ACADEMIC NETWORK FOR LEGAL STUDIES ON IMMIGRATION AND ASYLUM IN EUROPE

A NETWORK FOUNDED WITH THE FINANCIAL SUPPORT OF THE ODYSSEUS PROGRAMME OF THE EUROPEAN COMMISSION

RESEAU ACADEMIQUE D'ETUDES JURIDIQUES SUR L'IMMIGRATION ET L'ASILE EN EUROPE

UN RESEAU FONDE AVEC LE SOUTIEN FINANCIER DU PROGRAMME ODYSSEUS DE LA COMMISSION EUROPEENNE

DIRECTIVE 2001/51 CARRIERS LIABILITY SYNTHESIS REPORT

by Kay HAILBRONNER

&

Cordelia CARLITZ

STUDY ON THE "CONFORMITY CHECKING OF THE TRANSPOSITION BY MEMBER STATES OF 10 EC DIRECTIVES IN THE SECTOR OF ASYLUM AND IMMIGRATION" DONE FOR DG JLS OF THE EUROPEAN COMMISSION END 2007(CONTRACT JLS/B4/2006/03)

A Network coordinated by the Institute for European Studies
Un Réseau coordonné par l'Institut d'Etudes européennes
of the / de l'Université Libre de Bruxelles

and composed of academics of the following institutions / et
composé de membres du corps académique des institutions suivantes:
Université catholique de Louvain (B), Universidade Autonoma de Lisboa (P), Universidade Nova de Lisboa (P), Universität Salzburg (A), Radboud Universiteit Nijmegen (NL), University of Bristol (UK), Universitaet Konstanz (D), Universitaet Göttingen (D), Universidad Pontificia Comillas de Madrid (E), Università degli Studi di Milano (I), Université de Paris-Sud (F), Université de Pau et des pays de l'Adour (F), Vrije Universiteit Amsterdam (NL), Aarhus Universitet (DK), Umeå Universitet(S), Lunds Universitet (S), Åbo Akademi (FIN), University of Turku (FIN), Eötvös Loránd University (HU), University of Silesia (PL), Mykolas Romeris University (LT), University of Ljubljana (SLO), University of Latvia (LV)

TABLE OF CONTENTS

I. ACKNOWLEDGEMENTS

The present Synthesis Report has been elaborated for the European Commission by a Thematic Coordination Team, headed by Kay HAILBRONNER, Member of the Odysseus Network, who was supported by the four researchers Simone ALT, Cordelia CARLITZ, Georg JOCHUM and Markus PEEK. Special thanks go to Cordelia Carlitz who has prepared a draft version of this report and contributed actively to the final product you are holding in hands. Kay Hailbronner, in the capacity of Thematic Coordinator for this directive, retains sole responsibility for the content of this synthesis report. Sabine APPT, secretary to Kay Hailbronner, supported the team with her energy and organisational talent and was always receptive to listening to problems of all kinds.

This synthesis report would obviously not exist without the 27 National Reports on which it is based. These National Reports were prepared on the basis of a standard questionnaire. Experts from each of the 27 Member States elaborated these reports in their capacity as National Rapporteurs (see the list of National Rapporteurs in annex) and discussed the content of the draft Synthesis Report during a meeting which was held in Budapest in October 2007. They deserve special thanks for all their work done, in particular for their patient and precious contributions, clarifications and support during the process of drafting this Synthesis Report. The authors of this report can perfectly measure their efforts, having exchanged myriads of emails with all of them since the beginning of this study only 11 months ago. The National Coordinators deserve credit for safeguarding smooth communication between the different work units involved in this project.

Special thanks go to the General Coordination Team at the Free University of Brussels. This team composed of Philippe DE BRUYCKER, Coordinator of the Odysseus Academic Network, and Laurence DEBAUCHE did an incredible job on this project and carried out an enormously patient and careful work when checking and revising the consistency of the Synthesis Report with all the National Reports and Tables of Correspondence. Their energetic and persistent support throughout all stages of this project cannot be overestimated. Further thanks go to Nicole BOSMANS, administrative secretary of the Odysseus Network, for her extraordinary efficiency and kind assistance, and to Elona BOKSHI, responsible for the electronic database which forms the core of the final product.

The Odysseus Academic Network wants to warmly thank NGOs in the 27 Member States for their important contribution to this study. Their support helped the National Rapporteurs to gather the necessary factual information about the implementation of the Directive in practice. The same is true for various public agencies, the relevant ministries and other public authorities which also contributed largely to the National Reports and were often ready to provide the National Rapporteurs with additional information on short notice.

Finally, the fruitful and productive exchange with the other Thematic Coordination Teams was an important element to finalize this report. The steady and friendly but critical communication with all of them helped to develop an exhaustive analysis.

II. LIST OF THE NATIONAL RAPPORTEURS FOR THE COMPARATIVE STUDY ON CARRIERS LIABILITY

COUNTRY	NATIONAL RAPPORTEUR	EMAIL ADDRESS
Austria	Rudolf FEIK	rudolf.feik@sbg.ac.at
Belgium	Philippe DE BRUYCKER	debruyck@ulb.ac.be
Bulgaria	Blagoy VIDIN	bnvidin@yahoo.com
Cyprus	Nicolas IOANNOU	michaelidou.k@intercollege.ac.cy
Czech Republic	Julie EXNEROVÁ	julie.exnerova@gmail.com
Denmark	Ulla Iben JENSEN	ullaiben@hotmail.com
Estonia	Lehte ROOTS	lehte.roots@mail.ee
Finland	Kristina STENMAN	krstenma@abo.fi
France	Henri Labayle	henri.labayle@univ-pau.fr
Germany	Markus PEEK Kay HAILBRONNER	Markus.Peek@uni-konstanz.de Kay.Hailbronner@uni-konstanz.de
Greece	Kostas PAPADIMITRIOU	k.papadimitriou@parliament.gr
Hungary	Judith TOTH	skula@juris.u-szeged.hu
Ireland	John HANDOLL	john.handoll@williamfry.ie
Italy	Emanuela CANETTA	emanuela.canetta@unimi.it
Latvia	Kristine KRUMA	kristine.kruma@rgsl.edu.lv
Lithuania	Emanuelis MITUZAS	emanuelis.mituzas@gmail.com
Luxembourg	Olivier LANG	olivier.lang@barreau.lu
Malta	Gabriella PACE Caroline BRINCAT	gabriella.pace@gmail.com carolinebrincat@mail.global.net.mt
Netherlands	Karin ZWAAN Sophie SCHOLTEN	K.Zwaan@jur.ru.nl S.Scholten@jur.ru.nl
Poland	Ilona TOPA	ilona.topa@gmail.com
Portugal	Tânia PEREIRA	tcprm@hotmail.com
Romania	Daniela DETESEANU	daniela.deteseanu@bpa.ro
Slovakia	Miroslava VOLANSKA	volanska@lawclinic.sk
Slovenia	Neža KOGOVŠEK	neza.kogovsek@mirovni-institut.si
Spain	Andreu OLESTI	olesti@ub.edu
Sweden	Jennie MAGNUSSON	jennie.magnusson.847@student.lu.se
United Kingdom	Valsamis MITSILEGAS	v.mitsilegas@qmul.ac.uk

III. GENERAL INTRODUCTION TO THE STUDY

by

Philippe DE BRUYCKER
debruyck@ulb.ac.be
General Coordinator of the study

1. PRESENTATION OF THE STUDY

The study contains different types of reports:

1. Two hundred seventy **National Reports** about the implementation of each of the 10 directives in each of the 27 Member States.

