



Ad-Hoc Query on Transposition of Article 8 of Directive 2011/36/EU

Requested by SK EMN NCP on 30 October 2012

Compilation produced on 18 December 2012

Responses from Belgium, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Slovak Republic, Slovenia, Spain, Sweden, United Kingdom (19 in Total)

Disclaimer: The following responses have been provided primarily for the purpose of information exchange among EMN NCPs in the framework of the EMN. The contributing EMN NCPs have provided, to the best of their knowledge, information that is up-to-date, objective and reliable. Note, however, that the information provided does not necessarily represent the official policy of an EMN NCPs' Member State.

1. Background Information

The Slovak authorities hereby kindly ask the Member States for providing the relevant provisions of their legal order on transposition of Article 8 Non-prosecution or non-application of penalties to the victims of Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

Slovak Republic is currently in the process of amending its Criminal Code. The Ministry of Interior of the Slovak Republic and the Ministry of Justice of the Slovak Republic would find your answers very helpful if sent as soon as possible in order to prepare background documents for expert meetings. Your responses would be appreciated also later during November.

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2. Responses¹

		Wider Dissemination? ²	Could you provide us with the relevant provisions of your national legal order on the transposition of Article 8 of Directive 2011/36/EU?
	Belgium	Yes	Belgium is a country where the discretionary prosecution principle does exist, that entitles the prosecutor to decide to prosecute or not (article 28 quarter, al.1 penal procedure code). Moreover, the existing Directive from the Minister of Justice concerning the investigation and prosecution of trafficking in human beings, called Col 01/2007 (entered into force on 1 February 2007) includes a separate chapter on the respect for the victims' rights. According to this Directive, the persons concerned must be seen first, and above all, as victims of trafficking in human beings, even if they violated the Belgian law (e.g. by their illegal residence situation, by violation of the social security legislation,...). In order to comply with the new EU directive, Belgium is considering modifying the Ministerial Directive and being more explicit.
	Czech Republic	No	This EMN NCP has provided a response to the requesting EMN NCP. However, they have requested that it is not disseminated further.
	Estonia	Yes	Estonia does not implement penalties to the victims of Human trafficking (persons under Directive 2011/36/EU of the European Parliament art 8).
	Finland	Yes	Legislative amendments are not considered necessary based on Article 8 of the Directive as competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings within the framework of the legislation in force. There are general provisions on possibilities for judges and prosecutors not to convict or prosecute a person if they do not consider it appropriate in a specific case. Also there are general principles on the guilt of a person committing a crime. The fact that a person committed a crime only because they were forced to do so may abolish the criminal responsibility that is needed in order to prosecute or convict a person. As an example here is a provision on waiving the punishment in court: The Criminal Code of Finland Chapter 6 – Sentencing Section 12 – Waiving of punishment A court may waive punishment if

¹ If possible at time of making the request, the Requesting EMN NCP should add their response(s) to the query. Otherwise, this should be done at the time of making the compilation.

² A default "Yes" is given for your response to be circulated further (e.g. to other EMN NCPs and their national network members). A "No" should be added here if you do not wish your response to be disseminated beyond other EMN NCPs. In case of "No" and wider dissemination beyond other EMN NCPs, then for the Compilation for Wider Dissemination the response should be removed and the following statement should be added in the relevant response box: "This EMN NCP has provided a response to the requesting EMN NCP. However, they have requested that it is not disseminated further."

