offences are foreseen in the Penal Code. All kind of offences can be the predicate offence. The punishable conducts are: 1) to acquire, possess, use, convert, or conveys assets, knowing they originate from a criminal activity; 2) to perpetrate any other act to hide or conceal their unlawful origin; 3) to aid the person who participated in the offence or offences to avoid the legal consequences of his acts; 4) hiding or concealment of the true nature, origin, location, destination, movement or rights to the assets, or their ownership. The mens rea is intention or serious negligence (the lack of the most elementary standard of due care required of the least careful individual). Aiding, abetting, instigating and attempt are punishable under the general rules.

The Swedish Criminal Code (SCC) contains several provisions on money laundering-related offences. Ch. 9 (Sec. 6) of the SCC criminalizes taking possession of an object stolen from another by an offence in a manner that impedes the restitution of the object. Further, it criminalizes procuring improper gains from the result of another’s crime, the improper promoting of taking advantage from property originating in a crime, the assistance in transfer and the removal or selling of property which stems from the proceeds of crime with the intent to conceal the true origin of the property. This conduct is punishable by up to 2 years of imprisonment. The acquisition or receipt of objects misappropriated from another person by a crime is also punishable by the same penalty, if the perpetrator had reasons to assume the true origin of the object and does this in a manner that impedes the restitution of the object (Ch. 9 (Sec. 6 (2)) SCC). The SCC also declares punishable the improper promotion of taking advantage from property emanating from a criminal offense or its value or the participation in the transfer, convey (or similar measures) of such property if the perpetrator has the intent to conceal the true origin of the property (Ch. 9 (Sec. 6a) SCC). On the subjective side all offenses require intent (cf. Ch. 1 (Sec. 2) SCC). An attempt of those offences and a conspiracy to commit them is punishable only in aggravated cases (Ch. 23 (Sec. 1), 9 (Sec. 11) (1) SCC). Participation, instigation and aiding are also punishable (Ch. 23 (Sec. 4) SCC).

In the United Kingdom (England and Wales, Northern Ireland and Scotland), the offences of money laundering are contained in the Proceeds of Crime Act 2002. All kind of offences can be the predicate offence. The punishable conducts are: 1) Concealing criminal property (to conceal, disguise, convert, transfer or remove criminal property from England and Wales or from Scotland or from Northern Ireland) and concealing or disguising its nature, source, location, disposition, movement or ownership or any rights with respect to it). 2) Arrangements (a person commits an
offence if he enters into or becomes concerned in an arrangement which he knows or suspects facilitates the acquisition, retention, use or control of criminal property by or on behalf of another person). 3) Acquisition, use and possession (to acquire, use or have possession of criminal property).

The *mens rea* requires knowing that it is a criminal property, in the case of concealing criminal properties. In the case of arrangement, the *mens rea* requires that the author knows or suspects that it is a criminal property. In the case of acquisition, use and possession requires that a person acquires property knowing that the value of the consideration is significantly less than the value of the property. In the case of use or possession of property, the *mens rea* requires knowing that the value of the consideration is significantly less than the value of the use or possession. Aiding, abetting, counselling, procuring, inciting or conspiring, are punishable.

### 2.2. Key common pints and differences

Concerning the predicate offences, in practice most of the countries include all kind of offenses (France, Hungary, Italy, Latvia, Poland, Romania, Spain, Sweden, United Kingdom). Other countries establish a list of offences including minimum penalties to be considered predicate offence in some cases (Cyprus, Germany).

As punishable conducts, all the countries include the act of concealment. Assisting to evade the legal consequences is foreseen in Cyprus, Romania, Spain and UK (not using the wording of the Directive). In France, Germany Italy, Poland and Sweden this conduct is not foreseen. Acquisition, possession or use of criminal property is foreseen in Cyprus, Germany, Hungary, Poland, Romania, Spain, Sweden and UK. Participation, collaboration or attempts are covered in all the countries, but in Italy and Sweden, attempt in some cases cannot be covered.

There are some differences in the *mens rea*. In France, Italy, Latvia, Poland, Romania and Sweden, the *mens rea* is intention. In Cyprus the *mens rea* requires that the author knows or ought to have known that any kind of property constitutes proceeds of an offence. In Spain the *mens rea* is intention or serious negligence. In the United Kingdom the *mens rea* is different in the case of concealing (knowingly), in the case of arrangement (knowing or suspecting) and in the case of acquisition, use and possession (knowing that the value of the consideration is significantly less than the value of the property, use or possession). In Germany, the *mens rea* is intent, or, regarding the knowledge about the origin of the property, gross negligence. In Hungary, the *mens rea* of concealment or conversion of the property is intent. However, gross negligence is sufficient, if the perpetrator uses the property in his business activities or financial transactions. As to mitigation
and aggravation there are notorious differences among the different countries. It is not easy to find common points.
<table>
<thead>
<tr>
<th>CY</th>
<th>Conversion or transfer of property, in the knowledge of its origin from a criminal activity and with the intent to conceal its illicit origin (Art. 1 (2) (a))</th>
</tr>
</thead>
<tbody>
<tr>
<td>FR</td>
<td>Concealment or disguise of the nature, source, disposition, movement of or rights with respect to the property with knowledge of the criminal origin of the property (Art. 1 (2) (b))</td>
</tr>
<tr>
<td>DE</td>
<td>Acquisition, possession and use of property, in the knowledge of its criminal activity at the time of the acquisition (Art. 1 (2) (c))</td>
</tr>
<tr>
<td>IT</td>
<td>Attempt of the aforementioned activities and various forms of participation, such as direct participation, aiding others, abetting and counselling is punishable (Art. 1 (2) (d))</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>CY</th>
<th>Yes</th>
<th>Yes</th>
<th>Yes</th>
<th>Yes</th>
<th>Requires that the author knows or ought to have known</th>
</tr>
</thead>
<tbody>
<tr>
<td>FR</td>
<td>Yes</td>
<td>Yes</td>
<td>Not foreseen</td>
<td>Not foreseen</td>
<td>Yes</td>
</tr>
<tr>
<td>DE</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Not foreseen</td>
<td>No</td>
</tr>
<tr>
<td>HU</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Intent, but gross negligence is sufficient, if the perpetrator uses the property in his business activities or financial transactions</td>
</tr>
<tr>
<td>IT</td>
<td>Yes</td>
<td>Yes</td>
<td>Not foreseen</td>
<td>Not foreseen</td>
<td>In some cases</td>
</tr>
<tr>
<td>Country</td>
<td>Yes</td>
<td>Yes</td>
<td>Not foreseen</td>
<td>cannot be covered</td>
<td>Intention or serious negligence</td>
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<tr>
<td>LV</td>
<td>Yes</td>
<td>Yes</td>
<td>Not foreseen</td>
<td>Yes</td>
<td>Intention</td>
</tr>
<tr>
<td>PL</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Not foreseen</td>
<td>Yes</td>
</tr>
<tr>
<td>RO</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>ES</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>SE</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Not foreseen</td>
<td>In some cases cannot be covered</td>
</tr>
<tr>
<td>UK</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
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</tbody>
</table>

Table 1. Basic conducts and attempt
3. PENALTY LEVELS AND MINIMUM PENALTIES

3.1. Penalties in the different countries (imprisonment and fines)

In Cyprus, all Directive money laundering offences committed with knowledge (intention) are punishable by a maximum of 14 years imprisonment or by a pecuniary penalty of up to 500.000 Euro or both. The same maximum penalty is provided for aiding, abetting and attempting a money laundering offence.

In Cyprus, there have not been many convictions for money laundering in the period studied. The sentence imposed by the Supreme Court to natural persons were as follows, in 2013 there was no imprisonment imposed in anyone.

<table>
<thead>
<tr>
<th>Year</th>
<th>1 day-1 year</th>
<th>1 year-5 years</th>
<th>5-10 years</th>
</tr>
</thead>
<tbody>
<tr>
<td>2011</td>
<td>0</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>2012</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
</tbody>
</table>

Table 2. Cyprus penalties imposed

In France, money laundering is punishable by up to 5 years’ imprisonment and a fine of €375,000. The amount of the fine may be raised to half the value of the property or funds in respect of which the money laundering operations were carried out. Money laundering is punished by 10 years’ imprisonment and a fine of €750,000 where the money comes from drug trafficking or where the following aggravating factors exist: it was habitually committed (the offence was committed repeatedly or if the perpetrator is a recidivist) or by using the facilities offered by the exercise of a professional activity; or it was committed by an organized gang.

In France, the relevant information is extracted from the National criminal records system for 2011 and shows the sanction imposed against a natural person upon conviction.
The following table sets out the sanction imposed in recent decisions (2011/2012).

<table>
<thead>
<tr>
<th>Offences (Sole offence)</th>
<th>Imprisonment</th>
<th>Fine</th>
<th>Additional sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Unsuspended</td>
<td>Suspended</td>
<td></td>
</tr>
<tr>
<td>Simple laundering + Custom laundering</td>
<td>5 years</td>
<td>A custom fine</td>
<td></td>
</tr>
<tr>
<td>Simple laundering + Custom laundering</td>
<td>5 years</td>
<td>A custom fine</td>
<td></td>
</tr>
<tr>
<td>Aggravated laundering</td>
<td>1 year</td>
<td>1 year</td>
<td>€ 50,000</td>
</tr>
</tbody>
</table>

Table 3. France penalties imposed (2011)
<table>
<thead>
<tr>
<th>Offence</th>
<th>Duration</th>
<th>Fine</th>
<th>Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aggravated laundering</td>
<td>3 years</td>
<td></td>
<td>Prohibition to manage a company for 5 years + Confiscation of boats</td>
</tr>
<tr>
<td>Custom laundering</td>
<td>2 years</td>
<td>€ 21,950 + € 150,000</td>
<td>Forfeiture of the object which was used for the commission of the offence, the sum of € 87,800</td>
</tr>
<tr>
<td>Custom laundering</td>
<td>2 years</td>
<td>€ 150,000</td>
<td></td>
</tr>
<tr>
<td>Aggravated laundering</td>
<td>5 years</td>
<td>€ 100,000</td>
<td></td>
</tr>
<tr>
<td>Aggravated laundering</td>
<td>4 years</td>
<td>€ 100,000</td>
<td></td>
</tr>
<tr>
<td>Aggravated laundering</td>
<td>3 years</td>
<td>€ 50,000</td>
<td></td>
</tr>
<tr>
<td>Aggravated laundering</td>
<td>18 months + 42 months</td>
<td>€ 50,000</td>
<td></td>
</tr>
<tr>
<td>Simple laundering</td>
<td>18 months</td>
<td></td>
<td>Forfeiture</td>
</tr>
</tbody>
</table>

Table 4. France penalties imposed (2011/12)

In Germany, whosoever hides an object which results from an unlawful act, conceals its origin or obstructs or endangers the investigation of its origin, procures such an object for himself or a third person or keeps such an object in his custody or uses it for himself or a third person if he knew the origin of the object at the time of obtaining possession: in especially serious cases the penalty shall be imprisonment from 6 months to 10 years. An especially serious case typically occurs if the offender acts on a commercial basis or as a member of a gang whose purpose is the continued commission of money laundering.

In Germany according to collected data, the practice on money laundering is as follows:
<table>
<thead>
<tr>
<th>Year</th>
<th>Persons convicted total</th>
<th>Fine</th>
<th>Money Laundering Range of Penalties: 3 months – 5 years</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>Fine</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>less than 6 months</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>total</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>tot.</td>
</tr>
<tr>
<td>2011</td>
<td>285</td>
<td>198</td>
<td>87</td>
</tr>
<tr>
<td>2010</td>
<td>241</td>
<td>176</td>
<td>65</td>
</tr>
<tr>
<td>2009</td>
<td>164</td>
<td>112</td>
<td>52</td>
</tr>
<tr>
<td>2008</td>
<td>238</td>
<td>165</td>
<td>73</td>
</tr>
<tr>
<td>2007</td>
<td>249</td>
<td>191</td>
<td>58</td>
</tr>
<tr>
<td>2006</td>
<td>93</td>
<td>62</td>
<td>31</td>
</tr>
<tr>
<td>2005</td>
<td>58</td>
<td>27</td>
<td>31</td>
</tr>
<tr>
<td>2004</td>
<td>83</td>
<td>32</td>
<td>51</td>
</tr>
<tr>
<td>2003</td>
<td>96</td>
<td>31</td>
<td>65</td>
</tr>
<tr>
<td>2002</td>
<td>102</td>
<td>40</td>
<td>62</td>
</tr>
<tr>
<td>2001</td>
<td>88</td>
<td>38</td>
<td>50</td>
</tr>
<tr>
<td>2000</td>
<td>61</td>
<td>34</td>
<td>27</td>
</tr>
</tbody>
</table>

Table 5. Money Laundering Range of Penalties: 3 months – 5 years

Only in few cases was conviction for money laundering based on intent. In 2011, 285 convictions resulted from the basic statutory offence according to §261 subs.1 StGB, and this is the maximum value in the observation period. In 2007, the number of convictions increased greatly by 168% and then levelled out to an average of more than 200 convictions a year. The rate of convictions with a fine was around 70% in the last 5 years. Prison sentences not suspended on
probation were rare. In 2011, only 7 prison sentences were not suspended on probation which corresponds to 2.5% of all convictions. Prison sentences of more than 2 years are equally rare as is the imposition of a prison sentence of 5 years.

<table>
<thead>
<tr>
<th>Year</th>
<th>Persons convicted</th>
<th>Fine</th>
<th>Prison Sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>total</td>
<td></td>
<td>less than 6 months</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>tot.</td>
</tr>
<tr>
<td>2011</td>
<td>51</td>
<td>42</td>
<td>9</td>
</tr>
<tr>
<td>2010</td>
<td>27</td>
<td>22</td>
<td>5</td>
</tr>
<tr>
<td>2009</td>
<td>9</td>
<td>6</td>
<td>3</td>
</tr>
<tr>
<td>2008</td>
<td>16</td>
<td>10</td>
<td>6</td>
</tr>
<tr>
<td>2007</td>
<td>19</td>
<td>13</td>
<td>6</td>
</tr>
<tr>
<td>2006</td>
<td>5</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>2005</td>
<td>6</td>
<td>1</td>
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<td>2002</td>
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<td>4</td>
<td>11</td>
</tr>
<tr>
<td>2001</td>
<td>4</td>
<td>2</td>
<td>2</td>
</tr>
</tbody>
</table>

Table 6: Money Laundering (§ 261 subs. 2 StGB) Range of Penalties: 3 months – 5 years

Convictions according to §261 subs. 2 StGB – procurement of "impure" objects – are rare. Over the past few years, a certain increase of such convictions could be observed; however, the rates are too low and the observation period is too short to talk of a solid trend without significant random variations. A fine is also predominant with this conviction and the prison sentence not suspended on probation is rare.
<table>
<thead>
<tr>
<th>Year</th>
<th>Persons convicted total</th>
<th>Fine</th>
<th>Total</th>
<th>Suspension</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>less than 6 months</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>to.</td>
</tr>
<tr>
<td>2011</td>
<td>43</td>
<td>13</td>
<td>30</td>
<td>24</td>
</tr>
<tr>
<td>2010</td>
<td>21</td>
<td>6</td>
<td>15</td>
<td>12</td>
</tr>
<tr>
<td>2009</td>
<td>26</td>
<td>10</td>
<td>16</td>
<td>12</td>
</tr>
<tr>
<td>2008</td>
<td>23</td>
<td>14</td>
<td>9</td>
<td>6</td>
</tr>
<tr>
<td>2007</td>
<td>23</td>
<td>12</td>
<td>11</td>
<td>7</td>
</tr>
<tr>
<td>2006</td>
<td>17</td>
<td>7</td>
<td>10</td>
<td>8</td>
</tr>
<tr>
<td>2005</td>
<td>7</td>
<td>2</td>
<td>5</td>
<td>4</td>
</tr>
<tr>
<td>2004</td>
<td>6</td>
<td>2</td>
<td>4</td>
<td>3</td>
</tr>
<tr>
<td>2003</td>
<td>9</td>
<td>2</td>
<td>7</td>
<td>5</td>
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<td>2002</td>
<td>17</td>
<td>4</td>
<td>13</td>
<td>7</td>
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<tr>
<td>2001</td>
<td>6</td>
<td>1</td>
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<td>4</td>
</tr>
<tr>
<td>2000</td>
<td>2</td>
<td>-</td>
<td>2</td>
<td>2</td>
</tr>
</tbody>
</table>

Table 2: Especially Serious Cases of Money Laundering (§ 261 subs. 4 StGB) Range of Penalties: 6 months – 10 years

§ 261 subs. 4 StGB comprises money laundering in especially serious cases. An especially serious case typically occurs if the offender acts on a commercial basis or as a member of a gang. The aim thus is to punish money laundering in the frame of organized crime. Convictions are rare but have shown an increasing tendency over the past years. The fine does not play such an important role as for the preceding subsections and is in most cases imposed in less than 50 % of all convictions. The prison sentence not suspended on probation nevertheless is very rare and the maximum prisons sentence of 10 years is hardly ever imposed.
<table>
<thead>
<tr>
<th>Year</th>
<th>Persons convicted total</th>
<th>Fine</th>
<th>Prison Sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>total</td>
<td>total</td>
<td>less than 6 months</td>
</tr>
<tr>
<td>2011</td>
<td>495</td>
<td>449</td>
<td>46</td>
</tr>
<tr>
<td>2010</td>
<td>395</td>
<td>362</td>
<td>33</td>
</tr>
<tr>
<td>2009</td>
<td>195</td>
<td>177</td>
<td>18</td>
</tr>
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<td>2008</td>
<td>309</td>
<td>287</td>
<td>22</td>
</tr>
<tr>
<td>2007</td>
<td>292</td>
<td>264</td>
<td>28</td>
</tr>
<tr>
<td>2006</td>
<td>93</td>
<td>86</td>
<td>7</td>
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<tr>
<td>2005</td>
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<td>12</td>
<td>8</td>
</tr>
<tr>
<td>2004</td>
<td>14</td>
<td>10</td>
<td>4</td>
</tr>
<tr>
<td>2003</td>
<td>8</td>
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<td>4</td>
</tr>
<tr>
<td>2002</td>
<td>14</td>
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<tr>
<td>2001</td>
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<td>4</td>
<td>4</td>
</tr>
<tr>
<td>2000</td>
<td>14</td>
<td>8</td>
<td>6</td>
</tr>
</tbody>
</table>

Table 8: Money Laundering through Gross Negligence (§ 261 subs. 5 StGB) Range of Penalties: up to 2 years or a fine

Considering the rate of convictions, those for money laundering through gross negligence according to § 261 subs. 5 StGB are the most important ones. As gross negligence concerning the origin of the objects or the money is sufficient, the production of evidence is significantly facilitated. As the range of penalties is significantly lower than for the other subsections of § 261, the fine plays an important role and prison sentences not suspended on probation are only an exception.
In **Hungary**, money laundering acts of converting, transferring, concealing or acquiring are punishable by imprisonment of up to 5 years. Where the following aggravating factors are present the term of imprisonment is between 2 and 8 years: a) is committed in a pattern of criminal profiteering; b) is committed involving an exceptionally high amount of money or one of value in excess thereof c) is committed by an officer or employee of a financial institution, insurance company, investment firm, commodities broker, investment fund manager, venture capital fund manager, exchange market, clearing house, central depository, voluntary mutual insurance fund or a private pension fund, or an organization engaged in the operation of gambling activities; d) is committed by a public official in an official capacity; e) is committed by an attorney-at-law.

The volume of registered money laundering is rather low, conviction of §303/B increased between 2006 and 2009.

<table>
<thead>
<tr>
<th></th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
</tr>
</thead>
<tbody>
<tr>
<td>registered</td>
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<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>accusation</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
<th>2012</th>
</tr>
</thead>
<tbody>
<tr>
<td>registered</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>of which accusation</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Table 9: Hungary penalties imposed**

In **Italy**, money laundering is punishable with imprisonment between 4 and 12 years and a fine from 1032 to 15493 euro. Available statistical data considered concerns only the District of Genoa Appeal Court. It was found that 12/24 months (imprisonment) was imposed in 8%; 24/36 months (imprisonment) in 24%; 36/48 months (imprisonment) in 16%; 60/72 months (imprisonment) in 8%. Furthermore, according to the Statistics office of the Ministry of Justice there were 340 convictions in 2009, 432 convictions in 2010 and 358 convictions in 2011.
In **Latvia**, money laundering of criminally acquired financial resources or other property is punishable with deprivation of liberty for a term not exceeding 3 years, or a fine not exceeding 100 times the minimum monthly wage, with or without confiscation of property. Where the offence is committed by a group of persons pursuant to prior agreement imprisonment is not less than 3 and not exceeding 8 years, with confiscation of property. When committed on a large scale, or if in an organised group, the term increases to not less than 5 and not exceeding 12 years, with confiscation of property, and with or without police supervision for a term not exceeding 3 years. In practice, community service, a fine and deprivation of liberty (from 3 to 5 years) were applied against natural persons.

In **Poland**, the act of transferring property is punishable by imprisonment for a term of between 6 months and 8 years. If committed in cooperation with other persons or the perpetrator gains significant financial benefit the applicable term is between 1 and 10 years. Facilitating such a transfer attracts imprisonment for a period of up to 3 years. Where significant damage is caused, imprisonment is between 6 months and 8 years.

According to the available data, in 1999, 7 people were sentenced to imprisonment on the basis of Article 299(1) of the Penal Code; in 2002, 9 people were sentenced to imprisonment on the basis of Article 299(1) of the Penal Code; in 2008, 34 people were sentenced to imprisonment on the basis of Article 299(1), (2) and (3) of the Penal Code. In 2011 23 people were sentenced to imprisonment on the basis of Article 299(1) and (3) of the Penal Code.

In **Romania**, a conflict exists between Art.29 of Law no. 656/2002 and the provisions on money laundering in the Criminal Law Code. Art 29 punishes an individual who transfers, conceals or acquires to a term of imprisonment from 3 to 12 years. The Criminal Law Code punishes an individual who assists an offender to secure the benefits or proceeds of the crime in a general sense, and easement of the capitalization of property to a term of imprisonment from 3 months to 7 years.

According to the statistics provided by the Romanian Ministry of Justice, in the year 2011, 23 persons were convicted for money laundering offences. All persons were aged 18 and above. 15 convictions were to imprisonment ranging from 1-5 years, 5 were to imprisonment ranging from 5-10 years. In rest of the cases the sentences were suspended. In the year 2012, 6 persons were convicted for money laundering offences. All persons were aged 18 years and above. 1 conviction
was to imprisonment ranging from 1-5 years, 1 was to imprisonment ranging from 5-10 years. In rest of the cases the sentences were suspended.

In Spain, where an individual acquires, possesses or conceals they shall be punished with a sentence of imprisonment of 6 months to 6 years and a fine from 1 to 3 times the value of the goods.

Statistics are not available on Spain, thus cases were reviewed so as to gauge the general practice. Regarding the basic offence of money laundering, which carries a prison sentence oscillating between six months and six years and a proportional fine, the following 3 Supreme Court judgments (STS) have been reviewed:

- STS 834/2012, 25 October, in which the Supreme Court (TS) upheld the lower court judgment and sentence of 15 months’ imprisonment, plus fine and special disqualification for the right to be elected to office.
- STS 628/2011, 22 July, in which the penalty of 2 years’ imprisonment was applied, plus holding public office for the duration of the sentence and a proportional fine and also subsidiary liability for non-payment of the fine.
- STS 730/2006, 21 June, in which the TS set aside the lower court judgment and imposed a new prison sentence for the basic offence of money laundering of 3 years imprisonment, fine and special disqualification for the right to be elected to office with the concurring mitigating circumstance of undue delay.

In these judgments, the Spanish courts imposed the sanction for the basic offence of money laundering within the legally permitted limits, in the lower half (six months to three years) of the legally established framework.

As to aggravated money laundering, in particular when the perpetrator is the head of the organisation, it should be taken into account within the legal framework, which oscillates between six years and one day and nine years’ imprisonment and a fine equal to three times the value of the assets (article 302 CP), six Supreme Court judgments involving this criminal offence from 1999 to 2012 have been found. In these cases persons have been sentenced to imprisonment of an average duration of 6 years.

Regarding judgments for money laundering when the perpetrator belongs to an organisation, it should be taken into account within the legal framework which oscillates between three years and
three months and six years’ imprisonment and a fine equal to three times the value of the assets. Also in this case six Supreme Court judgments involving this criminal offence in 2011 have been reviewed. The general tendency observed in cases of pertaining to an organization is to impose the penalty from the upper half (from four years on) within the established criminal law framework (three years and three months to six years).

No judgments have been found (either acquittals nor convictions) in cases of money laundering where the assets originated from the offences of “drug trafficking, bribery, influence peddling, misappropriation, fraud and illegal collection and negotiations and activities prohibited to public servants and abuse in the exercise of public service or offences against territorial and urban planning).

Regarding the offence of negligent money laundering, it should be noted that the limit oscillates between 6 months and 2 years’ imprisonment and a fine three times the value of the assets. There are eleven judgments from the Supreme Court (TS) between 1999 and 2012.

- **STS 834/2012, 25 October**, the TS upheld the judgment for an offence of grave negligent money laundering, which imposed a sanction of fifteen months’ imprisonment and a fine, with subsidiary personal liability in the event of non-payment of one month, as well as the accessory penalty of special barring for holding public office for the duration of the prison term.
- **STS 522/2011, 1 June.** The TS partially set aside the judgment of the lower court and convicted a person for an offence of negligent laundering of money originating from drug trafficking, for which the TS decided to impose a penalty of one year and three months’ imprisonment and a fine, the maximum from the lower half.
- **STS 1137/2011, 2 November.** The TS partially set aside the judgment of the lower court and convicted one of the accused for an offence of grave negligent money laundering, handing down the penalty of one year’s imprisonment and a fine and the accessory special barring for holding public office for the duration of the prison term.
- **AP (Audiencia Provincial) Pontevedra 33/2011, 17 November,** in which two subjects were convicted as perpetrators of an offence of negligent laundering of money originating from drug trafficking to six months’ imprisonment, with the accessory penalty of special barring for holding public office for the duration of the sentence and fine.
- **AP Guipúzcoa, 456/2011, 2 December,** convicted a subject as perpetrator of a continuing offence of money laundering committed for serious negligence, to a penalty of one year
and three months’ imprisonment and a fine with subsidiary personal liability of one month and fifteen days’ imprisonment in the case of non-payment.

- STS 801/2010, 23 September, in which the TS upheld the judgment imposed by the lower court in which a tax accountant had been punished for committing an offence negligent laundering money originating from drug trafficking with a penalty of one year and six months’ imprisonment, a fine and special barring from exercising the profession of tax accountant, accountant and real estate agent for three years.

- STS 16/2009 27 January, in which the TS upheld the conviction of a lawyer for an offence of money laundering with serious negligence, with the mitigating circumstance of undue delay, to a prison sentence of one year, a fine and special barring from practicing the legal profession for a period of three years and special barring from running for office for the duration of the sentence.

- STS 960/2008, 26 December, in which the TS upheld the lower court conviction for an offence of money laundering with serious negligence, imposing a prison sentence of one year, a fine and special barring from running for office for the duration of the sentence.

- STS 34/2007, 1 February, in which the TS partially set aside the lower court judgment and imposed a prison sentence of one year, a fine and the accessory penalty of barring from running for public office on a subject for an offence of laundering money originating from drug trafficking with serious negligence.

- STS 1034/2005, 14 September upheld the lower court judgment that imposed a prison sentence of one year, a fine and accessory penalty of barring from running for office for negligent money laundering.

- STS 1907/2002, 9 November, the TS upheld the lower court judgment that imposed a prison sentence of five months and four months respectively on the accused, a fine and the accessory penalty of barring from holding or running for public office for the duration of the sentence.

In light of the case-law reviewed, it can be said that the tendency is to impose prison terms of one year for the offence of negligent money laundering, which is the middle point of the criminal law framework legally established.

In **Sweden**, to possess or participate attracts differing punishment depending on the gravity of the offence. For moderately grave offences, imprisonment is for at most 2 years, for grave offences it is for at least 6 months and at most 6 years and for minor offences at most 6 months or a fine.
For 2011 the sanctions imposed are recorded in the following table. The most notable change concerns the total number of convictions for handling stolen money (9:6a) which from 2000 has increased from 2, to 95 in 2011.

<table>
<thead>
<tr>
<th>Principal offence 2011</th>
<th>Imprisonment</th>
<th>Probation</th>
<th>Suspended sentence</th>
<th>Fines</th>
<th>Prosecutor Fines</th>
<th>Waiver of prosecution</th>
<th>In total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Handling stolen goods (9:6)</td>
<td>267</td>
<td>138</td>
<td>303</td>
<td>15</td>
<td>13</td>
<td>66</td>
<td>925</td>
</tr>
<tr>
<td>Handling stolen money (9:6a)</td>
<td>20</td>
<td>21</td>
<td>41</td>
<td>2</td>
<td>-</td>
<td>-</td>
<td>95</td>
</tr>
<tr>
<td>Handling stolen goods, petty crime (9:7)</td>
<td>-</td>
<td>1</td>
<td>3</td>
<td>111</td>
<td>16</td>
<td>21</td>
<td>162</td>
</tr>
<tr>
<td>Handling stolen money, petty crime (9:7a)</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>4</td>
<td>-</td>
<td>-</td>
<td>4</td>
</tr>
</tbody>
</table>

Table 10: Sweden penalties imposed

In the **United Kingdom**, to conceal, disguise, convert, transfer, possess, acquire will be punished differently depending on which court the individual is tried. On summary conviction, imprisonment is for a term not exceeding 6 months or to a fine not exceeding the statutory maximum or to both, or on conviction on indictment, to imprisonment for a term not exceeding 14 years or to a fine or to both.

The average custodial sentence for offences concerning Money Laundering ranged between 4 months in 2008 to 4.4 months in 2012. Section 334(1) of the Proceeds of Crime Act 2002 provides for a maximum 6 month term for summary convictions and a maximum of 14 years after conviction on indictment, courts appear disinclined to impose the maximum sentence, with the sentences at the high end reaching around 7 years.
3.2. Key common points and differences

Whilst some Member States do list the specific acts of money laundering set out in the Directive (such as Cyprus, Germany, Hungary and the UK) others either mention a few of the specific acts (such as Poland, Romania and Spain), or simply provide a general offence of money laundering (such as France, Italy, Latvia and Sweden). Cyprus, Latvia, Sweden and the UK provide for the imposition of a fine without imprisonment. France, Italy and Spain impose a fine in addition to imprisonment, whereas Germany, Hungary and Romania make no mention of a fine. The highest maximum penalty is 14 years in Cyprus and the UK with the lowest maximum sentence set at 3 years in Latvia and Poland (facilitating).

<table>
<thead>
<tr>
<th>Country</th>
<th>Directive 2005/60/EC, Article 1(2)(a): conversion or transfer of property, concealing or disguising the illicit origin</th>
<th>Directive 2005/60/EC, Article 1(2)(b): concealment or disguise knowing property is derived from criminal activity</th>
<th>Directive 2005/60/EC, Article 1(2)(c): acquisition, possession or use of property, knowing such property was derived from criminal activity</th>
<th>Directive 2005/60/EC, Article 1(2)(d): participation in, association and aiding, abetting, facilitating and counselling</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cyprus</td>
<td>14 years</td>
<td>14 years</td>
<td>14 years</td>
<td>14 years</td>
</tr>
<tr>
<td>France</td>
<td>5 years</td>
<td>5 years</td>
<td>5 years</td>
<td>5 years</td>
</tr>
<tr>
<td>Germany</td>
<td>10 years</td>
<td>10 years</td>
<td>10 years</td>
<td>10 years</td>
</tr>
<tr>
<td>Hungary</td>
<td>5 years</td>
<td>5 years</td>
<td>5 years</td>
<td>5 years</td>
</tr>
<tr>
<td>Italy</td>
<td>12 years</td>
<td>12 years</td>
<td>12 years</td>
<td>12 years</td>
</tr>
<tr>
<td>Latvia</td>
<td>3 years</td>
<td>3 years</td>
<td>3 years</td>
<td>3 years</td>
</tr>
<tr>
<td>Poland</td>
<td>10 years</td>
<td>10 years</td>
<td>10 years</td>
<td>3 years</td>
</tr>
<tr>
<td>Romania</td>
<td>12 years (Article 29) 7 years (Criminal Law Code)</td>
<td>12 years (Article 29) 7 years (Criminal Law Code)</td>
<td>12 years (Article 29) 7 years (Criminal Law Code)</td>
<td>12 years (Article 29) 7 years (Criminal Law Code)</td>
</tr>
<tr>
<td>Spain</td>
<td>6 years</td>
<td>6 years</td>
<td>6 years</td>
<td>-</td>
</tr>
<tr>
<td>Sweden</td>
<td>6 years (grave offence) 2 years (moderately grave) 6 months (minor)</td>
<td>6 years (grave offence) 2 years (moderately grave) 6 months (minor)</td>
<td>6 years (grave offence) 2 years (moderately grave) 6 months (minor)</td>
<td>6 years (grave offence) 2 years (moderately grave) 6 months (minor)</td>
</tr>
<tr>
<td>UK</td>
<td>14 years (on indictment) 6 months (summary)</td>
<td>14 years (on indictment) 6 months (summary)</td>
<td>14 years (on indictment) 6 months (summary)</td>
<td>14 years (on indictment) 6 months (summary)</td>
</tr>
</tbody>
</table>
3.2.1. Minimum Penalties

Where specified, the lowest minimum sentence of imprisonment set is 3 months in Latvia and Romania (Criminal Law Code offence). The minimum is set at 6 months in Germany, Poland, Spain and Sweden. Latvia has the highest minimum sentence at 5 years for the aggravated offence (when committed on a large scale, or if in an organised group), followed by Italy at 4 years.

3.2.2. Imposition of Maximum penalty

None of the Member States studied set legislative limitations on the imposition of the maximum sentence. The appropriate sentence is to be determined by the sentencing judge taking into account mitigating and aggravating factors listed in the following section.

In Cyprus, in no case involving money laundering offences did the judges impose a sanction towards the maximum sanction level foreseen in the national legislation.

Under French law, there is no specific limitation to sentence to the maximum. However, on the basis of the principles of proportionality and individualization of sentences, the Court has to pronounce a sentence suitable to the personality of the offender. This is the reason why in practice the maximum penalty is rarely pronounced.

As to basic offence (§ 261 StGB) in Germany, prison sentences of more than 2 years are rare and a possible prison sentence of 5 years is hardly ever imposed. With regard to § 261 subs. 4 StGB, which comprises money laundering in especially serious cases, maximum prisons sentence of 10 years is hardly ever imposed. Also in the case of negligent money laundering the maximum sentence (2 years) is hardly ever imposed.

No statistical data is available in Hungary on the level of penalty. According to answers given by practitioners, the highest level of sanction was imposed in no case.

In Italy, no case of the maximum penalty being imposed has been found (survey takes into account only one District of Appeal Court reviewed).

The Latvian Court Administration as well as the Information centre has no direct information on the imposition of the maximum sanction level foreseen in the national legislation, however reviewing data on general terms of sentences imposed it could be concluded that according to the publicly
available statistics (2004-2012), judges have never imposed the maximum sanction level foreseen in the national legislation for the offence set forth in the Section195 of the Criminal Law.

In Poland, the maximum sanction level is imposed in very exceptional cases. In 1999, out of 7 people convicted on the basis of the Article 299 paragraph 1 of the Penal Code, the maximum imposed sanction was 2 years of imprisonment (in one case). The maximum sanction provided for in Article 299 paragraph 1 is higher (up to 5 years). In 2007 in case of Article 299 paragraph 1 of the Penal Code which provides for a maximum sanction of imprisonment for 8 years, among all of the 13 sentenced, the highest received punishment was imprisonment for between 1 and 2 years, imposed in 6 cases. For instance in 2011 in case of Article 299 paragraph 1 of the Penal Code which provides for a maximum sanction of imprisonment for 8 years, among all of the 22 sentenced, the highest received punishment was imprisonment for 2 years, imposed in only one case and with suspension of execution.

In Romania, the maximum sanction level foreseen in the national legislation is 12 years imprisonment, no sentence upon conviction exceeded 10 years.

In Spain there are no statistics available and so a review of the case law was conducted. Regarding the basic offence of money laundering, which carries a prison sentence between six months and six years and a proportional fine, Supreme Court judgments (STS) have been reviewed. In light of these judgments, it would appear as though the Spanish courts tend to impose the sanction for the basic offence of money laundering within the legally permitted limits, in the lower half (6 months to 3 years) of the legally established framework.

The maximum sanction level for receiving/handling stolen goods (Criminal Code 9:6) and money receiving/handling stolen money (9:6a) in Sweden is imprisonment 2 years. For gross receiving/handling stolen goods (9:6 Paragraph 3) and gross money receiving/handling stolen money (9:6a Paragraph 3) the maximum sanction level is imprisonment for 6 years. For petty receiving/handling stolen goods (9:7) and petty money receiving/handling stolen money (9:7a), the maximum sanction level is 6 months. The statistics for handling stolen goods (9:6) and handlings stolen money (9:6) also include gross crimes. Receiving/handling stolen goods is by far the most common offence in this category of about 250 sentences for imprisonment per year for the last five years. In contrast, there have only been around ten sentences for imprisonment per year concerning money receiving/handling stolen money during the same time period.
4. AGGRAVATING AND MITIGATING CIRCUMSTANCES

The Directive does not itself set out what the applicable penalties or aggravating factors should be, Article 39 simply provides that the “penalties must be effective, proportionate and dissuasive”.

4.1. Situation in the different countries

In Cyprus the aggravating and mitigating factors are established and set out by the Supreme Court (Court of Appeal). Examples of aggravating factors include the sophistication of the act, the amount of money acquired, previous criminal record, membership of a criminal gang. Mitigating factors include no previous convictions, an early guilty plea, showing remorse.

In France, the law provides for specific aggravating circumstances: when the predicate offence is punishable by a custodial sentence exceeding certain limits, the aggravating circumstances that accompanied the predicate offence in the general money laundering can be applicable to the offence of money laundering; in the case of money laundering related to drug trafficking, some of those circumstances can be applicable (leading or organizing of a group, organized group). The only existing generic aggravating circumstance is recidivism. The collaboration with the authorities can be a mitigating circumstance.

In Germany, according to § 261 (4) StGB, especially serious cases of money laundering are punishable by between 6 months and 10 years of imprisonment. Especially serious cases are typically cases in which money laundering is committed on a commercial basis or by a gang whose purpose is the continued commission of the offence (§ 261 (4) StGB). If the perpetrator reports the offence to public authorities or causes the securing of the object, he is not liable for money laundering (§ 261 (9) StGB). Also, who is liable for his participation in the predicate offence, shall not be liable for money laundering either.

The Hungarian Criminal Code contains provisions regarding aggravating circumstances. If money laundering within the meaning of Art. 303 (1)-(3) HCC is committed by an official in his official capacity (Art. 303 (4) (d) HCC), an employee of a financial institution(Art. 303 (4) (c) HCC) , an attorney (Art. 303 (4) (e) HCC) or in a commercial way (Art. 303 (4) (a) HCC) or if it involves a high amount of money (Art. 303 (4) (b) HCC), the punishment is imprisonment from two to eight years (Art. 303 (4) HCC). Money laundering within the meaning of Art. 303A (1) HCC is punishable by up to three years of imprisonment, if the object of the crime is a higher amount of money (Art. 303A (2) (a) HCC) or the offence is committed by a public official in his official capacity (Art. 303A (2) (c)
HCC) or by an employee of a financial institution (Art. 303A (2) (b) HCC). The perpetrator of Art. 303 (1)-(5), 303A (1), (2) HCC is not liable if he reports the laundering activity to the authorities before it is completely revealed (Art. 303 (6), 303A (3) HCC).

In Italy there are specific aggravating circumstances: when the offence is committed in the exercise of a professional activity and when the offender is involved in the activities of the mafia or a similar organization. There is one specific mitigating circumstance: when the laundering is originated by an offence whose maximum penalty is no more than five years long. All the common circumstances, provided for by the general part of the criminal code apply.

In Latvia there are some specific aggravating circumstances: the commission of the offence is repeated, offence committed by a group of persons and commission on a large scale. There are also generic aggravating and mitigating circumstances.

In Poland, the joint commission of money laundering within the meaning of Art. 299 (1)-(2) PCC or money laundering resulting in a gain of considerable material benefit is punishable by an increased sentence of one to 10 years (Art. 299 (5), (6) PCC). According to Art. 37 of the Act on Counteracting Money Laundering and Financing Terrorism, the commission of the offenses defined in Art. 35 (1), (2) and 36 is punishable by a minimum of six months and a maximum of 8 years of imprisonment. The perpetrator may not be punished if he reports the offence to the authorities.

In Romania there are no specific circumstances. There is a list of generic mitigating circumstances and a list of generic aggravating circumstances in the General part of the Penal Code, as said before for other offences.

In Spain there are no specific circumstances but there is a list of generic mitigating circumstances and a list of generic aggravating circumstances in the General part of the Penal Code.