2. Ten **Synthesis Reports** for each of the 10 directives about their implementation in the 27 Member States. The abbreviated names used in the study for the 10 directives concerned by this report are:

- Family reunification
- Long-term residents
- Temporary protection
- Reception conditions
- Victims of trafficking
- Qualification
- Assistance for transit
- Carriers Liability
- Facilitation of unauthorised entry and stay
- Mutual recognition (of expulsion)

Those two kinds of reports are all accompanied by a summary.

Each National report is accompanied by a **National Summary Datasheet**. This Summary underlines the most serious problems related to the transposition of the concerned directive in the concerned Member State. Moreover, translations of the most problematic national provisions have been included in this National Summary Datasheet as requested by the Commission.

Each Synthesis Report is accompanied by a **Summary Datasheet** which underlines the most important conclusions and the main problems related to the transposition of the concerned Directive in the 27 Member States. It contains also some recommendations addressed to the Commission.

There are also 27 **Executive Summaries** about the implementation of the 10 directives in each of the Member States.

Apart of the reports, the **Tables of Correspondence** are very important tools to check the transposition of the directives by Member States. One table has been prepared about the implementation of each of the 10 directives in each of the 27 Member States. They have been included in each National Summary Datasheet. It gives a precise overview of the transposition

of each provision (sometimes even of each sentence) of the concerned directive: the state of transposition (has actually the provision or not been transposed?), the legal situation (in case of transposition, is there or not a legal problem?) and a reference to the national provisions of transposition. Footnotes giving brief explanations have also been included in the tables. The reader who wants to have more information can easily find in column 2 of the tables a reference to the number of the question to consult the national report. Guidelines explain how the national rapporteurs were asked to complete the table and how they had to understand each mention proposed in the table.

The paper version of the reports is accompanied by a website. Apart from an electronic version of all the reports, the website gives also access to the full text of the national rules of transposition.

2. METHODOLOGY OF THE STUDY

The study has been done in the framework of the *"Odysseus" Academic Network for Legal Studies on Immigration and Asylum in Europe* by a very large team of persons organised as following:

1. The 120 national rapporteurs in charge of the national reports and tables in each Member State for one or several directives. A lot of the rapporteurs are members of the Odysseus Academic Network, but the Network has at this occasion been extended to other persons because of the very large scope of the study and the considerable amount of work to be done;

2. The 27 national coordinators in charge of ensuring progress of the work at national level and responsible for the drafting of the Executive Summary per Member State;

3. The six thematic coordination teams in charge of the synthesis reports per directive:
    - Prof. Kees Groenendijck assisted by Ricky Van Oers, Roel Fernhout and Dominique Van Dam in the Netherlands for Long-term residents as well as by Prof. Cristina Gortazar and Maria-José Castano from Madrid in Spain for certain aspects;
    - Prof. Kay Hailbronner assisted by Markus Peek, Simone Alt, Cordelia Carlitz and Georg Jochum in Germany for Assistance in cases of transit for removal, Mutual recognition of expulsion decisions, Carrier sanctions and Facilitation of unauthorised entry and residence;
    - Prof. Henri Labayle assisted by Yves Pascouau in France for Family reunification;
    - Prof. Gregor Noll assisted by Markus Gunneflo in Sweden for Temporary protection and Residence permits for victims of trafficking;
    - Prof. Thomas Spijkerboer assisted by Hemme Battjes and Bram Van Melle in The Netherlands for the part on Qualification of refugees and subsidiary protection & Prof. Jens Vedsted-Hansen assisted by Jesper Lindholm in Denmark for the part on Rights of refugees and of persons under subsidiary protection.

4. The General Coordination team in charge of the overall coordination, methodology and contacts with the Commission as well as for the update of the synthesis report on reception conditions previously done by the Odysseus Academic Network in 2006. Prof. Philippe De Bruycker based in Belgium was therefore assisted by Laurence De Bauche (researcher), Elona Bokshi (manager of the website and also in charge of gathering national rules of transposition) and Nicole Bosmans (administrative and financial secretariat).

The authors are indicated at the beginning of each report with their email address in order to allow the Commission to contact them easily in case of need. The General Coordinator wants to thank warmly all the persons who were involved in this enormous study for their work and in particular their patience because of the many versions of the reports that we exchanged through thousands of emails.

Four meetings were organised: a kick-off and an intermediate meeting with the general and thematic coordination teams, a meeting with the general coordinator and all the researchers assisting the thematic coordinators and a final plenary meeting including almost all national rapporteurs were drafts for the synthesis reports have been discussed.

NGOs were asked to contribute on a voluntary basis by completing the questionnaires or at least part of it. The Member States were given the possibility to comment about the draft national reports (without the table of correspondence). We got only a limited number of contributions and reactions.

The Commission has been closely associated to the study. It was in particular consulted at the beginning on the projects for questionnaires and for tables of correspondence.

All member States are covered by the study, including those not bound by several directives upon the request of the Commission which asked to be informed about the developments in those Member States in comparison with Community law. The reports and tables of correspondence have been completed as if those States were bound by the concerned directives.

3. EVALUATION OF THE RESPECT OF COMMUNITY LAW

The study is about the transposition of 10 directives by Member States. More precisely, it covers extensively the legal measures adopted by the Member States to transpose those directives. As the process of transposition was not finished in some Member States, the authors decided to take into consideration the projects of national norms of transposition when they were accessible. It is important to note that those projects have been analysed like if they had been adopted as standing, which means that subsequent changes at national level are not covered by the study. The cut-off date for the national rapporteurs is in general 1st October; later developments have only been taken into consideration whenever possible.

The practical implementation of the directives is covered as much as it has been possible to do so. The study came indeed early as the directives have just or even not yet been transposed, so that implementation by Member States is just starting and in particular that the jurisprudence available was very limited. The fact that no practical problems are mentioned does not mean that there are none, but that the rapporteurs have not been informed of their existence.

Explanations are given in the 10 synthesis reports about the transposition of the concerned directive. Fore the mandatory provisions which have not been transposed or pose a problem, the explanations are followed by boxes listing the Member States in order to help the Commission to draw clear conclusions and make the report easy to read. They have been built upon the basis of the tables of correspondence included in the national summary datasheets for each directive and Member State. The guidelines given to national rapporteurs to assess the situation in their Member State are reproduced with the tables to help the reader to understand the methodology.