EMN Ad-Hoc Query: Transposition of Article 8 of Directive 2011/36/EU

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			<p>(1) the offence, when assessed as a whole, taking into account its harmfulness or the culpability of the perpetrator manifested in it, is to be deemed of minor significance,</p> <p>(2) the perpetrator has committed the offence under the age of 18 years and the act is deemed to be the result of lack of understanding or of imprudence,</p> <p>(3) due to special reasons related to the act or the perpetrator the act is to be deemed comparable to an excusable act,</p> <p>(4) punishment is to be deemed unreasonable or pointless in particular taking into account the factors referred to above in section 6, paragraph 3 and section 7 or the actions by the social security and health authorities, or</p> <p>(5) the offence would not have an essential effect on the total sentence due to the provisions on sentencing to a joint punishment.</p>
	France	Yes	Article 8 of Directive 2011/36/EU has not been implemented in French law. This transposition is not considered necessary as, according to the discretionary prosecution principle, the competent judicial authority is “entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit”, as mentioned in the Directive. The decision whether to prosecute is at the discretion of the prosecution service, according to the circumstances of each case.
	Germany	Yes	Pursuant to Article 1(2) of Council Decision 2008/381/EC, the objective of the EMN is to meet migration and asylum information needs. The question raised here does not concern the area of migration. Article 8 of Directive 2011/36/EU deals with issues regarding the prosecution of victims of trafficking in human beings. These issues do not fall within the competence of the EMN and the National Contact Points. The German authority responsible for the implementation of Article 8 of Directive 2011/36/EU is the Federal Ministry of Justice. The Slovak side is left free to directly contact the Ministry of Justice.
	Greece	Yes	Greece has not yet integrated into domestic legislation Dir. 2011/36/EU. Nevertheless, based on relevant domestic legislation which is in force, there is a provision which refers to assistance to the trafficked victims and pursuant to this provision during the reflection period the aliens who have been characterized as victims of human trafficking, are not deported. In cases of illegal immigrants who are victims of trafficking, it is provided by the law the suspension of their deportation with an order by the Prosecutor to the Court of First Instance, until the issue of an irrevocable court decision for the perpetrator of the illegal acts. Also, in the cases of illegal immigrants who are trafficked victims, with their will, they can be repatriated safely and in dignity. When the victim is a minor, for his/her repatriation it is required the consent of the Prosecutor for minors based on the report by the Legal guardian of minors.
	Hungary	Yes	There was no necessary the legislation in connection with Article 8 of Directive 2011/36/EU. The Hungarian Criminal Code determines the constraint as grounds for the Preclusion of Punishability: any person who perpetrates an act under undue influence by coercion or duress, depriving him of the capacity to act according to his own free will shall not be liable for prosecution. The punishment may be reduced without limitation if the coercion or duress deprives the perpetrator of the capacity to act according to his own free will.
	Italy	Yes	Italy has not yet transposed Directive 2011/36/EU although the implementation procedure is ongoing.

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	Latvia	Yes	In order to implement Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, the inter-institutional working group established by the Ministry of Justice in autumn 2011 has elaborated the proposal providing that a person might be released from criminal liability if the criminal offence has been committed when a person was trafficked and was forced to commit a criminal offence. At present the Criminal Law Section 1 provides basis of criminal liability. Only a person who is guilty of committing a criminal offence, that is, one who deliberately (intentionally) or through negligence has committed an offence which is set out in this Law and which has all the constituent elements of a criminal offence, may be held criminally liable and punished. If a person has committed a criminal offence because a person was forced to do so, then a person cannot be prosecuted because a person's will was affected (deformed). In such situation it is impossible to identify all the constituent elements of a criminal offence, so the person cannot be held criminally liable. In Latvia no single criminal proceeding is initiated imposing penalties on victims of human trafficking for their involvement in unlawful activities.
	Lithuania	Yes	Article 147 of the Criminal Code of the Republic of Lithuania was amended on 30 June 2012 adding Article 147 (3) as follows: Article 147. Trafficking in human beings [...] 147 (3). The victim of trafficking in human beings may be released from criminal liability for the criminal act which (s)he has been compelled to commit as a direct consequence of being subjected to any of the acts referred in this Article.
	Luxembourg	Yes	Luxembourg has not yet transposed the Directive 2011/36/EU (deadline is on 6 April 2013). The Government is preparing a draft bill to transpose it ³ and it will be submitted to the Government Council in the following months for approval.
	Netherlands	Yes	The implementation of Article 8 in the Netherlands is primarily provided for by the principle of opportunity (artikel 167 Wetboek van Strafvordering (Criminal Code)), from which follows that a crime will be prosecuted only when this is considered to be opportune. This means that public prosecutors have the arbitrary decision power to initiate prosecutions. Within this framework, the public prosecutor's office will provide instructions to its prosecutors on the non-punishment principle of Article 8. In the situation a case would be prosecuted, the Criminal Code provides for the possibility of conviction without punishment (artikel 9a Wetboek van Strafrecht: schuldigverklaring zonder straf).
	Poland	Yes	The discussion on implementation of the art. 8 is still in progress. The current regulations with regards to this matter are the following:

³ Rapport sur l'état de transposition des directives européennes. Ministère des Affaires Etrangères, 10 May 2012, p. 29