In Sweden, according to Ch. 9 (Sec. 6) (3) SCC, a offense within the meaning of Ch. 9 (Sec. 6) (1), (2) SCC to be qualified as grave may be punished by imprisonment between 6 months and 6 years. The same applies to the offense defined in Ch. 9 (Sec 6a) (1), (2) SCC (Ch. 9 Sec 6a (3) SCC). If the committed offence has to be regarded as petty, the maximum sentence is lowered to 6 months of imprisonment (Ch. 9 (Sec. 7), (Sec. 7a) SCC).

In United Kingdom previous convictions are considered to be an aggravating factor. Other aggravating and mitigating factors are listed in the Sentencing Guidelines.
Not all Member States provide for a specific aggravating penalty. France sets the aggravated penalty at 10 years (organized gang, committed in course of professional activity, recidivism, drug trafficking). Germany also sets the aggravated sentence at 10 years (high value and organized gang). In Poland it is also 10 years (high value or organized gang). In Hungary it is 8 years (high value, committed in course of professional activity or recidivism). In Latvia it is 12 years (high value or organized gang) or 8 years (group).

4.2. Key common points and differences

In general terms, recidivism or previous convictions are aggravating circumstances. Some jurisdictions contain other provisions on aggravating circumstances. In France, Germany, Italy, Latvia and Poland, specific forms of joint commission are considered aggravating circumstances. In Cyprus, Germany, Hungary and Poland, the amount of the benefits is an aggravating circumstance. In Italy and in Hungary the special status of the perpetrator is considered to be an aggravating factor. The Swedish Criminal Code includes a provision on gross money laundering. In Poland, Hungary and Germany, the perpetrator may avoid criminal liability for money laundering by reporting the offense to public authorities. Sweden is the only jurisdiction with provisions regarding mitigating circumstances. Thus, in cases of money laundering of petty amounts of money, the sentence may be reduced.

The Directive does not provide for aggravating or mitigating circumstances and this can be the cause of the differences among the different States. The effects of the aggravating and mitigating circumstances vary. In UK and Cyprus (common law systems) and in Hungary, the Court will impose the appropriate penalty taking into account the seriousness of the crime as well as any other aggravating and mitigating factors. In France recidivism leads to a compulsory minimum penalty. In Italy and Spain, the aggravating and the mitigating circumstances lead to a compulsory increase or reduction of the sentence. In Germany, only the specific aggravating circumstances lead to a compulsory increase of the sentence, and there is an open list of generic circumstances that the court can appreciate, as aggravating or mitigating circumstances and that may increase or reduce the sentence. In Latvia and in Sweden, basically but not always, the aggravating circumstances can lead to an increase of the sentence. In Poland, in some cases the rules are compulsory and in other cases they are not. In Romania the aggravating circumstances lead to an optional increase of the penalty and the mitigating circumstances lead to a compulsory decrease of the legal minimum of the penalty.
### Table 11. Frequent aggravating circumstances

Other than Cyprus, Italy and the United Kingdom additional penalties are set out for when certain aggravating circumstances exist. Sweden does not specify what aggravating factors impact on the gravity of the offence. Poland provides a separate penalty for Article 1(2) (d) which when aggravated by significant damage the maximum penalty is 8 years. The other Member States take into account the same aggravating factors for the money laundering offences and provide the same penalty for the aggravated offences.

### 5. SANCTIONS OTHER THAN IMPRISONMENT AND FINES

#### 5.1. Community Service

In Cyprus, Hungary, Latvia and the UK community service orders are available and can include the imposition of additional conditions.

#### 5.2. Confiscation and Forfeiture

In France, Germany, Italy, Latvia, Spain and Scotland confiscation or deprivation orders can be made in addition to imprisonment and fines. In Hungary, Poland and Scotland forfeiture can also be ordered.
In France, disqualification is one of the additional penalties that could be imposed to the offender (natural and legal) sentenced for money laundering. Nevertheless, in practice, that sentence is rarely pronounced. Looking at the recent decisions (2011/2012) that have been reviewed and in which at least one of offences listed above is concerned, it may be noted that only in one case confiscation (of boats) has been imposed (Aggravated laundering - Criminal chamber of the Supreme court, 5 Dec., 2012, n° 11-82.918); in two cases forfeiture has been applied (Custom laundering - Criminal chamber of the Supreme court, 16 May 2012, n° 11-82.409; Simple laundering - Criminal chamber of the Supreme court, 26 Jan., 2011, n° 10-84.081).

5.3. Restricted Movement

In France individuals can be prohibited from leaving the country. Also in France, Hungary, Latvia non-citizens can be expelled from the territory.

In Hungary and Poland individuals can be prohibited from entering certain areas or from making contact with certain individuals.

5.4. Restriction on Work Related Rights

In France, Hungary, Italy, Poland, Romania, Spain and Sweden upon conviction individuals can also be prohibited from undertaking certain professional activities, including disqualification from some professions.

In France, Hungary, Italy, Latvia, Poland and Romania, offenders are also prohibited from holding public office.

In Italy an individual can also be prohibited from holding directional positions in legal entities and can also lose and public licences they may hold.

In Spain the closure of establishments and premises can also be ordered.

In France they can also be prohibited from drawing cheques and making other types of payments.

In France, in one case prohibition to manage a company for 5 years (Aggravated laundering - Criminal chamber of the Supreme Court, 5 Dec., 2012, n° 11-82.918) was imposed. In practice, in Hungary exclusion from participation in public affairs as a secondary penalty is inflicted in addition
to imprisonment. This type of secondary penalty can be imposed for intentionally committed criminal offences provided that the perpetrator has been sentenced to non-suspended imprisonment (Arts 62-63 HCC). Also, in some cases (we do not have enough data to make any statistic calculation) the temporary prohibition from the profession of financial consultancy is inflicted.

In Italy, according to collected data and information (concerning in any case only the district of the Appeal Court of Genova) disqualifications are applied as average in 16% of cases.

In Latvia, section 195 does not set out disqualification and it does not appear to be applied in practice.

In Poland, due to the nature of discussed offences most frequently imposed penal measure is a prohibition of undertaking specific entrepreneurial activities. In 1999 no penal measure was imposed with reference to the Article 299 paragraph 1 of the Penal Code. For instance in case of Article 299 paragraph 1 of the Penal Code, among 13 sentenced in 2007, 2 were sanctioned with prohibition of undertaking business activities. No other penal measure was imposed. In 2011 in case of Article 299 paragraph 1 of the Penal Code, among 22 sentenced 2 were sanctioned with prohibition of undertaking business activities and 2 were sanctioned with forfeiture of objects or material benefits.

In Spain, all of the judgments reviewed apply the accessory penalty of special barring for public employment and office for the duration of the sentence, pursuant to article 56.2 of the CP. Additionally and pursuant to article 303 CP, judges must impose a special barring from public employment and office, profession or trade, industry or commerce, for three to ten years, when the acts foreseen were perpetrated by an entrepreneur, intermediary in the financial sector, a medical practitioner, civil servant, social worker, teacher or educator, when carrying out the duties of his office, profession or trade, in addition to the prison. The punishment of absolute barring shall be imposed from ten to twenty years when such acts are carried out by an authority or agent thereof.

5.5. Restriction of other Rights

In France, Latvia and Poland offenders lose their civic rights. In France, Hungary and Poland they can also be disqualified from driving.

Parental rights can also be affected by a conviction in France, Italy, Romania and Sweden.
The Polish Penal Code provides for the so called penal measures. One of the penal measures is deprivation of public rights, which includes among others the loss of the right to vote or be elected. The court may impose deprivation of public rights in exceptional cases i.e. in cases of imprisonment for a period of no less than 3 years for an offence committed out of motivation deserving particular reprobation.

### 5.6. Other Sanctions

In Poland it can be ordered that the decision be published.

| Sanction | Community Service | Confiscation/deprivation orders | Forfeiture of economic proceeds | Prohibition from leaving Country | Prohibition of certain professions, including disqualification | Prohibition on holding public office | Loss of civic rights | Parental rights affected | Driving disqualification | Loss of public licence | Expulsion of non-citizens | Prohibition from making payments | Prohibition from holding directional positions | Prohibition in legal entities | Publication of Decision | Closure of Premises |
|----------|------------------|--------------------------------|---------------------------------|--------------------------------|-------------------------------------------------------------|-------------------------------------|------------------|-----------------------------|-----------------------------|-------------------------|------------------------|---------------------------------|---------------------------------|-----------------|-------------------|
| Cyprus   | ✓                |                                |                                 |                                |                                                             |                                     |                  |                             |                             |                         |                        |                                 |                                 |                 |                   |
| France   | ✓                | ✓                              | ✓                               | ✓                              | ✓                                                           | ✓                                    | ✓                 |                             |                             | ✓                       | ✓                      | ✓                                | ✓                               | ✓                |                   |
| Germany  | ✓                |                                |                                 |                                |                                                             |                                     |                  |                             |                             |                         |                        |                                 |                                 |                 |                   |
| Hungary  | ✓                | ✓                              | ✓                               | ✓                              | ✓                                                           | ✓                                    | ✓                 |                             |                             | ✓                       | ✓                      | ✓                                | ✓                               | ✓                |                   |
| Italy    | ✓                |                                |                                 |                                |                                                             |                                     |                  |                             |                             | ✓                       | ✓                      | ✓                                | ✓                               | ✓                |                   |
| Latvia   | ✓                |                                |                                 |                                |                                                             |                                     |                  |                             |                             | ✓                       | ✓                      | ✓                                | ✓                               | ✓                |                   |
| Poland   | ✓                | ✓                              | ✓                              | ✓                              | ✓                                                           | ✓                                    | ✓                 |                             |                             | ✓                       | ✓                      | ✓                                | ✓                               | ✓                |                   |
| Romania  | ✓                |                                |                                 |                                |                                                             |                                     |                  |                             |                             | ✓                       | ✓                      | ✓                                | ✓                               | ✓                |                   |
| Spain    | ✓                |                                |                                 |                                |                                                             |                                     |                  |                             |                             | ✓                       | ✓                      | ✓                                | ✓                               | ✓                |                   |
| Sweden   |                  |                                |                                 |                                |                                                             |                                     |                  |                             |                             | ✓                       | ✓                      | ✓                                | ✓                               | ✓                |                   |
| England & Wales | ✓                  |                                |                                 |                                |                                                             |                                     |                  |                             |                             | ✓                       | ✓                      | ✓                                | ✓                               | ✓                |                   |
| Northern Ireland | ✓              |                                |                                 |                                |                                                             |                                     |                  |                             |                             |                         |                        |                                 |                                 |                 |                   |
| Scotland | ✓                | ✓                              | ✓                              |                                |                                                             |                                     |                  |                             |                             | ✓                       | ✓                      | ✓                                | ✓                               | ✓                |                   |

Table 12. Sanctions other than imprisonment and fines
6. SUSPENDED SENTENCES AND EARLY RELEASE

6.1. Suspended sentences

In all Member States studied suspended sentences are available, provided that the sentence of imprisonment imposed is under a certain number of years as set out in the table 5. By contrast, such a maximum term of imprisonment is not specified for France, Germany, Sweden and the UK. In France a suspended sentence is not available where a sentence for similar facts is pronounced within 5 years of the first sentence pronounced. In Romania a suspended sentence is only possible if the individual has not been previously sentenced to a penalty of imprisonment of more than 6 months. A suspended sentence does not exist in Scotland. The only analogous mechanism is the 'deferred' sentence, which allows a criminal court to defer passing sentence entirely with or without the imposition of conditions.

<table>
<thead>
<tr>
<th>Country</th>
<th>No. Years</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cyprus</td>
<td>3</td>
</tr>
<tr>
<td>France</td>
<td>-</td>
</tr>
<tr>
<td>Germany</td>
<td>-</td>
</tr>
<tr>
<td>Hungary</td>
<td>2</td>
</tr>
<tr>
<td>Italy</td>
<td>2</td>
</tr>
<tr>
<td>Latvia</td>
<td>5</td>
</tr>
<tr>
<td>Poland</td>
<td>2</td>
</tr>
<tr>
<td>Romania</td>
<td>3</td>
</tr>
<tr>
<td>Spain</td>
<td>2</td>
</tr>
<tr>
<td>Sweden</td>
<td>-</td>
</tr>
<tr>
<td>England and Wales</td>
<td>28 - 51 weeks</td>
</tr>
<tr>
<td>Northern Ireland</td>
<td>2</td>
</tr>
<tr>
<td>Scotland</td>
<td>-</td>
</tr>
</tbody>
</table>

Table 13. Suspended Sentences and the maximum no. of years

In Cyprus, there are no records for imposing a suspended sentence to a person found guilty for money laundering. There is no data available regarding this issue.
In France the collected data (period 2011, table at page 1) show that of 53 penalties pronounced for any kind of money laundering 46 have been suspended (32 for general money laundering; 14 for aggravated money laundering). In France, the average duration of the unsuspended part of the sentence (in month, for general money laundering and also aggravated money laundering) is 17.4.

In Germany, as to the basic offence (§ 261 StGB), prison sentences not suspended on probation are an exception. In 2011, 7 prison sentences not suspended on probation were imposed which corresponds to 2.5 % of all convictions. Prison sentences of more than two years which cannot be suspended on probation are an exception, and a possible prison sentence of 5 years is hardly ever imposed. In case of convictions according to § 261 subs. 2 StGB the prison sentence not suspended on probation is just a rare exception (2001: 1 on 2; 2002: 9 on 11; 2003: 7 on 7; 2004: 4 on 5; 2005: 4 on 5; 2006: 3 on 3; 2007: 6 on 6; 2008: 5 on 6; 2009: 3 on 3; 2010: 5 on 5; 2011: 7 on 9). As § 261 subs. 4 StGB comprises money laundering in especially serious cases - an especially serious case typically occurs if the offender acts on a commercial basis or as a member of a gang - the prison sentence not suspended on probation nevertheless is very rare and the maximum prisons sentence of 10 years is hardly ever imposed. Finally, as to money laundering through gross negligence according to § 261 subs. 5 StGB, prison sentences not suspended on probation are only an exception (2001: 37 on 46; 2010: 27 on 33; 2009: 17 on 18; 2008: 21 on 22; 2007: 28 on 28; 2006: 7 on 7; 2005 8 on 8; 2004: 4 on 4; 2003: 3 on 4; 2002: 4 on 4; 2001: 4 on 4; 2001: 6 on 6).

According to the available statistics (2004-2012), in Latvia with regard to Section 195 (Laundering of the proceeds of crime) in average about 95% cases suspended sentence was applied.

In Poland in 1999 7 people were sentenced to imprisonment on the basis of Article 299 paragraph 1 of the Penal Code. Only in one case the execution of the punishment was not suspended. In 2002 9 people were sentenced to imprisonment on the basis of Article 299 paragraph 1 of the Penal Code. Only in one case the execution of punishment was not suspended. In 2008 34 people were sentenced to imprisonment on the basis of Article 299 paragraph 1, 2 and 3 of the Penal Code. Only in 5 cases the execution of punishment was not suspended. In 2011 23 people were sentenced to imprisonment on the basis of Article 299 paragraph 1, and 3 of the Penal Code. Only in 3 cases the execution of punishment was not suspended.

According to the statistics provided by the Romanian Ministry of Justice, in the year 2011: out of 23 convictions, 1 sentence was suspended and 2 sentences were suspended under supervision. Therefore, 13% of the total sentences were suspended. In the year 2012: out of 6 convictions, 1 sentence was suspended and 3 sentences were suspended under supervision. Therefore, 66.66% of
the total sentences were suspended. Regarding the actual jail time, the Romanian criminal system is quite strict.

In Spain there are no statistics on this issue. According to the interviews carried out with some practitioners it is possible to conclude that suspension of the sentence of imprisonment for the offence of money laundering, as long as the penalty is less than two years’ imprisonment, is generally dependent on the payment of civil liability claims; in the event of non-payment, the suspension would be revoked and the offender would be imprisoned. If said suspension is not dependent on the payment of the civil liabilities *ex delicto*, in the case of first-time offenders, suspension of sentence will also be granted in cases of insolvency, after verifying assets, hearing the parties and the public prosecutor’s office. In the scope of the offence of money laundering, final conviction for money laundering with negligence which always carries penalties less than two years, will be suspended as a general rule by the Court of judgment enforcement in first-time offenders as long as the legal requisites of article 81 CP have been met and when the offender has been deemed to pose little criminal hazard. Likewise, and as explained above, in this type of financial crime, the judge usually makes suspension dependent on payment of the civil liabilities arising. In the event of non-payment, the suspension would be revoked and the offender would be imprisoned.

There are three conditions necessary proceed to suspend the sentence: 1) that the convict is a first-time offender. Previous convictions for negligent offences or criminal records that have been cancelled shall not be taken into account; 2) the sentence or sum of the sentences handed down does not exceed two years without including that which may arise from failure to pay a fine; 3) for the civil liabilities arising to have been paid, except if the Judge or Court of Law sentencing, after hearing the parties concerned and the Public Prosecutor, declares that it is fully or partially impossible for the convict to honour these.
In Sweden, the relationship between court sentencing of imprisonment and suspended sentences respectively was in 2011 as follows:

<table>
<thead>
<tr>
<th>Principal offence</th>
<th>Imprisonment</th>
<th>Suspended sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td>Handling stolen goods (6)</td>
<td>267</td>
<td>303</td>
</tr>
<tr>
<td>Handling stolen money (6a)</td>
<td>20</td>
<td>41</td>
</tr>
<tr>
<td>Handling stolen goods, petty crime (7)</td>
<td>-</td>
<td>3</td>
</tr>
<tr>
<td>Handling stolen money, petty crime (7a)</td>
<td>-</td>
<td>-</td>
</tr>
</tbody>
</table>

**Table 14. Sweden suspended sentences**

As to conditional release, according to Chapter 26, Section 6 of the Penal Code, a person serving imprisonment for a fixed term shall, unless it follows otherwise, e.g. if the sentenced person seriously violates the conditions for the serving of the sentence in a prison, be conditionally released when two-thirds of the sentence, but at least one month, has been served. According to Chapter 26, Section 10 of the Penal Code, after conditional release, there shall follow a probationary period corresponding to the remaining portion of the sentence, but of at least one year.

In the UK this is the category of offence that the implementation of the Criminal Justice Act in 2005 affected least, with no difference in the percentage use of the suspended sentence between the years of 2004, just before its inception, and 2006.

| Percentage use of sentences other than custody and suspended sentences |
|-----------------------------|-----------------------------|
| 35.7% | 34.4% | 35.7% | 77.4% | 78.3% | 78.8% | 79.1% | 75.3% | 75.3% | 74.2% | 75.8% | 75.3% | 74.4% | 73.2% |

**Table 15. UK suspended sentences**

6.2. Early Release

Early release is a possibility in all Member States studied. Early release is subject to the individual having served a certain proportion of their sentence as set out in the table 6. In France it depends on the behaviour. The requisite proportion is not specified for Germany, Latvia and Romania (significant percentage of sentence) and Sweden. Early release can be either unconditional or on licence.
<table>
<thead>
<tr>
<th>Country</th>
<th>Term to be served before early release</th>
</tr>
</thead>
</table>
| Cyprus      | - For a sentence of between 1 month and 2 years imprisonment, the reduction provided is 6 days per month.  
- For a sentence of between 2 years and up to 5 years imprisonment the reduction provided is 8 days per month.  
- For a sentence of between 5 years up to 8 years imprisonment the reduction is 10 days per month.  
- For a sentence of between 8 years and 12 years the reduction provided is 12 days.  
- For a sentence of more than 12 years the reduction is up to 14 days per month. |
| France      | -                                                                                                                                                                           |
| Germany     | -                                                                                                                                                                           |
| Hungary     | At least 4/5 sentence in a high security prison  
At least ¾ sentence in a medium security prison  
At least 2/3 sentence in a low security prison                                                                 |
| Italy       | At least 30 months and ½ sentence when the residual part is no more than 5 years.                                                                                           |
| Latvia      | Not less than ½ sentence for less serious crime  
Not less than 2/3 for a serious crime or previously convicted and record not extinguished  
Not less than ¾ for especially serious crime or if previously conditionally released prior to completion of punishment and has committed a crime during the period of the un-served punishment |
| Poland      | At least ½ sentence                                                                                                                                                         |
| Romania     | -                                                                                                                                                                           |
| Spain       | ½ sentence                                                                                                                                                                 |
| Sweden      | -                                                                                                                                                                           |
| England     | ½ sentence                                                                                                                                                                 |
| and Wales   |                                                                                                                                                                             |
| Northern Ireland | Sentence has to be at least 6 weeks with at least 4 weeks served and at least ½ sentence.                                                                                     |
| Scotland    | ½ sentence for short term prisoner (unconditional release)  
2/3 sentence for long term prisoner (on licence)                                                                                                                            |

**Table 16. Minimum Term to be served of sentence before early/conditional release is possible**
In France, there is no specific statistics focused on early release of the offender convicted for money laundering. However, there is general information dated on March 1st, 2013:

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Prisoners concerned by adjustment of their sentence</td>
<td>12,887</td>
<td>11,881</td>
</tr>
<tr>
<td>including:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Day parole (any modalities)</td>
<td>2,923</td>
<td>3,025</td>
</tr>
<tr>
<td>Electronic surveillance</td>
<td>9,955</td>
<td>8,856</td>
</tr>
<tr>
<td>Percentage of prisoners benefiting from adjustment of their sentence</td>
<td>21 %</td>
<td>19.8 %</td>
</tr>
</tbody>
</table>

**Table 17. France early releases**

Adjusted sentences represent 21 % of the sentences served on March 2013.

In Latvia, no early release was granted.

In Romania after the imposition of a penalty, the general principle is that the punishment will be executed in its entirety in jail. Accordingly, early release is possible only after the execution of a fraction of the imposed penalty. Regarding the exact fraction in the case of drug offences, we are speaking of crimes committed with intent. Therefore, Article 59(2) from the Criminal Code provides that early release requests can be made only after the execution in jail of at least 1/2 from the penalty in cases where the imposed penalty does not exceed 10 years or after the execution in jail of at least 2/3 in cases where the penalty exceeds 10 years. According to the statistics provided by the Romanian Ministry of Justice, we have access only to the general percentage regarding early release (regarding all crimes). For the year 2011, this was 32.61% and for 2012, 35.77%.

**7. SANCTIONS FOR LEGAL PERSONS**

In Germany legal persons cannot be sanctioned. In the UK proceedings can be taken against a legal person, however the available sanctions are not specified.

In Cyprus the only sanction is a fine. A fine can also be imposed in France, Hungary, Italy, Latvia, Romania, Spain and Sweden.
7.1. Public Aid

Exclusion from public aid, tenders and funds can be imposed in France, Italy, Poland, Romania and Spain.

7.2. Restriction on Commercial Activity

Disqualification and prohibition from exercising a professional or commercial activity is available as a sanction in France, Hungary, Italy, Romania and Spain.

7.3. Judicial Supervision

A legal person can be placed under judicial supervision in France and Romania.

7.4. Judicial Wind-up

In France, Hungary, Latvia, Romania and Spain the legal entity can be dissolved or wound up.

7.5. Confiscation and Forfeiture

Confiscation and forfeitures orders can be made in France, Spain and Latvia.

7.6. Publication of the Decision

The decision will be published in France, Poland and Romania.

7.7. Other Sanctions

In France a prohibition on making certain payments can be imposed.

In Italy any licenses can be revoked.

In Italy and Poland the legal person can be prohibited from advertising.
<table>
<thead>
<tr>
<th>Country</th>
<th>Sanction</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Fine</td>
</tr>
<tr>
<td>Cyprus</td>
<td>✓</td>
</tr>
<tr>
<td>France</td>
<td>✓</td>
</tr>
<tr>
<td>Germany</td>
<td>-</td>
</tr>
<tr>
<td>Hungary</td>
<td>✓</td>
</tr>
<tr>
<td>Italy</td>
<td>✓</td>
</tr>
<tr>
<td>Latvia</td>
<td>✓</td>
</tr>
<tr>
<td>Poland</td>
<td>-</td>
</tr>
<tr>
<td>Romania</td>
<td>✓</td>
</tr>
<tr>
<td>Spain</td>
<td>✓</td>
</tr>
<tr>
<td>Sweden</td>
<td>✓</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>-</td>
</tr>
</tbody>
</table>

Table 18. Sanctions for legal person

Whilst most Member States set forth provisions imposing sanctions against legal persons, the nature of liability and the correspondent sanctions, as well as the regime of responsibility varies. Some still have an administrative system whilst others have criminal liability.

This is in part related to the fact the EU legislation has always opted for a sort of ‘functional equivalence’, in the sense that the crucial point is not the formal denomination of sanctions (whether criminal, administrative or even civil) but their being effective, dissuasive and proportionate.

The imputation system is very different among MS: some have an ‘identification’ model (UK, France); others a liability system founded on a sort of organisational fault (Italy, Spain, UK for certain offences like bribery or manslaughter).
In general, sanctioning legal persons does not appear to be a popular tendency for the main route to punish money laundering and prevent commission of further offences of the same kind. This is clear by considering the following data.

In Cyprus, Italy (statistics only refer to the district of Genova), Latvia, Romania there is no conviction for legal entities in money laundering cases. In France, according data communicated by the Ministry of Justice, which regard only year 2011, there is only one sentence against legal persons for aggravated money laundering. In this case, a fine of Euros 15,000 has been imposed and one case in 2012 with a fine of 100,000 Euros imposed.

German law does not provide for a criminal responsibility of legal persons but rather for an administrative regime - §30 OWiG.

In Poland for the period between 2006 and 2011 there were 50 sentences issued (with reference to all offences for which such liability might be imposed) against legal entities. There were 47 financial sanctions imposed ranging from 1,000- PLN to 12,000 PLN. In 7 cases verdicts were made public and in 4 cases courts imposed forfeiture of material benefits.

In Spain, criminal responsibility for legal persons was foreseen for the first time in Spain in the amendment to the Criminal Code executed by LO (act of parliament) 5/2010. There still has been no penalty imposed by the Spanish courts against legal persons for this offense.

8. SETTLEMENT OF MINOR CASES

8.1. The definition of “minor case”

In order to avoid unnecessary reiterations, we refer to what was already mentioned under the report on child pornography for the definition of what is considered a “minor case” in the criminal justice system of the countries studied. To identify a minor offence the following elements, among others, are taken into account: the loss or harm can be described as minor and was the result of a single incident, or that the suspect played a minor role in the commission of the offence.

8.2. Special proceedings for minor cases

Under this paragraph we will focus mainly on the special rules applicable to minor cases of money laundering, trying to avoid the reiteration of the general rules on case settlement or discretionary discontinuation. These proceedings are described at length in the national reports and have been
analysed from a comparative law perspective in the comprehensive report on child pornography. Notwithstanding the aim to prevent repetitions, some overlapping between the different reports will be unavoidable.

The Report on Cyprus states that there is no provision specifying what is to be considered as a minor case and there are no mechanisms foreseen in the Law regarding the settlement of a minor money laundering case.

In France, the same alternative proceedings described for offences against children can be used in cases of money laundering, although it need to be stressed that only simple laundering can be prosecuted under the settlement procedure, since one of the required conditions for a settlement is that the confessed offence must be punished by imprisonment less than or equal to 5 years.

In Germany, as was already stated, the PP has certain powers regarding the decision on the commencement and discontinuation of the criminal proceedings in minor cases (Vergehen) if there is no public interest in the prosecution (Art. 153 German CPC), and in those cases where the punishment would not be useful besides another penalty already imposed to the same offender (Art. 154 CPC). Furthermore the PP can decide to impose conditions and instructions upon the defendant (for example, payment of damages, social service, enter into an agreement with the victim), instead of prosecuting. Once the criminal proceedings have been instituted, the court can also decide to discontinue the proceedings, in cases of misdemeanours, where there is no public interest upon consent of the PP and of the defendant (Art. 153 (2)). These general rules apply also to cases of money laundering.

Hungarian criminal justice system does not provide for diversionary measures or special proceedings, however regulates procedural short-cuts and fast-track proceedings. The general rules are applicable to money laundering offences. With regard Article 3 FD 2001/500/JHA (Member States may exclude the confiscation of property the value of which corresponds to the proceeds of crime in cases in which that value would be less than EUR 4000) it has to be noted that Hungary has not excluded the confiscation of property for small claims.

Italy provides for a very similar regulation on the agreement or patteggiamento if the penalty, once reduced, does not exceed five years or two years, depending on the offence. What was explained in the report on child pornography offences applies here.
**Latvia**, as mentioned earlier, deals with minor offences considered as administrative offences in an administrative procedure. It is provided for in the Latvian Administrative Violations Code Section 165: “Failure to Comply with the Procedures Specified for the Prevention of Money Laundering and Terrorism Financing.

In **Poland** the proceedings may not be initiated or may be conditionally discontinued, if the social harm is negligible and the guilt is not significant, and the maximum penalty is not higher than 3 years imprisonment for the offence in abstract.

In **Romania** if the offence does not entail social danger the criminal court or the PP in the investigative stage can substitute the penalty by an administrative sanction, as for example a reprimand or warning. No special rules seem to apply to money laundering cases.

**Spain** has a special procedure for misdemeanours, but it is generally not applicable to money laundering. However, the administrative regulations which regulate unlawful administrative acts in this matter are set down in Ley 10/2010 (law), of 28 April, on prevention of money laundering and financing terrorism, implementing Directives 2005/60/CE and 2006/70/CE. Administrative regulations on the prevention of money laundering foresee the imposition of reprimands, fines and dismissal, for commission of very serious, serious and minor administrative infringements. They are considered administrative violations, not criminal offences, and thus are handled within the administrative procedure. Apart from the administrative infringements, the general diversionary proceedings (judgment without trial in cases of agreement, where the accused accepts the indictment and the maximum penalty for the offence is not higher than 6 years) as explained in the report on child pornography are applicable here.

In **Sweden** those money laundering offences which are sanctioned with not more than 6 months or a fine, are considered as petty offences, but no special proceedings is provided for them.

The national report for the **UK** states that legislatively speaking, the Proceeds of Crime Act 2002 provides the most concrete guidance on the severity of money laundering offences, though this guidance is not explicitly presented as a mechanism for dealing with minor cases.

### 8.3. Key common points and differences

In sum, with regard to the existence of general rules or proceedings to settle minor cases and its possible application to money laundering offences, we could conclude that the same general rules
described for child pornography offences apply, although specific circumstances are taken into account:

Systems which provide for the possibility of non-prosecuting or discontinuing proceedings in minor cases at the pre-trial stage by PP: France, Poland, Latvia, Germany, Sweden, Cyprus.

Systems which provide for alternatives to penalty for minor cases: Germany, Italy, Latvia, Romania.

Systems which provide for procedural short-cuts based on confession or admission of guilt and penalty, although not necessarily limited to minor criminal cases: we only include here those countries whose reports mention expressly such procedural measures. Positive answers were received for France, Hungary, Italy, Latvia, Spain, but this list may be incomplete. The questionnaire was focused on settlement of minor cases, thus some of the reports have not mentioned procedural short-cuts or abbreviated procedural forms that are not exclusive of minor cases, but generally applicable.

The following rules apply specifically to money laundering related cases. Systems which provide for administrative sanctions outside the criminal justice system for certain conducts related to drug-trafficking: Spain and Latvia. As to the fulfilment with the requirements set out in the Framework Decision 2001/500/JHA of the Council of 26 June 2001, and the Framework Decision 2005/212/JHA of the Council of 24 February 2005 it has to be stated that only art. 3 of the FD 2001/500 and art. 3.4 of FD 2005/212 would apply to this point. Art. 3 of the FD 2001/500 states that “Member States may exclude the confiscation of property the value of which corresponds to the proceeds of crime in cases in which that value would be less than EUR 4000.” The national reports do not specifically address this issue, except the Hungarian report, where it is set out that this country has not provided for such a possibility. Art. 3 of the FD 2005/212 provides for the possibility of using other than criminal proceedings to deprive the perpetrator of the property. The national reports do not address this issue, but only the possibility of discontinuing the criminal proceedings and using procedural shortcuts. The issue in how far the different Member States apply administrative measures to deprive the perpetrator of the property, without waiting for the result of the criminal procedure should be further analyzed: the synergy between administrative proceedings (or the like) and criminal prosecution of money laundering is considered essential for an effective fight against this type of crime, very often linked to transnational organized crime. However, this topic fell out of the scope of this study on sanctions.
9. JURISDICTION

In all the eleven countries studied the basic rule on jurisdiction in criminal matters is based upon the principle of territoriality: the criminal law applies to all offences committed within the territory of the State. No special rules appear to apply with regard to the offence of money laundering.

With regard to the rules on extra-territorial jurisdiction, the countries studied provide rules on extraterritorial jurisdiction based on the active nationality principle and the passive nationality principle; although the conditions to exercise such extraterritorial jurisdiction vary (refer again back to the report on child pornography). No special provisions are found as to the application of the extraterritorial jurisdiction based on the nationality principle to money laundering offences, although the jurisdiction based on the passive nationality principle is hardly applicable to money laundering, as there is not an individual to be identified as a victim.

Spanish Law on art. 301.4 PC establishes that “the offender shall also be punished even though the offence from which the assets or the acts punishable pursuant to the preceding sections may have been committed, completely or partially, abroad” and thus dividing the jurisdiction for the crime from which the assets come and the offence of money laundering.

All the countries studied provide rules on jurisdiction based on the principle of territoriality and all eleven systems studied allow the prosecution of national offenders abroad. According to the national reports it seems that these rules on jurisdiction are also applicable to legal persons, except in Romania, where they are specifically excluded. The EU instruments on money laundering do not include special provisions on jurisdiction, thus there is no need to analyse here the compliance of the domestic legislation with the EU Framework Decisions.

10. STATUTE OF LIMITATIONS

As already explained under the report of child pornography, for clarity reasons, we will use the term “suspension” of the statutory period of limitations in those cases where the time already elapsed is taken into account; and “interruption” for those cases where the time period runs anew.

The national report on Cyprus states that there is no statute of limitations that governs offences related to money laundering.
In **France** the general rules on statute of limitations applies to offences of money laundering and it applies independently from the statute of limitations applicable to the main offence. If the proceeds of crime come from drug trafficking offences the period applicable to money laundering will range from 20 to 30 years (art. 706-31 CPC).

The general rules on suspension are applicable here: the statute of limitations will be suspended by legal impediments as mediation, settlement proceedings, or *force majeure*.

The statute of limitations for prosecution of money laundering offences in **Germany** is governed by the general rules, there not being any special time bar or period for these offences. Subsequently, according to art. 78(3) n.4 StGB the statute of limitations for money laundering is 5 years.

As was stated in the report of child pornography in **Hungary** the period of limitation is equal to the longest duration that can be imposed in abstract for the offence committed, with a minimum range of three years.

**Italy** also establishes a general period of statute of limitations equal to the maximum penalty that can be imposed for the offence, but taking into account the aggravating circumstances (and not the mitigating). The minimum limitation period is 6 years. There are no special provisions for drug-trafficking offences.

The **Latvian** criminal law establishes a fixed limitation period according to the category of offence: 2 years for violations, 5 years for less serious crime, 10 years for serious crimes, 15 for especially serious crimes, 30 years – upon decision of the court – when the penalty is of life imprisonment, and crimes against humanity which are not subject to statute of limitations. No special rules are applicable to money laundering offences (see the report on child pornography).

**Poland** does neither provide for special rules on statute of limitations for the offences analysed here nor for special rules on suspension or interruption. According to Article 122 from the Criminal Code, the statutory period is determined on the basis of the maximum term of the penalty (as provided for each offence). Therefore the statute of limitations term in cases of laundering is 10 years for the offence provided by Article 29 of Law no. 656/2002. The same statute of limitations term is applicable when the offence was committed by a legal person.
No special rules are applicable in Spain regarding statute of limitations of money laundering, general rules set out under Art. 131 CC apply. The penalties for the basic offence and the aggravated offences of money laundering shall not surpass ten years imprisonment, so that these infractions are barred after ten years. If the prison sentence oscillates between ten and fifteen years for the aggravated offence, the offence is barred after fifteen years.

The statute of limitations for criminal prosecution of money laundering in Sweden ranges from ten years for grave crimes, ten years for moderately grave crimes and two years for minor crimes and starts the date when the crime was committed. General rules on suspension, interruption and maximum periods apply here.

The national report for the UK states that there is no statute of limitations which concerns offences relating to money laundering in the United Kingdom.

Conclusions from a comparative perspective view: the statute of limitations period in the majority of the countries studied depends on the gravity of the offence and the penalty provided for it, and begins to run at the moment when the crime was committed, with a special rule in Germany stating that it starts to count when the offence is completed. Cyprus and England and Wales and Northern Ireland do not seem to provide for any statute of limitations for money laundering offences.

As to the suspension and interruption of the running of the period of limitations, no special rules are foreseen with regard to this type of offence. Thus it will generally be interrupted by the commencement of a criminal investigation and can be suspended by legal reasons as the request for extradition, the procedure to lift immunity, the proceedings for settlement or ground of force majeure.

As regards the compliance with the EU FD 2001/500/JHA of the Council of 26 June 2001, and the Framework Decision 2005/212/JHA, it has to be recalled that these EU instruments do not contain any rule on limitation periods and thus there is no need to analyse this issue here.

**B. IMPACT ASSESSMENT AND CONCLUSIONS**

All national legislations comply, in essence, with Directive 2005/60/EC. Only the list of predicate offences in § 261 (2) of the German StGB does not include all the offences mentioned in Art. 3 (5) of the Directive (cf. Art. 3 (5) (f)).
Germany and Hungary implemented the Directive into their national jurisdictions (Hungary: Act CXXXVI of 2007 on the Prevention and Combating of Money Laundering and Financing Terrorism; Germany: Gesetz über das Aufspüren von Gewinnen aus schweren Straftaten [Act on the detection of proceeds from serious criminal acts] of 13 March 2008). However, Poland and Sweden did not because their criminal codes already contained provisions which addressed the requirements of the Directive. Thus, the national jurisdictions criminalize the intentional acquisition and trade of objects stemming from criminal activities or the concealment of the true origin or deposition of such objects as required in the Directive. In Romania there seems to be some problems of overlapping between the special legislation and the Criminal Code.

The following is an illustration of the differing impact which the FDs have had on the laws of Member States. In Cyprus legislation was passed on money laundering following the adoption of the FD 2001 and FD 2005. The penalties of confiscation, seizing or freezing of instrumentalities and proceeds of crime already existed in the French national legislation (created by an Act n°96-392 of 13 May 1996), but they were recently amended by an Act n° 2012-409 of 27 March 2012 (article L. 324-7 of the French Penal Code) pursuant to that Framework Decision. In Italy, the National legislation predates the Framework Decision. In Latvia the amendments were made to the Criminal Law on 28 April, 2005 and 13 December, 2007. In Spain the criminal conduct of money laundering was broadened after the harmonization of the 2005 Directive with the last amendment to the criminal code in 2010. In UK the Proceeds of Crime Act 2002 predates to the Directive.
2.4. Frauds with no cash means of payment

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A. ASSESSMENT ON THE LEVEL OF COINCIDENCE/ DIVERGENCE OF NATIONAL SYSTEMS AND PRACTICAL APPLICATION OF THE LEGISLATION

1. RELEVANT EU SECONDARY LEGISLATION

The relevant instrument is Council Framework Decision 2001/413/JHA of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment (FD). The FD’s objectives are to “ensure that fraud and counterfeiting involving all forms of non-cash means of payment are recognised as criminal offences and are subject to effective, proportionate and dissuasive sanctions in all Member States” (preamble, para. 4). It covers the “whole range of activities that together constitute the menace of organised crime” concerning fraud and counterfeiting of non-cash means of payment (ibid., para. 8) and urges the Member States to provide sanctions for natural as well as legal persons (ibid., para. 9). By means of criminalization, prevention and mutual assistance in this field shall also be improved.