Some important remarks about the way the transposition of directives was assessed have to be made. The research team had to find a way between different priorities: firstly and obviously, the jurisprudence of the Court of Justice which has strict requirements regarding legal certainty and is even quite rigid on some points. Secondly, pragmatism which leads to check if the directives are effectively applied in practice with less attention given to certain aspects of pure legal transposition. The coordinators tried to find a reasonable middle way between these two approaches and agreed together with DG JLS upon the following elements:

- Administrative circulars of Member States have been considered as formal means of transposition. As much as they are binding for the administrative agents in charge of individual cases, they indeed ensure that the directive is implemented in practice despite they might not be considered sufficient to fulfil the requirements of the Court of Justice regarding an adequate legal transposition. They are nevertheless mentioned in the tables of correspondence separately from laws and regulations.

- Pre-existing norms of transposition meaning laws, regulations and circulars which were adopted before the concerned directive and so obviously not to ensure its formal transposition, have been considered as a mean of transposition. Their content may indeed reflect the provisions of the directives in internal law. This is not in line with the jurisprudence of the Court which has considered that “legislation in force cannot in any way be regarded as ensuring transposition of the directive, which, in article 23(1), second subparagraph, expressly requires the Member States to adopt provisions containing a reference to that directive or accompanied by such a reference” (Commission v. Germany, Case C-137/96 of 27 November 1997). All the ten directives covered by the study contain such an inter-connexion clause. A rigid application of this jurisprudence to our study would have led us to conclude that there is no transposition even when pre-existing rules ensure the implementation of the directive. In line with the approach of DG JLS to assess not only the formal transposition but also the application in practice of the directives, we have not done so and considered pre-existing national rules as a mean of transposition. They are nevertheless mentioned in the table of correspondence as pre-existing law, regulation or circular not under the item “Yes formally” but “Yes otherwise” together with general principles of internal law which the Court has accepted to consider under certain condition as a mean of transposition (Commission v. Germany, Case C-29/84 of 23 may 1985).

Despite the fact that we agreed with the Commission about these choices, the authors of this study considered necessary to make them explicit as they might seem inadequate from a purely legal point of view. Moreover, they have also decided to present in the tables of correspondence these possibilities separately from the classical ones. The Commission will so be perfectly informed about the situation regarding the transposition of the directives in the Member States. The transparency of the information given in the tables will allow it to take a final position which could depart from the choices done at the beginning of this study.

Finally, the provisions about human rights appearing here and there in the ten directives require some explanations. The obligation for Member States to formally transpose provisions like for instance article 20 §4 of the Qualification directive[1], article 15 §4 of the directive on temporary protection[2] or article 3, §2 of the directive on mutual recognition of expulsion decisions[3], gave raise to long discussions between all the rapporteurs involved in the study. It has been impossible to convince the group of 130 lawyers involved in this study to take a common position about the necessity to transpose or not that kind of provisions. The General Coordinator of this study decided in this context to leave the national rapporteurs free to express their own opinion in their report and table. This means that divergent views might be expressed on the same point by the national rapporteurs. This situation reflects the fact that the lawyers involved in the study face obviously very different situations and react sometimes in relation with the context of their Member State by considering that reminding human rights is either superfluous because they are generally respected, either necessary because they care about possible violations.

From a strictly legal point of view, it appears that all the provisions cannot be considered in the same way. Some articles have an added value and are more than repetitions of human rights provisions, like article 10 of the directive on permits for victims of trafficking which after a first clause on the best interests of the child requires specifically an adaptation of the procedure and of the reflection period to the child, or article 17 of the directive on family reunification which refers to the jurisprudence of the European Court of Human Rights on the right to family life and specifies its scope. Others may be considered as redundant with international treaties like article 20 §4 of the Qualification directive or article 15 §4 of the directive on temporary protection. One may consider superfluous to transpose such a provision in the case of Member States which have ratified the Convention on the right of the child and ensure its implementation, for instance by recognising it a direct effect. More in general it appears that references to human rights in secondary legislation require more attention and that their legal value needs to be clarified (see recommendation on this point below).

[1] « *The best interest of the child shall be a primary consideration for Member States when implementing the provisions of this chapter that involve minors* ».
[2] « *When applying this article, the Member States shall take into consideration the best interests of the child* ».
[3] « *Member States shall apply this directive with due respect for human rights and fundamental freedoms*».

4. RECOMMENDATIONS ABOUT THE EVALUATION OF THE IMPLEMENTATION OF DIRECTIVES

This part contains some general recommendations to the Commission about the way of checking transposition of directives by Member States (specific recommendations about the 10 directives are included in the Summary Datasheet of each synthesis report per directive). The following three recommendations are based on the experience acquired during this study covering 10 directives in 27 Member States.

- **Oblige the EU institutions to include tables of correspondence in the final provisions of any directive adopted**

It is clear that the method of checking the implementation of directives still needs to be improved. The increase of the number of Member States and of working languages makes it more and more difficult to check seriously the way they are legally transposed.

There is an absolute need to request the Member States to prepare a table of correspondence (also called concordance or correlation tables) indicating the national norms of transposition for each provision of a directive. The Member States which have prepared the transposition are the best authority to identify precisely these norms of transposition. Leaving it to the Commission or asking external experts to do this part of the job can be considered to large extend as a waste of time and resources. The Member States should be asked only to indicate the rules of transposition and of course not to evaluate its correctness. Even the NIF electronic database of the Commission used by the Member States to notify the rules of transposition is therefore not sufficient. It does not indicate precisely the national norm of transposition for each provision of the directives which might remain difficult to identify in very long national rules. Moreover, Member States send sometimes not only the norms of transposition as some directives require them to communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by the directive. If such a more or less standard provision has been included to allow the Commission to understand the general context of the transposition, it makes the search of the precise norm of transposition more difficult as some Member States transmit a lot of texts.

Remarkably, only one of the 10 directives under analysis contains a provision obliging the Member States to prepare a table of correspondence: following article 4 §2 of the directive on the facilitation of unauthorised entry, transit and residence, "*The Member States shall communicate to the Commission the text of 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*". The reasons explaining why only this directive contains such a requirement are not clear. This directive is the result of a State initiative, namely France. The other instruments proposed during the same period by France regarding carrier sanctions and mutual recognition of expulsion decisions do not contain such a clause. The same is true for the Commission's proposals at the origin of the other directives analysed.

There is a strong and urgent need to request such a table from Member States when they transpose a directive. The Commission should intensify its efforts undertaken since five years so that the European institutions are obliged to include such a clause in any directive adopted as envisaged in its Communication on "A Europe for results: applying Community law"[4].

[4] COM(2007)502 of 5 Septembre 2007.