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			<p>There are no express provisions in the Penal Code on relieving of responsibility someone who had been compelled to commit an offence. There are however several more general provisions that can achieve the desired effect. The first of those is the institution of a state of greater necessity.</p> <p>According to Article 26 of the Penal Code,</p> <p>“§ 1. Whoever acts with the purpose of averting an immediate danger threatening any well-being protected by law, if the danger cannot otherwise be avoided but the well-being sacrificed has a lower value than that of the well-being rescued, he shall be deemed to have not committed an offence.</p> <p>§ 2. Whoever rescues any well-being protected by law under the circumstances defined in § 1, or sacrifices well-being which does not represent a value manifestly greater than the well-being being rescued, he shall also be deemed to have not committed an offence.”</p> <p>This means that a person who was threatened or forced into committing a crime would not be criminally liable. Furthermore, if the crime entails minor harm to the community and the maximum penalty is lower than 3 years of deprivation of liberty, the court may waive the imposition of penalty if it adjudicates a penal measure at the same time (Article 59 § 1 of the Penal Code). When deciding on the extent of the harm to the community, the court will take into account whether the offender was forced into committing an offence.</p> <p>Finally, even if the above cannot be taken advantage of, “the court may also apply an extraordinary mitigation of the penalty in particularly justified cases when even the lowest penalty stipulated for the offence in question would be incommensurate” (Article 60 § 2 of the Penal Code). A case of a victim of THB being compelled to commit an offence would most probably be considered such a particularly justified case.</p> <p>Nevertheless, it is worth mentioning <i>Methodological guidelines for prosecutors carrying out or supervising criminal procedures dealing with trafficking in human beings</i>, which were developed by the Bureau for Organized Crime of the General Public Prosecutor’s Office. Guidelines are intended for use by the Public Prosecutors conducting cases concerning the crime of trafficking in human beings. The instructions include the issue of resignation from the prosecution of acts committed by victims of trafficking in human beings taking advantage of the existing legal measures (i.e. discontinuance of penal proceedings, a refusal to institute proceedings or an extraordinary mitigation of the penalty), which is of special importance, because actions of the victims can have features of such crimes as: illegal crossing the border or using falsified documents.</p>
	Slovak Republic	Yes	The Slovak Republic is currently working on the transposition of the Directive 2011/36/EU.
	Slovenia	Yes	There is no specific provision regarding this issue in the Specific Part of the Penal Code. However, article 8 of Directive 2011/36/EU is implemented in the provisions in the General Part of the Penal Code. It is generally interpreted that victims of trafficking in human beings have been compelled to commit criminal offences as a direct consequence of being subjected to trafficking in human beings. These cases are interpreted by the police and by the prosecution as cases of coercion, which the perpetrator was not able to withstand. As such these cases do not constitute a criminal offence and are not further prosecuted.

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	Spain	Yes	<p>Spain has mostly transposed, except for minor issues, the Directive 2011/36/EU in the Article 177 bis of the Criminal Code, Article 59 bis of the Aliens Act and Articles 140-146 of the implementing Regulation of the Aliens Act.</p> <ul style="list-style-type: none"> Article 177, paragraph 11 of the Spanish Criminal Code provides that: <p><i>“11. Without prejudice to application of the general rules of this Code, the victims of trafficking in human beings shall be exempt of punishment for the criminal offences that might have been committed while suffering exploitation, as long as participation therein has been a direct consequence of the situation of violence, intimidation, deceit or abuse to which they may have been subjected to and provided there is an adequate proportionality between that situation and the criminal act perpetrated”.</i></p> Article 59 bis of the Spanish Aliens Act (victims of human trafficking) states: <p>Paragraph 2: During the identification of the victims and the period of reestablishment and reflection (at least thirty days for the victim to decide whether he/she wishes to cooperate with the authorities in the investigation of the criminal offence and, when appropriate, cooperate in the ensuing criminal proceedings), any penalty administrative proceedings for infringements of Article 53.1. a. (illegal stay as a serious administrative offence) shall not be initiated.</p> <p>Paragraph 4: The competent authorities may declare the victim to be exempt from administrative responsibility.</p> Articles 140-146 of the Aliens Act Implementing Regulation regulate the temporary residence and work permits for humanitarian reasons granted to victims of human trafficking. In particular, Article 143.1 establishes <i>“the competent authorities working with the victim in the investigation of the criminal offence and in the ensuing criminal proceedings may propose to the competent Government Delegate or Deputy Delegate the victim’s exemption from the administrative responsibility in relation to the offence established in Article 53.1.a. of the Aliens Act”.</i>
	Sweden	Yes	<p>Sweden is currently implementing the directive and has conducted an analysis of the compliance of the Swedish legislation to the articles in the directive. The analysis resulted in that the Swedish legislation is in compliance with directive 2011/36/EU Art 8 through the following paragraphs:</p> <p>The Swedish Penal code 23 kap, 5§: <i>“If someone has been induced to be an accomplice to crime by coercion, deceit or misuse of his youth, innocence or dependent status or has been an accomplice only to a minor extent, the punishment imposed may be less than that otherwise provided for the crime. Punishment shall not be imposed in petty cases. This also applies where the issue is one of imposing a punishment provided for a person in a special position on an accomplice.”</i></p> <p>The Swedish Penal code 24 kap. 4 and 6§§: <i>“An act by a person, in cases other than those described previously in this Chapter, if committed out of necessity, constitutes a crime only if it is indefensible having regard to the nature of the danger, the injury caused to another and to the circumstances in general.</i></p>