Key Findings

- Most Member States rely on the general offence of theft and fraud to implement Article 2(a) and 2(d) offences respectively.
- The exact and complete wording of Article 2(c) FD is not found in the legislation of all countries.
- In different ways, all the conducts concerning computer frauds are covered in all countries.
- The FD does not provide a minimum maximum penalties, which may explain the disparity between Member States, which for some conducts are significant.
- Where specified the lowest minimum penalty for counterfeiting ranges from 6 months (Germany) to 4 years (Spain). The maximum penalties also vary greatly between states.
- Aggravating and mitigating circumstances are not specified in the FD.
- Some progress has been made towards consistency, but complete harmonisation does not exist.
The term “payment instrument” is defined as “a corporeal instrument, other than legal tender (bank notes and coins), enabling, by its specific nature, alone or in conjunction with another (payment) instrument, the holder or user to transfer money or monetary value [...] which is protected against imitation or fraudulent use, for example through design, coding or signature” (Art. 1 (a)). Payment instruments are e.g. “credit cards, euro-cheque cards, other cards issued by financial institutions, travellers’ cheques, euro-cheques, other cheques and bills of exchange” (ibid.). Incriminated conducts are behaviours related to payment instruments, computers and specifically adapted devices, such as “theft or other unlawful appropriation of a payment instrument” (Art. 2 (a)), “counterfeiting or falsification of a payment instrument in order for it to be used fraudulently” (Art. 2 (b)), “receiving, obtaining, transporting, sale or transfer to another person or possession of a stolen or otherwise unlawfully appropriated, or of a counterfeited or falsified payment instrument in order for it to be used fraudulently” (Art. 2 (c)), “fraudulent use of a stolen or otherwise unlawfully appropriated, or of a counterfeited or falsified payment instrument” (Art. 2 (d)) or “performing or causing a transfer of money or monetary value and thereby causing an unauthorised loss of property for another person, with the intention of procuring an unauthorised economic benefit for the person committing the offence or for a third party, by without right introducing, altering, deleting or suppressing computer data, in particular identification data, or without right interfering with the functioning of a computer programme or system” (Art. 3) as well as “the fraudulent making, receiving, obtaining, sale or transfer to another person or possession of” means to commit offences described under Articles 2 (b) and 3 (Art. 4). The FD’s scope covers only intentional conduct but also incriminates instigation and participation in the offences named above (Art. 5). Art. 7 and 8 provide for the liability and sanction of legal persons (i.e. “any entity having such status under the applicable law, except for States or other public bodies in the exercise of State authority and for public international organisations” [Art. 1 (b)]), Art. 9 for (extraterritorial) jurisdiction and Art. 10 and 11 concern mutual legal assistance.

2. INCriminated CONDUCT

2.1. Definition of the offences

In Cyprus, the offences related to payment instruments, can be found in the Cyprus Criminal Code, under articles 255, 256, 260 and 331-359. The offences related to computers and specifically adapted devices are foreseen in the Law of 2004 Ratifying the Cybercrime Convention (Law 22(III)/2004). The offences are the following:
a. Offences related to payment instruments. The punishable conducts are: stealing a payment instrument and the forgery of such a document, (defined as the making of a false document with intent to defraud, including banknote, bill of exchange, promissory note or other negotiable instrument, policy of insurance, cheque and credit card); to utter a false document and to purchase, receive or to possess a forged banknote.

b. Preparatory acts related to forgery. The Criminal Code punishes: 1) Any person who makes or mends, or begins or prepares to make or mend or use, or knowingly has in his possession, or disposes of, any die, plate or instrument, capable of making an impression resembling that made by any die, plate or instrument, used for the purpose of making any stamp, whether impressed or adhesive, which is used for the purposes of the public revenue or the Posts or Telegraphs Department in any country, or capable of producing in or on paper any words, figures, letters, marks or lines, resembling any words, figures, letters, marks or lines used in or on any paper especially provided by the proper authority for any such purpose. 2) Any person who knowingly has in his possession or disposes of any paper or other material which has on it the impression of any such die, plate or instrument, or any paper which has on it or in it any such words, figures, letters, marks or lines as aforesaid.

c. Offences related to computers. The punishable conducts are: causing a loss of property to another person by any input, alteration, deletion or suppression of computer data, or any interference with the functioning of a computer system, with fraudulent or dishonest intent of procuring without right an economic benefit for oneself or for another person.

d. Preparatory acts related to computers. The punishable conducts are: any intentional and without right possession, production, sale, procurement for use, import, distribution or otherwise making available of a device, including a computer program, designed for the purpose of committing any of the above criminal offences, or a computer password, access code, or any similar data by which the whole or any part of a computer system is capable of being accessed with intent that it be used for committing any of the aforementioned offences.

Aiding and abetting are punishable. Any person who, by means of any false and fraudulent representations as to the nature, contents or operation of a document, procures another to sign or execute the document is guilty of an offence of the same kind and is liable to the same punishment as if he has forged the document. The conspirator is also liable. Attempting to commit any of these offences is punishable. As to the mens rea of the above acts, the term “intentionally” has the meaning of direct and indirect intention as this is provided by the English legal system.
In France, counterfeiting or falsification of non-cash means of payment (cheque and payment instruments) must be sentenced under specific provisions provided for by the Monetary and Financial Code, whereas theft and unlawful appropriation of non-cash means of payment, as well as computer fraud, must be sentenced under general provisions of the French Penal Code. The offences are the following:

a. Offences related to payment instruments. The punishable conducts are: counterfeiting or falsification of cheque or payment instruments (any personalized security features and all procedures agreed upon between the payment service user and the payment service provider, and of which the payment service user makes use in order to issue a payment order), using or attempting to use a counterfeit or forged cheque or other payment instrument, to accept a payment made using a counterfeit or forged cheque or other payment instrument, theft and unlawful appropriation of a cheque, credit/debit card etc, fraud, (the use of a false name or a fictitious capacity or the abuse of a genuine quality, or by means of unlawful manoeuvres, to lead any person or entity to deliver funds, valuables or any property, to provide a service or to consent to an act incurring or discharging an obligation), breach of trust (when a person, misappropriates payment instruments that were handed over to him and that he accepted subject to the condition of returning, redelivering or using them in a specified way).

b. Preparatory acts related to forgery. The punishable conducts are: to manufacture, acquire, store, transfer or offer to make available equipment, instruments, computer programs or any data designed or specially adapted to commit counterfeiting or falsification of non-cash means of payment.

c. Offences related to computers. The punishable conducts are: unauthorised access to automated data processing with a view to perform a transfer of money or monetary values and fraudulent introduction of data into an automated data processing system or fraudulent deletion or modification of the data that it contains for the same purpose.

d. Preparatory acts related to computers. Importation, possession, offer, transfer or making available, without lawful authority, any equipment, instrument computer program or information created or specially adapted to commit computer frauds.

Intention is always required. Participating in a group or a conspiracy established with a view to the preparation of computer frauds is an offence. The attempt to commit these offences is punishable. However, the attempt to commit the acceptance of counterfeit or forged cheque or payment instrument is not punishable. The accomplice is punishable.
In Germany, §242 and §246 Criminal Code (Strafgesetzbuch, StGB) criminalize theft and the unlawful appropriation of property belonging to another person for him or a third person. §152a (1) No. 1 StGB incriminates counterfeiting and falsification of domestic or foreign payment cards, cheques or promissory notes (No. 1) as well as procuring for oneself or another, offering for sale, giving to another or using such counterfeit cards, cheques, or promissory notes (No. 2). §152a (5) StGB in conjunction with §149 incriminates the preparation of the counterfeiting. According to §151 No. 5 in conjunction with §§146, 147, 149 StGB, counterfeiting of travellers’ cheques in case of a special protection against imitation by print and type of paper, the putting into circulation of the forfeited travellers’ cheques and the preparation of the counterfeiting are punishable. §259 (1) StGB incriminates the handling of stolen goods. Moreover, fraud (§263 (1) StGB), computer fraud (§263a(1) StGB), the misuse of cheques or credit cards (§266b (1) StGB), data tampering (§303a(1) StGB) and computer sabotage (§303b StGB) are incriminated.

Concerning the subjective side, in principle only intentional conduct is punishable unless the law explicitly provides otherwise and includes negligence (§15 StGB). As this is not the case, the here relevant conducts are only punishable if committed intentionally. According to §25 StGB direct, indirect and co-perpetration are incriminated. According to §26 and §27 StGB also instigation/abetting and assistance/aiding are punishable. In general, the attempt is punished in case of all felonies (Verbrechen, §23(1) StGB). Felonies are offences that are punished with more than one year of imprisonment (§12(1) StGB). In casu, only some aggravated forms of the above-mentioned offences (see below) are felonies. In case of misdemeanours (Vergehen), i.e. in case of all the above-mentioned offences, the attempt is only punishable if the law explicitly provides it. In casu the attempt of §242 (§242(2) StGB), §246(1) and (2) (§246(3) StGB), §152a(1) (§152(2) StGB), §259(1) (§259(3) StGB), §263 (1) (§263(2) StGB), §263a(1) (§263a(2) in conjunction with §263(2) StGB), §303a(1) (§303a (2) StGB), and §303b(1) (§303b (3) StGB) is incriminated. German law does not provide for the criminal liability of legal persons.

In Hungary, the Criminal Code ("HCC") criminalizes counterfeiting of cash-substitute payment instruments (Art. 313/B HCC). Cash-substitute payment instruments include, among others, electronic means of payment, cheque and other instruments that enable their holders to dispose of an existing claim against a financial institution, to withdraw cash or to pay for goods and services on the ground of this claim, the Treasury Card, traveller’s cheques, the voucher issued by virtue of Act on Personal Income Tax, and bills of exchange, provided they contain protective fixtures (such as outfit, coding or signature) against duplication, counterfeiting and unauthorised use. In the same way, cash-substitute payment instruments issued in other countries are protected. According to Art. 313/B (2) HCC cards issued by a business entity for use in paying for its goods and services are
protected equally. According to Art. 313/B (3) HCC, the preparation of counterfeiting of cash-substitute payment instruments is also punishable. Art. 313/C (1) HCC incriminates the use of “a counterfeit or counterfeited cash-substitute payment instrument for unlawful gain”, the use of a “cash-substitute payment instrument without proper authorization”, and the acceptance of those instruments. According to Art. 313/D, producing, obtaining, possessing, delivering, distributing, and dealing “with materials, devices, equipment or computer programs to be used to counterfeit cash-substitute payment instruments” are punishable. Art. 300/C (3) HCC criminalizes the input of data into a computer system, the alteration or deletion of data stored, processed or transmitted in a computer system, the making of such data inaccessible, and the obstruction of a computer system “by way of inputting, transmitting, altering, deleting data or by using any other means” in order to receive an unlawful gain. According to Art.300/E(1) HCC creating, obtaining, distributing or trading of means to commit an offence in the sense of Art. 300/C HCC are sanctioned. In the same way, a person who provides his or her expertise in order to create means to gain access to a computer system is punishable (Art. 300/E (2) HCC).

The offences must be committed intentionally (Art. 10 HCC). The attempt is generally punishable in case of intentionally committed offences irrespective whether they are felonies or misdemeanours (Art. 16 HCC). Direct, indirect and joint perpetration is punishable as well as abetting and instigation (Art. 20 and 21 HCC). According to Act CIV of 2001, legal persons can be the object of criminal measures (such as liquidation, limitation of activity or imposition of a fine) if a natural person was found guilty of committing an offence intentionally.

In Italy these offences are foreseen in the Penal Code and in the Act of 21 October 2007 for the Implementation of the Directive 2005/60/EC concerning the prevention of the utilization of the bank system in order to money launder the proceeds of criminal activity and to fund terrorism, and of the Directive 2006/70 CE, which regulates its application. The offences are the following:

a. Offences related to payment instruments. The Penal Code punishes whoever, in order to get a profit for himself or for others, 1) unduly utilizes, without being the owner, credit or payment cards, or whatever else similar document which qualifies to draw money or to buy things or to get services; 2) counterfeits or alters credit or payment cards or whatever else similar document which qualifies to draw money, or to buy things or to get services; 3) cedes or acquires such cards or documents of illicit origin or in any way counterfeited or forged or payments order bases upon them.

b. Offences related to computers. The Act of 21 October 2007 punishes whoever gets for himself or for another person an unjust profit causing damages to others by 1) altering in
any way the functioning of a computer or electronic system, 2) by intervening without having the right to do so, in any modality, upon data, information or programs which are contained in a computer or electronic system or pertaining to it. Attempt is punishable. Aiders and abetters are liable.

In Latvia, all these offences are foreseen in the Special Part of the Penal Code:

a. Offences related to payment instruments. The punishable conducts are: acquiring property of another, or of rights to such property by fraud or misappropriation, stealing, destruction, damage or illegal utilization of means of payment of another person, counterfeiting of means of payment, circulating or utilizing such counterfeits.

b. Preparatory acts related to forgery. The punishable conducts are: Obtaining, manufacture, adaptation, distribution, utilization and storage of data, software and equipment for illegal acts with financial instruments and means of payment.

c. Offences related to computers. The punishable conducts are: knowingly entering of false data into an automated data processing system for the acquisition of the property of another person or the rights to such property, or the acquisition of other material benefits.

The preparation of the offences related to computers is only punishable under the general provisions of the Penal Code: the locating of or adaptation of means or tools or the intentional creation of circumstances conducive for the commission of an intentional offence shall be considered to be preparation for a crime. Criminal liability, however, shall result only in case of the preparation of a serious or especially serious crime (more than five years of imprisonment). That is why the preparatory acts will be punishable only in case of the aggravated offences. Only direct intent is required. Attempt is punishable. Organizers, instigators and accessories are liable. A person who knowingly has promoted the commission of a criminal offence, providing advice, direction, or means, or removing impediments for the commission of such, as well as a person who has previously promised to conceal the perpetrator or joint participant, the instruments or means for committing the criminal offence, evidence of the criminal offence or the objects acquired by criminal means or has previously promised to acquire or to sell these objects shall be considered to be an accessory.

In Poland, Art. 278 § 5 of the Act of the 6th June 1997 criminalizes theft of a card enabling withdrawal of money from an automated teller machine. According to Art. 310 § 1 of the Polish Penal Code (PCC), counterfeiting or altering, among others, money or other legal tender or documents which entitle one to obtain a sum of money (e.g. payment cards) are punishable.
According to Art.310 § 2 PCC, releasing into circulation or accepting of, among others, other legal tender in the sense of Art.310 § 1 PCC as well as the preparation of offences in the sense of Art. 310 § 1 and § 2 PCC are incriminated. Art. 310 PCC encompasses skimming and using of the so-called “white plastic”. Fraud is punishable according to Art. 286 PCC. All offences can only be committed intentionally. Attempt is punishable in all the above-mentioned cases (Art. 14 § 2 PCC), regardless the character of the offence as felony or misdemeanour. Aiding,abetting and instigating are punishable as well (Art. 19 § 1 PCC). Polish law does not provide for a criminal liability of legal persons but there is an administrative liability in case of, among others, offences in the sense of Art. 310 PCC.

In Romania these offences are foreseen in the Penal Code, in the Law no. 365 of 2002 on electronic commerce and in the Law no. 161 of 2003. These offences are the following:

a. Offences related to payment instruments. The punishable conducts are: forging public bills of exchange, cheques, bonds/securities of any kind for payment issued by a bank or by other competent credit institutions, or forging any other similar bonds/securities, forging electronic payment instruments, issuing on the market forged electronic payment instruments or owning them in order to put them into circulation, obtaining a stolen payment instrument with intent to defraud, the inaccurate declaration made to a bank, credit or financial institution or any other legal person authorized, under the conditions of the law, to issue electronic payment instruments in order to issue or use an electronic payment instrument for oneself or another.

b. Preparatory acts related to forgery. The punishable conducts are: manufacturing or possessing instruments or materials in order to use them in the manufacture of values or bonds or securities, manufacturing or owning equipment, including hardware and software, to be used to forge electronic payment instruments.

c. Offences related to computers. The punishable conducts are: causing the loss of property to a person by the input, alteration of deletion of computer data, by restricting the access to such data or by preventing in any way the operation of a computer system in order to obtain an economic benefit for oneself or for another.

Inciting to commit, aiding and abetting or attempting an offence are punishable under the general provisions of the Penal Code. Attempt is not punishable in the case of possession of instruments for the forgery, manufacturing or owning of equipment and inaccurate declaration. Intention is always required.
In Spain these frauds are foreseen in the Penal Code. The offences are the following:

a. Offences related to payment instruments. The punishable conducts are: to alter, copy, reproduce or in any other way forge credit or debit cards or travellers' cheques, possess forged credit or debit cards or travellers' cheques intended for distribution or trade, without having intervened in the forgery to use forged credit or debit cards or travellers' cheques to the detriment of another and being aware they are forged, to perpetrate operations of any kind to the detriment of their owner or a third party by using credit or debit cards or travellers' cheques or the data that any of these bear.

b. Preparatory acts related to forgery. The punishable conducts are: manufacturing or possessing tools, materials, instruments, substances, machinery, computer programs or appliances specifically used to commit forgery.

c. Offences related to computers. The punishable conducts are: to perpetrate an unauthorized transfer of any patrimonial assets to the detriment of another for profit and making use of any computer manipulation or similar scheme.

d. Preparatory acts related to computers. The punishable conducts are: to manufacture, upload, possess or provide computer programmes specifically intended to commit these kind of frauds.

Theft and other unlawful appropriation of means of payment are punishable under the provisions of the Penal Code for theft etc. Inciting to commit, aiding and abetting or the attempt of an offence are punishable under the general provisions of the Penal Code. Criminal attempt is always punishable. Conspiracy, solicitation and provocation are punishable in relation with the offence of swindling. Intention is always required.

In Sweden, there is a series of relevant offences. First, Ch. 8 Sect. 1 and 5 § 1 of the Swedish Criminal Code (SCC) criminalize as theft and robbery the unlawful taking of something that belongs to another with intent to acquire it (by means of violence or threat). Moreover, extortion is punishable (Ch. 9 Sect. 4 SCC). According to Ch. 8 Sect. 8 § 1 SCC, the unlawful taking, use or other appropriation is incriminated as “unlawful disposssession”. According to Ch. 8 Sect. 9 SCC, it is also punishable if someone unlawfully interferes with another's possession in order to restore a personal right. Second, Ch. 14 Sect. 1, 5, 9, and 10 SCC criminalize the falsification of a document respectively a signature, the use of, among others, a false document, a false signature or a counterfeit bank note or coin and the illegal distribution of imitations. Third, according to Ch. 9 Sect. 6 and 6a SCC, possessing gain of another's offence, procuring another's gain, improperly promoting an opportunity to take advantage of (the value of) property emanating from an offence,
assisting/participating in the removal, the transfer, the sale of the property derived from an offence or similar measures are incriminated. According to Ch. 9 Sect. 8 SCC, it is punishable to mislead someone and induce him to do/omit to do something and thereby harm him or a person he represents. Ch. 9 Sect. 10 SCC incriminates accepting a false document or a cheque drawn on insufficient funds for use as a means of exerting pressure in connection with a claim. Fourth, Ch. 9 Sect. 1 SCC criminalizes fraud. According to Ch. 9 Sect. 5 SCC, it is punishable to take advantage of someone’s distress, innocence or thoughtlessness or dependent relationship in connection with a contract in order to obtain a disproportionate benefit.

All offences must be committed intentionally. According to the general provision of Ch. 23 Sect. 1 and 2 SCC attempt, preparation and conspiracy shall only be criminalized if explicitly stated by law. In casu, Ch. 8 Sect. 12, Ch. 9 Sect. 11, Ch. 14 Sect 12 SCC provide for such a provision for most of the above-mentioned offences. Instigation, aiding and abetting are punishable according to Ch. 23 Sect. 4 SCC. Legal persons may be subject to a corporate fine, although the Swedish criminal system only holds natural persons criminal responsible (Ch. 36, Sect. 7 SCC).

In the United Kingdom, there are different statutes in England and Wales, Northern Ireland and Scotland containing the applicable rules.

In England and Wales, the applicable statutes are the Theft Act 1968, the Forgery and Counterfeiting Act 1981, the Computer Misuse Act 1990, the Data Protection Act 1998, and the Fraud Act 2006.

a. Offences related to payment instruments. The punishable conducts are: theft of a payment instrument, counterfeiting a payment instrument, handling stolen payment instruments, fraudulent use of a payment instrument knowing or believing to be false.

b. Offences related to computers. The punishable conducts are: unauthorised fraud by false representation intended to make a gain for oneself or another or to cause loss to another.

c. Preparatory acts. The punishable conducts are: possession of means for use in frauds, making or supplying means for use in frauds, access to computer material and unlawful obtaining of personal data.

Intention is required for these offences, but for unlawful obtaining of personal data the mens rea is ‘knowingly’ or ‘recklessly’. Aiding, abetting, counselling, or procuring the commission of the offences are punishable. Attempting to commit an offence is in itself an offence.

a. Offences related to payment instruments. The punishable conducts are: theft of a payment instrument, counterfeiting a payment instrument, handling stolen payment instruments, and fraudulent use of a payment instrument.

b. Offences related to computers. The punishable conducts are: unauthorised fraud by false representation intended to make a gain for oneself or another or to cause loss to another.

c. Preparatory acts. The punishable conducts are: possession of means for use in frauds, making or supplying means for use in frauds, access to computer material and unlawful obtaining of personal data.

Aiding, abetting, counselling and procuring the commission of an offence is also punishable in Northern Ireland. The attempt of the offences is punishable. Intention is required for these offences. Concerning the unlawful obtainment of personal data the mens rea, however, is ‘knowingly’ or ‘recklessly’.

Scotland has statutes and common law. The statutes that apply in Scotland are the Computer Misuse Act 1990, the Data Protection act 1998, and the Criminal Law (Consolidation) (Scotland) Act 1995.

a. Offences related to payment instruments. The punishable conducts are: theft of a payment instrument, fraud (when someone achieves a practical result by a false pretence), counterfeiting a payment instrument, uttering a false payment instrument, possession of a false payment instrument.

b. Offences related to computers. The punishable conducts are: unauthorised fraud by false representation intended to make a gain for oneself or another or to cause loss to another.

c. Offences related to specifically adapted devices. The punishable conducts are: possessing any machine, implement or computer programme, or any paper or other material, which is specially designed or adapted for the making of a false payment instrument.

Intention is required in principle whereas concerning unlawful obtaining of personal data the mens rea is ‘knowingly’ or ‘recklessly’. Aiding, abetting, counselling, or procuring the commission of the offences are punishable. The attempt to commit an offence is in itself an offence.
2.2. Key common points and differences

All systems provide for the main offences foreseen in the FD. Concerning payment instruments, all of countries include among the punishable offences counterfeiting or falsification. In some countries (Italy, Spain and Romania), theft or other unlawful appropriation of payment instruments are not foreseen among these offences, but the general rules on theft, robbery and unlawful appropriation apply to the means of payment. The problem is that in some countries (like in Spain) these general rules only apply to cases where the mean of payment has or represents an economic value in itself, which is not the case for credit cards, for example.

From the Member States studied only Cyprus, France and Germany appear to provide for all the Framework Decision offences in their national laws. Most Member States studied rely on the general offence of theft to implement Article 2(a) (Cyprus, France, Germany and the UK). The Article 2(d) offence of fraudulent use is also dealt with under the general fraud offence in national laws (Cyprus, France, Italy, Latvia, Romania and England and Wales). However a number of Member States have specific provisions related to the fraudulent use of payment instruments (France, Germany, Hungary and Italy). Counterfeiting under Article 2(b) is specifically dealt with by the national laws of Cyprus, France, Hungary, Poland, Romania (general forgery offence however under new 2009 law specifically counterfeiting of payment instruments), Spain and England and Wales. Not all the elements of Article 2(c) are specifically dealt with by the national laws of the Member States, nevertheless provisions are found in the laws of Cyprus (possession), France (knowingly accepting), Germany (procuring, offers for sale, gives), Hungary (obtains, delivers), Romania (2009 law), England and Wales and Northern Ireland.

Offences related to computers are set out in the national laws of Cyprus, Germany, Hungary, Italy, Romania, Spain, England and Wales and Northern Ireland. Offences related to specifically adapted devices are provided for in the national laws of Cyprus, France, Germany, Hungary, Romania and Spain.

It is difficult to find the wording of article 2(c) of the Framework Decision in the laws of the different countries. Only some of these conducts are clearly foreseen in most of the countries. For instance, the use of stolen or forged payment instruments is foreseen in all of the countries among the punishable conducts related to payment instruments, except in Poland and in Romania. In Poland and in Romania the use of forged electronic means of payment is not foreseen among the punishable conducts related to payment instruments. The possession of forged or stolen payment instruments is punishable in most of the countries. However, it is not foreseen in Latvia, where it is
punishable as a preparatory act, under the general rules, but only in case of aggravated offences. The word possession is not used in Italy. In Cyprus, only the possession of a forged banknote is criminalized. In Spain the possession of stolen means of payment is not foreseen among these offences, but the ordinary articles that punish receiving any kind of products of crime apply to receiving stolen means of payment. In the UK the possession of counterfeited instruments is not incriminated. The word transport is not used in any country. The transfer of stolen payment instruments is not punishable in Romania.

In Cyprus, the use of forged instruments is incriminated but not the use of stolen means of payment. In Romania the use of forged electronic means of payment is not criminalized. In UK the statute foresees the offence of “handling” of stolen instruments but there is no reference to forged instruments.

The preparatory acts to commit counterfeiting are not foreseen in some countries (Italy and Latvia); anyway the case law and the application of the general rules on preparatory acts can mitigate the effects of this lack, even not covering all the cases.

Conspiracy is not foreseen in Italy. In Romania attempting is not punishable in case of possession of instruments for forgery, manufacturing or owing of equipment and inaccurate declaration.

All offences must be committed intentionally, i.e., knowledge and/or purpose are required. Apart from the perpetration of the offence, any other form of (secondary) participation such as instigation, aiding or abetting is covered. Attempt is punishable in all jurisdictions.
### Table 3: Basic conducts and attempts

<table>
<thead>
<tr>
<th>Country</th>
<th>Theft or other unlawful appropriation of a payment instrument (Art. 2 (a))</th>
<th>Counterfeiting or falsification of a payment instrument in order for it to be used fraudulently (Art. 2 (b))</th>
<th>Receiving, obtaining, transporting, sale or transfer to another person or possession of a stolen or otherwise unlawfully appropriated, or of a counterfeited or falsified payment instrument in order for it to be used fraudulently (Art. 2 (c))</th>
</tr>
</thead>
<tbody>
<tr>
<td>CY</td>
<td>Yes</td>
<td>Yes</td>
<td>Only possession of a forged banknote, Transport not mentioned</td>
</tr>
<tr>
<td>FR</td>
<td>Yes</td>
<td>Yes</td>
<td>Transport not mentioned</td>
</tr>
<tr>
<td>DE</td>
<td>Yes</td>
<td>Yes</td>
<td>Transport not mentioned</td>
</tr>
<tr>
<td>HU</td>
<td>Yes</td>
<td>Yes</td>
<td>Transport not mentioned</td>
</tr>
<tr>
<td>IT</td>
<td>Not foreseen but general rules apply</td>
<td>Yes</td>
<td>No, Transport not mentioned</td>
</tr>
<tr>
<td>LV</td>
<td>Yes</td>
<td>Yes</td>
<td>Punishable as a preparatory act, under the general rules, but only in case of aggravated offences, Transport not mentioned</td>
</tr>
<tr>
<td>PL</td>
<td>Yes</td>
<td>Yes</td>
<td>No, Transport not mentioned</td>
</tr>
<tr>
<td>RO</td>
<td>Not foreseen but general rules apply</td>
<td>Yes</td>
<td>No, Transport not mentioned</td>
</tr>
<tr>
<td>ES</td>
<td>Not foreseen but general rules apply</td>
<td>Yes</td>
<td>Not foreseen among these offences, but the ordinary articles that punish receiving any kind of products of crime apply to receiving stolen means of payment, Transport not mentioned</td>
</tr>
<tr>
<td>SE</td>
<td>Yes</td>
<td>Yes</td>
<td>Transport not mentioned</td>
</tr>
<tr>
<td>UK</td>
<td>Yes</td>
<td>Yes</td>
<td>No, Transport not mentioned</td>
</tr>
<tr>
<td>Country</td>
<td>Fraudulent use of a stolen or otherwise unlawfully appropriated, or of a counterfeited or falsified payment instrument (Art. 2 (d))</td>
<td>Transfer of money or monetary value and causing an unauthorised loss of property [...] by without right introducing, altering, deleting or suppressing computer data, in particular identification data, or without right interfering with the functioning of a computer programme or system (Art. 3)</td>
<td>Fraudulent making, receiving, obtaining, sale or transfer to another person or possession of* means to commit offences described under Articles 2 (b) and 3 (Art.4)</td>
</tr>
<tr>
<td>---------</td>
<td>-----------------------------------------------------------------------------------------------------------------</td>
<td>---------------------------------------------------------------------------------------------------------------------------------</td>
<td>---------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>CY</td>
<td>The use of forged instruments is incriminated but not the use of stolen means of payment</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>FR</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>DE</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>IT</td>
<td>Yes</td>
<td>Yes</td>
<td>No, but case law and the application of the general rules on preparatory acts can mitigate the effects of this lack, even not covering all the cases.</td>
</tr>
<tr>
<td>LV</td>
<td>Yes</td>
<td>Yes</td>
<td>No, but case law and the application of the general rules on preparatory acts can mitigate the effects of this lack, even not covering all the cases.</td>
</tr>
<tr>
<td>PL</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>RO</td>
<td>The use of forged electronic means of payment is not criminalized</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>ES</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>SE</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>UK</td>
<td>Handling stolen instruments is foreseen but there is no reference to forged instruments</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>
3. PENALTY LEVELS AND MINIMUM PENALTIES

3.1. Penalties in the different countries (Imprisonment and fines)

In Cyprus, Article 2(a) is provided for under the general theft provision under Article 255 of the Criminal Code (penalty not provided by NC). Article 336 Criminal Code, criminalizes forgery of documents and carries with it a penalty of imprisonment for 14 years. Any person who, without lawful authority or excuse, purchases or receives from any person, or has in his possession a forged banknote, whether filled up or in blank, knowing it to be forged or who knowingly and fraudulently uses a false document, is liable to imprisonment for 7 years. For illegal access and illegal interception the penalty is a maximum of 5 years of imprisonment or 20,000 CP or both. The misuse of devices, computer related forgery and computer related fraud, is liable to a maximum of 5 years of imprisonment and or 20,000 CP.

Regarding fraud with no cash means the sentence imposed by the Supreme Court to natural persons are as follows: A) For the year 2011 imprisonment, between: 1 day to 1 year was not imposed to anyone; 1 year to 5 years 1 was imposed to 1 person; 5 years to 10 years was imposed to 1 person and no imprisonment of more than 10 years was imposed to anyone. B) For the year 2012 imprisonment between: 1 day to 1 year was not imposed to anyone; 1 year to 5 years was imposed to 1 person; no imprisonment of more than 5 years was imposed to anyone. C) For the year 2013, no imprisonment was imposed to anyone.

In France, theft is punished by a 3 years’ imprisonment and a fine of € 45.000. The penalty rises to 5 years’ imprisonment and a fine of € 75.000, where the offence has been committed: by a person holding public authority or discharging a public service mission, in the exercise or at the occasion of the exercise of the functions or mission; by a person unlawfully assuming the capacity of a person holding a public office or vested with a public service mission; by a person making a public appeal with a view to issuing securities or raising funds for humanitarian or social assistance; to the prejudice of a particularly vulnerable person, due to age, sickness, infirmity, a physical or psychological disability or pregnancy, when the vulnerability was apparent or known to the perpetrator. It is 7 years’ imprisonment and a fine of € 100.000: where the offence has been committed with two of the aggravating circumstances detailed above; where the offence has been committed by an adult with the support of one or more minors older than 13 years old; where the offence is preceded, accompanied or followed by acts of violence upon other persons, causing a maximum total incapacity to work of eight days; where the offence is committed to the prejudice of a person whose particular vulnerability. It is 10 years’ imprisonment and a fine of € 150.000: where the offence has been committed with three of the aggravating circumstances detailed above.
years' imprisonment and a fine of € 150,000: where the offence has been committed by an organized group (imprisonment with safety period); where the offence is preceded, accompanied or followed by acts of violence upon other persons, causing mutilation or permanent disability (with safety period). 20 years' imprisonment and a fine of € 150,000: where committed with the use of a weapon (with safety period); where the offence has been committed by an organized group is preceded, accompanied or followed by acts of violence upon other persons (with safety period). 30 years' imprisonment and a fine of € 150,000: where the offence has been committed by an organized group with the use of a weapon (with safety period). Life imprisonment and a fine of € 150,000: where the offence is preceded, accompanied or followed either by violence causing death, or acts of torture or barbarity (with safety period).

Whoever commits the following offences shall incur a term of 7 years imprisonment and a fine of €750,000: counterfeiting or forging a cheque or other instrument; knowingly using or attempting to use a counterfeit or forged cheque or other instrument; knowingly agreeing to accept a payment made using a counterfeit or forged cheque or other instrument. Fraud, shall be punished by a 3 years' imprisonment and a fine of € 375,000. The maximum penalty goes up to 7 years' imprisonment and a fine of € 750,000, where the offence has been committed: by a person holding public authority or discharging a public service mission, in the exercise or at the occasion of the exercise of the functions or mission; by a person unlawfully assuming the capacity of a person holding a public office or vested with a public service mission; by a person making a public appeal with a view to issuing securities or raising funds for humanitarian or social assistance; to the prejudice of a particularly vulnerable person (See above) and to 10 years’ imprisonment and a fine of € 1.000.000 where the offence has been committed by an organized group.

Whoever manufactures, acquires, stores, transfers or offers to make available equipment, instruments, computer programs or any data designed or specially adapted to commit the offences set out above shall incur a term of seven years' imprisonment and a fine of €750,000. The aggravating circumstance of offences committed by an organized group increased the penalty to 10 years’ imprisonment and a fine of € 1.000.000. Fraudulently accessing or remaining within all or part of an automated data processing system, is punished by 2 years' imprisonment and a fine of € 30,000. Where this behaviour causes the suppression or modification of data contained in that system, or any alteration of the functioning of that system (aggravating circumstance), the sentence is 3 years’ imprisonment and a fine of € 45,000. Where the offences were committed against an automated data processing system implemented by the State, the penalties are raised to 5 years' imprisonment and a fine of € 75,000. Fraudulent introduction of data into an automated data processing system or fraudulent deletion or modification of the data that it contains or obstructing or interfering with the functioning of an automated data processing system is punished
by 5 years’ imprisonment and a fine of €75,000. Where the offences were committed against an automated data processing system implemented by the State, the penalties are raised to 7 years’ imprisonment and a fine of €100,000.

As to offence of fraud, the relevant statistics are as follows:

<table>
<thead>
<tr>
<th>Number and type of penalties pronounced (sole offence) - 2011</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Offences (Sole offence)</strong></td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Any type of fraud with non-cash means of payment (offences detailed below included)</td>
</tr>
<tr>
<td>Counterfeiting or forging a non-cash mean of payment</td>
</tr>
<tr>
<td>Using or attempting to use counterfeit or forged a non-cash mean of payment</td>
</tr>
<tr>
<td>Agreeing to accept a payment made using counterfeit or forged a non-cash mean</td>
</tr>
<tr>
<td>Manufacture, acquire, store, transfer or offer to make available equipment, instruments, computer programs or any data designed or specially adapted to commit the offences of counterfeiting or forging a non-cash mean of payment</td>
</tr>
<tr>
<td>Concealment of the above mentioned offences</td>
</tr>
</tbody>
</table>

**Table 2: France sanctions imposed**

In Germany, a theft is punished by imprisonment not exceeding 5 years or a fine. Theft on a commercial basis as a member of a group shall be liable to imprisonment from 1 to 10 years. Counterfeiting of debit cards, cheques, and promissory notes is punished by imprisonment not exceeding 5 years or a fine. If acts on a commercial basis or as a member of a group whose purpose is the continued commission of offences, the penalty shall be imprisonment from 6 months to 5 years. Counterfeiting guaranteed payment cards and blank euro cheques, shall be liable to
imprisonment from 1 to 10 years. In less serious cases the penalty shall be imprisonment from 3 months to 5 years. If the offender acts on a commercial basis or as the member of a group whose purpose is the continued commission of offences the penalty shall be imprisonment of not less than 2 years to 15 years. In less serious cases the penalty shall be imprisonment from 1 year to 10 years. Whosoever procures for himself or another, offers for sale, gives to another or uses such counterfeit cards, cheques, or promissory notes shall be liable to imprisonment not exceeding 5 years or a fine. On a commercial basis as a member of a group shall be liable to imprisonment from 1 to 10 years. Whosoever in order to enrich himself or a third person, buys, otherwise procures for himself or a third person, disposes of, or assists in disposing of property that another has stolen or otherwise acquired by an unlawful act directed against the property of another shall be liable to imprisonment not exceeding 5 years or a fine; if the offender acts on a commercial basis and/or as the member of a group imprisonment is 1 year up to 10 years. Whosoever procures for himself or another, offers for sale, gives to another or uses such counterfeit cards, cheques, or promissory notes shall be liable to imprisonment not exceeding 5 years or a fine. On a commercial basis as a member of a group shall be liable to imprisonment from 1 to 10 years.

Computer fraud punishment is imprisonment not exceeding 5 years or a fine. Punishment is imprisonment of 6 months to 10 years in especially serious cases. An especially serious case typically occurs if the offender acts on a commercial basis or as a member of a group or if he causes a major financial loss or acts with the intent of placing a large number of persons in danger of financial loss by the continued commission of offences or if he places another person in financial hardship. Punishment is imprisonment from 1 to 10 years, in less serious cases imprisonment from 6 months to 5 years if the offender acts on a commercial basis as a member of a group. Data tampering is liable to imprisonment not exceeding 2 years or a fine. For computer sabotage the penalty shall be imprisonment not exceeding five years or a fine. In especially serious cases the penalty shall be imprisonment from 6 months to 10 years. An especially serious case typically occurs if the offender causes major financial loss, acts on a commercial basis or as a member of a group, or through the offence jeopardises the population’s supply with vital goods or services or the national security of the Federal Republic of Germany.

On the basis of the FD, §152a StGB was revised, §152b StGB was introduced as a new paragraph and subsections (3) and (4) of §263a StGB were also introduced as new subsections, within Strafrechtsänderungsgesetz (35th Criminal Law Amendment Act) of December 22, 2003. Following this convictions according to §152a StGB have drastically decreased and are rare. The introduction of §152b StGB made §152a significantly less important. It is striking that a fine is not predominant although there are only few convictions. In more than 50% of all cases, a prison sentence is
imposed which is, however, in most cases suspended on probation. There are hardly any prison sentences of more than 2 years that cannot be suspended on probation.

Counterfeiting of Guaranteed Payment Cards (§ 152b StGB) under §152b which was newly introduced in 2003 and not yet of great importance. 240 convictions in 2010 as maximum value do not speak for a mass offence. However, punishment is relatively hard: The fine does only play a minor role, over the last two years almost 40% of all penalties were, prison sentences of more than 2 years which could not be suspended on probation. Thus, the assessment of punishment for these offences is above the general assessment of punishment by German courts which impose prison sentences that cannot be suspended on probation in only 5.3% of all cases. Over the last 5 years there were more than 2000 convictions of computer Fraud (§263a StGB), it is thus a relatively important offence. However, the Strafverfolgungsstatistik does not show which act is the basis of the offence, therefore only some of the convictions are in connection with non-cash payments. The general tendency of the rate of convictions is increasing, this is due to the fact that business and payment transactions are in most cases computer-operated and that there are thus more possibilities to commit a crime. This becomes also clear by the increasing rates of cases in the PolizeilicheKriminalstatistik.∗

A fine is predominant; it was imposed in approx. 70 % of all convictions. On the other hand, the rate of prison sentences not suspended on probation is slightly above average and is still increasing.

In Hungary, counterfeiting of cash-substitute payment instruments, with purpose of use, counterfeits a cash-substitute payment instrument or manufactures a counterfeit cash-substitute instrument is punishable by imprisonment up to 2 years. Misuse of cash-substitute payment instruments, uses a counterfeit or counterfeited cash-substitute payment instrument, accepts payment with a counterfeit or counterfeited cash-substitute payment instrument, the punishment shall be imprisonment up to 2 years if the damage caused by the misuses of a cash-substitute payment instrument is small. Whoever unlawfully obtains or takes a cash-substitute payment instrument, delivers, obtains, exports or imports a counterfeit or counterfeited cash-substitute payment instrument or a cash-substitute payment instrument, or transports such an instrument through the territory of the country is punishable by imprisonment up to 1 year.

Criminal offence against computer system and data for unlawful gain, shall be punishable by imprisonment up to 3 years. Compromising or defrauding the integrity of a computer protection system or device, creates, obtains, distributes or trades, or otherwise makes available, computer

software, passwords, entry codes, or other data enabling to gain access to a computer system shall be punishable by imprisonment up to 2 years.

The sanctioning of criminal organization is very stringent according to the Criminal Code, if someone commits an intentional criminal offence punishable with imprisonment of at least 5 years in a criminal organization, the upper limit of the penalty shall be doubled but must not exceed 20 years.

As to the offences provided by the Hungarian legislation, a very high and increasing rate concerns the application of par. 313/C. From 2002 there were 1019 registered cases and 386 accusations, in 2012 there was 17595 registered cases and 1396 accusations. With regard to §§313/b and /D, the peak is between 2008 and 2009 with 1200 cases.

In Italy, whoever, in order to get a profit for himself or for others unduly utilises, without being the owner, credit or payment cards, or whatever else similar document which qualifies to draw money or to buy things or to get services or counterfeits or alters credit or payment cards or whatever else similar document which qualifies to draw money or to buy things or to get services cedes, or acquires such cards or documents of illicit origin or in any way counterfeited or forged or payments order bases upon them - punished with imprisonment from 1 up to 5 years and with a fine from 310 up to 1.550 euro. Whoever altering in any way the functioning of an computer or electronic ("informatics or telematic") system, or intervening without having the right to, in any modality upon data, information or programs which are contained in an computer or electronic system or pertaining to it, gets for himself or for another person and just profit causing damages to others - the penalty is from 6 months up to 3 years of imprisonment and with a fine from 51 up to 1032 euro.