- **Have a more in-depth debate about the choice of the right instrument instead of favouring directives**

A reflection on the type of instruments of secondary law to be used could also be fruitful. For instance, it seems that a Council decision would have been more appropriate than a directive to regulate the issue of assistance in cases of transit for the purposes of removal by air.

More important, directives should not be automatically chosen for reasons of subsidiarity or proportionality. One may wonder if they are not good reasons for choosing in certain cases a regulation instead of a directive, for example for the qualification of refugees and persons under subsidiary protection in order to ensure a more consistent implementation of the definitions of persons to be protected in the EU by the Member States.

- **Clarify the sense of including human rights references in secondary legislation in view of the future binding effect of the EU Charter on human rights**

As underlined above, many references to human rights have been included in directives adopted in the field of immigration and asylum. Their legal value is doubtful when they only repeat or refer to International or European provisions on human rights. As they may create long discussions during the transposition process by Member States about their need to be transposed and can even create confusion about the precise origin of the concerned human right, they could be omitted and included if relevant in the preamble of the instrument. The need to clarify this point will increase with the entry into force of the new Lisbon Treaty transforming the EU Charter of human rights into a legally binding instrument.

IV. SUMMARY DATASHEET AND RECOMMENDATIONS

1. Member States covered and not covered by the Synthesis Report

The Synthesis Report covers all 27 Member States.

2. Member States bound and not bound by the Directive

With the exception of *Ireland* all EU Member States are bound by Directive 2001/51/EC[5] (hereinafter: ***the Directive***).

Denmark is not bound as regards European law obligations. However, being contracting party to the Schengen Agreement, *Denmark* is bound by international law as it has decided to implement the Directive according to its Recital 9 and the Directive builds upon the Schengen acquis.

Ireland only participates in this Directive by virtue of Article 2 (2) (c) of Council Decision 2002/192. It is **not bound** by the Directive since the Council has not yet decided to put the Schengen acquis into effect pursuant to Article 6 (3) of that Decision. Hence it will be bound on the date on which the Council decides to put the Schengen acquis into effect.

3. State of transposition of the Directive

Number of Member States which have **transposed** the directive (meaning the norm of transposition has been adopted even if it is not yet in force): **24**

Number of Member States which have **not at all** transposed the Directive (meaning that even no project of transposition is known): **0**

Number of Member States where the **process of transposition is pending** (meaning there is a project of transposition but it is not yet adopted): **2**

[5] Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, OJ L 187/45 of 10.7.2001.

MEMBER STATES	STATE OF TRANSPOSITION
AUSTRIA	TRANSPOSED
BELGIUM	TRANSPOSED
BULGARIA	TRANSPOSED
CYPRUS	TRANSPOSED
CZECH REPUBLIC	IN PROCESS OF BEING TRANSPOSED
DENMARK	TRANSPOSED
ESTONIA	TRANSPOSED
FINLAND	TRANSPOSED
FRANCE	TRANSPOSED
GERMANY	TRANSPOSED
GREECE	TRANSPOSED
HUNGARY	TRANSPOSED
IRELAND	NOT BOUND BY THE DIRECTIVE
ITALY	TRANSPOSED
LATVIA	TRANSPOSED
LITHUANIA	TRANSPOSED
LUXEMBOURG	IN PROCESS OF BEING TRANSPOSED
MALTA	TRANSPOSED
NETHERLANDS	TRANSPOSED
POLAND	TRANSPOSED
PORTUGAL	TRANSPOSED
ROMANIA	TRANSPOSED
SLOVAKIA	TRANSPOSED
SLOVENIA	TRANSPOSED
SPAIN	TRANSPOSED
SWEDEN	TRANSPOSED
UK	TRANSPOSED

4. Types of transposition of the Directive

All Member States have transposed the Directive by legislative provisions. There are no Member States which have transposed the Directive only by administrative circulars, meaning that there is no legislative or regulatory basis.

5. Evaluation of the number of problems (quantitative approach)

This evaluation is based on the national Tables of Correspondence and not related to the seriousness of the problems.

There are two cases of **non-transposition**: one in *Estonia*, where Art. 2 of the Directive[6] is not transposed and one in *Italy*, where there is no norm transposing Art. 3.

Most legal problems exist in *Estonia* (**four**) which is followed by *Denmark* (**three**). Five Member States (*Germany, Hungary, Latvia, Luxembourg, Romania*) mention **two legal problems**.

16 Member States (*Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Germany, Greece, Hungary, Italy, Latvia, Malta, Poland, Portugal, Romania, Slovakia* and *Slovenia*) only mention **one legal problem** in regard to the transposition of Art. 4 (2). This evaluation was in some cases done in order to comply with a common approach suggested for the purposes of this study. The seriousness of this problem will be discussed below (chapter 7.).
Two more Member States (the *Netherlands* and the *United Kingdom*) mention no legal but a **practical problem** in this regard.

In seven Member States (*Austria, Belgium, Finland, France, Lithuania, Spain* and *Sweden*) there are **no legal and no practical problems of transposition**. It should however be noted that in the *Netherlands*, where only a practical problem is mentioned, and in *Sweden* not all the provisions have been transposed *verbatim*, as existing national legislation transposing Art. 26 of the Schengen Convention was considered to be sufficient.

No problems are also mentioned by *Ireland* which is however not bound by the Directive.

6. Evaluation of the seriousness of problems (qualitative vertical approach)

This evaluation is based on the National Summary Datasheets and contains a vertical approach as it envisages the situation per Member State. The most serious problems are:

In *Estonia* there is no explicit provision transposing Art. 2 which provides for the obligation to return a third country national that is stuck in transit. The relevant national acts only provide that the carrier must return a person "*who **upon arrival at the Estonian border** lacks the legal basis to stay in Estonia or a document necessary for **crossing the border**"* is required to return the person. The problem with this legislation is that normally a transit passenger will enter the country legally with a transit visa and thus dispose of the document necessary for crossing the border which could mean that the carrier's obligation is not applied. Despite this legislation it should be noted that according to information received by the National Rapporteur, third country nationals are also returned when they are in transit. On the other hand it is not clear how return by the carrier is ensured as it seems to be common practice that the return is carried out by State authorities.

[6] Unless otherwise indicated all articles mentioned below are provisions of Directive 2001/51/EC.

In *Italy* a provision transposing Art. 3 is missing. This article contains several elements, *inter alia* the obligation to "*assume responsibility for the costs of stay and return*" where no immediate return is possible. *Italian* legislation only obliges the carrier "*immediately to **assume responsibility** for the foreigner and **to return** him"*. Although this legislation might in theory be interpreted as comprising all elements of Art. 3, even the obligation to bear the costs of stay, this does not seem to be done in practice.

Denmark, Estonia and *Latvia* have only partly transposed Art. 3: First, the obligation to "*find means of onward transportation immediately and to bear the costs thereof*" is not transposed in all three Member States. This is a serious problem as it means that carriers in these Member States have fewer obligations than in others.

