I INTRODUCTION

The Mixed Committee at ministerial level (JHA) examined at its meeting on 15 March 2001 the principal outstanding questions in respect of the above proposals (the humanitarian clause in Article 1(2) of the draft Directive and the provisions on sanctions in Article 1(1), (3) and (4) of the draft Framework Decision) set out under point II of document 6766/01 DROIPEN 24 MIGR 15 COMIX 182. These questions were further examined by the JHA Counsellors group on 2 April 2001 and by the Mixed Committee at the level of ambassadors on 4, 11 and 25 April 2001.¹

¹ See documents 7671/01 DROIPEN 33 MIGR 23 COMIX 247, 8164/01 DROIPEN 38 MIGR 30 COMIX 299 and 8242/01 DROIPEN 39 MIGR 34 COMIX 308.
The Working Party on Substantive Criminal Law (Mixed Committee) examined at its meeting on 20 April 2001 the other outstanding questions regarding the two proposals on the basis of point III of DROIPEN 24. The texts of the two proposals resulting from the meeting are set out in Annexes I and II. Amendments made to the text as compared with document DROIPEN 24 are underlined.

The outstanding questions on the two proposals, apart from those dealt with in Mixed Committee at the level of ambassadors, are set out below. Certain minor points are set out in footnotes in the Annexes.

The European Parliament has been invited to give its opinion on the original initiatives by France by 17 November 2000. It has rejected the initiatives on 15 February 2001. ¹

II OUTSTANDING QUESTIONS

a. General reservations

The Finnish delegation has maintained a general scrutiny reservation on the two texts.

The two texts are subject to a parliamentary scrutiny reservation by the Danish, United Kingdom, Netherlands and Swedish delegations.

b. Recitals

It will be examined by the Legal Service of the Council to which extent there is a need for amendments or additions to the recitals of the Draft Directive and the Draft Framework Decision.

¹ PE 300.204.
c. **Relation to Article 27 of the 1990 Schengen Convention (Article 5 of the draft Directive and Article 8 of the draft Framework Decision)**

The draft Directive and the draft Framework Decision are to be regarded as a development of Article 27 of the 1990 Schengen Convention. The said Article consists of 3 paragraphs. Paragraph 1 has its legal basis within the Treaty Establishing the European Community whereas paragraphs 2 and 3 have their legal basis within the Treaty on European Union (see Council Decision 1999/436/EC of 20 May 1999 determining the legal basis for each of the provisions or decisions constituting the Schengen acquis\(^1\)).

Paragraph 1 of Article 27 is therefore related to the draft Directive and paragraphs 2 and 3 to the Draft Framework Decision. This is reflected in Article 5 of the draft Directive and Article 8 of the draft Framework Decision.

It should be clear with effect from which date Article 27 is repealed. It should be avoided that Article 27 is repealed before the Directive and the Framework Decision have been implemented in all the Member States.

The Legal Service of the Council will examine whether the proposed Articles in the two texts (Article 5 of the draft Directive and Article 8 of the draft Framework decision) need further adjustments.

d. **Jurisdiction (Article 4 of the Draft Framework Decision)**

All delegations which made comments on Article 4 were in favour of drafting it in line with already agreed Articles in other Framework Decisions.

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The Legal Service of the Council was of the opinion that the introduction of more far-reaching jurisdiction rules could be considered, taking into account the specific character of the conduct of illegal entry, transit and residence. Such rules could include an obligation to establish jurisdiction in cases where (i) an act forming part of the assistance has been performed on its territory, (ii) the offender has his or her habitual residence in its territory or, (iii) the offender is present in its territory.

A number of delegations thought that (i) was already covered by Article 4(a).

The representative of the Commission favoured a more far-reaching Article on jurisdiction.

e. **Legal basis**

The Commission has earlier entered a reservation on the legal basis. The Commission has explained its position in the Working Party on Substantive Criminal Law on 30 October 2000 and has announced that it will submit a formal note on the subject.

Certain delegations have earlier reserved their positions in respect of the legal basis.