Country-wide statistics are not available, thus a sample was taken from cases of the Genova District of Appeal Court which show that the average imprisonment duration of 6-12 months was handed down in 35%, 12-24 months in 35% and 24-36 months in 30%.

In Latvia, fraud is punishable by a term not exceeding 3 years, or custodial arrest, or community service, or a fine not exceeding sixty times the minimum monthly wage. If commission thereof is repeated, or by a group of persons pursuant to prior agreement, the applicable punishment is deprivation of liberty for a term not exceeding 6 years, or with confiscation of property, or a fine not exceeding one hundred times the minimum monthly wage. if it has been committed on a large scale, or has been committed in an organised group, the applicable punishment is deprivation of liberty for a term of not less than 5 years and not exceeding 13 years, or a fine not exceeding one
hundred and fifty times the minimum monthly wage, with or without confiscation of property, and with or without police supervision for a term not exceeding three years.

For fraud in an automated data processing system the applicable punishment is deprivation of liberty for a term not exceeding 5 years or custodial arrest, or community service, or a fine not exceeding eighty times the minimum monthly wage. If commission is repeated, or by a group of persons pursuant to prior agreement, the applicable punishment is deprivation of liberty for a term not exceeding 8 years or with confiscation of property, or a fine not exceeding one hundred and fifty times the minimum monthly wage. If it has been committed on a large scale or if it has been committed in an organised group, the applicable punishment is deprivation of liberty for a term of not less than 5 years and not exceeding 15 years, or a fine not exceeding two hundred times the minimum monthly wage, with or without confiscation of property, and with or without police supervision for a term not exceeding three years.

In Poland, for theft of a card enabling withdrawal of money from an ATM penalty is a penalty of deprivation of liberty for a period between 3 months and 5 years. In minor cases the applicable penalty is a penalty of a fine, restriction of liberty or deprivation of liberty for up to 1 year. For counterfeiting or altering, among legal tender or a document which entitles one to obtain a sum of money the applicable penalty is a penalty of deprivation of liberty for a period not shorter than 5 years or a penalty of deprivation of liberty for a period of 25 years.

According to the general statistics collected, in 1999 6855 persons, in 2007 26485, and in 2008 28064 persons were sentenced to imprisonment for an offence provided for in Article 286 paragraph 1 of the Penal Code.

In Romania, forgery, shall be punished by imprisonment from 3 to 12 years. If it caused significant prejudice to the financial system, the penalty shall be imprisonment from 5 to 15 years and the prohibition of certain rights, and if they have caused significant prejudice to the financial system, the penalty shall be imprisonment from 10 to 20 years. Forgery of electronic payment instruments, issuing on the market, in any way, of forged electronic payment instruments or owning them in order to put them into circulation is punished with imprisonment from 3 to 12 years. The punishment is imprisonment from 5 to 15 years and the prohibition of certain rights if the facts are carried out by a person who, by the nature of his (her) job. Owning equipment to forge electronic payment instruments, including hardware and software, to be used to forge electronic payment instruments is punished by imprisonment from 6 months to 5 years. Causing the loss of property to a person by the input, alteration of deletion of computer data, by restricting the access to such data
or by preventing in any way the operation of a computer system, in order to obtain an economic benefit for oneself or for another is punished with imprisonment from 3 to 12 years.

The New Romanian Criminal Code was approved by the Romanian Parliament in 2009 and it will enter into force on February the 1st, 2014. The offences are more in line with the Framework Decision with the minimum and maximum sanctions being less severe. Computer fraud, is punishable by imprisonment from 2 to 7 years. Forgery of debt securities, bonds or instruments for payment or any other securities or similar securities shall be punished with imprisonment from 2 to 7 years and prohibition of certain rights. If the offense refers to an electronic payment instrument, the punishment is imprisonment from 3 to 10 years and prohibition of certain rights. Possession of instruments for the counterfeiting of values shall be punished with imprisonment of 1 to 5 years. The manufacture, receipt, possession or transmittal of equipment, including hardware and software, in order for it to be used for counterfeiting electronic payment instruments, shall be punished with imprisonment from 2 to 7 years.

According to the statistics provided by the Romanian Ministry of Justice, in the year 2011, 120 persons were convicted for frauds with no cash means of payment 119 persons aged 18 years and above and one person was a minor. Regarding the persons aged 18 and older we mention that: 1 conviction was to imprisonment up to 6 months; 2 convictions were to imprisonment ranging from 6 months to 1 year; 50 convictions were to imprisonment ranging from: 1-5 years, and 6 convictions were to imprisonment ranging from 5-10 years.

In the year 2012, 91 persons were convicted for frauds with no cash means of payment offences. 89 persons were beyond 18 years of age and 2 were minors. Regarding the persons aged 18 and above: 46 convictions were to imprisonment ranging from 1-5 years, 4 convictions were to imprisonment ranging from 5-10 years.

In Spain, forgery of credit and debit cards and travellers’ cheques shall be punished with a sentence of imprisonment from 4 to 8 years. Swindling (computer manipulation), manufacturing, introducing, possessing or facilitating computer programmes specifically designated for committing the swindles shall be punished with a sentence of imprisonment from 6 months to 3 years imprisonment if the amount swindled exceeds 400 Euros.

Since no statistics are available, 22 judgments from the Audiencia Nacional (National Court), the Audiencias Provinciales and the Tribunal Supremo (Supreme Court) dealing with article 248(2)(c) (fraudulent use of credit cards) and article 399 bis (forgery of credit cards) were reviewed. It should
be noted that these categories of offences were introduced into the Spanish legal system by the amendment LO 5/2010 to the Criminal Code. It may be stated that in general, when applying the basic offence, the greatest percentage of judgments imposed a sanction from the middle range between the limits legally foreseen; very few applied the minimum level legally foreseen and none applied the maximum. However, when applying the overlapping rules or credit card forgery, there is a tendency to impose the minimum sanction level legally foreseen or at least to apply the lower half of the stipulated range.

In Sweden, no changes were introduced in national law to implement the Council Framework Decision, instead reliance is placed on existing general offences. The sanctions imposed depend on the seriousness of the offence. For theft, minor offences (having regard to the value of the stolen goods and other circumstances of the crime) a fine or imprisonment for at most 6 months; moderately grave offences: Imprisonment for at most 2 years; grave offences (whether the accused was equipped with a weapon, explosive or similar aid, or whether the act was otherwise of an especially dangerous or ruthless nature, concerned property of considerable value or entailed a keenly felt loss): imprisonment for at least 6 months and at most 6 years shall be imposed for gross theft. For robbery, moderately grave offences: Imprisonment for at least one and at most six years; grave offences (whether the violence was dangerous to life or whether the accused caused serious bodily injury or a severe illness or otherwise exhibited considerable brutality or ruthlessly took advantage of the victim’s defenceless or exposed situation): imprisonment for at least 4 and at most 10 years shall be imposed for gross robbery. For extortion: imprisonment for at most 2 years or, if the crime is petty, to a fine is imposed. If the crime is gross, imprisonment for at least 1 year and at most 6 years shall be imposed. For unlawful dispossession, moderately grave offences: Fine or imprisonment for at most 6 months; grave offences: imprisonment for at most 2 years shall be imposed. For self-repossession a fine or imprisonment for at most 6 months is imposed.

Article 2(b) offences are dealt with under the following general offences. For document forgery, a minor offence a fine or imprisonment for at most 6 months shall be imposed for falsifying a document; moderately grave offences: Imprisonment for at most 2 years; gross offences (whether the falsification involved a public authority’s important archival document or a document of special importance in general commerce such as a bond, a share certificate or a mortgage or whether the act was in other ways of an especially harmful nature): imprisonment for at least 6 months and at most 6 years shall be imposed for gross falsification of a document. For forgery of signature, imprisonment for at most 2 years or, if the crime is petty, to a fine or imprisonment for at most 6 months is imposed.
For Article 2(c) offences, illegal distribution of imitations is punishable by a fine. Receiving as a minor offence, imprisonment for at most 6 months or a fine; moderately grave offences, imprisonment for at most 2 years; and grave offences, for at least 6 months and at most 6 years shall be imposed. For money receiving, a minor offence, imprisonment for at most 6 months or a fine shall be imposed; moderately grave offences, imprisonment for at most 2 years; grave offences: imprisonment for at least 6 months and at most 6 years shall be imposed. For dishonest conduct the sanction is a fine or imprisonment for at most 2 years. For unserious acquisition it is a fine or imprisonment for at most 2 years.

Article 2(d) is covered by the offence of fraud, a minor offence, a fine or imprisonment for at most 6 months shall be imposed for fraudulent conduct; moderately grave offences, imprisonment for at most 2 years; and gross offences: imprisonment for at least 6 months and at most 6 years shall be imposed for gross fraud. For usury, moderately grave offences, a fine or imprisonment for at most 2 years; grave offences, imprisonment for at least 6 months and at most 4 years shall be imposed. Generally, the most common sanction for fraud is a suspended sentence and summary punishment. For 2011 the total number of the most common punishments can be seen below. For fraud, less than 10% of convictions led to imprisonment while the number for aggravated fraud was 46 % (see table A). As to the average duration, see table B.

<table>
<thead>
<tr>
<th>Table A</th>
</tr>
</thead>
<tbody>
<tr>
<td>2011</td>
</tr>
<tr>
<td>Fraud (9:1)</td>
</tr>
<tr>
<td>99</td>
</tr>
<tr>
<td>Fraudulent conduct (9:2)</td>
</tr>
<tr>
<td>Aggravated fraud (9:3)</td>
</tr>
<tr>
<td>Gross falsification of a document (14:3)</td>
</tr>
<tr>
<td>Use of falsification (14:9)</td>
</tr>
<tr>
<td>Table B</td>
</tr>
<tr>
<td>---------</td>
</tr>
<tr>
<td>Fraud (9:1)</td>
</tr>
<tr>
<td>Aggravated fraud (9:3)</td>
</tr>
<tr>
<td>Falsification of a document (14:1)</td>
</tr>
<tr>
<td>Gross falsification of a document (14:3)</td>
</tr>
<tr>
<td>Use of falsification (14:9)</td>
</tr>
</tbody>
</table>

In the United Kingdom, the offences are treated differently in England and Wales, Scotland and Northern Ireland. In England and Wales theft (of a payment instrument) shall be liable to imprisonment for a term not exceeding 7 years. Counterfeiting a payment instrument and Fraudulent use (of a payment instrument): on summary conviction to a fine not exceeding the statutory maximum; or to imprisonment for a term not exceeding 6 months; or to both; on indictment, to imprisonment for a term not exceeding 10 years. Handling stolen goods (payment instruments), liable to imprisonment for a term not exceeding 14 years. Possession etc. of articles for use in frauds, on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum (or to both); on indictment, to imprisonment for a term not exceeding 5 years or to a fine (or to both). Fraud by false representation or making or supplying articles for use in frauds, on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine or to both; on indictment, to imprisonment for a term not exceeding 10 years or to a fine (or to both). Unauthorised access to computer material on summary conviction to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum or to both; on indictment, to imprisonment for a term not exceeding 2 years or to a fine or to both. For unlawful obtaining etc. of personal data, the penalty is a fine.

In Scotland, there is no maximum or minimum penalty for theft. Offences related to computers and offences related to specifically adapted devices, to a fine not exceeding the statutory maximum; to imprisonment for a term not exceeding 6 months; or both.

In Northern Ireland, theft is punished by imprisonment for a term not exceeding 10 years. Handling stolen goods (payment instruments) or fraudulent use (of a payment instrument), is punished by imprisonment for a term not exceeding 14 years. Offences related to computers and offences related to specifically adapted devices, 6 months imprisonment.
The average custodial sentence for offences concerning frauds with no cash means of repayment (represented in the above table by the ‘fraud and forgery’ section) varied between 8.4 months in 2002 to 13.2 months in 2012.

3.2. Key common points and differences

From the Member States studied only Cyprus, France and Germany appear to provide for all the Framework Decision offences in their national laws. Most Member States studied rely on the general offence of theft to implement Article 2(a) (Cyprus, France, Germany and the UK). The Article 2(d) offence of fraudulent use is also dealt with under the general fraud offence in national laws (Cyprus, France, Italy, Latvia, Romania and England and Wales). However a number of Member States have specific provisions related to the fraudulent use of payment instruments (France, Germany, Hungary and Italy). Counterfeiting under Article 2(b) is specifically dealt with by the national laws of Cyprus, France, Hungary, Poland, Romania (general forgery offence however under new 2009 law specifically counterfeiting of payment instruments), Spain and England and Wales. Not all the elements of Article 2(c) are specifically dealt with by the national laws of the Member States, nevertheless provisions are found in the laws of Cyprus (possession), France (knowingly accepting), Germany (procuring, offers for sale, gives), Hungary (obtains, delivers), Romania (2009 law), England and Wales and Northern Ireland.

Offences related to computers are set out in the national laws of Cyprus, Germany, Hungary, Italy, Romania, Spain, England and Wales and Northern Ireland. Offences related to specifically adapted devices are provided for in the national laws of Cyprus, France, Germany, Hungary, Romania and Spain.
<table>
<thead>
<tr>
<th>Country</th>
<th>Min</th>
<th>5 years</th>
<th>7 years (fraud)</th>
<th>5 years (debit cards, cheques, and promissory notes)</th>
<th>10 years (guaranteed payment cards and blank euro cheques)</th>
<th>5 years</th>
<th>7 years</th>
<th>5 years</th>
<th>5 years</th>
<th>7 years</th>
<th>5 years</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cyprus</td>
<td>-</td>
<td>14 years</td>
<td>7 years</td>
<td>7 years</td>
<td>5 years</td>
<td>Min</td>
<td>7 years</td>
<td>5 years</td>
<td>5 years</td>
<td>7 years</td>
<td></td>
</tr>
<tr>
<td>France</td>
<td>5 years</td>
<td>5 years</td>
<td>5 years</td>
<td>5 years</td>
<td>5 years</td>
<td>5 years</td>
<td>5 years</td>
<td>5 years</td>
<td>5 years</td>
<td>7 years</td>
<td></td>
</tr>
<tr>
<td>Germany</td>
<td>Min</td>
<td>6 months</td>
<td>5 years</td>
<td>5 years</td>
<td>5 years</td>
<td>5 years</td>
<td>5 years</td>
<td>5 years</td>
<td>5 years</td>
<td>5 years</td>
<td></td>
</tr>
<tr>
<td>Hungary</td>
<td>-</td>
<td>2 years</td>
<td>1 year</td>
<td>2 years</td>
<td>3 years</td>
<td>Min</td>
<td>1 year</td>
<td>Min</td>
<td>6 months</td>
<td>2 years</td>
<td></td>
</tr>
<tr>
<td>Italy</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>5 years</td>
<td>3 years</td>
<td>Min</td>
<td>1 year</td>
<td>Min</td>
<td>6 months</td>
<td>2 years</td>
<td></td>
</tr>
<tr>
<td>Latvia</td>
<td>-</td>
<td>-</td>
<td>3 years</td>
<td>5 years</td>
<td>-</td>
<td>Min</td>
<td>3 years</td>
<td>2 years</td>
<td>2 years</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Poland</td>
<td>5 years</td>
<td>25 years</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>Min</td>
<td>3 months</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td></td>
</tr>
<tr>
<td>Romania</td>
<td>-</td>
<td>12 years</td>
<td>5 years</td>
<td>-</td>
<td>12 years</td>
<td>Min</td>
<td>7 years</td>
<td>Min</td>
<td>7 years</td>
<td>5 years</td>
<td></td>
</tr>
<tr>
<td></td>
<td>-</td>
<td>7 years</td>
<td>5 years (2009 law)</td>
<td>-</td>
<td>7 years (2009 law)</td>
<td>Min</td>
<td>7 years</td>
<td>Min</td>
<td>7 years</td>
<td>7 years</td>
<td></td>
</tr>
<tr>
<td></td>
<td>-</td>
<td>3 years</td>
<td>5 years (2009 law)</td>
<td>-</td>
<td>3 years (2009 law)</td>
<td>Min</td>
<td>2 years</td>
<td>Min</td>
<td>2 years</td>
<td>6 months</td>
<td></td>
</tr>
<tr>
<td></td>
<td>-</td>
<td>2 years</td>
<td>5 years (2009 law)</td>
<td>-</td>
<td>2 years (2009 law)</td>
<td>Min</td>
<td>1 year</td>
<td>3 years</td>
<td>3 years</td>
<td>3 years</td>
<td></td>
</tr>
<tr>
<td>Spain</td>
<td>-</td>
<td>8 years</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>Min</td>
<td>3 years</td>
<td>Min</td>
<td>3 years</td>
<td>3 years</td>
<td></td>
</tr>
<tr>
<td></td>
<td>-</td>
<td>4 years</td>
<td>-</td>
<td>-</td>
<td>6 months</td>
<td>Min</td>
<td>6 months</td>
<td>2 years</td>
<td>2 years</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sweden*</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td></td>
</tr>
<tr>
<td>E&amp;W</td>
<td>7 years</td>
<td>6 months</td>
<td>14 years (handling stolen goods)</td>
<td>12 months /fine/both (summary)</td>
<td>12 months /fine/both (summary)</td>
<td>12 months /fine/both (summary)</td>
<td>12 months /fine/both (summary)</td>
<td>12 months /fine/both (summary)</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

falsified payment instrument in order for it to be used fraudulently
altering, deleting or suppressing computer data, in particular identification data, or - without right interfering with the functioning of a computer programme or system.

the commission of any Article 2(b) offences;
- computer programmes the purpose of which is the commission of any Article 3 offences.
3.2.1. Minimum Penalties

In France there are minimum sentences only for recidivists where the penalty for the offence is 7 years, the minimum sentence is 3 years. Very few Member States stipulate minimum sanctions. Where specified the lowest minimum penalty for counterfeiting is 6 months (Germany) and the highest 4 years (Spain). For offences related to computers the minimum is 6 months in Italy and Spain and 3 years in Romania.

3.2.2. Imposition of Maximum penalty

None of the Member States studied set legislative limitations on the imposition of the maximum sentence. The appropriate sentence is to be determined by the sentencing judge taking into account mitigating and aggravating factors listed in the above section. The following tables sets out the maximum sanction stipulated for the basic offence.

In practice, Cyprus, Hungary, Italy, Latvia, Romania, Spain or Sweden report that in none of the cases involving frauds with no cash means of payment offences did the judges impose the maximum sanction level foreseen in the national legislation.

In France, Germany and Poland the maximum penalty is very rarely imposed.

In the UK we cannot clearly state if there has been any case imposing the maximum sanction, but this is probably the case given that legislative offences of this type range in terms of maximum sentence from between 6 months (Section 6 of the Forgery and Counterfeiting Act 1981) and 14 years (Section 22(2) of the Theft Act 1968).

<table>
<thead>
<tr>
<th>Scotland</th>
<th>-</th>
<th>-</th>
<th>-</th>
<th>6 months / fine</th>
<th>-</th>
</tr>
</thead>
<tbody>
<tr>
<td>NI</td>
<td>10 years</td>
<td>-</td>
<td>14 years (handling stolen goods)</td>
<td>-</td>
<td>6 months</td>
</tr>
</tbody>
</table>

Table 3: Minimum and maximum sanctions
4. AGGRAVATING AND MITIGATING CIRCUMSTANCES

4.1. Situation in the different countries

In **Cyprus** the aggravating and mitigating factors are established and set out in case law by the Supreme Court. Examples of aggravating factors include the sophistication of the act, the amount of money acquired, the previous criminal record or membership of a criminal group. Mitigating factors include no previous convictions, an early guilty plea and showing remorse.

In **France**, there is a long list of specific aggravating circumstances for these offences, which includes: offence committed by an organized group, by a person holding public authority or discharging a public service mission, or by a person unlawfully assuming the capacity of a person holding a public office or vested with a public service mission; to the prejudice of a particularly vulnerable person, offence committed by an adult with the support of one or more minors or offence preceded, accompanied or followed by acts of violence by or using weapons. As a mitigating circumstance, the French Penal Code provides that the penalty incurred by the perpetrator or the accomplice of the offences of theft committed by an organized group could be reduced if, by giving information to the administrative or judicial authorities, the perpetrator/accomplice has helped to stop the commission of the offence, or to avoid death or permanent disability and to identify other perpetrators or accomplices. Moreover, the French Penal Code provides that the perpetrator who attempts to commit one of the offences of theft is exempted from penalty if the information given has permitted to prevent the commission of the offence and to identify other perpetrators and accomplices.

**German** law provides for several aggravating circumstances. In case of offences in the sense of §242, the law provides for some especially serious cases in §243 StGB. Among others the sanction is aggravated if the offender acts on a commercial basis and/or as a member of a group whose purpose is the continued commission of offences (§243(1)(1) No. 3, §244(1) No. 2, §244a(1) StGB). In case of offences in the sense of §246(1) StGB the sanction is up to 5 years of imprisonment if the property was entrusted to the offender (§246(2) StGB). If in case of offences in the sense of §152a StGB the object of the offence is a guaranteed payment card (such as credit cards, euro cheque cards, and other cards the use of which can oblige the issuer to make a guaranteed payment by money transfer or which are especially protected against imitation through design or coding (§152b(4) StGB)) or a blank euro cheque, the sanction is imprisonment from one to ten years (§152b(1) StGB). Moreover, the sanction is aggravated if the offender acts on a commercial basis or as a member of a group whose purpose is the continued commission of offences (§152a(3),
§152b(2) StGB. In case of fraud (§263(1) StGB) and computer fraud an especially serious case is typically given if the offender acts on a commercial basis or as a member of a group whose purpose is the continued commission of counterfeiting or fraud, if he causes a major financial loss or acts with the intent of placing a large number of persons in danger of financial loss by the continued commission of offences, if he places another person in financial hardship, if he abuses his powers or his position as a public official (§263(3) No. 1 to 4 (in conjunction with §263a(2) StGB). In case of computer sabotage in the sense of §303b(1) StGB the penalty shall be imprisonment from 6 months to 10 years in especially serious cases which are typically given if the perpetrator causes major financial loss, acts on a commercial basis or as a member of a group, or through the offence jeopardizes the population's supply with vital goods or services or the national security of the Federal Republic of Germany (§303b(4) StGB). There are also some mitigations within the just mentioned aggravations if the case is less serious. Moreover, the general mitigation of §49(1) StGB applies if the offender reveals knowledge and thereby contributes to detect or prevent other offences (“crown witness” rule). §149(2) StGB provides for an exemption of penalties if the offender either voluntarily gives up the commission of the prepared offence and averts the danger caused by him that others continue to prepare and commit the offence or prevents the completion of the offence and destroys and renders unusable the means for counterfeiting or reports their existence or surrenders them to a public authority. According to §149(3) StGB the offender shall not be liable for imprisonment if the danger of commission or completion of the act is averted regardless of the contribution of the offender if he voluntarily and earnestly tried to avert the commission and completion.

Hungarian criminal law provides, apart from the general aggravation in case of the commission of an offence in a criminal organisation (Art. 98 HCC), for aggravations if the offence is committed in a criminal organization or for regular gain (Art. 313/C (2) HCC) or depending on the damage (Art. 313/C (3) to (6), Art. 300/C (4) HCC). Concerning mitigation, the general sentencing rules apply. The sanction shall be exempted, if in case of an offence in the sense of Art. 300/E (1) HCC, the offender confesses his “activity to the authorities before the authorities” become aware of the creation of any computer software, password, entry code, or other data enabling to gain access to a computer system, and if the person surrenders such things produced to the authorities and assists in the efforts to identify other persons involved”.

In Italy there is only one specific aggravating circumstance, the computer fraud committed which damages the State or another public entity by abusing the qualification as a system’s operator. There are not specific circumstances for frauds with non-cash means of payment. There is only a
list of general aggravating circumstances and a list of general mitigating circumstances in the general part of the Penal Code.

In Latvia there are some specific aggravating circumstances foreseen, like if the commission is repeated or if the offence is committed by a group of persons or if it has been committed on a large scale. There is a list of general mitigating circumstances and a list of general aggravating circumstances in the general part of the Penal Code, as said before for other offences.

In Poland, there are no aggravations or mitigations apart from the general rules, e.g. regarding aggravating circumstances recidivism (relapse into crime) (Article 64) and commission in an organized or commercial form (Article 65). The court may apply an extraordinary mitigation in case of, among others, a juvenile perpetrator, if the victim and perpetrator have been reconciled or if the perpetrator reveals information about other perpetrators that were involved in the commission of the offence.

In Romania there are no specific circumstances. There is a list of general mitigating circumstances and a list of general aggravating circumstances in the General part of the Penal Code, as said before for other offences.

In Spain, there are two specific aggravating circumstances that apply to forgery: when the forged items affect persons at large scale, or when the acts are committed within the set of a criminal organization dedicated to such activities. There is a list of general mitigating circumstances and a list of general aggravating circumstances in the general part of the Penal Code, as said before for other offences.

In Sweden, an aggravation is foreseen in cases of gross offences (Ch. 8 Sect. 4, 6 and 8 § 2, Ch. 9 Sect. 3, 4, 5§3, 6§3 and 6a§3, Ch. 14, Sect. 3) apart from the general sentencing rule in Ch. 29 Sect. 2 SCC. Mitigations are foreseen in minor cases (Ch. 8 Sect 2, 5, Ch. 9 Sect. 2, 7, 7a, Ch. 14 Sect. 2, 5) apart from the general sentencing rule in Ch. 29 Sect. 3 SCC.

In the United Kingdom, as said before, the law on sentencing is elucidated through different sources: the statutes, the published guidance provided by the Sentencing Council, and the case law.

In England and Wales the Criminal Justice Act 2003 foresees previous convictions as an aggravating factor. The same Act foresees the seriousness of the offence and any other factor that in the opinion of the court is relevant in mitigation of sentence as mitigating factors. Other
aggravating factors are listed in the Sentencing Council's Guidelines, like if the offence was committed whilst on bail for other offences, if the offenders operated in groups or groups, professional offending or the high level of profit from the offence. Some mitigating factors can be found, like the age of the offender or the fact that the offender played only a minor role in the offence.

In Northern Ireland, the case law provides some aggravating factors like if the offence was committed while the offender was on bail for another offence, previous convictions or the deliberate targeting of a vulnerable victim. Mitigating factors are also foreseen e.g. the offender's age, the fact that the offender has assisted the police during the investigation or that the offender has shown genuine remorse or only played a minor role.
4.2. Key common points and differences

All jurisdictions provide for several aggravating or mitigating circumstances, but they differ in their requisites. The Polish Penal Code only provides for a general sentencing rule.

The FD does not provide for aggravating or mitigating circumstances and this may explain the differences between the Member States. The effects of these circumstances vary. In UK and Cyprus (common law Systems) and in Hungary, the Court will impose the appropriate penalty taking into account the seriousness of the crime as well as any other aggravating and mitigating factors. In France, Italy and Spain, the aggravating and the mitigating circumstances lead to a compulsory increase or reduction of the sentence. In Germany only the specific aggravating circumstances lead to a compulsory increase of the sentence, and there is an open list of generic circumstances that the court may take into account as aggravating or mitigating. In Latvia and Sweden, the aggravating circumstances normally lead to an increase of the sentence. In Poland, in some cases the rules are compulsory and in other cases they are not. In Romania the aggravating circumstances lead to an optional increase of the penalty and the mitigating circumstances lead to a compulsory reduction of the legal minimum of the penalty.

<table>
<thead>
<tr>
<th></th>
<th>Group or association</th>
<th>Big amount of money acquired</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>CY</strong></td>
<td>Criminal group (case law)</td>
<td>Yes</td>
</tr>
<tr>
<td><strong>FR</strong></td>
<td>Organised group</td>
<td>No</td>
</tr>
<tr>
<td><strong>DE</strong></td>
<td>Group for continued commission</td>
<td>Major financial loss or large number of victims</td>
</tr>
<tr>
<td><strong>HU</strong></td>
<td>Criminal organization</td>
<td>No</td>
</tr>
<tr>
<td><strong>IT</strong></td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td><strong>LV</strong></td>
<td>Group</td>
<td>Yes</td>
</tr>
<tr>
<td><strong>PL</strong></td>
<td>Organised group (generic)</td>
<td>No</td>
</tr>
<tr>
<td><strong>RO</strong></td>
<td>No</td>
<td>Yes (generic)</td>
</tr>
<tr>
<td><strong>ES</strong></td>
<td>Organised group</td>
<td>Large scale</td>
</tr>
<tr>
<td><strong>SE</strong></td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td><strong>UK</strong></td>
<td>Organised group (Case Law)</td>
<td>Yes</td>
</tr>
</tbody>
</table>

Table 4: Frequent aggravating circumstances

Special provisions for aggravated offences are provided for by very few Member States. In France (for theft and fraud) a number of aggravating factors in different permutations are taken into account in order to identify the appropriate aggravated sentence. The same applies to Sweden.

For Article 1(2)(a) only Germany provides for the aggravating factor of being performed by an organised group increasing the sanction to 1-10 years. For Article 1(2)(b) again Germany provides for the same aggravating factor which increases the sanction to 6 months – 5 years (debit cards, cheques, and promissory notes) and 2-15 years (guaranteed payment cards and blank euro-
cheques). In Romania where significant loss results the aggravated sanction is 10-20 years. For Article 1(2)(c), Germany is again alone in providing an aggravated sanction when committed by an organised group (1-10 years).

For Article 1(2)(d), the aggravated penalties in Latvia are 5-13 years or fine x150 min wage (high value or organised gang) and 6 years or fine up to x100 min wage (by group). In Germany it is 1-10 years when involving an organised gang.

For Article 3 offences the aggravated penalties are 6 months – 10 years in Germany when involving a high value or organised gang. In France when committed against state interests the aggravated penalty is 5 years' imprisonment and a fine of €75,000 for fraudulent accessing, 7 years' imprisonment and a fine of €100,000 for fraudulent introduction of data or obstructing or interfering. When there has been alteration of the system the aggravated penalty for fraudulent accessing is 3 years' imprisonment and a fine of €45,000 and for fraudulent introduction of data 5 years' imprisonment and a fine of €75,000. In Latvia it is 5-15 years or fine up to x200 min wage (high value or organised gang) and 8 years or fine up to x150 min wage (by group). In Romania it is 5-15 years when committed in the course of a professional activity.

For the Article 4 offence, the aggravated penalty is 7 years’ imprisonment and a fine of €750,000 in France when involving an organised gang and in Germany 6 months-10 years when involving a high value or organised gang.

5. SANCTIONS OTHER THAN IMPRISONMENT AND FINES

In addition to imprisonment and fine, upon conviction a court can impose additional sanctions. Prohibitions and exclusions can be on a permanent or temporary basis, whilst some orders are mandatory the vast majority are discretionary. For detailed consideration of the modalities in each country please refer to the national reports annexed, what follows is a comparative analysis of what sanctions are available in the Member States studied. Alternative sanctions are available in Sweden but are not listed in the national report.

5.1. Community Service

In Cyprus, Hungary, Latvia and the UK community service orders are available and can include the imposition of additional conditions.
5.2. Confiscation and Forfeiture

In France, Germany, Hungary, Latvia and Romania confiscation orders can be imposed. In France, Hungary, Italy and Poland forfeiture orders can be made.

5.3. Restricted Movement

In Hungary and Poland an individual can be prohibited from entering certain areas and in Poland they can also be prohibited from contacting certain individuals. An individual can also be expelled from France, Hungary and Latvia.

5.4. Restriction on Work Related Rights

Prohibition from undertaking certain professions can be imposed in France, Hungary, Italy, Poland, Romania and Spain. In France, Hungary, Italy, Latvia, Poland, Romania and Spain a person can also be prohibited from holding public office. In France premises can be closed and an individual can be prohibited from making certain payments. In Italy public licences can be lost and an individual can be prohibited from holding directional positions. The license to practice medicine can be revoked in Sweden (Chapter 5, Section 7 lagen (1998:531) omyrkesverksamhet på hälso- och sjukvårdensområde) and a person can under certain circumstances be the object of disciplinary measures, dismissal, or suspension (Section 18 lagen (1982:80) omanställningsskydd; Chapter 11, Section 1, 1976 års lag omoffentliganställning).

Generally in Hungary in the cases in which imprisonment is imposed, an exclusion from participation in public affairs as a secondary penalty was applied in addition to imprisonment. This type of secondary penalty can be inflicted for intentionally committed criminal offences provided that the perpetrator has been sentenced to non-suspended imprisonment (Arts 62-63 HCC). In Italy, although disqualifications are provided by law, they are not applied in practice. In Latvia, the Section 177 and the Section 177\textsuperscript{1} punishment like disqualification is not set forth and accordingly was not applied in practice.

According to the Medical Responsibility Board of Sweden\textsuperscript{2}, in 2011, 3 licences were revoked on the ground of the offence dealt here specifically, and in 2012 the number increased to 10. The total number of revoked licences to practice medicine based on criminal activities was 24 and 50

respectively in those years. The decisions of the Medical Responsibility Board can be appealed to the administrative courts.

5.5. Restriction of other Rights

In France, Italy, Romania and Spain an individual upon conviction can also lose their civic rights and their parental rights can be affected. In Hungary and Poland an individual can lose their driving licence.

In Spain judgments generally impose the accessory sanction of special barring for the right to run for elected office for the duration of the sentence, as foreseen in article 56.2 of the CP.
5.6. Other Sanctions

In France they can be excluded from public tenders. In France and Germany rehabilitation orders can be made.

<table>
<thead>
<tr>
<th>Sanction</th>
<th>Country</th>
<th>Community Service</th>
<th>Confiscation/deprivation orders</th>
<th>Forfeiture</th>
<th>Prohibition from making contact with certain individuals</th>
<th>Prohibition from undertaking certain professions</th>
<th>Prohibition on holding public office</th>
<th>Loss of civic rights</th>
<th>Driving disqualification</th>
<th>Loss of public licence</th>
<th>Expulsion of non-citizens</th>
<th>Prohibition from making payments</th>
<th>Prohibition from holding directional positions in legal entities</th>
<th>Publication of Decision</th>
<th>Closure of Premises</th>
<th>Rehabilitation</th>
<th>Exclusion from public tenders and aid</th>
</tr>
</thead>
<tbody>
<tr>
<td>Community Service</td>
<td>Cyprus</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Confiscation/deprivation orders</td>
<td>France</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td></td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td></td>
<td>✓</td>
<td>✓</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Forfeiture</td>
<td>Germany</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Prohibition from making contact with certain individuals</td>
<td>Hungary</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td></td>
<td>✓</td>
<td>✓</td>
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<td>✓</td>
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<td></td>
<td>✓</td>
<td>✓</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Prohibition from undertaking certain professions</td>
<td>Italy</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td></td>
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</tr>
<tr>
<td>Prohibition on holding public office</td>
<td>Latvia</td>
<td>✓</td>
<td></td>
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<td></td>
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</tr>
<tr>
<td>Loss of civic rights</td>
<td>Poland</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Driving disqualification</td>
<td>Romania</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
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</tr>
<tr>
<td>Loss of public licence</td>
<td>Spain</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
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<td></td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Expulsion of non-citizens</td>
<td>Sweden</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td></td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>-</td>
</tr>
<tr>
<td>Prohibition from making payments</td>
<td>UK</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
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</tr>
</tbody>
</table>

Table 5: Sanctions other than imprisonment and fine

The answers vary since the majority of countries do not have precise statistics on this issue and the information gathered from individual practitioners might not be fully reliable, as they themselves recognized. The detailed statistics are discussed in greater detail bellow.

In France, according to “Convictions for 2010” published by the Ministry of Justice, there is data regarding disqualifications pronounced as additional penalties for fraud involving cheques, as detailed in the following table:
<table>
<thead>
<tr>
<th>Additional penalties for fraud with cheques</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of penalties</td>
</tr>
<tr>
<td>---------------------</td>
</tr>
<tr>
<td>Any type of fraud with cheques</td>
</tr>
<tr>
<td>Counterfeiting or forging a cheque</td>
</tr>
</tbody>
</table>

Table 6: France other sanctions

Poland provided detailed statistics; the following data concerning ‘practice’ refer to the years 1999, 2008, 2011. In 1999 courts imposed penal measures in 179 cases with reference to Article 286 paragraph 1 of the Penal Code. In 100 cases the courts imposed forfeiture of objects and it was the most frequently imposed penal measure. Among others, there were also prohibition of undertaking business activities (15 cases), executing certain profession (7 cases), occupying certain posts (17 cases), compensation of damage (22 cases).

In 2008, among 28928 people sentences on the basis of Article 286 paragraph 1 of the Penal Code, on 1373 were additionally imposed penal measures. 36 convicted were additionally banned from occupying specific posts, 22 from exercising specific profession and 63 from undertaking business activities. In 24 cases the sentences were made publicly known. In 2011 the courts imposed 1852 penal measures on 1808 people with relation to the Article 286 paragraph 1 of the Penal Code. The most frequently imposed penal measure was forfeiture of objects – 1419 cases. Deprivation of public rights is very rarely imposed, since according to Polish law judges may impose deprivation of public rights only in cases of imprisonment for a period of no less than 3 years.

In the UK the statistics do not specify the percentage of sentences that impose a other sanctions, but rather are set out in general terms (see the table as follows):
In general, the most recurrent sanctions, other than imprisonment, are fine and community sentence. From 2002 to 2012, the application of fine is in more than 20% of cases; the application of community sentence in more than 30%.

6. SUSPENDED SENTENCES AND EARLY RELEASE

6.1. Suspended sentences

In all Member States studied suspended sentences are available, provided that the sentence of imprisonment imposed is under a certain number of years as set out in the table 7. The only Member State where suspended sentences are not available is Scotland where analogous ‘deferred sentences’ are available allowing a criminal court to defer passing sentence entirely with or without the imposition of conditions. A specific term of imprisonment is not specified for France, Germany and Sweden. In France a suspended sentence is not available where a sentence for similar facts is pronounced within 5 years of the first sentence pronounced. In Romania a suspended sentence is only possible if the individual has not been previously sentenced to a penalty of imprisonment of more than 6 months.

<table>
<thead>
<tr>
<th>Country</th>
<th>No. Years</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cyprus</td>
<td>3</td>
</tr>
<tr>
<td>France</td>
<td>-</td>
</tr>
<tr>
<td>Germany</td>
<td>-</td>
</tr>
<tr>
<td>Hungary</td>
<td>2</td>
</tr>
<tr>
<td>Italy</td>
<td>2</td>
</tr>
<tr>
<td>Latvia</td>
<td>5</td>
</tr>
<tr>
<td>Poland</td>
<td>2</td>
</tr>
<tr>
<td>Romania</td>
<td>3</td>
</tr>
<tr>
<td>Spain</td>
<td>2</td>
</tr>
<tr>
<td>Sweden</td>
<td>-</td>
</tr>
<tr>
<td>England and Wales</td>
<td>28-51 weeks</td>
</tr>
<tr>
<td>Northern Ireland</td>
<td>2</td>
</tr>
<tr>
<td>Scotland</td>
<td>-</td>
</tr>
</tbody>
</table>

Table 7: Suspended Sentences and the maximum no. of years
Most countries do not provide for differentiated data on suspension of sentences and early release regarding every kind of offence, and thus no complete data can be provided for frauds with non-cash means of payment. Where possible these data have been supplemented with information collected from practitioners. However if such information did not appear to be reliable, as expressed by the interviewee, it has been decided not to be included in this report. Facing the choice between including non-fully reliable information that can be misleading and leaving out such information, it has been decided for the latter.

For suspension in France see table. In Germany, as to §152a StGB, in most cases, in more than in 50% of all cases, prison sentence is suspended on probation; §152b StGB: almost 40% of all penalties are prison sentences of more than 2 years which cannot be suspended on probation; §263a StGB: the rate of prison sentences not suspended on probation is slightly above average and is still increasing: In 2011, prison sentences not suspended on probation were imposed in almost 10% of all convictions. In Hungary the official statistics (ENYÜBS and VIR systems) do not provide data on early release specifically related to these offences are available. The evaluation of single judgements does not give an answer, as due to the prevalence of aggregated penalty. Out of interviews with judges the answer was “Normally suspending the imprisonment is more typical than the opposite but it depends on the method the dangerousness and the individual harm of the perpetrator.”

In Italy, around 30% of penalties imposed are suspended (data concerning District of Appeal Court of Genoa). In Latvia, Section 177 on average in 52% cases the sentence was suspended. Section 177 1 on average in 78% cases the sentence was suspended. The data in Poland, show that in 1999 6855 people were sentenced to imprisonment for an offence provided for in Article 286 paragraph 1 of the Penal Code, on 6062 cases with suspension of its execution. In 2007 26485 persons were sentenced to imprisonment for an offence provided for in Article 286(1) of the Penal Code, in 23396 cases with suspension of its execution. In 2008, 28064 people were sentenced to imprisonment for an offence provided for in Article 286 paragraph 1 of the Penal Code, 24758 with suspension of its execution. In conclusion the vast majority of cases have been suspended.