The level of financial penalties is not as high as provided for by Art. 4 (1) in five Member States (besides *Denmark* and *Estonia* these are *Luxembourg, Romania* and the *United Kingdom*). It is problematic whether these penalties are still dissuasive as required for by Art. 4 (1).

There is also a legal problem with regard to Art. 4 (1) in *Germany*: Penalties have a different legal character than provided for by the Directive. They are not imposed directly upon a specific misconduct in the past. Once misconduct has been ascertained, an individual ban on transportation of not properly documented passengers is enforced by the threat of financial sanctions for future infringements. It should however be noted that in practice this problem does not seem to diminish the dissuasiveness of penalties.

7. Types of problems (horizontal approach throughout all Member States)

As mentioned above (chapter 5.) 16 Member States (*Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Germany, Greece, Hungary, Italy, Latvia, Malta, Poland, Portugal, Romania, Slovakia* and *Slovenia*) indicate a **legal problem** in regard to the transposition of Art. 4 (2). In these Member States there is no provision which exempts carriers from financial penalties in case the person transported is seeking or is being granted international protection. The Directive itself is not clear in this regard (for details please refer to part V. chapter 3.4.1. of the Synthesis Report). Based on the wording and the legislative history of Art. 4 (2), it is doubtful whether an exemption is required. Therefore, only seven of the concerned National Rapporteurs conclude this problem to be serious (these are: *Bulgaria, Cyprus, Denmark, Estonia, Italy, Romania* and *Slovenia*). The *Slovenian* Rapporteur for instance states that the missing exemption is a problem as it might cause carriers to reject transport of people who are in need of international protection.

8. Impact of the Directive on the Member States

8.1. Evolution of national law before and after transposition

As intended by the Directive the transposition has intensified obligations for carriers in most Member States. However, in most of them the impact of the Directive is rather marginal, as obligations for carriers already existed before due to the implementation of Art. 26 of the Schengen Convention. Interestingly, the *Austrian* National Rapporteur concludes that the transposition has led to a more favourable situation for carriers as provisions are now more detailed.
Due to the transposition *Bulgaria* and *Cyprus* introduced carriers' liability for the first time.

8.2. Regarding the content of national law with the standard of the Directive

According to Art. 4 (1) of the Directive Member States are obliged to introduce one of the following penalties for transporting a person not in possession of proper travel documents and visas:

(1) a maximum amount of not less than 5,000 EUR for each person carried,
(2) a minimum amount of not less than 3,000 EUR for each person carried or
(3) a maximum amount imposed as a lump sum for each infringement of not less than[7] 500,000 EUR irrespective of the number of people carried.

With the exception of five Member States (*Denmark, Estonia, Luxembourg, Romania* and the *United Kingdom*) financial penalties have been elevated in conformity with Art. 4 (1) of the Directive in most Member States.
However some of these Member States have introduced a considerably stricter scheme than required by the Directive:
In the *Netherlands* the maximum amount for each person carried is approximately 16,000 EUR instead of 5,000 EUR as required for by the Directive.
Furthermore, nearly half the Member States (12 Member States) have introduced a minimum amount **and** a maximum amount although the Directive only required them to introduce one of these amounts. *Poland* and *Spain* even introduced all three kinds of financial penalties.

The optional provision Art. 5 allows Member States to introduce additional measures with regard to sanctions. However, this option has not been widely used as only ten Member States, including *Ireland* which is not bound by the Directive, have introduced such additional measures.

9. Recommendations to the European Commission

The major problem of interpretation of the Directive arises in regard to the question, whether **financial penalties shall also apply in case the person transported is in need of international protection**. The wording of the relevant provision (Art. 4 (2)) is rather ambiguous. Also from the history of this provision it is doubtful whether the Directive requires Member States to introduce such an exemption. Consequently 16 Member States do not exempt carriers in this case.

The missing exemption in national law may cause carriers to be even more reluctant with transporting a person not in possession of proper travel documents.

On the other hand it is unclear whether this exemption has much relevance in practice. First, it is unsure that for example on busy airports a carrier will check whether a person not in possession of proper travel documents has a plausible case of seeking international protection. Second, it is more likely that a carrier will not transport a person not in possession of proper documents as there is nothing to win but much to loose by transporting that person. On the one hand carriers do not have any disadvantages when they refuse to transport the person and on the other hand carriers run the financial risk of bearing the costs of stay and return when they carry out the transport. This financial risk always arises when the transport is carried out as at that moment normally it is not clear that national authorities at the country of destination will see things in the same light. In this regard the *Dutch* system seems to offer a pragmatic solution: There are special immigration officers a carrier can call to ask what to do with an undocumented passenger that wants to claim asylum. Of course it may still be doubtful whether at busy airports a carrier will do so instead of simply refusing to transport the person.

[7] The Directive mentions “that” instead of “than”. This seems to be a spelling mistake.

The problem of dealing with carriers which are punished for transporting passengers who might eventually have a claim for international protection raises legal issues which have for a long time been the subject of a controversy on the meaning of the non-refoulement prohibition of the 1951 Geneva Convention Relating to the Status of Refugees.
The Convention is largely silent on that issue except that according to its Art. 31 (1) refugees themselves can not be penalized.

As an argument for an explicit exemption clause one may recall that the European Council in Tampere agreed to base the EU's common policies on asylum and immigration on principles which "*offer guarantees to those who seek protection in or **access** to European Union.*"[8]

Bearing this statement in mind as well as the inhomogeneous situation among the Member States, a clarification of the provision should be envisaged stating whether or not and under which conditions carriers transporting passengers who are later granted access to an asylum procedure or even receive international protection are exempt from sanctions.

10. Any other interesting particularity to be mentioned about the transposition and the implementation of the Directive in the Member States

Prior to the adoption of the Directive most Member States had implemented carriers' obligations provided for by Art. 26 of the Schengen Convention. The Directive does not establish a new set of obligations but develops and specifies the obligations mentioned in Art. 26 of the Schengen Convention. Therefore several Member States (for example the *Netherlands* and *Sweden* concerning Art. 2 of the Directive) concluded that there was no need to explicitly transpose some of the provisions already covered in substance by Art. 26. This has been noted in the report accordingly.

Several Member States mention innovative practices. For example *France* and the *Netherlands* require carriers to make a transcript of passengers' documents at the port of departure. This will enable them to prove that they have been carefully controlling not to transport passengers who are not in possession of proper travel documents.

[8] Presidency conclusions of the Tampere summit of 15 and 16 October 1999, no. 3, http://www.europarl.europa.eu/summits/tam_en.htm.

V. EUROPEAN SYNTHESIS OF THE NATIONAL REPORTS

1. Determination of the Member States bound by the Directive

1.1. Member States bound by the Directive

The Directive is part of the development of the so-called Schengen acquis. As such it binds all Member States – with the exception of the *United Kingdom*, *Ireland* and *Denmark* – who formed part of the European Community when the Schengen aquis became Community law (*cf.* Protocol annexed to the Amsterdam Treaty).