Ⅲ **CONCLUSIONS**

The Article 36 Committee (Mixed Committee) is invited to examine the questions set out under II above with a view to reaching political agreement on the two instruments in the Mixed Committee at ministerial level (JHA) on 28-29 May 2001.
THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 61(a) and 63(3)(b) thereof,

(…)

Having regard to the initiative of the French Republic¹,

Having regard to the opinion of the European Parliament,

Whereas:

(1) (…)

(2) The Treaty establishing the European Community provides for the gradual creation of an area of freedom, security and justice, which means, inter alia, that illegal immigration must be combated.

(3) Consequently measures should be taken to combat the aiding of illegal immigration, whether in connection with unauthorised crossing of the border in the strict sense or for the purpose of sustaining networks that exploit human beings.

To that end it is essential to approximate existing legal provisions, in particular, on the one hand, the precise (…) definition of the infringement in question and the cases of exemption, which is the subject of this Directive and, on the other hand, minimum rules for penalties, liability of legal persons and jurisdiction, which is the subject of Council Framework Decision …/…/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence.

The purpose of this Directive (…) is to provide a definition of the facilitation of illegal immigration and consequently to render more effective the implementation of the Framework Decision …/…/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, in order to prevent that offence.

This Directive supplements other instruments adopted in order to combat illegal immigration, illegal employment, trafficking in human beings and the sexual exploitation of children.

This Framework Decision constitutes a development of the Schengen acquis that is covered by Article 1 of Council Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen acquis;

The United Kingdom takes part in the adoption of this Directive, in accordance with Article 8(2) of Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis;

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1 A reference to the OJ has to be inserted concerning the Framework Decision.
2 Some delegations thought that the recital stating that the Directive complements other action taken to combat illegal immigration, illegal employment, trafficking in human beings and the sexual exploitation of children ought to be kept. However, in order to be as general as possible and not become out of date, the reference to certain instruments has been deleted.
3 The reason for repealing Article 27(1) of the 1990 Schengen Convention should be explained in the preamble.
5 OJ L131 of 1.6.2000, p. 43.
(9) Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, is not participating in the adoption of the present Directive, and is therefore not bound by it, nor subject to its application. Within 6 months after the Council has decided on the present Directive, Denmark will decide whether it will implement it in its national law, in accordance with Article 5 of the Protocol on the position of Denmark;

HAS ADOPTED THIS DIRECTIVE:

Article 1
General infringement

1. Each Member State shall adopt appropriate sanctions on:

(a) Any person who intentionally assists or tries to assist a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens;

(b) Any person who, for financial gain, intentionally assists or tries to assist 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.

2. Any Member State may decide not to impose sanctions in regard of the behaviour defined in paragraph 1(a) for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned.
Article 2
Participation, instigation

Each Member State shall take the measures necessary to ensure that the sanctions referred to in Article 1 are also applicable to any person who is the accomplice or instigator of any conduct as referred to in Article 1(1)(a) or (b).

Article 3
Sanctions

Each Member State shall take the measures necessary to ensure that the conduct referred to in Articles 1 and 2 is subject to effective, proportionate and disuasive sanctions.

Article 4
Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before […].¹ They shall forthwith inform the Commission thereof. When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

2. Member States shall communicate to the Commission the main provisions of their national law which they adopt in the field covered by this Directive together with a table showing how the provisions of this Directive correspond to the national provisions adopted. The Commission shall inform the other Member States thereof.

¹ A majority of the delegations thought that the date to be inserted should be 2 years after the adoption of the instrument.
Article 5
Repeal

Article 27 (1) of the 1990 Schengen Convention shall be repealed as from […]

Article 6
Entry into force

This Directive shall apply from the day of its publication in the Official Journal of the European Communities.

Article 7
Addressees

This Directive is addressed to the Member States in accordance with the Treaty establishing the European Community.

Done at

For the Council

The President
ANNEX II

COUNCIL FRAMEWORK DECISION …/…/JHA

of

on the strengthening of the penal framework to prevent
the facilitation of unauthorised entry, transit and residence

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Articles 29, 31(e) and 34(2)(b) thereof,

(…)

Having regard to the initiative of the French Republic¹.