The data of Romania with regard to suspension that in 2011 out of 119 convictions, 33 sentences were suspended and 27 sentences were suspended under supervision. Therefore, 50% of the total sentences were suspended. In 2012 out of 89 convictions, 22 sentences were suspended and 17 sentences were suspended under supervision. Therefore, 43.8% of the total sentences were suspended.
As far as suspension of sentences in Spain is concerned, the information provided here comes from interviews with magistrates, due to the lack of statistics on this issue. When the sentence imposed for this offence is not higher than two years’ imprisonment, as is the case in fraud through computer manipulation, it is to believe that the courts will opt for this solution in practically all of the cases, as long as the offender has been deemed to pose little criminal hazard and the necessary conditions for suspension of sentence have been met (article 81 CP). It is worth recalling that in practice and given the high prison population, in the case of fraud through computer manipulation, suspension of sentence is granted automatically as long as the offender has no prior convictions or those have been cancelled or could be cancelled and the proves that he is solvent to face civil liabilities. Likewise, if the offender has a criminal record, prison sentences are normally substituted with a fine (each day of prison is substituted by two quotas of the fine), pursuant to article 88 CP.

The relationship between court sentencing of imprisonment and suspended sentences respectively for Sweden can be seen below:

<table>
<thead>
<tr>
<th></th>
<th>Imprisonment</th>
<th>Suspended sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td>2011</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fraud (9:1)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fraud (9:1)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fraudulent conduct (9:2)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Aggravated fraud (9:3)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Gross falsification of a document (14:3)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Use of falsification (14:9)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Table 8: Sweden suspended sentence

The statistical data for UK are:

| Percentage use of the suspended sentence in Fraud with no cash means of payment cases |
|-----------------------------------------|-------|-------|-------|-------|-------|-------|-------|-------|-------|-------|-------|-------|-------|
| 1.7% | 2.0% | 1.8% | 1.5% | 1.4% | 1.8% | 3.1% | 9.0% | 12.3% | 14.2% | 16.6% | 16.6% | 20%  | 20%  |

In the UK, the percentage of the suspended sentences (the number is shown under the next question) in such cases increased only slightly with the implementation of the CJA in 2005, with a greater increase between that year and 2012.
6.2. Early Release

Early release is a possibility in all Member States studied. Early release is subject to the individual having served a certain proportion of their custodial sentence as set out in the table X. In France there is no set period but depends on the behaviour of the prisoner. The requisite proportion is not specified for Germany or Romania (significant percentage of sentence) and Sweden. Early release can be either unconditional or on licence.

<table>
<thead>
<tr>
<th>Country</th>
<th>Term to be served before early release</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cyprus</td>
<td>- For a sentence of between 1 month and 2 years imprisonment, the reduction provided is 6 days per month.</td>
</tr>
<tr>
<td></td>
<td>- For a sentence of between 2 years and up to 5 years imprisonment the reduction provided is 8 days per month.</td>
</tr>
<tr>
<td></td>
<td>- For a sentence of between 5 years up to 8 years imprisonment the reduction is 10 days per month.</td>
</tr>
<tr>
<td></td>
<td>- For a sentence of between 8 years and 12 years the reduction provided is 12 days.</td>
</tr>
<tr>
<td></td>
<td>- For a sentence of more than 12 years the reduction is up to 14 days per month.</td>
</tr>
<tr>
<td>France</td>
<td>½ the sentence can be raised to 2/3</td>
</tr>
<tr>
<td>Germany</td>
<td>-</td>
</tr>
<tr>
<td>Hungary</td>
<td>Minimum of 2 months and 4/5 of sentence in high security prison</td>
</tr>
<tr>
<td></td>
<td>¾ of sentence in medium security prison</td>
</tr>
<tr>
<td></td>
<td>2/3 of sentence in low security prison</td>
</tr>
<tr>
<td></td>
<td>½ of sentence under 3 years</td>
</tr>
<tr>
<td>Italy</td>
<td>At least 30 months and ½ of sentence</td>
</tr>
<tr>
<td></td>
<td>At least 4 years and ¾ of sentence (if recidivist)</td>
</tr>
<tr>
<td>Latvia</td>
<td>½ of sentence for less serious crime</td>
</tr>
<tr>
<td></td>
<td>2/3 of sentence for serious crime or recidivist</td>
</tr>
<tr>
<td></td>
<td>¾ of sentence for especially serious crime or committed on conditional release</td>
</tr>
<tr>
<td>Poland</td>
<td>½ of sentence</td>
</tr>
<tr>
<td>Romania</td>
<td>-</td>
</tr>
<tr>
<td>Spain</td>
<td>¾ of sentence</td>
</tr>
<tr>
<td>Sweden</td>
<td>-</td>
</tr>
<tr>
<td>England and Wales</td>
<td>½ of sentence</td>
</tr>
<tr>
<td>Northern Ireland</td>
<td>At least 4 weeks and ½ of sentence</td>
</tr>
<tr>
<td>Scotland</td>
<td>½ of sentence for short term prisoners</td>
</tr>
<tr>
<td></td>
<td>2/3 of sentence for long term prisoners</td>
</tr>
</tbody>
</table>

Table 9: Minimum Term to be served of sentence before early/conditional release is possible

In France, there are no specific data focused on early release of the offender convicted for fraud with non-cash means of payment. However, there is general information 2012-13:
In Latvia, Section 177 there was one case in 2007 when early release was granted. Section 177 1 there were no cases where early release was granted.

In Romania, as for early release, only the access to the general percentage regarding early release (regarding all crimes) has been possible. For the year 2011, this was 32.61% and for 2012, 35.77%.

7. SANCTIONS FOR LEGAL PERSONS

Criminal prosecution of a legal person is possible in the UK, however the available sanctions are not specified in the national report. In Germany a legal person cannot be held criminally liable. In all other Member States a fine can be imposed as a sanction against a legal person.

7.1. Public Aid

Exclusion from public aid, tenders and funds can be imposed in France, Italy, Poland, Romania and Spain.

7.2. Restriction on Commercial Activity

Prohibition from exercising a professional or commercial activity is available as a sanction in France, Hungary, Romania and Spain.

In France, Romania and Spain closure of establishments can also be ordered.

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Prisoners concerned by adjustment of</td>
<td>12,887</td>
<td>11,881</td>
</tr>
<tr>
<td>their sentence including:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Day parole (any modalities)</td>
<td>2,923</td>
<td>3,025</td>
</tr>
<tr>
<td>Electronic surveillance</td>
<td>9,955</td>
<td>8,856</td>
</tr>
<tr>
<td>Percentage of prisoners benefiting</td>
<td>21 %</td>
<td>19.8 %</td>
</tr>
<tr>
<td>from adjustment of their sentence</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Table 10: France suspended sentences
7.3. Judicial Supervision

A legal person can be placed under judicial supervision in France and Spain.

7.4. Judicial Wind-up

In France, Hungary, Latvia, Romania and Spain the legal person can be dissolved or put into liquidation.

7.5. Confiscation and Forfeiture

Confiscation and forfeitures orders can be made in France, Spain and Latvia.

7.6. Publication of the Decision

The decision will be published in France, Poland and Romania.

7.7. Other Sanctions

In France a prohibition can be imposed on drawing cheques and making other payments. In Italy and Poland the legal entity can also be prohibited from advertising.

| Sanction | Country  | Fine | professional | Commercial | Civil | Establishment | or | Criminal | proceeding related to | making | Confiscation | Publication | Liquidation | Judicial Wind-up/Dissolution | Forfeiture | Prohibition from advertising | Judicial supervision |
|---------|---------|------|--------------|------------|------|---------------|    |           |   |           |     |              |           |    |                    |               |                            |                           |
|         | Cyprus  | ✓    |              |            |      |               |    |           |   |           |     |              |           |    |                    |               |                            |                           |
|         | France  | ✓    | ✓            | ✓          | ✓    | ✓             | ✓  | ✓         | ✓ | ✓         |     |              | ✓           |    |                    | ✓              |                            |                           |
|         | Germany | -    | -            | -          | -    | -             | -  | -         | - | -         |     |              | -           |    |                    | -              |                            |                           |
|         | Hungary | ✓    | ✓            |            |      |               |    |           |   |           |     |              | ✓           |    |                    | -              |                            |                           |
|         | Italy   | ✓    | ✓            |            |      |               |    |           |   |           |     |              | ✓           |    |                    |               |                            |                           |
|         | Latvia  | ✓    | ✓            |            |      |               |    |           |   |           |     |              | ✓           |    |                    |               |                            | ✓                           |
|         | Poland  | ✓    | ✓            |            |      |               |    |           |   |           |     |              | ✓           |    |                    |               |                            | ✓                           |
The extensive legal regulation of the corporate criminal liability does not have an equivalent importance in practice. The majority of MS have no case of imposing a criminal sanction on a legal person for the type of offence analysed here. This is the case of Cyprus, France (at least until 2011) Italy (data regard only the District of Appeal Court of Genoa), Romania and Spain. The statistics for Poland do not differentiate regarding the type of offence, and only the total number of sentences issued against a legal person were provided (total of 50 sentences issued with reference to all offences for which such liability might be imposed).

Hungary, Latvia and Sweden do not present any data, probably because there have not been any convictions either. Germany does not provide for criminal liability of legal persons.

The statistical data cannot be regarded as conclusive, but the general trend is visible: as for other offences, sanctioning legal persons is not a tool which MS refer to in order to combat and prevent fraudulent activities.

### 8. SETTLEMENT OF MINOR CASES

#### 8.1. The definition of “minor case”

For the definition of what is considered a “minor case” in the criminal justice system of the countries studied, in order to avoid unnecessary reiterations, we refer to what was already mentioned under the report on child pornography. To identify a minor offence following elements, among others, are taken into account: the loss or harm can be described as minor and was the result of a single incident or that the suspect played a minor role in the commission of the offence.

#### 8.2. Special proceedings for minor cases

Under this paragraph we will focus mainly on the special rules applicable to minor cases of fraud with non-cash means of payment (hereinafter “fraud”), trying to avoid the reiteration of the general rules on case settlement or discretionary discontinuation. These proceedings are described at length in the national reports and have been analysed from a comparative law perspective in the
comprehensive report on child pornography. Notwithstanding the aim to prevent repetitions, some overlapping between the different reports will be unavoidable.

**Spain** has a special procedure for misdemeanours, and it may apply to fraud offences. Precisely for forgery offences when the value does not exceed 400€ the conduct is deemed a misdemeanour pursuant to article 623 PC with permanent traceability from four to twelve days or a fine of one to two months. This petty offence can only be prosecuted on the request of the victim or their legal representative.

In **Latvia**, there isn’t any administrative violation of fraud defined in the Latvian Administrative Violations Code.

In **Cyprus** there are no mechanisms foreseen in the Law regarding the settlement of minor cases, as there is no definition of minor or petty offence.

In **France**, the same alternative proceedings described for offences of child pornography can be used in cases of fraud with non-cash means payment.

In **Germany**, as was already stated the PP has certain powers regarding the decision on the commencement and discontinuation of the criminal proceedings in minor cases (Vergehen) if there is no public interest in the prosecution (Art. 153 German CPC), and in those cases where the punishment would not be useful besides another penalty already imposed to the same offender (Art. 154 CPC). Furthermore the PP can decide to impose conditions and instructions upon the defendant (for example, payment of damages, social service, enter into an agreement with the victim), instead of prosecuting. Once the criminal proceedings have been instituted, the court can also decide to discontinue the proceedings, in cases of misdemeanours, where there is no public interest upon consent of the PP and of the defendant (Art. 153 (2)). These general rules apply also to cases of fraud as analyzed here.

In **Poland** the proceedings may not be initiated or may be conditionally discontinued, if the social harm is negligible and the guilt is not significant, and the maximum penalty is not higher than 3 years imprisonment for the offence in abstract.

In **Romania** if the offence does not entail social danger the criminal court or the PP in the investigative stage can substitute the penalty by an administrative sanction, as for example a reprimand or warning. No special rules seem to apply to fraud cases.
Hungarian criminal justice system does not provide for diversionary measures or special proceedings, however regulates procedural short-cuts and fast-track proceedings. The general rules are applicable to fraud with non-cash payment offences.

In Spain, the general diversionary proceedings (judgment without trial in cases of agreement, where the accused accepts the indictment and the maximum penalty for the offence is not higher than 6 years) as explained in the report on child pornography are applicable here.

Italy provides for a very similar regulation on the agreement or patteggiamento if the penalty, once reduced, does not exceed five years or two years, depending on the offence. What was explained in the report on child pornography offences applies here. In Sweden those fraud offences which are sanctioned with not more than 6 months or a fine, are considered as petty offences, but no special proceedings is provided for them.

The national report for the UK states that legislatively speaking, the Fraud Act 2006 provides the most concrete guidance on the severity of fraud offences, though this guidance is not explicitly presented as a mechanism for dealing with minor cases.

The Swedish system provides for the possibility to sanction minor cases by way of summary orders rendered by the public prosecutor. Usually minor cases are those sanctioned with a fine penalty. Police summary orders are also foreseen, but apply only in cases of breach of regulations.

8.3. Key common points and differences

In sum, with regard to the existence of general rules or proceedings to settle minor cases and its possible application to offences of fraud with non-cash means of payment, we could conclude that the same general rules described for child pornography offences apply, although specific circumstances are taken into account:

Systems which provide for the possibility of non-prosecuting or discontinuing proceedings in minor cases at the pre-trial stage by PP: France, Poland, Latvia, Germany, Sweden, Cyprus, Northern Ireland and England and Wales.

Systems which provide for alternatives to penalty for minor cases: Germany, Italy, Latvia, Romania.
Systems which provide for procedural short-cuts based on confession or admission of guilt and penalty, although not necessarily limited to minor criminal cases: we only include here those countries whose reports mention expressly such procedural measures. We received positive answers for France, Hungary, Italy, Latvia, Spain, Northern Ireland and England and Wales. The questionnaire was focused on settlement of minor cases, thus some of the reports have not mentioned procedural short-cuts or abbreviated procedural forms that are not exclusive of minor cases, but generally applicable.

No system seems to provide for administrative sanctions outside the criminal justice system for conducts related to fraud without cash means of payment.

The Framework Decision 2001/413/JHA of the Council of 28 May 2001 does not contain any provision related to proceedings for minor cases or diversionary proceedings.

9. JURISDICTION

In all the eleven countries studied the basic rule on jurisdiction in criminal matters is based upon the principle of territoriality: the criminal law applies to all offences committed within the territory of the State. No special rules appear to apply with regard to the offence of fraud studied here.

With regard to the rules on extra-territorial jurisdiction, the countries studied provide rules on extraterritorial jurisdiction based on the active nationality principle although the conditions to exercise such extraterritorial jurisdiction vary (we refer here again to the report on child pornography).

No special provisions are found as to the application of the extraterritorial jurisdiction based on the nationality principle to fraud with non-cash means of payment. Even if in the UK the Fraud Act 2006 mentions specifically the rules on extraterritorial jurisdiction for these kind of offences, it regulates the territoriality principle and the active nationality principle.

All the countries studied provide rules on jurisdiction based on the principle of territoriality and all eleven systems studied allow the prosecution of national offenders abroad. According to the
national reports it seems that these rules on jurisdiction are also applicable to legal persons, except in Romania, where they are specifically excluded.

According to the national reports, the requirements set out in the Framework Decision 2001/413/ of the Council of 28 May 2001, regarding to jurisdiction (arts. 9 and 10), are complied with in all studied MS, except made of Romania, which does not seem to comply with the requirement set out in art. 9.1 (c) of the FD 2001/413. This provision states that the MS shall ensure that the rules on jurisdiction shall allow the prosecution of frauds with non-cash means of payment where the offences has been committed “(c) for the benefit of a legal person that has its head office in the territory of that Member State”. However the Romanian law does not provide for the possibility to prosecute the legal person if the offence has been committed entirely outside Romanian territory.

10. STATUTE OF LIMITATIONS

As already explained under the report of child pornography, for clarity reasons, we will use the term “suspension” of the statutory period of limitations in those cases where the time already elapsed is taken into account; and “interruption” for those cases where the time period runs anew.

The national report on Cyprus states that there is no statute of limitations that governs offences related to frauds with non-cash means of payment.

In France the general rules on statute of limitations applies to offences of frauds with non-cash means of payment.

The general rules on suspension are applicable here: the statute of limitations will be suspended by legal impediments as mediation, settlement proceedings, or force majeure.

The statute of limitations for prosecution of frauds with non-cash means of payment in Germany is governed by the general rules, not being any special time bar or period for these offences.

As was stated in the report of child pornography in Hungary the period of limitation is equal to the longest duration that can be imposed in abstract for the offence committed, with a minimum range of three years.

Italy also establishes a general period of statute of limitations equal to the maximum penalty that can be imposed for the offence, but taking into account the aggravating circumstances (and not the
mitigating). The minimum limitation period is 6 years. There are no special provisions for offences of frauds with non-cash means of payment.

The **Latvian** criminal law establishes a fixed limitation period according to the category of offence: 2 years for violations, 5 years for less serious crime, 10 years for serious crimes, 15 for especially serious crimes, 30 years upon decision of the court when the penalty is of life imprisonment, and crimes against humanity which are not subject to statute of limitations. No special rules are applicable to offences frauds with non-cash means of payment, thus we refer to the report on child pornography.

**Poland** does neither provide for special rules on statute of limitations for the offences analysed here nor for special rules on suspension or interruption.

No special rules are applicable in **Spain** regarding statute of limitations of frauds with non-cash means of payment. According to article 131 PC this offence is barred by the statute of limitations after five years have elapsed. If the specific aggravating circumstances foreseen in article 250 PC exist, the limitation is ten years.

The statute of limitations for criminal prosecution of frauds with non-cash means of payment in **Sweden** ranges from ten years for moderately grave crimes and two years for minor crimes and starts the date when the crime was committed. General rules on suspension, interruption and maximum periods apply here.

The national report for the **UK** states that there is no statute of limitations which concerns offences relating to frauds with non-cash means of payment in the United Kingdom.

The statute of limitations in **Romania** goes from 5 years to 10 years, depending on the gravity of the offence. Any procedural act that has to be notified to the defendant interrupts the running of the limitation period. However, regardless of the interruptions there is a maximum fixed time of the limitations period, which is the double of the initial one. No special rules seem to be applicable to the offences related to frauds with non-cash means of payment.

Conclusions from a comparative perspective view: the statute of limitations period in the majority of the countries studied depends on the gravity of the offence and the penalty provided for it, and begins to run at the moment when the crime was committed, with a special rule in Germany stating
that it starts to count when the offence is completed. Cyprus and England and Wales and Northern Ireland do not have any statute of limitations for fraud offences.

As to the suspension and interruption of the running of the period of limitations, no special rules are foreseen with regard to this type of offence. Thus it will generally be interrupted by the commencement of a criminal investigation and can be suspended by legal reasons as the request for extradition, the procedure to lift immunity, the proceedings for settlement or ground of force majeur.

As regards the compliance with the EU FD 2001/413/JHA of the Council of 28 May 2001 it has to be recalled that this EU FD does not contain any rule on limitation periods and thus there is no need to analyse this issue here.

B. IMPACT OF EU LEGISLATION

In order to comply with the FD, Germany amended §152a and introduced §152b and §263a (3) and (4) StGB. However, Germany still fails to comply with the provisions concerning the liability of legal persons. Hungary explicitly amended the HCC in order to comply with the FD. Only the regulations concerning the computer fraud were introduced before the accession of Hungary to the EU in order to comply with the Council of Europe’s Cybercrime Convention. The Polish Penal Code already complied with the FD. Yet, the definition of “documents” was enlarged in order to more easily include payment cards. The Swedish Criminal Code already complied with the FD. Other countries modified the legislation in order to implement the FD. Although there are often no very serious lacks, it seems that the states have been reluctant to follow the wording of the Framework Decision. The interpretation made by the courts has been necessary to correct the problems of the implementation. In some occasions the national legislator decided to apply general rules, not including some terms in the implementation so that the results are not always accurate.

From a practical point of view following conclusions can be drawn: the data show that the sentences on fraud offences are in general numerous. In France, for example, in the year taken into account (2011) the number of convictions was 209. In Germany, while application of §152a StGB for the reasons mentioned above tend to decrease, convictions for counterfeiting of Guaranteed Payment Cards (§152b StGB) and especially Computer Fraud (§263a StGB) have increased (204 in 2011, 240 in 2010, 187 in 2009 persons convicted for §152b StGB; 2289 in 2011, 2234 in 2010 and 2122 in 2009 persons convicted for §263a StGB).
Significant is also what has been recorded by the statistics in Hungary (more than 1,200 person convicted between 2008 and 2009), in Romania and Sweden (where there have been 1138 convictions for fraud-basic offence in 2011).

Where applied, fraud with no cash payment determines the imposition of imprisonment on average around two years.

The period of two years is sometimes exceeded in Germany (with regard to § 152b, up to 3 years in practice) and usually exceeded in Poland and Romania. In any case, in line with what occurred also in relation to other offences and penalties, the exercise of judicial discretion determines that the maximum penalty is never or almost never applied.

Due to the low level of penalties applied (on average), the suspension of the sentence is often applied: it can be affirmed that it is applied in around 50% of cases (see in particular France, Germany and Sweden).

The role played by fines is not prominent: in France and UK it is imposed in around 20-25% of cases. In Germany, it plays an even minor role. Community sentence is often imposed in the UK.

The following include a summary of the more significant changes made as a result of the FD. In Cyprus the Criminal Code was amended in 2004 to implement the FD. In France the provisions of the Penal Code, were extended to any type of payment instrument by the transposition of the EU Directive 2007/64/EC, 13 November 2007. ) The Italian legislation in part predates the FD and in part is subsequent to it: the Penal Code was amended in 2007 for this purpose. In Latvia, some amendments were made in 2007. In Spain the Penal Code was amended in 2003 and 2010. In UK one act completed in 2006 the existing legislation.
2.5. Illegal Entry

A. ASSESSMENT ON THE LEVEL OF COINCIDENCE/ DIVERGENCE OF NATIONAL SYSTEMS AND PRACTICAL APPLICATION OF THE LEGISLATION
   1. RELEVANT EU SECONDARY LEGISLATION
   2. INCriminated CONDUCT
      2.1. Definition of the offences
      2.2. Key common points and differences
   3. PENALTY LEVELS AND MINIMUM PENALTIES
      3.1. Penalties in the different countries (imprisonment and fines)
      3.2. Key common points and differences
   4. AGGRAVATING AND MITIGATING CIRCUMSTANCES
      4.1. Situation in the different countries
      4.2. Key common points and differences
   5. SANCTIONS OTHER THAN IMPRISONMENT AND FINES
      5.1. Community Service
      5.2. Confiscation and Forfeiture
      5.3. Restricted Movement
      5.4. Restriction on Work Related Rights
      5.5. Restriction of other Rights
      5.6. Other Sanctions
   6. SUSPENDED SENTENCES AND EARLY RELEASE
      6.1. Suspended sentences
      6.2. Early release
   7. SANCTIONS FOR LEGAL PERSONS
      7.1. Public Aid
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      7.3. Judicial Supervision
      7.4. Judicial Wind-up
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      7.6. Publication of the Decision
      7.7. Other sanctions
   8. SETTLEMENT OF MINOR CASES
      8.1. The definition of "minor case"
      8.2. Special proceedings for minor cases
      8.3. Key common points and differences
   9. JURISDICTION
   10. STATUTE OF LIMITATIONS

B. IMPACT OF EU LEGISLATION
Table 1: Basic conducts and attempts
Table 2: Punishable Infringements against the Aufenthaltsgesetz (Residence Act, § 95 AufenthG).
Range of Penalties: subs. 1, 1a: up to 1 year or a fine; subs. 2: up to 3 years or a fine
Table 2a: Punishable Infringements against the Ausländergesetz (Act on Foreigners, § 92 AuslG).
Range of Penalties: subs. 1: up to 1 year or a fine; subs. 2: up to 3 years or a fine
Table 3: Smuggling of Foreigners (§ 96 AufenthG) Range of Penalties: subs. 1: up to 5 years or a fine; subs. 2: 6 months – 10 years
Table 3a: Smuggling of Foreigners (§ 92a AuslG) Range of Penalties: subs. 1: up to 5 years or a fine; subs. 2: 6 months – 10 years
Table 4: Especially Heavy Case of Smuggling of Foreigners (§ 97 AufenthG) Range of Punishment: subs. 1: 3 – 15 years; subs. 2: 1 year – 10 years; subs. 3: 6 months – 10 years
Table 4a: Smuggling of Foreigners By Acting Commercially and as a Member of a Gang (§ 92b AuslG) Range of Penalties: subs. 1: 1 year – 10 years; subs. 2: 6 months – 5 years
Table 5: Punishable Infringements against the Asylverfahrensgesetz (Asylum Procedure Act)
Table 6: Sweden maximum sanctions
Table 7: Frequent aggravating circumstances
Table 8: Sanctions other than imprisonment and fines
Table 9: France other sanctions
Table 10: Suspended Sentences and the maximum no. of years
Table 11: Sweden suspended sentences
Table 12: Minimum Term to be served of sentence before early/conditional release is possible
Table 13: Sanctions for legal person
A. ASSESSMENT ON THE LEVEL OF COINCIDENCE/ DIVERGENCE OF NATIONAL SYSTEMS AND PRACTICAL APPLICATION OF THE LEGISLATION

1. RELEVANT EU SECONDARY LEGISLATION

The relevant secondary legislation is the Council Framework Decision (2002/946/JHA) of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence (“FDUE”) as well as the Council Directive (2002/90/EC) of 28 November 2002 defining the facilitation of unauthorized entry, transit and residence (“CDUE”). The FDUE aims to combat the aiding of illegal immigration in connection with unauthorized entry and the sustaining of networks which exploit human beings (preamble para 2). The incriminated conduct is defined in Art. 1 CDUE, whereas the FDUE provides for the respective sanctions. According to Art. 1(1a) CDEU, the Member States shall penalize the intentional assistance to non-EU-citizens to enter or transit a member state (“MS”) in breach of the relevant laws of this state on entry or transit of foreigners. The MS may decide not to penalize the aforementioned conduct and

Key Findings

- All countries criminalise the conduct of assisting a third country national to enter or transit across the territory of the EU.
- The conduct of “assisting to reside” is foreseen in different ways in all of the countries, except Spain.
- Not all states introduced new legislation to implement the Directive or FD.
- The aggravating circumstances in national legislation fall short of the Directive in most Member States.
- The FD sets out minimum maximum penalties for both the basic and aggravated offences, most States fall short of this penalty.
- Whilst, the penalties set out in the national laws vary, however in practice the actual penalties imposed are on average 2 years.
- Some progress has been made towards consistency, but complete harmonisation does not exist.
to apply their national sanctions, if the perpetrator aimed at providing humanitarian assistance to the persons concerned (Art. 1 (2) CDUE). It is also made punishable to assist a person to reside within a MS in breach of the laws of this state (Art. 1 (1b) CDUE). The required mens rea is intent (Art. 1 (1a), (2b) CDUE). Instigation, complicity and attempt shall also be penalized (Art. 1 (2) CDUE). If the aforementioned crimes are committed for financial gain by a criminal organization or if the commission endangered the life of the persons concerned, the punishment shall be a maximum sentence of at least eight years of imprisonment (Art. 1 (3) FDUE). The MS may lay down a maximum sentence of six years, if a higher sentence would be inconsistent with the national penalty system (Art. 1 (4) FDUE). The corresponding sanctions shall be effective, proportionate and dissuasive (Art. 3 CDUE, Art. 1 (1) FDUE).

2. INCRIMINATED CONDUCT

2.1. Definition of the offences

In Cyprus, the primary law that governs the criminalization of the support for illegal entry, transit and residence is the Aliens and Immigration Law. The punishable conducts are: assisting on purpose a third country national to enter or pass through the territory of any Member State, in breach of this Law or the legislation of the Member State in question respectively, and assisting on purpose a third-country national to reside in Cyprus or in other Member State to gain a profit in breach of the provisions of this Law or the legislation of the Member State in question respectively. Aiding and abetting are punishable. Attempt is punishable. Intention is required for natural persons. For legal persons, they will be considered responsible in the case that the persons acting for the legal person have a leading position or when the incomplete supervision or inadequate control made possible the commitment of the offence by a person who is under the authority of the leading persons.

In France, the conditions for entry and residence of foreigners within the territory of the French Republic are governed by the French Code of Entry and Residence of Foreigners and the Right to Asylum (hereafter CERFRA), which results from the codification in 2004 of an Ordinance dated November, 2nd, 1945. The punishable conducts are: the irregular entry or residence of a foreigner in France; to facilitate by direct or indirect support, or to attempt to facilitate entry, transit or residence of a foreigner in France or in other State Party to the Convention of Schengen; to facilitate or to attempt to facilitate entry, transit or residence of a foreigner in the territory of a State Party to the Supplementing Protocol against the Smuggling of Migrants by Land, Sea and Air, of the United Nations Convention against Transnational Organized Crime. Intention is required. The animus lucri is not an element of the offence of illicit support under French law. The complicity for the offence of
support for irregular entry, transit and residence is governed by the general provision of the French Penal Code. The accomplice to an offence or a crime is the person who knowingly, by aiding and abetting, facilitates its preparation or commission. Any person who, by means of a gift, promise, threat, order, or an abuse of authority or powers, provokes the commission of an offence or gives instructions to commit it, is also an accomplice. As is mentioned, attempt is foreseen among the punishable conducts.

In Germany, the Aufenthaltsgesetz (Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory – AufenthG) provides for rules on the illegal entry of aliens. According to § 96 (1) no. 1 (a)-(b) inciting or aiding a person to enter the territory of the Federal Republic of Germany without a passport or a permission or after being deported, for financial advantage or the promise of a financial gain, repeatedly or to the benefit of several aliens, shall be punishable by up to five years of detention or a fine. The same penalty applies to a perpetrator, who incites or aids an alien to reside within the German territory without a certification of his residence permit or without a permit (i.e. if the alien is obliged to leave German territory or has not been granted a period of time for exit or his deportation has not been suspended) or having only a Schengen visa when a residence permit is required, staying within German territory after being deported or making false statements to gain a residence permit, if he acted for financial gain or for the promise of it (§96(1) no. 2 AufenthG). The aforementioned conduct is also criminalized, when the perpetrator is aiding or instigating a foreigner, who is not a national of a ms or a Schengen-state, violating the provisions on the enter and residence of foreigner within a ms or a Schengen state (§96(4) AufenthG). This offence is punishable by up to five years of detention or a fine (§96(4), (1) AufenthG).

The subjective side of these offences requires intent (§16 StGB), i.e. dolus directus (meaning that the perpetrator is directly aiming at the criminal result) or dolus eventualis (meaning that the perpetrator approves or reconciles himself with the criminal result). The attempt of all the aforementioned acts is punishable (§23(1) StGB, 96(3), (4), AufenthG). Other forms of perpetration (§25 StGB), instigation (§26 (1) StGB) and aiding (§27(1) StGB) are punishable as well.

In Hungary, aiding, for financial gain, a foreigner who is not a citizen of a MS of the EU to reside within a ms is punishable by up to two years of imprisonment, community service or a monetary penalty (Art. 214A (1) Hungarian Criminal Code – HCC). The same penalty applies to anyone, who assists, beyond merely aiding, a foreigner to stay within Hungarian territory for financial gain (Art. 214A (2) HCC). According to Art. 218 (1) HCC, aiding another person to cross the state border without authorization or in an unauthorized manner (human trafficking), is punishable by up to
three years. The *mens rea* for the aforementioned crimes is intent (cf. Art. 10 HCC). Direct participation (Art. 20 HCC), attempt (Art. 16 HCC) and aiding or abetting (Art. 21 HCC) are penalized as well. The preparation of human trafficking is also punishable (Art. 218 (4) HCC).

In **Italy** these offences are not contained in the Italian Penal Code, but in a specific comprehensive legislative act, D. Lgs. July 25, 1998, n. 286, containing the provisions related to the regulation of the immigration and to the condition of the alien). The Act was modified in 2002, 2004, 2006, 2008, 2009, 2011 and 2012. This act punishes to promote, lead, fund, or effectuate the transport of aliens into the Italian territory, or to do other acts directed to illegally achieve the entry of aliens in the Italian territory, or in the territory of another State whose nationality the alien has not, or where he has not title to reside on a permanent basis; to facilitate the permanence in the Italian territory in violation of the provisions of the Act, in order to gain an unjust profit from the condition of illegality of the alien or in the ambit of the activities punished by the Act; for financial gain, in order to obtain an illicit profit, to accommodate or give, also on lease, a house to an alien who has not a permission of residence at the moment of the lease contract or at that of its renewal. The Italian general penal law does not distinguish among modalities of participation in committing the crime among main perpetrators, aiders and abetters, or instigators, and foresees the same basic penalty for all of them. Some of the punishable foreseen conducts are structured as attempted conducts (in the sense that they foresee offences which consist in simply attempting to support irregular entry, independently from the result. For the rest of the modalities attempt is punishable (to facilitate the permanence in the Italian territory, to accommodate or give, also on lease, a house). For all the offences intent is required.

In **Latvia** the criminal liability for support of irregular entry, transit and residence is foreseen in the Special part of the Criminal Code, basically in Section 284, Section 285 and Section 285. The punishable conducts are: to commit intentionally illegal crossing of the State border, if commission thereof is repeated within one year; to commit illegal movement of a person across the State border; knowingly, to commit ensuring persons the possibility of residing illegally in the Republic of Latvia, if commission thereof is repeated within one year. Preparation for a crime and an attempted crime are uncompleted criminal offences. The locating of, or adaptation of, means or tools, or the intentional creation of circumstances conducive for the commission of an intentional offence, are considered to be preparation for a crime, but criminal liability results only for preparation of serious or especially serious crimes, so this applies only in aggravated offences. Attempting is only punishable in crimes, not in a violation. For this reason attempting is not punishable in the basic offence of ensuring persons the possibility of residing illegally in Latvia. The form of guilt is direct
intent (the person who has committed the mentioned offence has foreseen the consequences of the offence and has desired such).

In Poland, the relevant offences are foreseen in the Polish Criminal Code (PCC). Enabling or aiding another person to reside illegally within polish territory for financial gain is punishable (Art. 264A PCC). Organizing of border crossing under violation of the relevant provisions is also punishable (Art. 264 (3) PCC). The mens rea of these offences is intent (Art. 8 PCC). The attempt of the aforementioned offences is penalized (Art. 13 PCC) as well as instigation, abetting and joint perpetration (Art. 18 (1)-(3) PCC).

In Romania these offences are foreseen in the Government Emergency Ordinance (OUG) no. 194 of 2002 on the legal regime of foreigners and in the Government Emergency Ordinance (OUG) no. 105 of 2001 on the state border of Romania. The punishable conducts are: to assist intentionally a person, who is not a Romanian national, to reside within the Romanian territory in breach of the laws concerning the residence of aliens; the recruitment, the guidance or the leadership of one or more persons for the purpose of illegal border state crossing, as well as the organization of these activities. Aiding, abetting and attempting are punishable. Intention is required.

In Spain it is set out in the Penal Code. The punishable conducts are: to promote, favour or facilitate, directly or indirectly, illegal trafficking or immigration of persons from, in transit or with their destination in Spain, or in another country in the European Union. Aiding and abetting and criminal attempt are punishable. All of the acts provided for in article 318 bis CP are considered to have criminal intent. The aiders and abettors shall be given the sentence that corresponds to the perpetrator in its different modalities, reduced by one degree. On the other hand, and within the different modalities of criminal actions recognised by the CP, the accomplices and the accessories who counsel and procure shall receive the same penalty as the perpetrators of the offence. The preparatory acts (provocation, conspiracy and solicitation) are not considered punishable.

In Sweden, assisting a foreigner to enter a MS of the European Union, Iceland, Liechtenstein, Norway or Switzerland under violation of the law ("human smuggling") is punishable (Ch. 20 (Sec. 8 (1)) Swedish Aliens Act – SAA). Organizing activities to enable foreigners to enter Sweden without passport or permission to do so for financial advantage ("organisation of human smuggling") is also penalized and punishable (Ch. 20 (Sec 9 (1) SAA). According to Ch. 20 (Sec. 7 (1)) SAA, aiding a foreigner to stay within the territory of a MS or the countries mentioned above for financial gain is criminalized ("assistance to remain unlawfully"). The subjective side of these offences requires intent (cf. Ch. 1 (Sec. 2) Swedish Criminal Code – SCC). The attempt of the aforementioned offences...
is only punishable in cases of human smuggling and assistance to stay illegally (Ch. 23 (Sec. 1) SCC, 20 (Sec. 8 (4)) (Sec. 7 (2)) SAA). Instigation, participation and aiding are penalized as well (Ch. 23 (Sec. 4) SCC).

In the **United Kingdom** (England and Wales, Northern Ireland and Scotland) these offences are foreseen in the Immigration Act 1971, modified by the Nationality, Immigration and Asylum Act 2002, and by the UK Borders Act 2007. The punishable conducts are: a) doing an act that facilitates the commission of a breach of immigration law by an individual who is not a citizen of the European Union, by a person who knows or has reasonable cause for believing that the act facilitates the commission of a breach of immigration law (UK or another Member State's immigration law) by the individual, and who knows or has reasonable cause for believing that the individual is not a citizen of the European Union; b) to facilitate for gain the arrival in or the entry into the United Kingdom of an individual, knowing or having reasonable cause to believe that the individual is an asylum seeker; c) doing an act which facilitates a breach of a deportation order in force against an individual who is a citizen of the European Union, and knowing or having reasonable cause for believing that the act facilitates a breach of the deportation order; d) knowingly, doing an act which assists a person to arrive in, enter or remain in the United Kingdom, knowing or having reasonable cause for believing that the Secretary of State has personally directed that the individual's exclusion from the United Kingdom is conducive to the public good. Aiding and abetting, and as well to counsel, or to procure the commission of the offence, are punishable. Attempting to commit an offence is in itself an offence. The subjective elements require to know or to have reasonable cause to believe the existence of the objective elements.

### 2.2. Key common points and differences

All of the countries include the punishable conduct of assisting a third country national to enter or transit across the territory of the EU and assisting to reside. The conduct of “assisting to reside” is foreseen in all of the countries, except Spain. In Italy it is foreseen to accommodate or give, also on lease, a house to an alien who has not a permission of residence at the moment of the lease contract or at that of its renewal. Some countries include not only the assistance, but even the irregular entry or residence of a foreigner (France, Latvia). In the United Kingdom other conducts not foreseen in the Directive are included as punishable.

In all of the states except Latvia the attempt is incriminated, although the Italian and the Swedish law do not cover the attempt of all offences related to illicit entry and residence. In Latvia, the
attempt is not punishable in the basic offence of ensuring persons the possibility of residing illegally in Latvia.

In subjective terms in all of the countries intention is required. In Cyprus, intention is required for natural persons but for legal persons, they will be considered responsible in the case that the persons acting for the legal person have a leading position or when the incomplete supervision or inadequate control made possible the commitment of the offence.

<table>
<thead>
<tr>
<th>Country</th>
<th>Intentional assistance to enter or transit (Art. 1(1.a))</th>
<th>To assist a person to reside within a ms in breach of the laws of this state (Art. 1 (1b)).</th>
<th>Attempt is punishable</th>
<th>Mens rea</th>
</tr>
</thead>
<tbody>
<tr>
<td>CY</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Intention is for natural persons but for legal persons</td>
</tr>
<tr>
<td>FR</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Intention is required</td>
</tr>
<tr>
<td>DE</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Intention is required</td>
</tr>
<tr>
<td>HU</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Intention is required</td>
</tr>
<tr>
<td>IT</td>
<td>Yes</td>
<td>Yes, but not all offences To accommodate or give, also on lease, a house to an alien who has not a permission of residence at the moment of the lease contract or at that of its renewal</td>
<td>Yes, but not all offences</td>
<td>Intention is required</td>
</tr>
<tr>
<td>LV</td>
<td>Yes</td>
<td>Yes</td>
<td>Not punishable in the basic offence of ensuring persons the possibility of residing illegally</td>
<td>Intention is required</td>
</tr>
<tr>
<td>PL</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Intention is required</td>
</tr>
<tr>
<td>RO</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Intention is required</td>
</tr>
<tr>
<td>ES</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>Intention is required</td>
</tr>
</tbody>
</table>
3. PENALTY LEVELS AND MINIMUM PENALTIES

3.1. Penalties in the different countries (Imprisonment and fines)

In Cyprus, a person who assists a third country national to enter or pass or to reside through the Republic’s territory or through any other Member State, shall be subject to a penalty, this may be the penalty of imprisonment not exceeding the period of 8 years or pecuniary penalty not exceeding the amount of €34 000, or both of these penalties. Attempt is a crime punishable with a maximum sentence of 3 years imprisonment or a fine of no more than €8,500. The national report only refers to 1 case in which the defendant was sentenced to a penalty of two years of imprisonment.