The new Member States which joined the European Union on 1 May 2004 are since bound by the Directive as well[9] and *Romania* and *Bulgaria* are bound by the Directive following their accession to the European Union on 1 January 2007.[10]

Special conditions only apply to the *United Kingdom*, *Denmark* and *Ireland*:

The *United Kingdom* was already bound by Art. 26 of the Schengen Convention following the Council decision of 29 May 2000. The Member State has opted into all provision of the Directive and is therefore bound by the Directive.

Denmark did not participate in the adoption of this Directive in accordance with Art. 1 and 2 of the ***Protocol on the position of Denmark annexed to the Treaty on European Union and Treaty establishing the European Union***.[11] Therefore it is not bound as regards European law obligations. However, as a result of Art. 5 of that same Protocol and according to Recital 9 of the Directive *Denmark* was allowed to decide on the implementation of the Directive into national law within 6 month from its adoption. By letter of 31 October 2001 *Denmark* informed the council about its decision to transpose the Directive. Although not bound as regards European law obligations, *Denmark* is bound by international law. This results from the fact that the Directive builds upon the Schengen aquis which includes the Schengen Agreement of 14 June 1985 and *Denmark* signed its accession to this Agreement on 19 December 1996.

1.2. The situation of Ireland

Thus *Ireland* remains the only Member State not bound by the Directive at all. *Ireland* was not even bound by Art. 26 of the Schengen Convention when the Directive became adopted. ***Council Decision 2002/192 concerning the request of Ireland to take part in some of the provisions of the Schengen acquis***[12] was only taken on 28 February 2002 and thus after the adoption of the Directive which was on 28 June 2001. Consequently, *Ireland* participates in the Directive only by virtue of Art. 2 (2) (c) of that Decision. That means it is **not bound by the Directive** since the Council has not yet decided to put the Schengen acquis into effect pursuant to Art. 6 (3) of that Decision. *Ireland* has, however, sought to transpose the Directive into national law. The situation of *Ireland* will therefore be assessed separately at the end of part V.

[9] Protocol A to the Accession Treaty, OJ L 236 of 23 September 2003, p. 50.
[10] Annex II to the Protocol to the Accession Treaty, OJ L 157 of 21 June 2005, p. 49.
[11] OJ C 340 of 10 November 1997.
[12] Council decision 2002/192, OJ L 64/20 of 7 March 2002.

2. National legal basis and competent authorities

2.1. Norms of transposition (Q.1., Q.4.)

Q.1.A.	**Identify the main (because of its content) norm(s) of transposition and indicate its legal nature. This question includes even norms adopted before the adoption of the directive but ensuring its Transposition (what is called a pre-existing norm in the table of correspondence).**
Q.1.B.	**List the others norms of transposition by order of importance of their legal nature (first laws, secondly regulations; thirdly circulars or instructions).**[13]
Q.4.A.	**Has the main regulation foreseen explicitly by the main norm of transposition already been adopted or not:**
Q.4.B.	**If the main norm(s) of transposition foresees the adoption of one or several regulations, indicate if they have all been adopted:**

Directive 2001/51 had to be transposed until 11 February 2003 (Art. 7 (1)). However, nearly no Member State has respected this deadline. Even *France*, which had initiated the Directive's legislative process during its presidency of the European Union[14] adopted the transposition norms only with delay. On the other hand *Denmark* and *Sweden* stated that the transposition did not require any changes in national legislation and national legislation was already in conformity with the Directive.

By 1 October 2007[15] nearly all Member States had transposed the Directive by one or several laws. Only in two Member States this process was not finalized yet:

- The Government of *Luxembourg* presented its project of law to the National Parliament only in September 2007.
- In the *Czech Republic* the legislative process was still pending, the *Czech* draft was discussed in the Parliaments.

With the exception of *Cyprus* and *Bulgaria* all these Member States have amended pre-existing legislation to transpose the Directive. *Cyprus* and *Bulgaria* did not have any legislation on carriers' liability before.

In the majority of the Member States the main acts of transposition did not provide for a **main regulation** that would need to be adopted. Only in four Member States (*Austria*, *Belgium*, *Latvia* and *Lithuania*) the main norms of transposition explicitly provided for a main regulation which in all those Member States has already been adopted. Hence in none of the Member States the adoption of a regulation is still open.

[13] This question includes even norms adopted before the adoption of the directive but ensuring its transposition (what is called a pre-existing norm in the table of correspondence).

[14] *Cf.* OJ C 269 of 20 September 2000, p. 8: Initiative of the French Republic with a view to the adoption of a Council Directive concerning the harmonisation of financial penalties imposed on carriers transporting into the territory of the Member States third-country nationals lacking the documents necessary for admission (2000/C 269/06). Under the Amsterdam Treaty the Member States disposed of the competence to propose directives until 1 May 2004.

[15] This date has been determined as the cut-off date for the purposes of this study. National Rapporteurs were asked to include in their National Reports all changes in their national legislation up to this date.

2.2. Situation in federal or assimilated Member States (Q.2.)

Q.2.	**This question is in principle only for federal or assimilated Member States like Austria, Belgium, Germany, Italy, Spain**
Q.2.A.	**Explain which level of government is competent to adopt the norms of transposition.**
Q.2.B.	**In case, explain if the federal structure and the distribution of competences between the different levels pose any problem or difficulty regarding the transposition and/or the implementation of the directive.**

Five Member States (*Austria, Belgium, Germany, Italy, Spain*) are composed in a federal or similar structure. The distribution of competences between the different levels might imply problems of transposition or implementation. However, the national reports show that in all these Member States the **federal/central level alone** is competent to adopt legislative norms of transposition and regulations in the field of the directive. Hence the transposition was done by the federal level only. Consequently, the National Rapporteurs declare unanimously that the federal structure and the distribution of competences did not pose a problem or difficulties in regard to the transposition of the Directive. Furthermore no problems of implementation have been mentioned.

In *Finland*, which has not been mentioned above, the self-governing **Åland Islands** exercise legislative authority in respect of several enumerated matters. However within the field of the Directive the national norms of transposition are in force also in the Åland Islands.