Having regard to the opinion of the European Parliament,

Whereas:

(1) (…) Title VI of the Treaty on European Union states that one of the Union’s objectives shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the member States in the fields of police and judicial cooperation in criminal matters;

(2) In this framework, measures should be taken to combat the aiding of illegal immigration, whether in connection with unauthorised crossing of the border in the strict sense or for the purpose of sustaining networks that exploit human beings;

(3) To that end it is essential to approximate existing legal provisions, (…) in particular, on the one hand, the precise (…) definition of the infringement in question and the cases of exemption, which is the subject of Directive 2000/…/EC defining the facilitation of unauthorised entry, transit and residence and, on the other hand, minimum rules for penalties, liability of legal persons and jurisdiction, which is the subject of this Framework Decision¹;

(4) It is likewise essential not to confine possible actions to natural persons only but to provide for measures relating to the liability of legal persons;

(5) This Framework Decision supplements other instruments adopted in order to combat illegal immigration, illegal employment, trafficking in human beings and the sexual exploitation of children².

(6) This Framework Decision constitutes a development of the Schengen acquis that is covered by Article 1 of Council Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen acquis³;

¹ A reference to the OJ concerning the Directive has to be inserted.
² Some delegations thought that the recital stating that the Framework Decision complements other action taken to combat illegal immigration, illegal employment, trafficking in human beings and the sexual exploitation of children ought to be kept. However, in order to be as general as possible and not become out of date, the reference to certain instruments has been deleted.
HAS ADOPTED THIS FRAMEWORK DECISION:

Article 1\(^1\)

Penalties

1. Each Member State shall take the measures necessary to ensure that the conduct defined in Articles 1 and 2 of Directive 2000/…./EC is punishable by effective, proportionate and dissuasive criminal penalties which may entail extradition.

2. Where appropriate, the penalties covered in paragraph 1 may be accompanied by the following measures:

- confiscation of the means of transport used to commit the offence;

- a prohibition on practising directly or through an intermediary the occupational activity in the exercise of which the offence was committed;

- deportation (…).

3. Each Member State shall take the measures necessary to ensure that, when committed for financial gain, the actions defined in Article 1(1)(a) and, to the extent relevant, Article 2, of Directive 2000/…./EC, is punishable by custodial sentences, with a maximum sentence of not less than [8 years], where they are committed in any of the following circumstances:

- the offence was committed as an activity of a criminal organisation as defined in the Joint Action of 21 December 1998, adopted by the Council on the basis of Article K.3 of the Treaty\(^2\);

- the offence was committed while endangering the lives of the persons who are the subject of the offence.

\(^1\) Certain possible linguistic changes to Article 1 were discussed. The question will be adressed when a revised text of Article 1 is established following discussions on the questions of principle regarding Article 1 in the Mixed Cimmittee at the level of ambassadors.

4. If imperative to preserve the coherence of the national penalty system, the actions defined in paragraph 3 shall be punishable by custodial sentences with a maximum sentence of not less than 6 years, provided that it is among the most severe maximum sentences available for crimes of comparable gravity.

Article 2¹
Liability of legal persons

1. Each Member State shall take the measures necessary to ensure that legal persons may be held liable for the conduct to be sanctioned in accordance with Articles 1 and 2 of Directive 2000/…/EC and committed (…) for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:

– a power of representation of the legal person, or

– an authority to take decisions on behalf of the legal person, or

– an authority to exercise control within the legal person,

(…)

2. Without prejudice to the cases provided for in paragraph 1, each Member State shall take the measures necessary to ensure that a legal person may be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission of the conduct to be sanctioned in accordance with Articles 1 and 2 of Directive 2000/…/EC (…) and committed for the benefit of that legal person by a person under its authority.

¹ It was agreed that the liability of legal persons should be the same as that for physical persons and that the Articles 2 and 3 should be drafted in accordance with the corresponding Articles in the Second Protocol to the PIF-Convention.
3. Liability of a legal person for the conduct to be sanctioned in accordance with Articles 1 and 2 of Directive 2000/…/EC (…) shall not exclude criminal proceedings against natural persons who are involved as perpetrators, instigators or accessories in the offences referred to in paragraph 1.