In France, any person who, by direct or indirect support, facilitates or attempts to facilitate entry, transit or residence of a foreigner in France shall be punished with 5 years imprisonment and a fine of €30,000. The level of penalties is increased to 10 years imprisonment and a fine of €750,000 when the support for irregular entry, transit or residence is committed: by an organized gang; in circumstances that expose foreigners to an immediate risk of death or injury likely to cause mutilation or permanent disability; by means of an authorization or an identification card giving access to restricted areas of an airport or harbour; when foreigners are subject to living conditions, transport, working or accommodation conditions incompatible with human dignity; or when, for foreign children, it keeps them away from their family or their traditional environment.

The following two tables illustrate the ‘practice’ in the year 2011.

<p>| Table A                                                                 Number of penalties pronounced in 2011 |
|-------------------------------------------------------------------------|--------------------------------------------------|
| Offences                                                                | Natural person                                  |
|                                                                        | Legal person                                    |
|                                                                        | Main offence         | Sole offence | Main offence | Sole offence |
| 3.1. Penalties in the different countries (Imprisonment and fines)      |                    |             |              |              |
| 3. PENALTY LEVELS AND MINIMUM PENALTIES                                  |                    |             |              |              |</p>
<table>
<thead>
<tr>
<th>Offence (Sole offence)</th>
<th>Imprisonment</th>
<th>Fine</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Total</td>
<td>Average duration of the unsuspended part of the sentence (in month)</td>
</tr>
<tr>
<td>Any type of support for irregular entry, transit and residence in France</td>
<td>295</td>
<td>7.0</td>
</tr>
<tr>
<td>Support for irregular entry, transit and residence in France</td>
<td>235</td>
<td>11.2</td>
</tr>
</tbody>
</table>

It is worth noting that illicit support for irregular entry, transit and residence can be prosecuted under the general provision of complicity provided by the French Penal code, as well as under the specific provision of Illicit support irregular entry, transit and residence provided by Article L. 622-1 of the French CERFA.

In Germany, the following offence can only be committed by German nationals. Anyone who incites another person to illegally enter the Federal territory or helps to do so and receives a pecuniary advantage or the promise of a pecuniary advantage in return or acts in such a manner repeatedly...
or for the benefit of several foreigners; the punishment is prison sentence up to 5 years or a fine. Anyone who incites or assists a foreigner to illegally stay in the Federal territory and receives a pecuniary advantage or the promise of a pecuniary advantage in return shall be punishable with a prison sentence of between 6 months and 10 years if, acts for gain or as a member of an organised gang which has come together for the purpose of committing such offences on a continuous basis, who carries a firearm when inciting or helping another person to illegally enter the German territory or who carries another type of weapon in order to use said weapon in connection with the offence, or who subjects the smuggled persons to potentially fatal, inhumane or humiliating treatment or a risk of sustaining severe damage to their. Anyone who causes the death of the smuggled person shall be punished with imprisonment of 3 years up to 15 years.

Anyone (including a foreigner) who incites or helps a foreigner to provide incorrect or incomplete information during the asylum procedure before the Federal Office or during the judicial proceedings in order for the applicant to be recognized as being entitled to asylum or to have determined that the conditions of §60 AufenthG are met, shall be punished with imprisonment of up to 3 years or with a fine. In particularly serious cases a prison sentence of up to 5 years or a fine shall be imposed (if the perpetrator receives or expects to receive a financial advantage or repeatedly acts for or acts in favour of more than five foreigners). Anyone who is motivated by commercial interests or acts as a member of a gang formed for the purpose of committing such offences on a recurring basis shall be punishable by a prison sentence of between 6 months and 10 years.

The Directive has already been implemented with the original version of the AufenthG of July 30, 2004 which was announced on February 25, 2008. The collected statistics take into account the following offences: 1) punishable infringements against the Aufenthaltsgesetz (Residence Act, § 95 AufenthG); 2) punishable infringements against the Ausländergesetz (Act on Foreigners, § 92 AuslG); 3) smuggling of foreigners (§ 96 AufenthG); smuggling of foreigners (§92a AuslG); 4) especially heavy case of smuggling of foreigners (§ 97 AufenthG); 5) smuggling of foreigners by acting commercially and as a member of a gang (§ 92b AuslG); 6) punishable infringements against the Asylverfahrensgesetz (Asylum Procedure Act).

Convictions according to § 95 AufenthG and § 92 AuslG significantly decrease during the observation period (2005-2011; 2000-2004). According to the experts’ meaning, this is mainly due to the omission of the obligation to hold a visa for numerous states, e.g. by the eastward expansion of the EU in 2004 and 2007. The new version of the relevant law in 2004 and the new publication in 2008 due to the EU Directive of 2002 had no influence on the decreasing tendency in the rate of convictions.
The sentences have low ranges of penalties, with a predominance of a fine (2011: 93 %). However, at least 100 prison sentences are imposed per year which are not suspended on probation. This can be explained by the fact that the convicted foreigners are often without means and that a removal to a foreign country because of lacking residence is feared which would avoid a penal access.

Data are more detailed by the following tables:
<table>
<thead>
<tr>
<th>Year</th>
<th>Persons convicted total</th>
<th>Fine</th>
<th>Prison Sentence</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>less than 6 months</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>total</td>
<td>suspension</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>6 months</td>
<td>6 months</td>
</tr>
<tr>
<td>2011</td>
<td>6.929</td>
<td>6.432</td>
<td>497</td>
<td>395</td>
</tr>
<tr>
<td>2010</td>
<td>6.607</td>
<td>6.058</td>
<td>549</td>
<td>413</td>
</tr>
<tr>
<td>2009</td>
<td>7.168</td>
<td>6.570</td>
<td>598</td>
<td>479</td>
</tr>
<tr>
<td>2008</td>
<td>8.422</td>
<td>8.100</td>
<td>731</td>
<td>555</td>
</tr>
<tr>
<td>2007</td>
<td>11.634</td>
<td>10.637</td>
<td>997</td>
<td>756</td>
</tr>
<tr>
<td>2006</td>
<td>10.259</td>
<td>9.208</td>
<td>1.051</td>
<td>788</td>
</tr>
<tr>
<td>2005</td>
<td>10.252</td>
<td>9.061</td>
<td>1.191</td>
<td>951</td>
</tr>
</tbody>
</table>

Table 2: Punishable Infringements against the Aufenthaltsgesetz (Residence Act, § 95 AufenthG). Range of Penalties: subs. 1, 1a: up to 1 year or a fine; subs. 2: up to 3 years or a fine

<table>
<thead>
<tr>
<th>Year</th>
<th>Persons convicted total</th>
<th>Fine</th>
<th>Prison Sentence</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>less than 6 months</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>total</td>
<td>suspension</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>6 months</td>
<td>6 months</td>
</tr>
<tr>
<td>2004</td>
<td>13.178</td>
<td>11.667</td>
<td>1.511</td>
<td>1.191</td>
</tr>
<tr>
<td>2003</td>
<td>16.353</td>
<td>14.523</td>
<td>2.030</td>
<td>1.502</td>
</tr>
<tr>
<td>2002</td>
<td>16.948</td>
<td>14.863</td>
<td>2.085</td>
<td>1.392</td>
</tr>
<tr>
<td>2001</td>
<td>17.036</td>
<td>15.107</td>
<td>1.929</td>
<td>1.198</td>
</tr>
<tr>
<td>2000</td>
<td>17.582</td>
<td>15.893</td>
<td>1.689</td>
<td>1.036</td>
</tr>
</tbody>
</table>

Table 2a: Punishable Infringements against the Ausländergesetz (Act on Foreigners, § 92 AuslG). Range of Penalties: subs. 1: up to 1 year or a fine; subs. 2: up to 3 years or a fine
The conviction rates for smuggling of foreigners (§ 96 AufenthG; § 92a AuslG) have also strongly decreased in the observation period which can also be explained by the fact that the number of states from which an illegal entry is possible by lacking visa has decreased. In the past years, a fine is imposed in almost half of the cases; the number of prison sentences not suspended on probation is low. For more details, see tables above:

<table>
<thead>
<tr>
<th>Year</th>
<th>Persons convicted total</th>
<th>Fine</th>
<th>Year</th>
<th>Persons convicted total</th>
<th>Fine</th>
</tr>
</thead>
<tbody>
<tr>
<td>2011</td>
<td>474</td>
<td>235</td>
<td>2010</td>
<td>474</td>
<td>241</td>
</tr>
<tr>
<td>2009</td>
<td>610</td>
<td>317</td>
<td>2008</td>
<td>796</td>
<td>406</td>
</tr>
<tr>
<td>2008</td>
<td>796</td>
<td>406</td>
<td>2007</td>
<td>861</td>
<td>518</td>
</tr>
<tr>
<td>2007</td>
<td>861</td>
<td>518</td>
<td>2006</td>
<td>696</td>
<td>422</td>
</tr>
<tr>
<td>2006</td>
<td>696</td>
<td>422</td>
<td>2005</td>
<td>1,020</td>
<td>627</td>
</tr>
</tbody>
</table>

**Table 3: Smuggling of Foreigners (§ 96 AufenthG) Range of Penalties: subs. 1: up to 5 years or a fine; subs. 2: 6 months – 10 years**
<table>
<thead>
<tr>
<th>Year</th>
<th>Subsection 1</th>
<th>Subsection 2</th>
<th>Subsection 3</th>
<th>Subsection 4</th>
<th>Subsection 5</th>
<th>Subsection 6</th>
<th>Subsection 7</th>
<th>Subsection 8</th>
<th>Subsection 9</th>
<th>Subsection 10</th>
</tr>
</thead>
<tbody>
<tr>
<td>2004</td>
<td>1.484</td>
<td>980</td>
<td>504</td>
<td>426</td>
<td>33</td>
<td>29</td>
<td>61</td>
<td>59</td>
<td>147</td>
<td>130</td>
</tr>
<tr>
<td>2003</td>
<td>1.550</td>
<td>1.070</td>
<td>480</td>
<td>386</td>
<td>59</td>
<td>53</td>
<td>85</td>
<td>71</td>
<td>118</td>
<td>92</td>
</tr>
<tr>
<td>2002</td>
<td>1.601</td>
<td>1.009</td>
<td>592</td>
<td>424</td>
<td>67</td>
<td>62</td>
<td>132</td>
<td>101</td>
<td>186</td>
<td>124</td>
</tr>
<tr>
<td>2001</td>
<td>1.473</td>
<td>907</td>
<td>556</td>
<td>442</td>
<td>78</td>
<td>73</td>
<td>120</td>
<td>103</td>
<td>156</td>
<td>114</td>
</tr>
<tr>
<td>2000</td>
<td>1.466</td>
<td>879</td>
<td>567</td>
<td>411</td>
<td>123</td>
<td>113</td>
<td>132</td>
<td>95</td>
<td>147</td>
<td>98</td>
</tr>
</tbody>
</table>

Table 3a: Smuggling of Foreigners (§ 92a AuslG) Range of Penalties: subs. 1: up to 5 years or a fine; subs. 2: 6 months – 10 years

Convictions for especially serious cases of smuggling of foreigners (§ 97 AufenthG) and for smuggling of foreigners by acting commercially and as a member of a gang (§ 92b AuslG) are rare and less linearly decreasing. The penalty levels are very high. Fines play hardly any role and many lengthy prison sentences are not suspended on probation. For further details see the following tables:
<table>
<thead>
<tr>
<th>Year</th>
<th>Persons convicted total</th>
<th>Fine</th>
<th>Prison Sentence</th>
<th>Year</th>
<th>Persons convicted total</th>
<th>Fine</th>
<th>Prison Sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>less than 6 months</td>
<td></td>
<td></td>
<td></td>
<td>less than 6 months</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>6 months</td>
<td>6-9 months</td>
<td>9 months – 1 year</td>
<td>1-2 years</td>
<td>2-3 years</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>tot.</td>
<td>sus.</td>
<td>tot.</td>
<td>sus.</td>
<td>tot.</td>
</tr>
<tr>
<td>2011</td>
<td>64</td>
<td>-</td>
<td>64</td>
<td>35</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>2010</td>
<td>48</td>
<td>1</td>
<td>47</td>
<td>24</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>2009</td>
<td>64</td>
<td>4</td>
<td>60</td>
<td>34</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>2008</td>
<td>78</td>
<td>3</td>
<td>75</td>
<td>45</td>
<td>1</td>
<td>1</td>
<td>-</td>
</tr>
<tr>
<td>2007</td>
<td>71</td>
<td>3</td>
<td>68</td>
<td>42</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>2006</td>
<td>67</td>
<td>8</td>
<td>59</td>
<td>39</td>
<td>-</td>
<td>-</td>
<td>1</td>
</tr>
<tr>
<td>2005</td>
<td>87</td>
<td>3</td>
<td>84</td>
<td>40</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
</tbody>
</table>

Table 4: Especially Heavy Case of Smuggling of Foreigners (§ 97 AufenthG) Range of Punishment: subs. 1: 3 – 15 years; subs. 2: 1 year – 10 years; subs. 3: 6 months – 10 years

<table>
<thead>
<tr>
<th>Year</th>
<th>Persons convicted total</th>
<th>Fine</th>
<th>Prison Sentence</th>
<th>Year</th>
<th>Persons convicted total</th>
<th>Fine</th>
<th>Prison Sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>less than 6 months</td>
<td></td>
<td></td>
<td></td>
<td>less than 6 months</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>6 months</td>
<td>6-9 months</td>
<td>9 months – 1 year</td>
<td>1-2 years</td>
<td>2-3 years</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>tot.</td>
<td>sus.</td>
<td>tot.</td>
<td>sus.</td>
<td>tot.</td>
</tr>
<tr>
<td>2004</td>
<td>79</td>
<td>1</td>
<td>78</td>
<td>36</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>2003</td>
<td>58</td>
<td>3</td>
<td>55</td>
<td>23</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>2002</td>
<td>60</td>
<td>-</td>
<td>60</td>
<td>23</td>
<td>-</td>
<td>-</td>
<td>1</td>
</tr>
<tr>
<td>2001</td>
<td>72</td>
<td>-</td>
<td>72</td>
<td>24</td>
<td>2</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>2000</td>
<td>90</td>
<td>24</td>
<td>66</td>
<td>29</td>
<td>12</td>
<td>9</td>
<td>4</td>
</tr>
</tbody>
</table>

Table 4a: Smuggling of Foreigners By Acting Commercially and as a Member of a Gang (§ 92b AuslG) Range of Penalties: subs. 1: 1 year – 10 years; subs. 2: 6 months – 5 years

...
Also for the offences according to the AsylG a decrease of more than 84% between 2000 and 2011 has been recorded. The range of penalties of the AsylG is low. The fine is thus predominant, prison sentences not suspended on probation are only very rare. See the following table:

<table>
<thead>
<tr>
<th>Year</th>
<th>Persons convicted total</th>
<th>Fine total</th>
<th>Fine suspension</th>
<th>Prison Sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>less than 6 months</td>
<td>6 months</td>
<td>6-9 months</td>
</tr>
<tr>
<td></td>
<td></td>
<td>tot.</td>
<td>susp.</td>
<td>tot.</td>
</tr>
<tr>
<td>2011</td>
<td>943</td>
<td>17</td>
<td>12</td>
<td>12</td>
</tr>
<tr>
<td>2010</td>
<td>846</td>
<td>22</td>
<td>19</td>
<td>19</td>
</tr>
<tr>
<td>2009</td>
<td>667</td>
<td>19</td>
<td>17</td>
<td>17</td>
</tr>
<tr>
<td>2008</td>
<td>645</td>
<td>15</td>
<td>13</td>
<td>14</td>
</tr>
<tr>
<td>2007</td>
<td>886</td>
<td>32</td>
<td>27</td>
<td>28</td>
</tr>
<tr>
<td>2006</td>
<td>910</td>
<td>40</td>
<td>33</td>
<td>31</td>
</tr>
<tr>
<td>2005</td>
<td>1.631</td>
<td>70</td>
<td>62</td>
<td>63</td>
</tr>
<tr>
<td>2004</td>
<td>2.679</td>
<td>99</td>
<td>76</td>
<td>85</td>
</tr>
<tr>
<td>2003</td>
<td>3.720</td>
<td>119</td>
<td>90</td>
<td>104</td>
</tr>
<tr>
<td>2002</td>
<td>4.196</td>
<td>186</td>
<td>145</td>
<td>162</td>
</tr>
<tr>
<td>2001</td>
<td>4.393</td>
<td>190</td>
<td>139</td>
<td>169</td>
</tr>
<tr>
<td>2000</td>
<td>6.015</td>
<td>269</td>
<td>208</td>
<td>229</td>
</tr>
</tbody>
</table>

Table 5: Punishable Infringements against the Asylverfahrensgesetz (Asylum Procedure Act)
In Hungary, any person who provides aid, for financial gain to stay illegally within the territory of any of the mentioned States is punishable by imprisonment of up to 2 years. Any person who provides aid to another person for the crossing of state borders is punishable by imprisonment not to exceed 3 years. For the aggravated offence the punishment shall be imprisonment between 1 to 5 years for smuggling for financial gain or if it takes place in assisting more people in crossing state borders. The punishment shall be imprisonment between 2 to 8 years for smuggling by tormenting the smuggled person, in possession of firearms or in a pattern of criminal profiteering.

Application of Article 214 HCC (the offence according to Article 214/A HCC does not exist in practice in Hungary) and has significantly increased after the year 2007 in terms of registered cases, accusations and number of persons against whom sanction is imposed. As to the levels of penalty in smuggling of human beings under Art. 218 HCC, according to national report there were fourteen cases available, in which the accused ones were found guilty “only” for one count of this offence. The survey of these cases clearly shows that the courts tend to inflict penalties near the lower limit of the penalty range even if the criminal offences were committed in a criminal organization. Committing a criminal offence in a criminal organization has the consequence that the upper limit of the penalty range shall be doubled as set forth in Art. 98 CC. The cases examined here show that the courts tend to inflict penalties near the lower limit despite the increase of the range of penalty in case of criminal organization. The following list contains imprisonments inflicted for a qualified type of smuggling of human beings under Art. 218 par. 3 point c). The range of penalty is imprisonment from 2 years to 8 years, the majority of the cases were committed in a criminal organization (penalty range increased to imprisonment from 2 to 16 years).

In Italy, transport of a person is subject to a penalty from 1 to 5 years of imprisonment and a fine of 15,000 euro for each alien. The aggravated offence relates to the illegal entry or permanence in the Italian territory of five or more aliens, the transported alien has been exposed to a danger for his life in order to effectuate his illegal entry or permanence, the transported person has been subjected to an inhuman or degrading treatment in order to effectuate his illegal entry or permanence, the offence has been committed by three or more persons concurring among themselves or by utilizing international transport services or counterweighted, modified or anyway illegally obtained documents, the perpetrators have the availability of arms or explosive materials; the penalty is from 5 to 15 years and a fine of 15,000 euro for each alien. To gain an unjust profit from the condition of illegality of the alien or in the ambit of the activities punished by the present article, whoever facilitates the permanence in the Italian territory, the penalty is imprisonment up to 4 years and a fine of 15,438 euro for each alien. For financial gain, in order to obtain an illicit profit,
accommodates or gives, also on lease, an house to an alien, the penalty is 6 months to 3 years and a fine of 15.000 euro for each alien.

According to general data issued by Italian Minister of Justice convictions for the offence of support of illegal entry, transit and residence committed for a benefit purpose were 172 in 2009, 181 in 2010 and 127 in 2011; acquittals were 149 in 2009, 200 in 2010 and 188 in 2011.

According to specific data concerning only a Court of Appeal District (Genoa), levels of penalty are as follows: 12/24 months: 25%; 24/36 months: 25%; 36/48 months: 25%; 48/60 months: 25%.

In Latvia, for a person who commits illegal movement of a person across the State border, the applicable punishment is deprivation of liberty for a term not exceeding 5 years. If commission is repeated or by a State official utilising his or her official position, the applicable punishment is deprivation of liberty for a term not exceeding 7 years, with or without confiscation of property. A person who commits the same acts, if commission thereof was in an organised group or such has resulted in serious consequences, or also who commits illegal movement of a large number of persons, that is, more than five persons at one time, across the State border, the applicable punishment is deprivation of liberty for a term of not less than 5 and not exceeding 10 years.

Knowingly ensuring persons the possibility of residing illegally in the Republic of Latvia, if repeated within one year, the applicable punishment is deprivation of liberty for a term not exceeding 2 years, or community service, or a fine not exceeding forty times the minimum monthly wage. If commission is by a State official utilising his or her official position, the applicable punishment is deprivation of liberty for a term not exceeding 3 years, or community service, or a fine not exceeding sixty times the minimum monthly wage. If committed for the purpose of acquiring property or if such a possibility is ensured for two or more persons, the applicable punishment is deprivation of liberty for a term not exceeding 5 years, or community service, or a fine not exceeding one hundred times the minimum monthly wage.

In Poland, for organizing illicit border crossing, the applicable penalty is a penalty of deprivation of liberty for a period of between 6 months and 8 years. For enabling or facilitating the other person’s illicit residence in Poland with an aim of obtaining personal or financial benefit, the applicable penalty is a penalty of deprivation of liberty for a period of between 3 months and 5 years.

In the years under observation the penalties ranged from 2 years and between 3 and 5 years of imprisonment. In particular, in 2000 108 people were sentenced on the basis of Article 264
paragraph 3 of the Penal Code. The highest sanction imposed was 2 years of imprisonment (in 9 out of all 10 cases with suspension of execution). In 48 cases the courts imposed sanction of imprisonment (in 45 out of 48 cases with suspension of execution) for a period between 1 and 2 years. In 2007 the highest sanction imposed on the basis of Article 264 paragraph 3 of the Penal Code was imprisonment for a period of three years – in two cases. In the same year, in case of the sentenced on the basis of Article 264 paragraph 1a of the Penal Code none of them was sentenced to the maximum sanction level, which is 5 years of imprisonment. In 2011 the highest sanction imposed on the basis of Article 264 paragraph 3 of the Penal Code was imprisonment for a period between over 3 and 5 years – in 1 case with suspension of its execution, in 1 case with without suspension (maximum sanction level being 8 years of imprisonment). In the same year, in case of the sentenced on the basis of Article 264 paragraph 1a of the Penal Code none of them was sentenced to the maximum sanction level, which is 5 years of imprisonment.

In Romania, any person who intentionally assists a person who is not a Romanian national to reside within the Romanian territory in breach of the laws concerning the residence of aliens, shall be punished with imprisonment from 6 months to 5 years. If the offence is committed by a person who is a member of a criminal organisation or if it has produced significant material benefits for that person or another, the maximum limit for the penalty shall be 8 years. If is committed by two or more persons together; or it endangers the life or the corporal integrity of a foreign national, the punishment will be imprisonment from 2 to 8 years. If the offence resulted in the foreign national’s death, the punishment shall be imprisonment from 3 to 15 years. The recruitment, the guidance or the leadership of one or more persons for the purpose of illegal border state crossing, as well as the organization of these activities constitute the offence of migrant trafficking and shall be punished with imprisonment from 2 to 7 years. If the offence is likely to endanger the life or safety of migrants or to subject them to inhuman or degrading treatments the punishment shall be imprisonment from 5 to 10 years. If the offense resulted in the death or suicide of the victim, the punishment shall be imprisonment from 10 to 20 years.

As to the offence provided by Article 141 (Facilitation of unauthorised residence within the Romanian territory) from Government Emergency Ordinance no. 194 of 2002 on the legal regime of foreigners in Romania (republished in 2008) there is no case law in the Romanian jurisprudence. Regarding Government Emergency Ordinance no. 105 of 2001 on the state border of Romania, 2011 and 2012 have been taken into account. In the year 2011, 37 persons were convicted: 2 convictions were to fine, 2 convictions were to imprisonment up to 6 months; 3 convictions: imprisonment ranging from 1-5 years; 1: 5-10 years. In rest of the cases the sentences were
suspended. In the year 2012, 93 persons were convicted: 2 convictions were to imprisonment ranging from 6 months to 1 year; 4: 1-5 years. In rest of the cases the sentences were suspended.

In Spain, whoever, directly or indirectly, promotes, favours or facilitates illegal trafficking or immigration of persons from, in transit and with their destination in Spain, or with their destination in another country in the European Union, shall be punished with the penalty from 4 to 8 years imprisonment. The penalty foreseen for the aggravated offence, regarding the concurrence of profit, using violence, intimidation, deceit or abuse of a situation of superiority; or the perpetrator acts availing himself of his status as an authority, agent or public officer, the upper half of the penalty: 6 to 8 years imprisonment. The penalty foreseen for the aggravated conduct with minor or incapacitated victims is the higher degree of the penalty: 8 to 12 years imprisonment. The perpetrator belongs to an illegal organisation or association 8-12 years or 12 to 18 years when dealing with illegal immigration of minors or incapacitated persons.

From the data provided, and generally speaking, it is possible to deduce that there is a clear tendency on the part of Spanish criminal courts to impose the minimum sanction level foreseen legally, in case of basic offence (four years or two years in less serious cases). This tendency to impose the minimum legal sanction level foreseen persists also when aggravated circumstances concur. E.g. when the offence is committed for profit or using violence, intimidation, deceit, or abusing a situation of superiority or vulnerability of the victim, or endangering life, personal health or integrity of persons, the courts generally impose the minimum legal sanction level, that is to say: imprisonment for six years and one day and accessory penalty of special barring from running for public office for the duration of the sentence⁶. Furthermore, when, in addition to the aforementioned aggravating circumstances, the aggravating circumstance of belonging to an organization concurs, the TS imposes sanctions from the lower sanction level established by law, such as, for example, STS 730/2010, 20 July in which the Supreme Court upheld a conviction of nine years and six months’ imprisonment, special barring from trade or commerce for the duration of the sentence and absolute barring for the same period.

In Sweden, any person who intentionally assists an alien to unlawfully enter or pass through Sweden, a member state of the European Union or Iceland, Norway, Switzerland or Liechtenstein shall be sentenced for human smuggling to imprisonment for not more than 2 years. Any person

⁶ (STS 1381/2005, of 20 January; STS 466/2005, 14 April; STS 491/2005, 18 April; STS 689/2005, 3 June; STS 1451/2005, 20 December; STS 830/2005, 27 June; STS 799/2007, 2 October; STS 740/2009, 30 June; STS 366/2010, 13 April; STS 689/2005, 3 June; STS 1358/2011, 20 December; STS 175/2012, 15 March; STS 22/2012, 23 January; AP [Audiencia Provincial] Santa Cruz de Tenerife, 88/2011, 9 March). In other cases, the sanction increases, reaching seven years’ imprisonment (STS 1400/2011, 22 December; AP Málaga 49/2011; AP Málaga 10/2011, 4 February; STS 1059/2006, 31 October) or even the maximum legal sanction level, condemning the offender to eight years’ imprisonment and the accessory penalty of absolute barring for running for public office (such as STS 380/2007, 10 May). Others impose a lesser sanction than that legally established without there being any concurring mitigating circumstances to warrant this, as for example (STS 1595/2005, 30 December; STS 432/2012, 1 June; STS 655/2012, 19 July)
who, for financial gain, plans or organises activities designed to enable aliens to travel to Sweden without passports or the permits required for entry into Sweden shall be sentenced for organisation of human smuggling to imprisonment for not more than 2 years. If the offence is to be regarded as gross, the sentence shall be imprisonment for gross human smuggling for not less than 6 months and not more than 6 years. Any person who intentionally assists an alien to remain unlawfully in Sweden, a member state of the European Union, Iceland, Norway, Switzerland or Lichtenstein by hiding the alien or by some other such action shall, if the act has been committed for financial gain, be sentenced to imprisonment for not more than 2 years or, if there are mitigating circumstances, to a fine. Data collected takes into account the last two years (2011-2012). In 2011, court sentences concerning the aliens act resulted in 59 imprisonments, 2 probations, 2 suspended sentences, 107 fines, and two orders. Together with 198 prosecutor fines and 27 waivers of prosecutions this amounted to 395 in total. These numbers have changed somewhat during the last ten years with a total increase since 2000. In 2000, court sentences concerning the aliens act resulted in 26 imprisonments, 1 psychiatric care, 6 suspended sentences, 37 fines, and one exemption from sanction. Together with 119 prosecutor fines and 20 waivers of prosecutions this amounted to 210 in total. Almost half compared to 11 years later.

In the United Kingdom, for assisting unlawful immigration the maximum sentence on indictment is up to 14 years imprisonment.

3.2. Key common points and differences

<table>
<thead>
<tr>
<th>Country</th>
<th>Article 1(1)</th>
</tr>
</thead>
<tbody>
<tr>
<td>FD</td>
<td>(a) any person who intentionally 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. (b) any person who, for financial gain, intentionally 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.</td>
</tr>
<tr>
<td>Cyprus</td>
<td>Max no less than 6 years Max no less than 6 years</td>
</tr>
<tr>
<td>France</td>
<td>8 years/€34 000 fine / or both 8 years/€34 000 fine / or both</td>
</tr>
<tr>
<td>Germany</td>
<td>5 years and €30 000 fine 5 years and €30 000 fine</td>
</tr>
<tr>
<td>Germany</td>
<td>5 years / fine 10 years 5 years (false information)</td>
</tr>
<tr>
<td>Hungary</td>
<td>Min: 6 months</td>
</tr>
<tr>
<td>Italy</td>
<td>Min: 1 year</td>
</tr>
<tr>
<td></td>
<td>Min: 1 year</td>
</tr>
</tbody>
</table>

FD - Min: 1 year

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In the United Kingdom, for assisting unlawful immigration the maximum sentence on indictment is up to 14 years imprisonment.

3.2. Key common points and differences

<table>
<thead>
<tr>
<th>Offence\Penalty</th>
<th>Article 1(1)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(a) any person who intentionally 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. (b) any person who, for financial gain, intentionally 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.</td>
</tr>
<tr>
<td>FD</td>
<td>Max no less than 6 years Max no less than 6 years</td>
</tr>
<tr>
<td>Cyprus</td>
<td>8 years/€34 000 fine / or both 8 years/€34 000 fine / or both</td>
</tr>
<tr>
<td>France</td>
<td>5 years and €30 000 fine 5 years and €30 000 fine</td>
</tr>
<tr>
<td>Germany</td>
<td>5 years / fine 10 years 5 years (false information)</td>
</tr>
<tr>
<td>Hungary</td>
<td>Min: 6 months</td>
</tr>
<tr>
<td>Italy</td>
<td>Min: 1 year</td>
</tr>
</tbody>
</table>

FD - Min: 1 year
<table>
<thead>
<tr>
<th>Country</th>
<th>Min Penalties</th>
<th>Max Penalties</th>
</tr>
</thead>
<tbody>
<tr>
<td>Latvia</td>
<td>5 years</td>
<td>2 years / fine not exceeding x400 min wage</td>
</tr>
<tr>
<td>Poland</td>
<td>8 years</td>
<td>5 years</td>
</tr>
<tr>
<td>Romania</td>
<td>7 years</td>
<td>5 years</td>
</tr>
<tr>
<td>Spain</td>
<td>8 years</td>
<td>8 years</td>
</tr>
<tr>
<td>Sweden</td>
<td>2 years</td>
<td>2 years</td>
</tr>
<tr>
<td>UK</td>
<td>14 years</td>
<td>14 years</td>
</tr>
</tbody>
</table>

3.2.1. Minimum Penalties

In France there are minimum sentences only for recidivists where the penalty for the offence is 7 years, the minimum sentence is 3 years. Very few Member States stipulate minimum sanctions. Where specified the lowest minimum penalty for assisting in the entry or transit is 6 months (Poland) and the highest 4 years (Spain). For assisting a person to reside, the minimum is 3 months in Poland, 6 months in Germany and Romania and 4 years in Spain.

3.2.2. Imposition of Maximum penalty

None of the Member States studied set legislative limitations on the imposition of the maximum sentence. The appropriate sentence is to be determined by the sentencing judge taking into account mitigating and aggravating factors listed in the above section. The following tables sets out the maximum sanction stipulated for the basic offence.

The Framework Decision under Article 1(4) stipulates that the basic offence shall be punishable by custodial sentence with a maximum of not less than 6 years. Only Cyprus, Poland, Romania and the UK appear to fulfil this requirement.

Special provisions for aggravated offences are provided for by most Member States. In Cyprus and the UK the specific aggravating factors together with their impact on sentencing are not set out.

The Framework Decision specifies number of aggravating factors which should increase the maximum sentence to at least 8 years. These factors are when the offence is committed for financial gain, committed as an activity of a criminal organisation or while endangering the lives of the persons.
Only Hungary, Italy and Spain specifically list financial gain as an aggravating factor. Membership of a criminal organization is specifically given as a factor in France, Italy, Latvia and Spain. Exposing the persons to danger is an aggravating factor in France, Italy and Romania.

In Sweden an aggravated sanction is specified where the offence is to be regarded as gross, the sentence shall be imprisonment for gross human smuggling for not less than six months and not more than six years. However the aggravating factors which make the offence gross are not specified.

In Spain the combination of 2 aggravating factors increases the sanction further; where the perpetrator belongs to an illegal organisation or association and when dealing with illegal immigration of minors or incapacitated persons the aggravated sanction is 12 to 18 years.

In Cyprus and Poland, in none of the cases involving irregular entry, transit and residence, did the judges impose a sanction towards the maximum sanction level foreseen in the national legislation. In France, in practice, the maximum penalty is rarely pronounced. Collected data from Germany indicate that the maximum penalty is applied only in exceptional cases. National experts report, as a general tendency, that if only one aspect of the assessment of punishment speaks in favour of the accused person, the maximum penalty will not be imposed. The maximum penalty is provided for the worst thinkable case, and, according to the experts, “a more severe case” can always be taken into consideration. Above this, the high court jurisdiction requires very detailed findings of law for penalties far above average so that in case of very high sentences there is always the danger of reversal by appeal on points of law. The orientation of the assessment of punishment at the lower limit of the range of penalties and the aggravated requirements of findings of law to heavy penalties have created a penal law culture in Germany in which the maximum prison sentence is applied only in very rare cases. From a realistic point of view it is only imposed in cases of heavy violent crimes. This opinion has been equally held by judges and or prosecutors. In general, the experts declared themselves satisfied with the assessment of punishment by German law courts.

No statistics are available for Hungary. However a review of judgements has shown that the highest level of sanction was inflicted in no cases.

In Italy, the national experts remarked that Italian judges never use the maximum sanction level foreseen by the law: this is a generalised practice, due to the often extremely high level of maximum penalties and more frequently due to the use of a “special proceedings”, like “patteggiamento” or “giudizio abbreviato”, which concede a “discount”, respectively up to one third
and by one third, upon the penalty that otherwise the judge should impose between the minimum
and maximum limits provided for by the law in favour of the defendant who waives the regular trial.

The Court Administration in Latvia as well as the Information centre has no specific information
about the imposition of the maximum sanction level foreseen in the national legislation. According
to national Experts studying data about terms of imposed sentences allows to conclude that
according to the available (2004-2012) statistics judges have never impose the maximum sanction
level foreseen in the national legislation for the offences set forth in the Section 284 and Section
285 of the Criminal Law.

In Romania, in the period under observation, in only one case the judges imposed a sanction
towards the maximum level foreseen in the national legislation. In Spain, the maximum of penalty
is not imposed, even when aggravated circumstances concur with the basic offence.

In Sweden, the average time spent in prison for crimes against the aliens act has changed during
the last ten year period, as the table below shows:

<table>
<thead>
<tr>
<th>Crimes against Aliens Act</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Imprisonment in months</td>
<td>Average</td>
</tr>
<tr>
<td>2002</td>
<td>2</td>
</tr>
<tr>
<td>2003</td>
<td>3</td>
</tr>
<tr>
<td>2004</td>
<td>1,9</td>
</tr>
<tr>
<td>2005</td>
<td></td>
</tr>
<tr>
<td>2006</td>
<td>5</td>
</tr>
<tr>
<td>2007</td>
<td>5</td>
</tr>
<tr>
<td>2008</td>
<td>6</td>
</tr>
<tr>
<td>2009</td>
<td>3</td>
</tr>
<tr>
<td>2010</td>
<td>3</td>
</tr>
<tr>
<td>2011</td>
<td>2</td>
</tr>
</tbody>
</table>

Table 6: Sweden maximum sanctions
4. AGGRAVATING AND MITIGATING CIRCUMSTANCES

4.1. Situation in the different countries

In Cyprus the Article 19A(3) of the Aliens and Immigration Law sets out two specific aggravating factors: when the crime is committed as part of an activity of a criminal organisation; and when the lives of the subjects (third country nationals) where endangered. The general aggravating and mitigating factors are set out by the Supreme Court (Court of Appeal). Mitigating factors include no previous convictions, an early guilty plea, showing remorse and assisting the police.

In France, there are only specific aggravating circumstances. These are the following: when the support for irregular entry, transit or residence is committed by an organized gang; or on circumstances that expose foreigners to an immediate risk of death or injury likely to cause mutilation or permanent disability, by means of an authorization or an identification card giving access to restricted areas of an airport or harbour; when foreigners are subject to living conditions, transport, working or accommodation conditions incompatible with human dignity, and when, for foreign children, it keeps them away from their family or their traditional environment.

The German AufenthG provides for aggravating and mitigating circumstances. If the perpetrator of the acts mentioned above acts in an organized criminal form aiming at maximum profit (§ 96 (2) no. 1 AufenthG), as a member of a gang whose purpose is the continued commission of such offences (§ 96 (2) no. 2 AufenthG) or if he carries a (fire)weapon (§ 96 (2) nos. 3-4 AufenthG) or endangers the life of the concerned persons or subjects them to a humiliating treatment (§ 96 (2) no. 5 AufenthG), the punishment shall be between six months and ten years of imprisonment. If the perpetrator committed the offence mentioned in § 96 (4), only § 96 (2) nos. 1, 2, 5 do apply. If the acts mentioned in § 96 (1), (4) AufenthG caused the death of the foreigner concerned, the sentence is at least three years of detention (§ 97 (1) AufenthG). In minor cases, the punishment is detention between one and ten years (§ 97 (3)). If the perpetrator acted as a member of a gang, whose purpose is the continued commission of such offences in a profit-oriented pattern, the punishment shall be a minimum sentence of one year and a maximum sentence of ten years (§ 97 (2) AufenthG). In minor cases, the sentence is between six months and ten years of detention (§ 97 (3) AufenthG).

The Hungarian law provides for aggravating circumstances. The offence of human smuggling is punishable by between one and five years of imprisonment, if the perpetrator committed the offence for financial gain (Art. 218 (2) (a) HCC) or if several persons were involved (Art. 218 (2) (b)
If the human smuggling is committed by tormenting the persons concerned (Art. 218 (3) (a) HCC), while carrying a firearm (Art. 218 (3) (b) HCC) or in a profit-oriented pattern (Art. 218 (3) (c) HCC), the offence is punishable by between two and eight years of detention (Art. 218 (3) HCC).

In Italy the specific aggravating circumstances are the following: when the offence relates to the illegal entry or permanence in the Italian territory of five or more aliens; when the transported alien has been exposed to a risk of death or injury; when the transported person has been subjected to an inhuman or degrading treatment in order to effectuate his illegal entry or permanence; when the offence has been committed by three or more persons or by utilizing international transport services or counterweighted, modified or anyway illegally obtained documents; when the perpetrators have the availability of arms or explosive materials; when the facts are committed in order to recruit persons to be employed for prostitution or anyway for sexual or work exploitation or when the facts are related to the entry or children (less than 18 years old) to be employed in illicit activities in order to favour their exploitation; and when the facts are committed in order to take a direct or indirect profit from the offence. As to specific mitigating circumstances these are the following: when the defendant acts in order to avoid that the criminal activity can reach further consequences, by helping the police or the judicial authority in collecting evidence that is decisive to ascertain the facts or in identifying or arresting one or more authors of the offences or in subtracting resources which are relevant in committing the offence; when the perpetrator is less than 18 years old, and when his participation in the offence had a minimum importance in the preparation or committing the offence itself. There is also a list of generic aggravating circumstances and a list of generic mitigating circumstances in the general part of the criminal code.

In Latvia there are some specific aggravating circumstances: if commission is repeated or by a State official utilising his or her official position; if commission thereof was in an organised group or such has resulted in serious consequences, or to commit illegal movement of a large number of persons, that is, more than five persons at one time, across the State border; if such is committed for the purpose of acquiring property or if such a possibility is ensured for two or more persons. There is a large list of aggravating and a large list of mitigating circumstances, provided for in the General part of the Criminal Law.

Polish law does only provide for some generic aggravating circumstances: recidivism and organized groups or perpetrators for whom committing a offense became a regular source of income. In exceptional cases the sentence may be reduced, if the perpetrator committed the offences mentioned in Art. 264A PCC without obtaining a financial advantage.
In **Romania** the specific aggravating circumstances are: offence committed by two or more persons, when it endangers the life or the corporal integrity of a foreign national or it causes his death, offence committed by a person who is a member of a criminal organisation, producing significant material benefits, and when it subjects the migrants to inhuman or degrading treatments. There are also generic aggravating and mitigating circumstances in the general part if the Criminal Code. The list thus provided is not exhaustive, and the court may deem as aggravating or mitigating circumstance any other element or situation, if it considers it relevant for that specific case.