2.3. Competent authorities for the practical implementation (Q.3.)

Q.3.	**Explain which authorities are competent for the practical implementation of the norm of transposition by taking the decisions in individual cases.**

The situation concerning the authority competent for taking decisions in individual cases is similar in most Member States:

- In the majority of the Member States the practical implementation of the norms of transposition is mainly done by one single authority which is a division within or another level of administration belonging to the **Ministry of the Interior**. The authority is therefore bound by the instructions of this Ministry. (19 Member States: *Austria, Bulgaria, Cyprus, Czech Republic, Estonia, France, Finland, Greece, Hungary, Italy, Latvia, Lithuania, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, United Kingdom*).
- In two Member States (*Malta* and *Sweden*) a division of the **Ministry of Justice** is the competent authority.
- In the remaining five Member States (*Belgium, Denmark, Germany, Luxembourg* and *the Netherlands)* the competences are exercised by **two authorities**:
  - In *Belgium* **judges** apply those fees that are criminal sanctions whereas the **Office for Aliens**, which forms part of the **Ministry for Home Affairs,** imposes those fees that are administrative sanctions.
  - In *Denmark* all decisions regarding the **return** of the refused alien without expenses to the state and the refunding of the state's expenses are taken by the **police**. (It should be noted that the Danish National Police Force belongs under the *organisational* jurisdiction of the **Ministry of Justice** whereas with regard to situations pursuant to the Aliens Act the Danish National Police Force belongs under the *functional* jurisdiction of the **Ministry of Refugee, Integration and Immigration Affairs**.) On the other hand **fines** are imposed by the **Attorney General**, the public prosecutors and the chief police constable.
  - In *Germany* the tasks are mainly fulfilled by a central Police unit and the Border Police which are both subordinate to the **Federal Ministry of the Interior**.

- In *Luxembourg* a Police service which is attached to the **Ministry of Justice** is in charge of recording the carrier's failure in a statement and the **Minister of Foreign Affairs** is competent to fine the carrier.
- In the *Netherlands* the competences are divided similarly: carriers are prosecuted and sanctioned by the **Public Prosecutors Office** (which is subordinated to the **Ministry of Justice**). Border control, reporting carriers and escorting aliens that will be re-transported is carried out by a division called Marechaussee and by the **Rotterdam-Rijnmond Seaport Police**. The Marechaussee is subordinate to the **Ministry of Defence** however they also work for the Ministry of Justice and for the Ministry of Interior and Kingdom Relations.
  Concerning the task of border control both the Marechaussee and the seaport police are subordinate to the IND – which in turn is subordinate to the **Ministry of Justice**.

3. Analysis of the content of the norms of transposition

3.1 Obligation to return third country nationals in transit, Art. 2 (Q.5.)

Q.5.	**Necessary steps to ensure that the obligation of carriers to return third country nationals (Art. 26 (1) (a) of the Schengen Convention) applies when entry is refused to a third country national in transit (*see Art. 2, which is a mandatory provision*)**
Q.5.A.	**Has the existing legislation providing for a carrier obligation to return been amended? *(The term "Legislation" includes regulations in connexion with this question.*)**
Q.5.B.	**If yes, please specify**

Art. 2 of Directive 2001/51/EC refers to Art. 26 (1) (a) of the ***Convention implementing the Schengen Agreement*** (hereinafter: ***Schengen Convention***). This provision already contained the obligation of **air, sea** and **land** carriers **to return** a third country national that was refused entry into his/her country of departure, the third country which delivered the documents or in which admission is guaranteed.
Art. 2 of the Directive stipulates that this obligation to return be applied also when the third country nationals is in the Member State **in transit**. The article mentions two different situations in which third country nationals may be in transit in a Member State:
(1) The carrier who was to take the foreigner to the country of destination refused to take the foreigner on board (Art. 2 (a)) or
(2) The authorities of the State of destination refused the entry and sent him back (Art. 2 (b)).

Art. 2 has been transposed as follows:

- A majority of 19 Member States has amended **existing** legislation which already contained carriers' obligations to return third country nationals in order to comply with Art. 2 of the Directive. In *Cyprus* there was no pre-existing legislation providing for carriers liability at all. So transposition actually did not simply amend existing legislation but introduced carriers' obligations for the first time.
  - Nearly all these Member States have adopted provisions which copy both alternatives of Art. 2 (*Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Finland, France, Hungary, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, Slovenia* and *Spain*).
  - This is not the case of *Germany*. However, national law was amended in 2004 in order to make clear that both transit cases shall be covered.

  It should be noted that in *Luxembourg* and in the *Czech Republic* the obligation to return third country nationals in transit is only applicable to **air** carriers. The *Czech* Legislator did consider it unnecessary to oblige other carriers since the only external borders are international airports. This understanding seems to be correct: Art. 26 (1) (a) Schengen

Convention only obliges carriers which brought a third country national to the "*external border*" which mean Schengen external borders. *Luxembourg* and the *Czech Republic* are entirely surrounded by other Schengen Members so carriers transporting by sea or land do not arrive at external borders.

- Five Member States did not amend their legislation in this regard at all (*Estonia, Denmark, Greece, the Netherlands* and the *United Kingdom*). In *Sweden* only minor changes were done in 2004. As a result, **explicit** norms providing for the obligation to return a third country national in transit are missing. However, with the exception of *Estonia* this does not cause problems of transposition nor of implementation:
  - No problems of transposition exist in the *Netherlands.* In this Member State the *travaux préparatoires* make clear that there was no need for transposition: According to the *Dutch* Government Art. 2 of the Directive does not supplement but rather **clarify** the re-transportation duty of the carrier stipulated in Art. 26 of the Schengen Convention and the *Dutch* Aliens Act was in conformity with both provisions.
  - *Swedish* law only states the obligation of a carrier *"to return a third country national that lacks passport or required visa, or necessary means for the return home."* An amendment was adopted in 2004 only to clarify that the alien concerned shall have arrived from a State outside Schengen. However, in the *travaux préparatoires* of the main norm of transposition the government concludes that with this amendment, the existing Swedish provision on carriers' liability comprises also third country nationals in transit. The *travaux préparatoires* are an important source of interpretation in the Swedish legal system.

  It needs to be discussed whether this situation can still be considered as correct transposition. Art. 1 of the Directive states that the aim of the Directive *"is to **supplement** the provisions of Article 26… of the… Schengen Convention…and to **define** certain conditions with respect to their implementation."* Art. 2 mentions that Member States shall "***ensure** that the obligation …to return…of Art. 26 (1) (a) of the Schengen convention also apply …* [in the transit case]". According to the wording ('define', 'ensure') it can indeed be assumed that Art. 2 does not supplement but clarify the content of the general obligation to return the third country national. According to the jurisprudence of the European Court of Justice (ECJ) a directive's provision must not necessarily be transposed *verbatim in express* but it must be ensured that the directive is fully applied.[16] Since the general obligation to return has been transposed, it will at least be possible to interpret this obligation in light of the Directive so as to encompassing the case of a third country national in transit.[17] Therefore the legislation does not have to be regarded as a problem of transposition.

  The situation is slightly different in *Denmark, Greece* and the *United Kingdom*. In these three Member States clear Government statements are missing.
  - *Greek* legislation is quite similar to the *Swedish*. In *Greek* law the obligation to return is expressly provided only concerning *"an alien registered on the record of undesirable foreigners of Greece or not holding the required travel documents or not having gone through the normal police control"*. According to *Greek* authorities these obligations to return also comprise the obligation to return persons in transit.