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		<p>Necessity exists when a danger threatens life, health, property or some other important interest protected by the law. (Law 1994:458)” “If a person who, in a case where Sections 1-5 of this Chapter or Section 10 of the Police Act (1984:387) apply, has done more than is permitted, he shall nevertheless not be held responsible if the circumstances were such that he had difficulty in stopping to think. (Law 1994:458)”</p> <p>The Swedish Penal code 29 kap, 3 and 6 §§: “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:</p> <ol style="list-style-type: none"> 1. the crime was occasioned by the grossly offensive behavior of some other person, 2. 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, 3. the actions of the accused were connected with his manifestly deficient development, experience or capacity for judgement, 4. the crime was occasioned by strong human compassion or 5. the act, without being free from criminal responsibility, was such as is covered by Chapter 24. <p>The sentence imposed may be less severe than that prescribed for the crime in question if this is called for having regard to the penal value of the crime. (Law 1994:458)”</p> <p>” If, in view of a circumstance described in Section 5 it is manifestly unreasonable to impose a sanction, the court shall grant exemption from sanction.”</p> <p>The Swedish Code of Judicial Procedure 20 kap 7 and 7a§§: “Prosecutors may waive prosecution (waiver of prosecution), provided no compelling public or private interest is disregarded:</p> <ol style="list-style-type: none"> 1. if it may be presumed that the offence would not result in another sanction than a fine; 2. if it may be presumed that the sanction would be a conditional sentence and special reasons justify waiver of prosecution; 3. if the suspect has committed another offence and no further sanction in addition to the sanction for that offence is needed in respect of the present offence; or 4. if psychiatric care or special care in accordance with the Act on Support and Service for Certain Persons with Functional Impairments (1993:387) is rendered. <p>A prosecution may be waived in cases other than those mentioned in the first paragraph if it is manifest by reason of special circumstances that no sanction is required to prevent the suspect from engaging in further criminal activity and that, in view of the circumstances, the institution of a prosecution is not required for other reasons. (SFS 1997:726)</p> <p><i>Section 7a</i> A decision to waive prosecution may be made even after the institution of a prosecution when circumstances emerge that, had they existed or been known at the time of the prosecution, would have led to waiver of prosecution. Prosecution may not be waived, however, if the defendant objects or after judgment has been rendered. (SFS 1981:1285)”</p> <p>The Swedish Code of Judicial Procedure 23 kap 4a§: “A preliminary investigation may also be discontinued</p> <ol style="list-style-type: none"> 1. if continued inquiry would incur costs not in reasonable proportion to the importance of the matter and the offence, if prosecuted, would not lead to a penalty more severe than a fine or
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			<p>2. if it can be assumed that prosecution will not be instituted pursuant to the provision on waiver of prosecution contained in Chapter 20, or on special examination of prosecution and if no Chapter 23 Preliminary investigation 123 substantial public or private interests would be ignored by the discontinuance of the preliminary investigation.</p> <p>If the conditions for discontinuance of a preliminary investigation under the first paragraph exist already before such investigation has been initiated, it may be decided that a preliminary investigation shall not be initiated.</p> <p>Decisions under this section shall be issued by a prosecutor. (SFS 1985--:13")</p>
	United Kingdom	Yes	<p>The UK relies on existing legislation and guidance to implement this article. Prosecutors Guidance sets general principles for prosecutors in determining whether proceedings for an offence should be instituted. The Court of Appeal has considered the approach to the equivalent provision in the Trafficking Convention and noted that implementation is achieved through three mechanisms: (i) the common law defences of duress and necessity; (ii) specific rules for the guidance of prosecutors in considering whether charges should be brought against those who are victims of trafficking; (iii) the ultimate power of the court to stay a prosecution in the event the duty on the prosecutor to exercise judgement is not properly discharged.</p> <p>Prosecutors should adopt a three-stage exercise of judgment. (i) Is there reason to believe the person has been trafficked? If so, then (ii) if there is clear evidence of a credible common law defence the case will be discontinued in the ordinary way on evidential grounds, but importantly, (iii) even where there is not, but the offence may have been committed as a result of compulsion arising from the trafficking, prosecutors should consider whether the public interest lies in proceeding to prosecute or not.</p> <p>There is legal guidance about human trafficking on the Crown Prosecution Service website: http://www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/#a30. Given the long common law tradition and prosecutorial discretion being a basic principle of our legal system we have identified no further action required to ensure compliance with this article.</p>