In **Spain** there are generic aggravating and mitigating circumstances, foreseen in the general part of the Penal Code. There are also specific aggravating circumstances: using violence, intimidation, deceit or abusing a situation of superiority or of special vulnerability of the victim; to commit it for profit or endangering life, personal health or integrity the victim or being the victim a minor or incapacitated; when the offender belongs to an organisation or assembly, even if transitory in nature, which perpetrates such operations. There is some kind of a mitigating circumstance, foreseen in the special part of the Penal Code: the courts, taking into account the seriousness of the act and its circumstances, the conditions of the offender and the purpose he had intended, may impose a lower sentence.

In **Sweden**, the SAA contains provisions regarding aggravating and mitigating circumstances. If the human smuggling is regarded to be gross, the punishment is as a minimum six months and as a maximum six years of imprisonment (Ch. 20 (Sec. 8 (2)) SAA). When determining whether the offence was gross, it shall be considered, whether the human smuggling was committed in return for remuneration, as part of an activity that included a large number of people, in a way that endangered the lives of the aliens involved or in another ruthless way (Ch. 20 (Sec. 8 (2) (nos. 1-3)) SCC). The same punishment applies to gross organisation of human smuggling. When judging whether the offence is regarded to be gross, it shall be taken into account whether the commission entailed the exploitation of the vulnerable situation of aliens, endangered their lives or their reckless treatment (Ch. 20 (Sec. 9 (2) SCC). In minor cases of human smuggling or the organising thereof, the maximum sentence is up to six months of detention or a fine (Ch. 20 (Sec. 8 (3)) (Sec . 9 (3)) SAA).

In **United Kingdom** the law on sentencing is elucidated through three sources: the primary source is the body of statutes created by Parliament; the main secondary source is the published guidance provided by the Sentencing Council; and the third source is case law. In England and Wales the
courts are obliged to take into consideration, when deciding upon a sentence, the seriousness of the offence as a mitigating factor (Section 143 of the Criminal Justice Act 2003). The Criminal Justice Act 2003 makes provision for a sentence to take account of any matters that in the opinion of the court, are relevant in mitigation of sentence. The issue of remorse should be taken into account at this point along with other mitigating features such as admissions to the police in interview. In the same Criminal Justice Act previous convictions are considered to be an aggravating factor. Other aggravating (and mitigating) factors are listed in the Sentencing Council’s Guideline on seriousness. As aggravating factors: offence committed whilst on bail for other offences, failure to respond to previous sentences, offence racially or religiously aggravated, offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation, disability, or towards a minority group; previous convictions, planning of an offence, intention to commit more serious harm, offenders operating in groups or gangs, professional offending, commission of the offence for financial gain, high level of profit from the offence, attempt to conceal or dispose of evidence, failure to respond to warnings or concerns expressed by others about the offender’s behaviour; offence committed whilst on licence, under the influence of alcohol or drugs, using a weapon or gratuitous violence or damage to property; deliberate targeting of vulnerable victim, abuse of power or position of trust. As mitigating factors: a greater degree of provocation than normally expected, mental illness or disability, youth or age, where it affects the responsibility of the individual defendant and the fact that the offender played a minor role in the offence. In Northern Ireland the aggravating and mitigating factors are foreseen in the Criminal Justice Order 2004 and in the case Law. Aggravating features which may occur in any offence include, among others: the offence was committed in the context of ‘hostility’ based on racial, religious or sexual orientation reasons; the offence was committed while the offender was on bail for another offence, the impact on the victim and on society as a whole and the existence of previous convictions; the offence was committed for financial gain, the offender was operating as part of a group or gang and the use of a weapon to commit the offence. Mitigating features which may occur in any offence may include, among others: the offender’s age, the offender has assisted the police with the investigation of related or other unrelated offences, the offender has shown genuine remorse, the offender played only a minor role in the offence.

4.2. Key common points and differences

In some legislations (Germany, Sweden) a life endangering treatment of the person concerned is an aggravating circumstances. The German legislation is the only one in which not only a life endangering treatment, but also the death of an alien is an aggravating circumstance. The Polish CC does not contain any provisions on aggravating circumstances.
The effects of the aggravating and mitigating circumstances are very varied. In UK and Cyprus (common law Systems) and in Hungary, the Court will impose the appropriate penalty taking into account the seriousness of the crime as well as any other aggravating and mitigating factors. In France, recidivism leads to a compulsory minimum penalty. In Italy and Spain, the aggravating and the mitigating circumstances lead to a compulsory increase or reduction of the sentence. In Germany only the specific aggravating circumstances lead to a compulsory increase of the sentence, and there is an open list of generic circumstances that the court can appreciate, as aggravating or mitigating circumstances and that may increase or reduce the sentence. In Latvia and in Sweden, basically but not always, the aggravating circumstances can lead to an increase of the sentence. In Poland, in some cases the rules are compulsory and in other cases they are not. In Romania the aggravating circumstances lead to an optional increase of the penalty and the mitigating circumstances lead to a compulsory decrease reduction of the legal minimum of the penalty.

<table>
<thead>
<tr>
<th></th>
<th>Group or association</th>
<th>Danger for the life or risk</th>
<th>Inhuman or degrading treatment</th>
</tr>
</thead>
<tbody>
<tr>
<td>CY</td>
<td>Organised group</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>Organised gang</td>
<td>Danger for the life or risk of injury</td>
<td>Yes</td>
</tr>
<tr>
<td>FR</td>
<td>Organised gang</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Organised for profit or continued commission</td>
<td>Yes</td>
<td>Humiliating treatment</td>
</tr>
<tr>
<td>DE</td>
<td>Several persons involved</td>
<td>Yes</td>
<td>By tormenting the persons concerned</td>
</tr>
<tr>
<td></td>
<td>(Case Law)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>HU</td>
<td>Three or more persons</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>Organised Group (generic)</td>
<td>No</td>
<td>Yes (generic)</td>
</tr>
<tr>
<td>IT</td>
<td>Organised group (generic)</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>LV</td>
<td>Two or more persons</td>
<td>Yes</td>
<td>Open list of generic circumstances</td>
</tr>
<tr>
<td>PL</td>
<td>Organised group (generic)</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>RO</td>
<td>Organised group</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>ES</td>
<td>Group or gang</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Organised group (Case Law)</td>
<td>Yes</td>
<td>Using weapons or violence</td>
</tr>
<tr>
<td>SE</td>
<td>Group or gang</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>UK</td>
<td>Organised group</td>
<td>Yes</td>
<td></td>
</tr>
</tbody>
</table>

*Table 7: Frequent aggravating circumstances*
5. SANCTIONS OTHER THAN IMPRISONMENT AND FINES

In addition to imprisonment and fine, upon conviction a court can impose additional sanctions. Prohibitions and exclusions can be on a permanent or temporary basis, whilst some orders are mandatory the vast majority are discretionary. For detailed consideration of the modalities in each country please refer to the national reports annexed, what follows is a comparative analysis of what sanctions are available in the Member States studied. Alternative sanctions are available in Sweden but are not listed in the national report.

The Framework Decision itself provides that where appropriate the custodial sentences are to be accompanied by the following measures: confiscation of the means of transport used to commit the offence; a prohibition on practising the occupational activity in the exercise of which the offence was committed; and deportation. Only four Member States provide specifically for the confiscation of the vehicle, although five others provide general confiscation orders. Seven Member States provide for the prohibition from undertaking certain professions and only five provide for the expulsion of the individual.

5.1. Community Service

In Cyprus, Hungary, Latvia and the UK community service is an alternative sanction available for courts to impose.

5.2. Confiscation and Forfeiture

In France, Germany, Hungary, Italy, Latvia, Poland and Romania courts can impose confiscation or forfeiture orders on individuals. In Cyprus, France, Italy and England and Wales, specific reference is made to confiscation of the vehicle used in the commission of the crime.

5.3. Restricted Movement

In Hungary and Poland a person’s movement can be restricted with prohibition from entering certain areas. In Poland this prohibition may also be extended to include contact with certain individuals.

An individual can be expelled from France, Germany, Hungary, Latvia and the UK.
5.4. Restriction on Work Related Rights

Prohibition from undertaking certain professions can be imposed in Cyprus, France, Hungary, Latvia, Poland, Romania and Spain.

In Hungary, Latvia, Romania and Spain a person can also be prohibited from holding public office.

In Latvia, as well as a specific employment, an individual can be deprived from the right to perform all forms of entrepreneurial activity and specific holding permits.

In France an individual can lose authorisation to operate transportation or shuttle services.

5.5. Restriction of other Rights

In Romania an individual upon conviction can also lose their civic rights and their parental rights can be affected detrimentally.

In France, Hungary, Latvia, Poland and England and Wales an individual can lose their driving licence or be prevented from obtaining one.

5.6. Other Sanctions

In Germany and Latvia rehabilitation orders can be made.

In Poland it can be ordered for the decision to be published in the press or on TV.
<table>
<thead>
<tr>
<th>Country</th>
<th>Community Service</th>
<th>Confiscation/deprivation orders</th>
<th>Forfeiture</th>
<th>Prohibition from holding public office</th>
<th>Loss of civil rights</th>
<th>Parental rights affected</th>
<th>Driving disqualification</th>
<th>Loss of authorisation to operate/transport/shuttle service</th>
<th>Expulsion of non-citizens</th>
<th>Prohibition from staying in country</th>
<th>Prohibition from frequenting certain places</th>
<th>Prohibition from holding directional positions in legal entities</th>
<th>Publication of Decision</th>
<th>Rehabilitation</th>
<th>Confiscation of vehicle</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cyprus</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>France</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
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<td>✓</td>
<td>✓</td>
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<td></td>
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</tr>
<tr>
<td>Germany</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Hungary</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
<td>✓</td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Italy</td>
<td>✓</td>
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<td></td>
<td></td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Latvia</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
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<td>✓</td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Poland</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
<td>✓</td>
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<td></td>
<td></td>
<td></td>
<td></td>
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</tr>
<tr>
<td>Romania</td>
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<td>✓</td>
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<tr>
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<td>Sweden</td>
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<td></td>
<td></td>
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</tr>
<tr>
<td>Scotland</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
<td></td>
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<td>✓</td>
</tr>
<tr>
<td>Northern</td>
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<td></td>
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<td></td>
<td></td>
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<tr>
<td>Ireland</td>
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<td></td>
<td></td>
<td></td>
<td>✓</td>
</tr>
</tbody>
</table>

**Table 8: Sanctions other than imprisonment and fines**

**Empirical data on disqualification sanctions**

In France, data regarding disqualifications pronounced as additional penalties for any type offences related to illegal entry or stay in France, including illicit support, may be illustrated as follows:
Additional penalties for irregular entry, transit and residence in France

<table>
<thead>
<tr>
<th></th>
<th>Number of penalties</th>
<th>Banning from the French territory</th>
<th>Loss of civil and political rights</th>
<th>Suspension of a driving license</th>
<th>Driving prohibition</th>
<th>Community Service orders</th>
<th>Daily fine</th>
<th>Forfeiture</th>
<th>Specific measures for minors</th>
<th>Others</th>
</tr>
</thead>
<tbody>
<tr>
<td>Any conviction for illegal entry or stay of a foreigner</td>
<td>1,933</td>
<td>1,222</td>
<td>1</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>652</td>
<td>0</td>
<td>56</td>
</tr>
</tbody>
</table>

Table 9: France other sanctions

In addition, in 2011 77 fine penalties have been imposed (average amount € 928).

In Hungary, in general these types of sanctions have less importance in cases for §§ 214-2146A HCC. In almost all cases available, exclusion from participation in public affairs as a secondary penalty was inflicted in addition to imprisonment. This type of secondary penalty can be inflicted for intentionally committed criminal offences provided that the perpetrator has been sentenced to non-suspended imprisonment (Arts 62-63 HCC). In cases of foreign perpetrators (that is, perpetrator of non-Hungarian nationality), expulsion (mainly as a secondary penalty before 2010) was also inflicted in addition to imprisonment.

According to the available statistics in Latvia some cases were initiated in 2010, 2009, 2008, 2007 in the State Border guard Service, but there isn’t any publicly available data about court proceedings (and accordingly applying punishments) in these cases.

Due to the nature of offences concerned, in Poland the most commonly imposed penal measures are forfeiture of items and forfeiture of the material benefits.

In Spain, in all cases the accessory penalty of special barring from running for public office for the duration of the sentence, according to article 56.2 of the CP is applied, as well as payment of court costs. Likewise, if applicable, a special or absolute barring from public office or employment, or profession, trade, or industry according to the cases, depending on the position of the perpetrator.
6. SUSPENDED SENTENCES AND EARLY RELEASE

6.1. Suspended sentences

In all Member States studied suspended sentences are available, provided that the sentence of imprisonment imposed is under a certain number of years as set out in the table 7. The only Member State where suspended sentences are not available is Scotland where analogous 'deferred sentences' are available allowing a criminal court to defer passing sentence entirely with or without the imposition of conditions. A specific term of imprisonment is not specified for France, Germany and Sweden. In France a suspended sentence is not available where a sentence for similar facts is pronounced within 5 years of the first sentence pronounced. In Romania a suspended sentence is only possible if the individual has not been previously sentenced to a penalty of imprisonment of more than 6 months.

<table>
<thead>
<tr>
<th>Country</th>
<th>No. Years</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cyprus</td>
<td>3</td>
</tr>
<tr>
<td>France</td>
<td>-</td>
</tr>
<tr>
<td>Germany</td>
<td>-</td>
</tr>
<tr>
<td>Hungary</td>
<td>2</td>
</tr>
<tr>
<td>Italy</td>
<td>2</td>
</tr>
<tr>
<td>Latvia</td>
<td>5</td>
</tr>
<tr>
<td>Poland</td>
<td>2</td>
</tr>
<tr>
<td>Romania</td>
<td>3</td>
</tr>
<tr>
<td>Spain</td>
<td>2</td>
</tr>
<tr>
<td>Sweden</td>
<td>-</td>
</tr>
<tr>
<td>England and Wales</td>
<td>28-51weeks</td>
</tr>
<tr>
<td>Northern Ireland</td>
<td>2</td>
</tr>
<tr>
<td>Scotland</td>
<td>-</td>
</tr>
</tbody>
</table>

Table 10: Suspended Sentences and the maximum no. of years

In France, according to available data (which refers to year 2011) totally suspended sentences are about 50% of the total.

As known, day parole and electronic surveillance are the main sentence adjustments provided by French law. In particular, day parole is a suspension or an early termination of a penalty and also a
personalization of the imprisonment sentence, decided by the Court in its decision. Day parole can only be granted when the convicted offender has been sentenced to a maximum of two years’ imprisonment or when the remaining duration of the sentence does not exceed two years’ imprisonment. Where the convicted person is a recidivist, day parole can only be granted when the offender has been sentenced to a maximum of one year imprisonment. Electronic surveillance, also decided by the Court, may be granted if the convicted offender has been sentenced to a maximum of two years’ imprisonment, or where the remaining duration of the sentence does not exceed two years’ imprisonment.

In Germany, suspension in particular is often applied, in average in around 50% of cases (this general conclusion may refer to the practice of all concerned offences; for further details, see the table in the previous pages).

In Hungary, it is worth noting that in practice, proceedings are generally characterized by a concurrence of offences and aggregated penalty regarding offences under Arts 214 to 214/A CC, which does not allow making an offence-related statement on the question of suspension. In the cases found, non-suspended imprisonments were inflicted. Though, according to national experts, the predominance of the more serious offences might have been a ground for non-suspending the imprisonment.

In Italy, around the 25% of sentences are suspended (data referred to the Court of Appeal of Genoa). In general, suspended sentences are possible only when the judge fix in the specific case a penalty up to two years, such limit is to be determined by adding the previous sentences (also the already served ones) to the present one.

According to the available statistics (2004-2012) in Latvia, the average of suspensions in case of Section 284 is high: in about 71% of all the cases sentences were suspended; in case of imprisonment – in about 95% ; the same may be said for the case of Section 285: in about 71% of all the cases sentences were suspended; in case of imprisonment – in about 95%.

In Poland, in the years under observation (2000, 2002, 2007 and 2011) suspension has been granted in a vast majority of cases.

In Romania, in the year 2011 77% of the total sentences were suspended. In the year 2012, 93.5% of the total sentences were suspended.
In Spain, suspension of sentence is granted when the sanction imposed is less than two years’ imprisonment. Taking into account that the sanction for the basic offence is from four to eight years’ imprisonment, it is unlikely that the penalty be suspended or substituted with this type of offence. Nevertheless, taking into account the optional mitigating circumstances provided for in article 318.5, it is possible that prison sentences of less than two years be suspended. In these cases, judges may opt for this solution in practically all of the cases, as long as the offender has been deemed to pose little criminal hazard and the necessary conditions for suspension of sentence have been met (see art. 81 c.p.).

In Sweden, given the level of penalties legally provided, suspension of sentence is very rare. The case of suspended sentences, with respect to imprisonment, can be seen below:

<table>
<thead>
<tr>
<th>Crimes against Aliens Act</th>
<th>Imprisonment</th>
<th>Suspended sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000</td>
<td>26</td>
<td>6</td>
</tr>
<tr>
<td>2001</td>
<td>33</td>
<td>6</td>
</tr>
<tr>
<td>2002</td>
<td>59</td>
<td>3</td>
</tr>
<tr>
<td>2003</td>
<td>28</td>
<td>3</td>
</tr>
<tr>
<td>2004</td>
<td>41</td>
<td>4</td>
</tr>
<tr>
<td>2005</td>
<td>69</td>
<td>5</td>
</tr>
<tr>
<td>2006</td>
<td>59</td>
<td>5</td>
</tr>
<tr>
<td>2007</td>
<td>89</td>
<td>7</td>
</tr>
<tr>
<td>2008</td>
<td>62</td>
<td>2</td>
</tr>
<tr>
<td>2009</td>
<td>86</td>
<td>7</td>
</tr>
<tr>
<td>2010</td>
<td>91</td>
<td>2</td>
</tr>
<tr>
<td>2011</td>
<td>59</td>
<td>2</td>
</tr>
</tbody>
</table>

Table 11: Sweden suspended sentences

6.2. Early Release

Early release is a possibility in all Member States studied. Early release is subject to the individual having served a certain proportion of their custodial sentence as set out in the table X. The requisite proportion is not specified for Germany or Romania (significant percentage of sentence). Early release can be either unconditional or on licence.
<table>
<thead>
<tr>
<th>Country</th>
<th>Rule</th>
</tr>
</thead>
</table>
| Cyprus        | - For a sentence of between 1 month and 2 years imprisonment, the reduction provided is 6 days per month.  
- For a sentence of between 2 years and up to 5 years imprisonment the reduction provided is 8 days per month.  
- For a sentence of between 5 years up to 8 years imprisonment the reduction is 10 days per month.  
- For a sentence of between 8 years and 12 years the reduction provided is 12 days.  
- For a sentence of more than 12 years the reduction is up to 14 days per month. |
| France        | ½ the sentence can be raised to 2/3       |
| Germany       | -                                         |
| Hungary       | Minimum of 2 months and  
4/5 of sentence in high security prison  
¾ of sentence in medium security prison  
2/3 of sentence in low security prison  
½ of sentence under 3 years |
| Italy         | At least 30 months and ½ of sentence  
At least 4 years and ¾ of sentence (if recidivist) |
| Latvia        | ½ of sentence for less serious crime  
2/3 of sentence for serious crime or recidivist  
¾ of sentence for especially serious crime or committed on conditional release. |
| Poland        | ½ of sentence                             |
| Romania       | -                                         |
| Spain         | ¾ of sentence                             |
| Sweden        | 2/3 sentence and at least 1 month         |
| England and Wales | ½ of sentence     |
| Northern Ireland | At least 4 weeks and ½ of sentence   |
| Scotland      | ½ of sentence for short term prisoners  
2/3 of sentence for long term prisoners |

**Table 12**: Minimum Term to be served of sentence before early/conditional release is possible

271
In France there is no specific statistics focused on early release of the offender convicted for support for irregular entry, transit and residence in France. In general, on March 2013 adjusted sentences represent 21% of the all sentences.

In Italy, early release cases refers to the detainees who are suffering their prison sentence into the prisons of the District, but they could have be convicted and sentenced in another District.

In Romania, in relation to early release, national experts had access only to the general percentage regarding early release (regarding all crimes), provided by the Ministry of Justice. For the year 2011, this was 32.61% and for 2012, 35.77%.

7. SANCTIONS FOR LEGAL PERSONS

The Framework Decision under Article 3 provides that sanctions against legal persons may include in addition to fines, the following: exclusion from entitlement to public aid; disqualification from practice of commercial activities; placing under judicial supervision; and a judicial wind-up order. Criminal prosecution of a legal person is possible in the UK, however the available sanctions are not specified in the national report. In all other Member States a fine can be imposed as a sanction against a legal person. Six Member States provide for exclusion from public aid and six provide for the disqualification from the practice of commercial activities. Three Member States provide for judicial supervision and five for winding up or dissolution.

7.1. Public Aid

Exclusion from public aid, tenders and funds can be imposed in Cyprus, France, Italy, Poland, Romania and Spain.

7.2. Restriction on Commercial Activity

Disqualification from exercising certain professional or commercial activity is available as a sanction in Cyprus, France, Hungary, Italy, Romania and Spain.

In France, Romania and Spain closure of establishments can also be ordered.

In Italy authorizations and licenses can also be revoked.
7.3. Judicial Supervision

A legal person can be placed under judicial supervision in Cyprus, France and Spain.

7.4. Judicial Wind-up

In France, Hungary, Latvia, Romania and Spain the legal person can be dissolved or put into liquidation.

7.5. Confiscation and Forfeiture

Confiscation and forfeitures orders can be made in France, Latvia, Spain and Sweden.

7.6. Publication of the Decision

The decision will be published in Cyprus, France, Romania and Spain.

7.7. Other Sanctions

In Italy and Poland the legal entity can also be prohibited from advertising.
<table>
<thead>
<tr>
<th>Sanction</th>
<th>Cyprus</th>
<th>France</th>
<th>Germany</th>
<th>Hungary</th>
<th>Italy</th>
<th>Latvia</th>
<th>Poland</th>
<th>Romania</th>
<th>Spain</th>
<th>Sweden</th>
<th>United Kingdom</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fine</td>
<td>✓</td>
<td>✓</td>
<td></td>
<td></td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Disqualification to exercise professional or commercial activity</td>
<td>✓</td>
<td>✓</td>
<td></td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td>✓</td>
<td></td>
<td></td>
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<tr>
<td>Closure of establishment (permanent/temporary)</td>
<td>✓</td>
<td>✓</td>
<td></td>
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<td></td>
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<td></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Exclusion from public aid, tenders, funds, etc</td>
<td>✓</td>
<td>✓</td>
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<tr>
<td>Prohibition related to making payments</td>
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<td></td>
<td>✓</td>
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<tr>
<td>Confiscation / forfeiture</td>
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<tr>
<td>Publication of Decision</td>
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<tr>
<td>Liquidation/Judicial winding-up/Dissolution</td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Prohibition from advertising</td>
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<td></td>
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<tr>
<td>Judicial supervision</td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Revocation of Licence</td>
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</tbody>
</table>

**Table 13:** Sanctions for legal person
There is no conviction of legal persons in Cyprus or Romania for these offences. In France, according data communicated by the Ministry of Justice, 6 convictions have been pronounced against a legal person for support for irregular entry in France in 2011. Nevertheless, there is no information about the amount of the fine. In Latvia, there is no information recorded as to the application of coercive measures to legal persons in the courts.

In Poland, the liability of collective entities in the period between 2006 and 2011 there were 50 sentences issued (with reference to all offences for which such liability might be imposed). There were 47 financial sanctions imposed ranging from 1.000,- PLN to 12.000,- PLN. In 7 cases verdicts were made public and in 4 cases courts imposed forfeiture of material benefits.

In Spain, since criminal responsibility for legal persons has been introduced by Ley Orgánica (act of parliament) 5/2010, there has still been no penalty imposed by the Spanish courts against legal persons for this offence.

8. SETTLEMENT OF MINOR CASES

8.1. The definition of “minor case”

For the definition of what is considered a “minor case” in the criminal justice system of the countries studied, in order to avoid unnecessary reiterations, we refer to what was already mentioned under the report on child pornography. To identify a minor offence following elements, among others, are taken into account: the loss or harm can be described as minor and was the result of a single incident or that the suspect played a minor role in the commission of the offence.

8.2. Special proceedings for minor cases

Under this paragraph we will focus mainly on the special rules applicable to minor cases of support of irregular entry of aliens, trying to avoid the reiteration of the general rules on case settlement or discretionary discontinuation. These proceedings are described at length in the national reports and have been analysed from a comparative law perspective in the comprehensive report on child pornography. Notwithstanding the aim to prevent repetitions, some overlapping between the different reports will be unavoidable.
**Spain** has a special procedure for misdemeanours, but it is generally not applicable to support of irregular entry, transit and residence. However, the administrative regulations which regulate unlawful administrative acts in this matter are set down in Organic Law 4/2000, 11 January, on rights and freedoms of aliens in Spain and their social integration, provides for a series of administrative infringements (minor, serious and very serious) regarding acts of supporting illegal entry and residence in Spain. The different administrative infringements concerning laws on aliens are all sanctioned with a fine, but the substitution of a fine for expulsion from Spanish territory can be ordered when the offenders are aliens and the administrative violation is considered very serious have committed acts classified as very serious.

**Latvia**, as mentioned earlier, deals with minor offences considered as administrative offences in an administrative procedure. The Latvian Administrative Violations Code regulates several administrative infringements that are related to the support of illegal entry.

No provision specifying what is to be considered as a minor case is foreseen in **Cyprus** and therefore no mechanisms regarding the settlement of petty offences is provided. In **France**, the same alternative proceedings described for child pornography offences can be used in cases of support of illegal entry.

In **Germany**, no special rules apply to the offence of supporting the illegal entry of aliens. As was already stated the PP has certain powers regarding the decision on the commencement and discontinuation of the criminal proceedings in minor cases (Vergehen) if there is no public interest in the prosecution (Art. 153 German CPC), and in those cases where the punishment would not be useful besides another penalty already imposed to the same offender (Art. 154 CPC). Furthermore the PP can decide to impose conditions and instructions upon the defendant (for example, payment of damages, social service, enter into an agreement with the victim), instead of prosecuting. Once the criminal proceedings have been instituted, the court can also decide to discontinue the proceedings, in cases of misdemeanours, where there is no public interest upon consent of the PP and of the defendant (Art. 153 (2)). These general rules apply also to cases of support of irregular entry.
In **Poland** the proceedings may not be initiated or may be conditionally discontinued, if the social harm is negligible and the guilt is not significant, and the maximum penalty is not higher than 3 years imprisonment for the offence in abstract.

In **Romania** if the offence does not entail social danger the criminal court or the PP in the investigative stage can substitute the penalty by an administrative sanction, as for example a reprimand or warning. No special rules seem to apply to support of illegal entry, transit or residence of foreigners.

**Hungarian** criminal justice system does not provide for diversionary measures or special proceedings, however regulates procedural short-cuts and fast-track proceedings. With regard to support of illegal entry the Act on Regulatory Offences (ARO) contains two regulatory offences that are in direct connection with the offences analysed here. These are the following: According to Article 204, the person who crosses the borders of Hungary without authorisation or in an unauthorised manner or who attempts this commits a regulatory offence. The same Article sets forth that the person who violates the legal rules issued for passports or other travel documents, commits a regulatory offences.

**Spain**, apart from the administrative infringements already mentioned earlier under this same paragraph, the general diversionary proceedings (judgment without trial in cases of agreement, where the accused accepts the indictment and the maximum penalty for the offence is not higher than 6 years) as explained in the report on child pornography are applicable here.

**Italy** provides for a very similar regulation on the agreement or *patteggiamento* if the penalty, once reduced, does not exceed five years or two years, depending on the offence. What was explained in the report on child pornography offences applies here. In Sweden offences which are sanctioned with not more than 6 months or a fine, are considered petty offences, In the case of minor offences of irregular stay, prosecution under this Section shall only be initiated if this is called for in the public interest.

The national report for the **UK** states that the law provides guidance on the severity of offences related to irregular entry, though this guidance is not explicitly presented as a mechanism for dealing with minor cases.
The **Swedish** system provides for the possibility to sanction minor cases by way of summary orders rendered by the public prosecutor. Usually minor cases are those sanctioned with a fine penalty. Police summary orders are also foreseen, but apply only in cases of breach of regulations.

### 8.3. Key common points and differences

In sum, with regard to the existence of general rules or proceedings to settle minor cases and its possible application to offences related to the support of irregular entry, we should conclude that the same general rules described for child pornography offences apply:

- Systems which provide for the possibility of non-prosecuting or discontinuing proceedings in minor cases at the pre-trial stage by PP: France, Poland, Latvia, Germany, Sweden, Cyprus, England and Wales and Northern Ireland.

- Systems which provide for alternatives to penalty for minor cases: Germany, Italy, Latvia, Romania and England and Wales and Northern Ireland.

- Systems which provide for procedural short-cuts based on confession or admission of guilt and penalty, although not necessarily limited to minor criminal cases: we only include here those countries whose reports mention expressly such procedural measures. We received positive answers for France, Hungary, Italy, Latvia, Spain, Northern Ireland and England and Wales but this list may be incomplete. The questionnaire was focused on settlement of minor cases, thus some of the reports have not mentioned procedural short-cuts or abbreviated procedural forms that are not exclusive of minor cases, but generally applicable.

- Systems which provide for administrative sanctions outside the criminal justice system for certain conducts related to support of irregular entry of aliens: Hungary, Spain, Sweden and Latvia.

As to the fulfilment with the requirements set out in the Framework Decision 2002/946/JHA of the Council of 28 November 2002, as it does not mention any requirement regarding settlement or diversionary measures, there is no need to comment this issue under this point.
9. JURISDICTION

In all the eleven countries studied the basic rule on jurisdiction in criminal matters is based upon the principle of territoriality: the criminal law applies to all offences committed within the territory of the State. No special rules appear to apply with regard to the offence of support of irregular entry, transit and residence.

It is important to note, that the offences mentioned can be committed abroad – for instance on the other side of the borders. With regard to the rules on extra-territorial jurisdiction, the countries studied provide rules on extraterritorial jurisdiction based on the active nationality principle and the passive nationality principle, although the conditions to exercise such extraterritorial jurisdiction vary (we refer here again to the report on child pornography). With regard to Hungary the national report states that the new HCC will introduce the passive nationality principle as well, i.e. that if Hungarian citizens or Hungarian legal persons are victims of any offence punishable by the HCC abroad, then the application of the HCC will be justified to punish such extraterritorial offences as well.

In Spain pursuant to article 23.4 f) Ley Orgánica del Poder Judicial (LOPJ – Act of Parliament on the Judiciary), illegal trafficking or immigration of persons, whether they are workers or not, can be prosecuted regardless of where the offence took place and the nationality of the perpetrators. However this broad regulation of the jurisdiction was restricted in 2009, and since then the law requires some kind of connection related with Spain for the Spanish courts to prosecute these crimes committed abroad by a non-national.

In the UK, Section 25(5) of the Immigration Act 1971 (that which defines the offences in question) was replaced by section 30(1) of the UK Borders Act 2007 which came into force on 31 January 2008. It now covers acts committed in the United Kingdom, regardless of the nationality of the perpetrator as well as acts committed overseas, and imposes upon said perpetrators criminal sanctions.

No special provisions are found as to the application of the extraterritorial jurisdiction based on the nationality principle to the offences of support of irregular entry.
All the countries studied provide rules on jurisdiction based on the principle of territoriality and all eleven systems studied allow the prosecution of national offenders abroad. According to the national reports it seems that these rules on jurisdiction are also applicable to legal persons, except in Romania, where they are specifically excluded.

The requirements set out in the Framework Decision 2002/946/ of the Council of 28 November 2002, regarding to jurisdiction (arts. 4 and 5), are complied with in all studied MS, exception made of Romania, which does not seem to comply with the requirement set out in art. 4.1 (c) of the FD 2002/946. This provision states that the MS shall ensure that the rules on jurisdiction shall allow the prosecution of infringements regarding unauthorized entry or transit where the offence has been committed “(c) for the benefit of a legal person that has its head office in the territory of that Member State”. However the Romanian law does not provide for the possibility to prosecute the legal person if the offence has been committed entirely outside Romanian territory.

10. STATUTE OF LIMITATIONS

As already explained under the report of child pornography, for clarity reasons, we will use the term "suspension" of the statutory period of limitations in those cases where the time already elapsed is taken into account; and “interruption” for those cases where the time period runs anew.

The national report on Cyprus states that there is no statute of limitations that governs offences related to the offence of supporting the irregular entry of aliens.

In France the general rules on statute of limitations applies to these offences and the general rules on suspension are applicable here: the statute of limitations will be suspended by legal impediments as mediation, settlement proceedings, or force majeure.

The statute of limitations for prosecution of the offences of support of irregular entry in Germany is governed by the general rules, not being any special time bar or period for these offences the general rules of art. 78(3) n.4 StGB apply here.
As was stated in the report of child pornography in **Hungary** the period of limitation is equal to the longest duration that can be imposed in abstract for the offence committed, with a minimum range of three years.

**Italy** also establishes a general period of statute of limitations equal to the maximum penalty that can be imposed for the offence, but taking into account the aggravating circumstances (and not the mitigating). The minimum limitation period is 6 years. There are no special provisions for offences of support of irregular entry.

The **Latvian** criminal law establishes a fixed limitation period according to the category of offence: 2 years for violations, 5 years for less serious crime, 10 years for serious crimes, 15 for especially serious crimes, 30 years –upon decision of the court– when the penalty is of life imprisonment, and crimes against humanity which are not subject to statute of limitations. No special rules are applicable to offences of support of irregular entry thus we refer to the report on child pornography.

**Poland** does neither provide for special rules on statute of limitations for the offences analysed here nor for special rules on suspension or interruption.

No special rules are applicable in **Spain** regarding statute of limitations of support to irregular entry, general rules set out under Art. 131 CC apply. The penalties for the basic offence of instigating clandestine immigration (318.1 bis CP) shall not surpass ten years imprisonment, so that these infractions are barred after ten years. If the prison sentence oscillates between ten and fifteen years for the aggravated offence, the offence is barred after fifteen years. The statute of limitations shall be twenty years when the sentence surpasses fifteen years imprisonment.

The statute of limitations for criminal prosecution of the offence of support of illegal entry in **Sweden** ranges from two years to ten years. General rules on suspension, interruption and maximum periods apply here.

The national report for the **UK** states that there is no statute of limitations which concerns offences relating to the offence of supporting irregular entry of aliens in the United Kingdom.
The statute of limitations in Romania goes from 5 years to 10 years, depending on the gravity of the offence. Any procedural act that has to be notified to the defendant interrupts the running of the limitation period. However, regardless of the interruptions there is a maximum fixed time of the limitations period, which is the double of the initial one. No special rules seem to be applicable to the offence of supporting the illegal entry.

Conclusions from a comparative perspective view: the statute of limitations period in the majority of the countries studied depends on the gravity of the offence and the penalty provided for it, and begins to run at the moment when the crime was committed, with a special rule in Germany stating that it starts to count when the offence is completed. Cyprus and England and Wales and Northern Ireland do not regulate any statute of limitations for the offences analysed here.

As to the suspension and interruption of the running of the period of limitations, no special rules are foreseen with regard to this type of offence. Thus it will generally be interrupted by the commencement of a criminal investigation and can be suspended by legal reasons as the request for extradition, the procedure to lift immunity, the proceedings for settlement or ground of force majeur.

As regards the compliance with the EU Framework Decision 2002/946/JHA of the Council of 28 November 2002 it has to be recalled that this EU instrument does not contain any rule on limitation periods and thus there is no need to analyse this issue here.

B. IMPACT OF EU LEGISLATION

All states essentially comply with the Directive. Germany and Sweden implemented the Directive into national legislation. Hungary did not, because their national provisions were, due to the implementation of the Schengen acquis in 2002, already in compliance with the Directive. Poland did not adopt the Directive explicitly, but adopted new provisions with its EU accession in 2004. However, Poland does not comply with Art. 1 (3) FDUE, which requires a maximum sentence of at least eight years, if the offences endangered the lives of the person concerned or if the offences are committed on a commercial basis by a criminal organization. The Polish provisions only cover illicit entering/residing of polish territory.
In Cyprus Article 19A of Law 8(I)/2007 fully incorporated the FD. France implemented the FD in 2004, Italy in 2004, but introduced further amendments later. Latvia joined the EU in 2004. Romania adopted the FD in 2002 and in Spain the national legislation relied upon was from 2001. In UK, most of the legislation predates the FD with some amendments made in 2002.

In Spain some modifications are required to be made to the Spanish Penal Code, to include explicitly the conduct of facilitating the residence of people irregularly residing in Spain. Facilitating the immigration is sufficiently covered, but there are some fraudulent conducts aimed at assisting to reside those who previously entered illegally the EU, such as bogus marriage (for gain or not) that now are not foreseen.

The data collected shows that the application of the offences of support of illegal entry is generally in the mid to high range in the Member States. This is particularly evident in certain cases, such as in Germany, France, Hungary and Spain. As evidenced by the detailed tables which can be found in the preceding pages, the highest figures are those from Germany,. Significant are also the number of convictions in France, Hungary (with, in particular, a peak in 2008) and Spain.

In other States, such as in Italy, data indicates a lower application, but this because the available data issued by the Ministry of Justice only refers to a specific type of offence, among those provided for to combat the illegal entry activity. However, the number of convictions for the period considered (2009, 2010, 2011) is not negligible.

The number of convictions, however, decreased in the case of Poland, Romania and Sweden.

The level of penalties applied is, as a general trend, uniform. In a vast majority of Member States, the penalty actually applied is around two years. The penalty increases when aggravating circumstance concur, as indicated particularly in reference to Germany, Poland and Spain, and in these cases the punishment tends to be around three years or, in some cases, between three to five years.

In any case, as indeed happens also for other offences taken into consideration, the maximum sentence in the trend line, is never or rarely applied.
In general, because of the penalty level, the suspension of the sentence is not uncommon. In certain cases, the use of the suspension occurs in approximately 50% of cases (France and Germany), in others this percentage is much higher (Lithuania and Romania) and in others lower (Sweden, where the use of the suspension can be defined as limited).

With regard to the "sanctions other than imprisonment", the data collected does not identify general trends.
3. Diagnosis, recommendations and proposals

3.1) Diagnosis

3.1.1) Definition of the offences
3.1.2) Penalties
3.1.3) Aggravating and mitigating circumstances
3.1.4) Relevant conclusions on the convergence/divergence in settlement, jurisdiction and statute of limitations
3.1.5) Conclusions with regard to each of the five offences
  3.1.5.1) Child Pornography
  3.1.5.2) Drug trafficking
  3.1.5.3) Money laundering
  3.1.5.4) Fraud
  3.1.5.5) Illegal entry
3.1.6) Conclusion with regard to statistics

3.2) Recommendations and proposals

3.2.1) Minimum rules on the definition of criminal offences
3.2.2) Aggravating circumstances and aggravated offences
3.2.3) Minimum rules on sanctions
3.2.4) Statistics
3.2.5) Settlement of minor cases
3.2.6) Jurisdiction
3.2.7) Statute of limitations:
3.1) Diagnosis

The following section sets out conclusions reached in the study in relation to each of the five offences showing how far the Member States have implemented the requirements set out in the relevant EU Framework Decisions and/or Directives.

3.1.1) Definition of the offences

Concerning the definition of the offenses, the following positive and negative elements of assessment arise from the horizontal comparison of the results obtained in the five taken offences.

Positive results of the diagnosis. It can be concluded that the relevant EU legislation has produced a considerable level of effective harmonization in the national legislation of the Member States, even if some differences and gaps in the implementation still exist. The main punishable conducts of the five studied offences are foreseen in almost all of the national legislations.

It is important to note that implementing legislation was unnecessary in many jurisdictions since the relevant offences already existed. In particular this applies to drug trafficking in some Member States. But even in this case, the national legislation has been and continues to be amended with regard to the lists of prohibited narcotic drugs or precursors contained in the international conventions or EU regulations.

Negative results of the diagnosis. The Member States did not always implement in an accurate way the framework decisions and the directives, producing important gaps in the implementation:

In some cases, the punishable conducts listed in the FD or directives are implemented but limitations not foreseen in the EU legislation or grounds of exclusion are introduced. For example, in the case of child pornography, in France taking, recording or transmitting a picture or representation of a minor is punishable only when it is intended to disseminate it but not when
the conduct is only carried out for personal use. In illegal entry the Polish law only refers to the Polish territory and thus falls short of the Directive which refers to the territory of any EU Member State.

The national rules on *forms of (secondary) participation and attempt* do not always comply with the FD or directives. In child pornography the attempt is not punishable, in all Member States. For in the Romanian legislation, the attempt is punishable only when the offence is committed by using a computer system or computer data storing device. Concerning money laundering, in Italy and Sweden attempt is in some cases not covered. In illegal entry attempt is not always punishable in Italy, Latvia and Sweden, as it is required by the Directive (2002/90/EC).