Article 3
Penalties for legal persons

1. Each Member State shall take the measures necessary to ensure that a legal person held liable pursuant to Article 2(1) is punishable by effective, proportionate and dissuasive penalties, which shall include criminal or non-criminal fines and may include other penalties such as:

(a) exclusion from entitlement to public benefits or aid;

(b) temporary or permanent disqualification from the practice of commercial activities;

(c) placing under judicial supervision;

(d) a judicial winding-up order.

2. Each Member State shall take the measures necessary to ensure that a legal person held liable pursuant to Article 2(2) is punishable by effective, proportionate and dissuasive sanctions or measures.

Article 4
Jurisdiction

1. Each Member State shall take the measures necessary to establish its jurisdiction with regard to the conduct to be sanctioned in accordance with Articles 1 and 2 of Directive 2000/…/EC and committed (…)

(a) in whole or in part within its territory; or
(b) by one of its nationals; or

(c) for the benefit of a legal person established in the territory of that Member State.

2. Subject to the provisions of Article 4 a, any Member State may decide that it will not apply, or that it will apply only in specific cases or circumstances, the jurisdiction rule set out in:

- paragraph 1(b);
- paragraph 1(c).

3. Each Member State shall inform the Secretary-General of the Council in writing if it decides to apply paragraph 2, where appropriate with an indication of the specific circumstances or conditions in which its decision applies.

Article 4 a
Extradition and prosecution

1. (a) Any Member State which, under its law, does not extradite its own nationals shall take the necessary measures to establish its jurisdiction over the conduct to be sanctioned in accordance with Articles 1 and 2 of the Directive 2000/…/EC when committed by its own nationals outside its territory.

(b) Each Member State shall, when one of its nationals is alleged to have committed in another Member State the conduct defined by Directive 2000/…/EC, and it does not extradite that person to that other Member State solely on the ground of his nationality, submit the case to its competent authorities for the purpose of prosecution if appropriate. In order to enable prosecution to take place, the files, information and exhibits relating to the offence shall be transmitted in accordance with the procedures laid down in Article 6(2) of the European Convention on Extradition. The requesting Member State shall be informed of the prosecution initiated and of its outcome.
2. For the purpose of this Article, a "national" of a Member State shall be construed in accordance with any declaration made by that State under Article 6(1)(b) and (c) of the European Convention on Extradition of 13 December 1957, where appropriate as amended by the declarations made with respect to the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, relating to extradition between the Member States of the European Union.\(^1\)

**Article 5**

International law on refugees

This Framework Decision shall apply without prejudice to the protection afforded refugees and asylum seekers in accordance with international law on refugees or other international instruments relating to human rights, in particular Member States' compliance with their international obligations pursuant to Articles 31 and 33 of the 1951 Convention on refugee status as amended by the protocol of New York of 1957.

**Article 6**

(…title to be inserted …)

1. If a Member State is informed of conduct to be sanctioned in accordance with Articles 1 and 2 of the Directive defining the facilitation of unauthorised entry, transit and residence, which are in breach of the law on the entry and residence of aliens of another Member State, it shall inform the latter accordingly.

2. Any Member State which requests another Member State to prosecute, on the grounds of a breach of its own laws on the entry and residence of aliens, conduct to be sanctioned in accordance with Articles 1 and 2 of the Directive defining the facilitation of unauthorised entry, transit and residence must specify, by means of an official report or a certificate from the competent authorities, the provisions of law that have been breached.

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\(^1\) OJ C 313, 23.10.1996, p. 12.
Article 7
Implementation

1. Member States shall adopt the measures necessary to comply with the provisions of this Framework Decision before [...] 1

2. Before […], Member States shall communicate to the General Secretariat of the Council and to the Commission the texts of the provisions transposing into their national law the obligations imposed on them by this Framework Decision. On the basis of that information and a written report of the Commission, the Council will, no later than […], assess the extent to which Member States have complied with this Framework Decision.

Article 8
Repeal

Article 27(2) and (3) of the Schengen Convention shall be repealed as from […].

Article 9
Entry into force

This Framework Decision shall enter into force on the day of its publication in the Official Journal of the European Communities.

Done at

For the Council

The President

1 A majority of the delegations thought that the date to be inserted should be 2 years after the adoption of the instrument.