Some definitions used in certain national laws do not exist or do not comply with the FD/directives. For example in relation to the offences of child pornography, in Latvia the offence of traffic of pornographic or erotic materials does not refer to the definition in the FD 2004/68; in Romania the definition also does not comply entirely with the FD and there is no definition of “child pornography” set out in the Spanish Criminal Code.

The wording of the FD or Directive is not always used in the national legislations. For example in fraud with no cash means of payment, it is very difficult to find the wording of the Article 2(c) of the Framework Decision in the laws of the different countries, concerning the offences related to payment instruments.

One can distinguish between technical inconsistencies, absolute absence of implementation and the decision to not to implement completely a FD and/or a Directive. Where these terms are really relevant for the harmonization, the absence of definitions or accurate definitions (child pornography) and the misuse of the same terms used in the FD or directives, seem to be technical inconsistencies, rather than principled decisions to not follow the European rules. In the case of Cyprus, it is clear that this Member State has not implemented the child pornography FD, within the implementation period. This is an unacceptable failure to comply with an implementation obligation which should be remedied as soon as possible.

The remaining implementation deficits indicate that Member States do not always fully accept EU legislation in all its details. From the perspective of some of the members of the Editorial Team, this may be due to the fact that some national legislators do not fully agree with a
particular European provision and thus feel free to adopt a more “flexible” form of implementation. From the national perspective such a flexibility may allow to it adjust the relevant EU legislation to the national particularities, while from an EU perspective this may often imply a partial failure of implementation.

3.1.2) Penalties

Maximum penalties

Three framework decisions provide for maximum penalties (minimum maximum penalty formula): the FD on child pornography, drug trafficking and illegal entry. The FD on frauds with no cash means of payment and the Directive on money laundering do not provide for minimum maximum penalties. There are significant differences between Member States in both the first group (those measures which stipulate minimum maximum penalties) and the second group. In the first group, in relation to child pornography, there is a significant difference between the lowest and highest maximum sanction for the four offences: for acquisition or possession the lowest maximum sentence is 1 year in Germany (juvenile) and Spain and the highest 10 years in Poland and Romania; for distribution or transmission, the lowest maximum penalty is 1 year in Spain and 12 years in Italy (commercializing); for offering, supplying or making available child pornography the lowest maximum is 3 years in Germany (juvenile) and the highest 10 years in Romania; finally the maximum penalty for production is 1 year in Spain (use of altered voice or image) and at the other end of the scale 12 years in Italy (commercializing). The differences between Member States are very similar in drug trafficking, and sometimes they are substantial: for Article 2(1)(a) of the FD, the lowest maximum sentence is 2 years in Poland (for preparation) and he highest is life imprisonment in Cyprus and the UK. It is interesting to note that the remaining states are equally split in terms of setting their maximum sentences above 10 years or below 10 years. For cultivation and possession the lowest maximum sentence is 3 years in Poland and life in Cyprus. For the Article 2(1)(d) offence the lowest is 2 years in Poland and life (or a fine) in Cyprus. If we look at illegal entry, the first remark is that only Cyprus, Poland, Romania and the UK appear to fulfil the requirement of the Framework Decision concerning the minimum maximum penalty (custodial sentence with a maximum of not less than 6 years). Secondly we can realize that there is a big difference between the lowest maximum sanction (2 years in Sweden) and the highest maximum (UK at 14 years).

In the second group of offences (with no European rule on minimum maximum sanction) we find that the differences between States are similar. In money laundering the highest maximum
penalty is 14 years in Cyprus and the UK and the lowest maximum custodial sentence is 3 years in Latvia and Poland (facilitating). But even 4 states provide for the imposition of a fine without imprisonment. In frauds with no cash means of payment there is a significant difference too between the lowest and highest max sanction for the offences. For the basic offence of counterfeiting the lowest maximum sanction is 2 years in Hungary and the highest is 25 years in Poland although the other Member States are between 12 and 5 years. For receiving, obtain or possession under Article 2(c) the lowest maximum, sanction is 1 year and the highest is 14 years in England and Wales and Northern Ireland. For fraudulent use the lowest is 2 years and the Highest is 10 years in England and Wales. For offences related to computers the lowest is 6 months in Scotland and Northern Ireland and the highest is 12 years in Romania, although most other Member States fall somewhere around 5 years. Finally for offences related to specifically adapted devices the lowest maximum sanction is 6 months and the highest is 7 years in France.

Three conclusions can be drawn. First that the criminal policies of the Member States, concerning the penalties, differ considerably. Second that the Member States seem to consider that the penalties belong to the field of the criminal policy of every State and they are reluctant to accept obligations to approach the maximum limits of the penalties (illegal entry). Third that the differences among Member States are very similar with or without European provisions on maximum sanctions.

**Minimum penalties**

The FD and the Directive that have been studied do not provide for minimum penalties. Only six Member States stipulate minimum sanctions in their national laws: Germany, Italy, Poland, Romania, Spain and Sweden. In France there are minimum sentences only for recidivists. Where specified the lowest minimum penalties vary. In child pornography the minimum for all offences in Latvia is a fine whereas in Romania the minimum for all offences is 3 years. The minimum offences stipulated in Germany, Italy, Poland and Spain fall between this range. In drug trafficking the sentences vary greatly, for example for Article 2(1)(a) offence at the low end Sweden sets the minimum at 14 days, at the high end Italy sets it at 6 years. In money laundering the lowest minimum sentence of imprisonment set is 3 months in Latvia and Romania (Criminal Law Code offence). The minimum is set at 6 months in Germany, Poland, Spain and Sweden. Italy has the highest minimum sentence at 4 years for the basic offence. In frauds with no cash means of payment the lowest minimum penalty for counterfeiting is 6 months (Germany) and the highest 4 years (Spain). For offences related to computers the
minimum is 6 months in Italy and Spain and 3 years in Romania. In illegal entry the minimum for the basic offence for assisting in the entry or transit goes from 6 months in Poland to 4 years in Spain.

There are significant differences between States in relation to minimum penalties. The first difference is whether provisions on minimum penalties exist or not. Where these national rules exist, the minimum penalties are very greatly. The reason why some Member States do not provide provisions on minimum penalties is not the criminal policy, but the traditions and the special characteristics of each legal system, and it is important to have this in mind.

**Sanctions other than imprisonment and fines**

Only two FD provide for sanctions other than imprisonment and fines (drug trafficking and illegal entry). Regarding drug trafficking, the Framework Decision provides that where appropriate confiscation orders should be made, but only 7 states provide for confiscation or forfeiture orders. The States provide a range of other sanctions. These include, community service in 2 states, restricted movement in 4, restriction on work related rights in 6, parental rights can be subject to restrictions in 3 states, disqualification from driving is provided in 3, loss of civic rights in 6 and finally rehabilitation orders in 4. In illegal entry the FD foresees confiscation and prohibition of from undertaking certain professions. Confiscation (general or specific confiscation of the vehicle) is foreseen in all of the countries. Not all the States provide for the prohibition of from undertaking certain professions.

In child pornography, money laundering and frauds, without any European rule, all Member States provide for a varied range of sanctions other than imprisonment and fines.

The sanctions other than imprisonment and fines seem to belong to the special characteristics of each Member State, not having a substantial impact in the common fight against crime, except in some special cases such as confiscation and prohibition of from undertaking certain professions. In these special cases, the sanctions can have an impact in a European criminal policy. Some Member States seems to be reluctant to accept rules on penalties other than prison. It is particularly worrying in the case of the confiscation which is a very useful instrument for a common criminal policy.
Sanctions against legal persons

Only the Directive on money laundering does not specify the sanctions for imposition on legal persons. The other four FD only suggests sanctions, but the use of these sanctions is not compulsory. The situation is not very different whether they are mentioned or not.

As said, the Directive on money laundering does not specify sanctions for legal persons but the Member States do it. The sanctions imposed vary and include exclusion from public aid in 5 states, restriction on commercial activity in 5, judicial supervision in 2, judicial wind-up in 5, confiscation and forfeiture orders in 2, publication of the decision in 3, in France a prohibition on making certain payments can be imposed, in Italy any licenses can be revoked and prohibition on advertising in 2 states.

The FD on child pornography provides that sanctions against legal persons may include in addition to fines, other penalties such as exclusion from entitlement to public aid; disqualification, judicial supervision and winding up. These are optional and their use varies in the different States. None of the Member States studied include all the above sanctions and some include additional ones.

Referring to drug trafficking, the Framework Decision provides that in addition to fines states may also impose other sanctions (exclusion from benefits or public aid, disqualification from the pursuit of commercial activities, judicial supervision, judicial winding-up order, closure of establishments and confiscation). Not all States provide these sanctions and none provide all of them. Exclusion from public aid is set out in the laws of 6 states, restriction on commercial activity in 5 with the closure of establishments in 3, judicial supervision in 2, wind-up in 3 and finally confiscation and forfeiture orders in 4.

In frauds with no cash means of payment the Framework Decision suggests four sanctions, in addition to fines, for imposition against legal persons. None of the states include all these suggested sanctions and very few include even some of them. Exclusion from public aid is available in 5 states, restriction on commercial activity in 4, judicial supervision in 2 and wind-up in 5. Additional sanctions include confiscation or forfeiture, publication of the decision, prohibition on drawing cheques and making other payments and prohibition from advertising.
Referring to the sanctions against legal persons in illegal entry, the Framework Decision under provides that sanctions against legal persons may include in addition to fines, other penalties like exclusion from entitlement to public aid; disqualification, etc. Not being compulsory the use of these other sanctions, the situation is varied in the different States.

In the European legislation studied, defining the sanctions against legal persons is understood as belonging to the competence of the Member States. For this reason the Directive does not provide for these sanctions and the FD only suggest sanctions. The situation is very similar in any case. One reflection that can be made is that it is not easy to understand why confiscation, or even prohibition of from undertaking certain professions, is foreseen as a compulsory penalty, apparently only for natural persons, in two FD (drug trafficking and illegal entry) but it is not included as a compulsory penalty for legal persons. The same could be said, perhaps, referring to prohibition of from undertaking certain professions in illegal entry.

**Suspension of the sentence and early release**

There is an important degree of convergence in the suspension of the sentence and early release. In all Member States studied suspended sentences are available. Early release is also a possibility in all Member States studied.

**3.1.3) Aggravating and mitigating circumstances**

There is a short convergence between Member States, concerning the aggravating and mitigating circumstances. It is more relevant in the case of the aggravating circumstances and the situation is not very different in the case of the FD that provide for these circumstances and those that do not.

The Directive on money laundering and the FD on fraud with no cash means of payment do not provide for aggravating circumstances. In money laundering the only existing convergence which can be seen is in the inclusion of the aggravating circumstance of a large amount of money, and even then 3 States do not provide for this circumstance. In frauds, there is only a certain level of convergence in two aggravating circumstances: group or association and the high value of money acquired.
The other three FD provide for aggravating circumstances. In the case of drug trafficking, the FD only provide for two circumstances. Most of the Member States provide aggravating circumstances in connection with the amount of drugs and the commission within the framework of an organisation, the two circumstances foreseen in the FD. Out of these two circumstances there is a great divergence among Member States with regard to aggravating circumstances. In child pornography national legislation falls short of the FD’s demands in that all listed circumstances are not covered (in most cases only the commission in an organized form) nor do all specific child pornography offences contain any aggravating circumstances. In illegal entry the FD provide for two aggravating circumstances: if the aforementioned offences are committed for financial gain by a criminal organization or if the commission endangered the life of the persons concerned. Most of the countries include these two circumstances, but not all: Poland (endangering the life and organization) and Latvia (endangering the life).

The aggravating and mitigating circumstances are very connected, not only with the national criminal policy, but especially with the national traditions and the characteristics of each national legal system. This could explain why, even with very short lists of aggravating circumstances, the complete convergence and implementation is not reached. The most common aggravating circumstances seem to be the commission by a criminal organization, the financial gain and endangering the life of the victims.

3.1.4) Relevant conclusions on the convergence/divergence in settlement, jurisdiction and statute of limitations

The rules on settlement of minor cases, jurisdiction and statute of limitations have been studied in the 11 Member States, with a special view on the compliance of the domestic rules with the EU legal instruments, with the aim of identifying deficiencies and to assess the impact of the EU legislation on the national systems and on the harmonization of these rules.

Settlement of minor cases

In identifying the different diversionary measures or special proceedings in place to handle minor criminal offences, the problem identified is that many Member States do not have a definition of what is to be considered a “minor offence”. Only Latvia differentiates between administrative offences and criminal offences, in the ambit of the offences covered in this study, dealing with minor offences not regulated in the criminal code under the procedure for
administrative violations. Most systems regulate some kind of discretionary powers to discontinue the prosecution when there is no public interest in prosecuting and instead provide for alternative measures to the penalty for minor criminal cases. The systems that legally do not have discretionary powers in discontinuing the prosecution have procedural shortcuts and agreements to deal more efficiently with their overloaded justice systems. The procedural diversionary measures foreseen in each of the Member States studied vary greatly so that the same offence, even if sanctioned with the same penalty in one MS, would fall within the discretionary powers of the PP and end up with no prosecution (for example Germany), whilst in another MS, the case would only be shortened, by avoiding the public trial if a guilty plea is entered (Spain). Thus, even if harmonization is reached in defining the offences and establishing the penalties, the procedure will cause significant differences in the treatment of the same conduct and the final sanctioning.

However, these differences are acceptable since they stem from the differences in the national judicial institutions, the structure and powers of the police enforcement agencies and the institution of the public prosecution. In the short run the lack of harmonization in the handling of minor cases will continue to exist as no general harmonization is feasible or justified under the subsidiarity principle. In sum, within the single AJFS, even if there would be a complete harmonization of the substantive criminal law, the discretionary procedural powers would lead to different results depending on the choice of forum.

Three issues should be considered under this point: 1) the principle of equality within the single AFJS; 2) ensuring that the most serious crimes are effectively prosecuted and sanctioned in each MS; and 3) the effects of the lack of harmonization in the effective transnational cooperation. Answering these questions is beyond the scope of this study and was not its aim. However, attention should be paid to the possibility of at least trying to find a common definition of a “minor case” in the criminal field, where diversionary measures could be applied in each MS, or the other way round, establish a certain threshold or certain offences, where the discretionary powers should preferably be restricted.

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However it has to be noted that presently there is a draft law in Latvia reforming the scope of the administrative offences. This law is at this moment (5th October) under the second reading in Parliament. The passing of this law could affect some of the statements made here, which are based on the national reports sent by the end of 2011.


**Jurisdiction**

In all the eleven countries studied the basic rule on jurisdiction in criminal matters is based upon the principle of territoriality: the criminal law applies to all offences committed within the territory of the State and generally the elements to identify where the offence has been committed do not present significant differences. More divergences are visible with regard to the rules on extra-territorial jurisdiction. The 11 countries studied provide for the extraterritorial extension of their jurisdiction based on the active nationality or personality principle. But the application of this principle is subject to different conditions: while some countries allow the prosecution of the offences studied here when committed abroad by one of their nationals, other countries extend the extraterritorial jurisdiction also to foreigners who have become citizens after the commitment of the offence (naturalized citizens), or to permanent residents even if they do not have the citizenship of the relevant state. Other countries may require also the filing of the complaint by a high rank official (for example, the General Public Prosecutor) or the victim to prosecute the crime committed abroad. The extraterritorial jurisdiction based on the nationality (or residence) of the perpetrator is still as a rule subject to the condition of double criminality and to a certain penalty threshold. The requirement of the double criminality for applying the principle of active personality has been traditionally justified on the basis of the legality principle that has to be respected in the ambit of the criminal law. However, most countries studied make an exception to this general rule for the offences studied here.

The idea of sovereignty (clearly present in the EU MS and in their criminal legislation) may explain why the national legal framework still subjects the extension of the extraterritorial jurisdiction in criminal matters to many limitations. This shows that while the concept of the European citizenship is trying to be developed and implemented in other areas, in the criminal prosecution, the exercise of jurisdiction is still very much linked to the territory and to the national citizenship, both traditional elements of the sovereign state.

If the prosecution of offences committed by a national (or a resident in one of the MS) abroad, is generally foreseen, the extraterritorial jurisdiction based on the passive nationality or personality principle is much more restricted. First the passive personality principle is not provided for in all countries, and in those countries where it is foreseen, it is subject to double criminality requirement, to a certain minimum penalty or only applied when the victim has suffered a serious harm.

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5 As stated above Sweden also applies the principle of active personality to citizens of the Nordic countries.
These differences, although they do not seem to allow spaces of impunity with regard to the criminal offences studied, show that in this respect not all legislations have adapted their legal framework to the EU Directives studied here. Three different aspects should be highlighted here:

**Rules on jurisdiction for child pornography offences:** In particular, the Directive 2011/92 on child pornography includes precise rules to be implemented with regard to the extraterritorial prosecution of those offences. In this regard it has to be stated that the obligation expressed under Art. 17.3 and Art. 17.4 is not reflected in the legal framework of all countries. From the information gathered it appears that none of the countries studied has specific rules for extraterritorial jurisdiction to prosecute child pornography offences committed by means of ICT even for the cases where the server is located abroad. On the other hand, Art.17.4 which requires that the application of the double criminality principle does not impede the prosecution of child pornography crimes committed abroad (in cases where the extraterritorial jurisdiction is based on active or passive nationality or residence principle), is widely disregarded, especially in connection with the passive nationality principle: only very few countries allow the prosecution of child pornography abroad, based only on the grounds that the victim is a national or a resident of the relevant country.

The majority of countries seem to rely on the response of the criminal justice system of the country where the offence has been committed. This may explain the lack of special jurisdictional provisions in this aspect, but this approach, which is against the provisions of the Directive 2011/92 needs to be considered. First, this may have sense when the offence against the child is committed in another EU MS, as there is already some harmonization with regard to these types of crimes and each of the MS should be able to rely on the adequate protection of the victim regardless of his/her nationality. But the rules on extraterritorial jurisdiction are applicable also to offences committed outside the EU. If the provisions based on the passive nationality principle are not developed, this could cause that a European child that has been sexually abused in a country where such a conduct is not sanctioned, could not be prosecuted in the state of citizenship or residence of the child. The same applies if the jurisdiction based on the active nationality principle only applies when the double criminality principle is complied with. If these limitations have been historically accepted on the basis of non interference in the affairs of another state and in the principle of legality and foreseeability of the criminal law, the EU legislator has already made an option against the traditional approach in favour of a more
efficient prosecution of offences of child pornography. In the present context, to my mind it is not the moment to discuss if the active and passive personality principle should apply and the double criminality principle abolished, because this decision has already been adopted in the Directive 2011/92.

Therefore, the full implementation of Art. 17 of the Directive 2011/92 on child pornography should be sought and the non-implementation should lead to legal proceedings before the ECJ.

**Rules of jurisdiction for the rest of the offences studied:** The rules on jurisdiction (except money laundering where the EU instruments do not include rules on jurisdiction), that are provided for in the EU instruments for the other offences studied here, are widely complied with. Since the content is the same in the different framework decisions (drug trafficking, illegal entry and fraud with non-cash payments) they are considered together. The only mandatory provision contained is the application of the territoriality principle. The EU provisions on jurisdiction are complied with: the rules relating to extraterritorial jurisdiction based on the nationality principle and on the seat of the legal person that has benefitted from the crime, are not mandatory. In so far, logically, the impact of the EU legislation on the national provisions on jurisdiction with regard to these offences has been clearly insignificant. This has been the choice of the EU legislator, and the MS can decide how far they want to extend (or limit) the extraterritorial jurisdiction for the prosecution and sanctioning of these crimes.

It should be considered whether the EU should advance in the direction set out with regard to the offence of child pornography, and require that the MS also developed rules for extraterritorial jurisdiction with regard to these other serious offences. This would represent a step forward in the development of a Single Area of Freedom, Security and Justice (AFSJ), allowing each of the MS to prosecute crimes committed in the territory of the EU, if they have some link to their state. This approach would deepen the idea of blurring national borders and departing from the traditional view that each country shall not intervene in the sovereign power of the other countries. However, such an approach is not exempt from problems. First, it should require further harmonization, in the substantive as well as in the procedural criminal law, to overcome the criticisms based on the legality principle. Second, the more the rules on extraterritorial jurisdiction are expanded, the more the conflicts of jurisdiction between the MS will arise. As long as there are no binding rules and procedures for solving the conflicts of jurisdiction and avoiding parallel proceedings against the same defendant, this approach should
not be chosen. This issue is not further explored (how to regulate the conflicts of jurisdiction in the EU and if the limitation of the extraterritorial jurisdiction would be one of the possibilities, or rather one of the problems), since it falls out of the scope of this study.

**Rules of jurisdiction regarding legal persons:** The national reports do not reflect any specific rules on jurisdiction for offences committed by legal persons or in the benefit of legal persons. It is not possible to conclude if this is due to the formulation of the question (“Which are the general rules and are there any specific rules on jurisdiction for the analysed offences?”), or due to the absence of such special rules. Only one report made a reference to the legal persons in this regard. This is why it is concluded that the same rules are applied in cases of corporate criminal liability, but it may be doubted if they are applied in practice. As no definitive conclusion can be established on this issue, we propose that the application of these principles to the offences committed by legal persons, should be further studied.

**Statute of limitations**

Finally, the regulation of the lapse of time after which the prosecution of an offence is barred, presents huge differences: the UK does not provide for any statute of limitations, whilst in other countries it is equal to the penalty that could be imposed, in others it is double time of that penalty. The grounds for suspending the period of time also differ. Usually the commencement of a criminal investigation leads to the definitive suspension of the running of the time limits, but in some countries there is also an absolute maximum period of time for sanctioning after the suspension of the statute of limitations.

The offences studied in the selected 11 MS, though presenting differences, seem to be adequate and justified, promoting an efficient administration of justice and taking into account the aim of the punishment.

The exception may be seen in the common law systems studied, where there is no statute of limitations, and thus it could be thought that the aims of the penalty are not properly dealt with. However, in these systems, the absence of statute of limitations is counterbalanced by the broader discretionary powers to drop the prosecution. Nevertheless, the different time periods of the statute of limitations may lead to some transnational crimes being prosecuted in those countries which do not apply any statute of limitations. The lack of rules regarding the choice of forum in European transnational criminal cases, may generate some further uncertainty: for
example, if there is a connection to the UK territory and the offence that cannot be prosecuted in any other country because of the lapse of time of the statute of limitations, it could still be prosecuted in the UK. Some thought should be given to these discrepancies and its impact in the building of a single AFSJ.

3.1.5) Conclusions with regard to each of the five offences

3.1.5.1) Child Pornography

With regard to settlement of minor cases Article 15(1) of Directive 2011/92/EU states that “Member States shall take the necessary measures to ensure that investigations into or the prosecution of the offences referred to in Articles 3 to 7 are not dependent on a report or accusation (...) and that criminal proceedings may continue even if that person has withdrawn his or her statements”. Several of the countries analysed, provide for the possibility to terminate the criminal proceedings upon the agreement or settlement between the victim and the offender. This is the case at present for some of the child pornography offences in Latvia and also in Germany. Consideration should be given to whether these rules should be revised with a view to the implementation of the Directive.

With regard to the rules on jurisdiction all eleven systems studied allow the prosecution of national offenders abroad. In this sense they comply with Art. 8(1) of the FD of 2004 and Art. 17.1 of the Directive of 2011. According to the national reports it seems that these rules on jurisdiction are also applicable to legal persons, except in Romania, where they are specifically excluded.

Finally with regard to the regulation on the statute of limitations, with a view to the compliance with the EU FD of 2003 (Art. 8(6)) and the Directive of 2011 (Art. 15(2)), requires the Member States to ensure the possibility of prosecuting the crime “for a sufficient period of time after the victim has reached the age of majority”) special attention has been paid to the suspension and extension of the terms of the statute of limitations. The common law systems studied (England and Wales, Northern Ireland and Cyprus) are not affected by this provision since their legal orders do not foresee any lapse of time that bars the prosecution of an offence. In all other countries, either via suspension of the period of the statute of limitations or by way of extending it, Art. 15 of the Directive of 2011 is complied with. This rule has directly caused legal reforms in several Member States granting that the domestic rules on statute of limitations do not impede
the prosecution of child pornography once the victim has reached the majority of age. No deficiencies have been observed with this regard in the legislation of the systems analysed.

### 3.1.5.2) Drug trafficking

Art. 8 of the FD 2004/757/JHA contains a provision on jurisdiction (but not on settlement nor on statute of limitations), which is identical to the provision on jurisdiction in art. 4 FD 2002/946 (illegal entry) and art. 9 FD 2001/413 (fraud). Refer to the conclusion stated under the latter offence since there are no special considerations to be made with regard to the offences related to drug trafficking.

### 3.1.5.3) Money laundering

With regard to the offence of money laundering only the possibility of some discontinuation of proceedings in cases of minor offences and the possibility of confiscating proceeds of crime outside the criminal procedure, are considered since the EU FDs on money laundering does not contain any provision with regard to jurisdiction or statute of limitations. As to the fulfilment with the requirements set out in the Framework Decision 2001/500/JH, and the Framework Decision 2005/212/JHA it has to be stated that only art. 3 of the FD 2001/500 and art. 3(4) of FD 2005/212 would apply to this point. Art. 3 of the FD 2001/500 states that "Member States may exclude the confiscation of property the value of which corresponds to the proceeds of crime in cases in which that value would be less than EUR 4000." The national reports do not specifically address this issue, except the Hungarian report where it is set out that it has not provided for such a possibility. Art. 3 of the FD 2005/212 provides for the possibility of using other than criminal proceedings to deprive the perpetrator of the property. The issue as to how far the different Member States apply administrative measures to deprive the perpetrator of the property in cases of money laundering, without waiting for the result of the criminal procedure should be further analyzed: the synergy between administrative proceedings (or the like) and criminal prosecution of money laundering is considered essential for an effective fight against this type of crime, very often linked to transnational organized crime. However, this topic concerning precautionary or provisional measures regarding the proceeds of crime, fell out of the scope of this study on criminal sanctions.

In sum, with regard to money laundering:
1) since the rules on settlement and diversionary measures to the criminal prosecution are not mandatory, the EU FD is complied with;

2) there is no harmonization on the way of handling minor cases in the different MS;

3) for the efficiency in combating the offence of money laundering, which is visibly under-prosecuted in all Member States studied, the possibility set out in art. 3 of the FD 2005/212 should be further explored and developed.

3.1.5.4) Fraud

The Framework Decision 2001/413/ does not contain any provisions regarding settlement of minor cases or statute of limitations. Regarding these two topics we refer to the general conclusions above. The EU FD on fraud related offences with non-cash means of payment, includes two provisions on jurisdiction (arts. 9 and 10) and, according to the national reports they seem to be complied with in all Member States studied, except in Romania, which does not seem to comply with the requirement set out in art. 9(1)(c) of the FD 2001/413 (application of the extraterritoriality principle if the offence has been committed for the benefit of a legal person that has its head office in the MS).

It is to be noted that, the offences covered by the EU instruments regarding fraud might entail personal and/or corporate criminal liability. With regard to the latter, in many of the countries studied the practice on corporate criminal liability, although legally foreseen, is scarcely applied. Therefore the prosecution of legal persons based on the extraterritoriality principle, might have no relevant impact in practice. This may explain why most countries do not provide for special rules on jurisdiction for the prosecution of legal persons for frauds committed outside their country for the benefit of a domestic corporation, and rely on the general rules on extraterritorial jurisdiction or a broad interpretation of the principle of territoriality.

In sum, it can be concluded:

1) that the FD 2011/413 is generally implemented with regard to the rules on jurisdiction;

2) that there has not been a legal harmonization of rules of jurisdiction as a consequence of the implementation of this EU FD, since the principles governing these rules were already quite similar before the EU FD was implemented;
3) no special measures seem to be needed in order to comply with arts. 9 and 10 of the FD 2011/413;

4) it seems that the absence of special rules regarding rules on the prosecution of legal persons based on the principle of extraterritorial jurisdiction may be explained by the scarce number of such prosecutions.

3.1.5.5) Illegal entry
As stated for the offences of fraud with non-cash means of payment, the FD 2002/946/, only contains provisions regarding to jurisdiction (arts. 4 and 5), and not on settlement and statute of limitations. Arts. 4 and 5 of this EU FD correspond with arts. arts. 9 and 10 of the EU FD 2001/413/ (on frauds). The same conclusion stated under the offence of fraud above is applicable to the offence of illegal entry.

3.1.6) Conclusions on statistics
With regard to the data on the practical implementation of the sanctioning system established in the 11 Member States studied with regard to the five types of offences selected, it must be affirmed that such data only give general indications and trends, but are in no way conclusive. Most of the Member States studied do not keep complete statistical data on the criminal justice system in general not to say with regard to the sanctioning of each of the type of offences. The differences in the level of accuracy and detail between the 11 Member States are enormous and the different statistics refer to diverse time periods. Whilst Germany and UK have a very developed statistical system, other countries only provide general numbers and regarding to general categories of offences, but not on sanctioning of the individual offences studied or early release (for example Spain, or Cyprus). Even countries which have high quality statistical databases, in many occasions do not have separate data for the individual offences but only with regard to the general type of offence (for example, not distinguishing child pornography with computer systems or not) or do not provide separate information on non-custodial sanctions, or on suspended sentences. All this has posed an additional difficulty in making an appropriate assessment of the real practice of sanctioning and prosecution of the offences studied and on the effective implementation of the European legal instruments.

The team has attempted to fill the gaps in the statistics by reviewing judicial decisions and interviewing practitioners. Due to the lack of statistical information, the review of judicial
decisions has proved to be useful in Spain or in Italy. However, the information gathered in this way or by interviewing practitioners cannot be used to draw valid and conclusive conclusions on sanctioning in practice, but only give an approximate snapshot of the practice in the relevant country. It is important to note this fact because, for the review of judicial files and sentences which has been done in some countries covering certain courts and only a certain short period of time would have taken years to conduct on a broader and country wide scale. Secondly, the practitioners interviewed recognized themselves that they were not aware of the general practice and could only give some information of what they had seen in their own court room or their general impression. In sum, where statistics are lacking, the practitioners mainly state that they cannot provide accurate and reliable information. Their experience varies greatly, depending on the type of court, the jurisdiction and the seniority of the relevant judge interviewed, even the information gathered from different persons in the same country may offer quite different pictures. Further it is not possible to identify a certain type of judge or court which can provide the right information on the offences studied, as can be done, for example, with mutual legal assistance or European Arrest Warrant cases. It can be concluded that, in those countries where no official statistics are carried out, no conclusive data can be obtained in the timeframe of the project.
3.2) Recommendations and proposals

3.2.1) Minimum rules on the definition of criminal offences

Clear progress has been made to establish minimum substantive criminal law rules with a view to (further) approximation of the criminal laws of the Member States (cf. Articles 83 (1) and (2) and, with regard to the Union's financial interests, Article 325 TFEU). Of course, there always remains certain discretion of Member States when implementing this legislation. While full implementation is required by the Treaty, Member States are always faced with the task of having to adjust their traditions and principles in their domestic criminal law to new EU requirements. In this study some gaps in the implementation have been identified. Mostly, the reason of these gaps is the perception in the national legislator that the European rules are not respecting the principles of subsidiarity and legitimate purpose.

As said by scholars⁶, the principle of subsidiarity is respected in fields of criminal law when the offences are by trend committed transnationally and cannot be prevented on national level only, or when the impact of the offence does not stop at the borders. European legislation can be regarded as legitimate and proportionate only if criminal law is used in order to safeguard the fundamental interests of its citizens. The opinion of the majority of the Team, is that in some cases, it can be necessary a detailed explanation in the preamble of the new directives about the reasons why the European legislator considers to be necessary a European legislation and how the above-mentioned principles are respected. It can help to get the collaboration of the national legislators to implement them correctly. This study shows that in the past not all Member States have abided by the letter of the law when setting out all the elements of the offences defined in EU legislation. The new Directives should be implemented more accurately by the Member States. Supervision by the European Commission of the implementation of EU legislation is a necessary to ensure that Member States are fulfilling their obligation to implement the EU legislation adopted as well as the objectives of such legislation. If the directives respect the essential principles (mainly the principles of legitimate purpose and subsidiarity) the European Commission should negotiate with the Member States the complete and accurate implementation and in case of doubts the Court of Justice of the EU should establish who is

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right: the European Commission or the Member State that decided not to implement a Directive or a part of a Directive.\(^7\)

### 3.2.2) Aggravating circumstances and aggravated offences

Although arguably the use of aggravating and mitigating circumstances belongs in the category of differences amongst the legal systems and traditions of Member States which are to be respected in line with Article 67 TFEU; it may be useful for harmonisation and the vision of a European criminal policy to establish in the Directives specific aggravating circumstances referring to factors of special relevance to the offence, with a compulsory effect if appropriate (i.e.) use of computer network in child pornography or significant value in money laundering/fraud. There are also some factors which are relevant because of an EU nexus (i.e.) where against European currency. In general we could say that it is deemed appropriate, for these and some other aggravating factors directly connected with the legitimate purpose of the Directive, to be set out as compulsory that should be implemented by the MS. The way to find a balance between the respect of the traditions of the Member States and the need for harmonization and approximation with regard to aggravating circumstances can be found in establishing only compulsory rules on the aggravating circumstances that are strictly necessary from the point of view of the legitimate purpose of the Directive. Other aggravating or mitigating circumstances can be just recommended. And finally, in the Member States having a Common Law system, the implementation in the statute cannot be necessary if the circumstances are foreseen in the case law. This assessment can only be conducted for each offence individually. It would include an analysis of the offence in question and whether it is necessary for particular aggravating factors to be highlighted or if they can be adequately accommodated by general aggravating factors which exist in all Member States.

### 3.2.3) Minimum rules on sanctions

Whilst Article 83 (1) TFEU now gives the EU a clear competence to harmonize not only offence definitions but also “sanctions”, a general view held by in various Member States is that this competence does not go beyond the ECJ’s Trias (dissuasive, effective and proportional) established in the Greek Maize case.\(^8\) Here the view is that full compliance with the mandate of

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\(^7\) Article 258 and following of the TFUE

\(^8\) Case 68/88 Commission v Greece, 21 September 1989. The opinion of the project’s Editorial Team is not conclusive or unanimous on this point with some members believing that the EU is entitled to go further then these general concepts and to move towards a
Art. 83 TFEU entails further secondary legislation and supervision of Member States’ implementation regarding the existing instruments. The problems can come from mainly from the vertical coherence. The opinion of the majority of the team is that the inner coherence (vertical coherence) must be respected, except in the case that the particularities of a national legislation can seriously interfere the horizontal coherence of the European rules or can make impossible a necessary European criminal policy. The requirements of the vertical coherence should be established in the process of the creation of the European legislation.

In most of the States the Judges have a wide discretionary power. As said before, in most of the countries the range of the penalties contained between the maximum and the minimum limit is very wide or even extremely wide (for example in France). If the new directives only establish maximum penalties there is a risk that they will not have a real influence on the penalties in practice. So, it is recommend that within the directives minimum penalties for those relevant aggravating factors directly connected with the legitimate purpose of the Directive. Although when setting out minimum sanctions, consideration will need to be given as to whether this is a practice across Member States. If necessary, a lack clause can be established for the Member States having an insurmountable problem of vertical coherence.

Some gaps still remain in the implementation of the penalties which should be solved; in particular with illegal entry (maximum penalties and prohibition of undertaking certain professions) and with drug trafficking (confiscation). A negotiation should be undertaken with the Member States to fill these gaps, especially in the case of confiscation.

The minimum maximum formula already used in some EU measures goes some way in establishing some consistency across Member States, whilst providing the room for them to impose higher sanctions where deemed appropriate.

Sanctions for legal persons is another area where further work is necessary, at least as a start in those Member State which accept the criminal responsibility of legal persons. Overall there is an evident discrepancy across Member States in terms of the liability of legal persons, the available sanctions and their imposition. It is an area which would benefit from greater focus if consistency and coherency is to be established.

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European criminal policy, but only if the offences are foreseen in article 83 (1) and (2) TFEU. This could also be achieved by taking steps to move towards a system of maximum and minimum penalties.
3.2.4) Statistics

Even without the existence of homogeneous statistics, the data collected reveals a clear difference between the penalties foreseen in the laws and the actual penalties imposed by the courts. The actual penalties imposed in practice are usually at the lower end of those foreseen in the law and often not anywhere near the maximum penalties. The data collected in this study shows that the maximum penalties are rarely pronounced. Only in Spain (which has strict detailed penalties corresponding to the basic and aggravated offences) and in Germany (with detailed scales of penalties) is the use of the maximum penalties not rare. In these two countries the aggravating circumstances lead to a compulsory increase of the sentence.

With regard to the data on the practical implementation of the sanctioning system established in the 11 Member States studied and with regard to the five types of offences selected, it must be affirmed that such data only gives general indications and trends, but are in no way conclusive. Most of the Member States studied do not keep complete statistical data on the criminal justice system in general let alone with regard to the sanctioning of each of the type of offences. The differences in the level of accuracy and detail between the 11 Member States is enormous and the different statistics refer to diverse time periods. Whilst Germany and UK have a very developed statistical system, other countries only provide general numbers and regarding to general categories of offences, but not on sanctioning of the individual offences studied or early release (for example Spain, or Cyprus). Even countries which have high quality statistical databases, on many occasions do not have separate data for the individual offences but only with regard to the general type of offence (for example, not distinguishing child pornography with the use of computer systems or not) or do not provide separate information on non-custodial sanctions, or on suspended sentences. This significant inconsistency between Member States has posed an additional difficulty in making an appropriate assessment of the real practice of sanctioning and prosecution of the offences studied and on the effective implementation of the European legal instruments.

The team has attempted to fill the gaps in the statistics by reviewing judicial decisions and interviewing practitioners. The review of judicial decisions has proved to be useful in Spain or in Italy. However, the information gathered in this way or by interviewing practitioners cannot be used to draw valid and conclusive conclusions on sanctioning in practice, but only gives an approximate snapshot of the practice in the relevant country. It is important to note this fact because, the review of judicial files and sentences which has been conducted in some countries
covering certain courts and only a certain short period of time would have taken years to conduct on a broader and country wide scale. Secondly, the practitioners interviewed recognized themselves that they were not aware of the general practice and could only give some information of what they had seen in their own court or their general impression. In sum, where statistics are lacking, the practitioners mainly state that they cannot provide accurate and reliable information. Their experience varies greatly, depending on the type of court, the jurisdiction and the seniority of the relevant judge interviewed, even the information gathered from different persons in the same country may offer quite different pictures. Further it is not possible to identify a certain type of judge or court which can provide the right information on the offences studied, as can be done, for example, with mutual legal assistance or European Arrest Warrant cases. It can be concluded that, in those countries where no official statistics are gathered, no conclusive data could be obtained within the timeframe of the project.

In order to accurately and usefully assess the practice it is necessary for statistics on sanctions in all of the States to be recorded in an homogeneous way. This would enable an adequate comparison between Member States, in order to assess the real compliance with the sanctions foreseen in the Directives and Framework Decisions, and to analyze the development of the criminality of the offences.

If the Union deems it desirable to evaluate the impact of its legislation in practice, it is recommended that the EU requires the collection of precise and complete statistics on criminal offences. At the very least these should be in reference to the offences which have been regulated at the EU level. It is acknowledged that this recommendation entails financial costs and training, but it is considered essential for the effective assessment of EU criminal policy, its justification and its effectiveness, as well as for the advancement of a higher level of harmonization.

3.2.5) Settlement of minor cases

It is believed that harmonization at the level of sanctions and substantive law may be hindered by the different praxis in closing cases or discontinuing prosecutions. It is recommended that a common definition of a “minor case” be established or alternatively that the threshold for applying diversionary measures allowing for the non-prosecution of a certain offence be set out.
Consideration should be given to whether the subsidiarity principle would allow the establishment of EU guidelines on the grounds for exercising prosecutorial discretion with regard to the offences studied.

It should be further considered how far in a single AFJS the broad differences in discontinuing the prosecution and the procedural handling of cases can produce spill-over effects, forum-shopping, inequality before the law, and/or cases of impunity.

3.2.6) Jurisdiction

Even if all Member States provide for the possibility of prosecuting the national offender who has committed abroad one of the offences studied, there is a risk that the conditions for this prosecution in the national legislations may in practice render such rules ineffective. Some members of the Editorial Team think that the conditions to exercise extraterritorial jurisdiction could be further harmonized to ensure the implementation of the EU legislation. This could increase the risk of conflicts of jurisdiction. However, the solution to the conflicts of jurisdiction to our mind, does not lie in the elimination or restriction of the principle of extraterritorial jurisdiction. This principle is necessary to guarantee the effective prosecution of the offense analysed here.

The application of the principle of extraterritorial jurisdiction to the offences committed by legal persons, should be further studied.

3.2.7) Statute of limitations

The different time periods of the statute of limitations may cause some transnational crimes to be prosecuted in those countries that apply longer or no statute of limitations. A clear set of rules on jurisdiction should be implemented to avoid spill-over effects or discretionary decisions on choice of forum.
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