[16] ECJ, case 361/88, ECR 1991, 2567, judgement of 30 May 1991 (*Air pollution*) no. 15: "… *the transposition of a directive into domestic law does not necessarily require that its provisions be incorporated formally and verbatim in express,* [into] *specific legislation; a general legal context may, depending on the content of the directive, be adequate for the purpose, provided that it does indeed **guarantee the full application of the directive** in a **sufficiently clear and precise manner** so that, where the directive is intended to create rights for individuals, the persons concerned can ascertain the full extent of their rights and, where appropriate, rely on them before the national courts.*"

[17] ECJ, case 14/83, ECR 1984, 1891, judgement of 10 April 1984 (*von Colson*), no. 26: "*In applying the national law … national courts are required **to interpret their national law in the light of the wording and the purpose of the Directive** in order to achieve the result referred to in the third paragraph of article 189* [EC-Treaty]."

- *Danish* law provides the obligation to return a third-country national *"who is refused entry, transferred or retransferred under the rules laid down in the Aliens Act."* The National Rapporteur states that transit was already encompassed by that provision.
- In the *United Kingdom* the relevant section of the Immigration Act provides the obligation to return a third country national *"who is refused leave to enter"*. According to the National Rapporteur this obligation already covered transit passengers.

➢ *Estonian* legislation explicitly only obliges the carrier to return the passenger "*from the border"*. It seems problematic to conclude that this obligation to return a person from the border comprises the case of Art. 2. In the case regulated by Art. 2 a foreigner usually entered the territory legally with a transit visa but later is stuck in the territory – for example because the next carrier refuses the transport. So the problem concerning the return does not occur at the border but later when the person is already in the territory. Therefore it seems that in *Estonia* Art. 2 is **not transposed**.

Q.5.C. Have administrative practices been changed?
Q.5.D. If yes, please specify

Many National Rapporteurs have encountered difficulties to obtain relevant information in regard to this question. Therefore six National Rapporteurs (from *Austria, Belgium, Denmark, Italy, Malta and Romania*) could not indicate whether administrative practices have been changed at all. The *Greek* National Rapporteur could not answer the question as *Greek* authorities declared that cases in which the obligation to return a third country national in transit would become important have not been presented to them.

Interestingly out of the remaining 20 Member States only a minority of five Member States (*Bulgaria, Finland, Lithuania, Spain* and *Sweden*) has changed administrative practices:

- In *Bulgaria* before the transposition the obligation to return a third country national did not exist and hence there were no practices in this regard before.
- In *Lithuania* prior to the transposition act carriers were not required to ensure that a third country national was in possession of necessary travel documents. The amendment act added new capacities to the competent authority. Later new administrative procedures, naming concrete local officials responsible for the supervision of carriers' obligations under Art. 2 of the Directive were introduced. Hence the transposition was the basis for the adoption of completely new administrative practices.
- In *Spain* carriers must now submit to the authorities information on the third country nationals transported.
- *Sweden* has amended the Migration Board's Manual on Alien Issues and the instructions to the Police.

Article 2: obligation to return third country nationals in transit	
NO TRANSPOSITION	Estonia
LEGAL PROBLEM	--
PRACTICAL PROBLEM	--

3.2. Obligation to find onward transportation and to bear costs, Art. 3 (Q.6.)

Q.6. Necessary measures to oblige carriers which are unable to effect the return of a third country national whose entry is refused to find means of onward transportation and to bear the costs thereof or assume responsibility for the costs (*see Art. 3, which is a mandatory provision*)
Q.6.A. Have legislative provisions stipulating the obligations or responsibilities of carriers been adopted?
Q.6.B. If yes, please specify

Art. 3 of the Directive is based on the obligations to **return** that were set up by Art. 26 (1) (a) of the Schengen Convention. The provision contains four elements: The carrier who is unable to effect the return of the third country national must

(1) find means of onward transportation immediately and
(2) bear the costs thereof or
(3) where immediate onward transportation is not possible bear the **costs of the stay**
(4) and return.

Legislative provisions transposing Art. 3 of the Directive have been **adopted** in nearly all Member States (in the *Czech Republic* and *Luxembourg* the legislative process is still pending). They may be divided into three main groups:

- In the first group (thirteen Member States: *Austria, Belgium, Cyprus, Finland, Lithuania, Luxembourg* (once again this obligation is only applicable to air carriers), *Malta, the Netherlands, Poland, Slovakia, Slovenia, Sweden* and *the United Kingdom*) **all four elements of Art. 3** have been copied into national law-.

  Within this group a **problem of transposition** exists in *Luxembourg* as there are no provisions stipulating the obligation to return the third country national **immediately**. So the only element that might bring a carrier to carry out the return immediately will be that otherwise the financial risks become too high. Apart from that there is no measure to ensure the effectiveness of Art. 3.

- The second group (eleven Member States: *Bulgaria, Czech Republic, Denmark, Estonia, France, Greece, Germany, Hungary, Latvia, Portugal, Romania*) has **only transposed the third and fourth element** explicitly whereas an explicit phrase transposing the **first and second element**, i.e. the obligation "***to find means of onward transportation immediately and to bear the costs thereof***" is **missing**:
  - In most these Member States this does not lead to a problem of transposition as in these Member States national law provides for a general obligation to return and this obligation is interpreted as comprising also the first and second element of Art. 3.
    - This is especially true for Member States in which the obligation to return is worded rather broad (for example in *Portugal*, where the carrier is obliged to *"promote the third-country national's return"* or *Romania: "ensure the immediate transport"*).
    - Other Member States explicitly only provide for the obligation to return in a rather limiting wording (for example *France: "has to take him back forthwith": Germany: "transport the third-country national*). However, with the exception of *Denmark, Estonia* and *Latvia* all National Rapporteurs concerned acknowledge that this obligation is a general obligation and the carrier must fulfil this obligation either by himself or by finding for example another carrier for the return. Thus, the result of return counts, not the way the return is carried out. In *Germany* this interpretation has even been confirmed by the Federal Administrative Court. Thus, in the light of the jurisprudence European court of Justice mentioned above the application of Art. 3 of the Directive may be considered as guaranteed.
  - However, a **problem of transposition** exists with regard to *Denmark. Estonia* and *Latvia*.
    - *Danish* law obliges a carrier *"to see that the alien immediately leaves Denmark or returns without expenses to the State"*. Although it is not the necessary conclusion of this wording, the *travaux préparatoires* give a starting point to conclude that the carrier is only obliged to carry the alien concerned himself. There is no information available on the practice under the provision.

- In *Estonia* and *Latvia* the obligation "*to find means of onward transportation and to bear the costs thereof*" has not been transposed.

- Within this group of Member States the *Hungarian* Rapporteur mentions another **problem** in regard to the transposition of the third element of Art. 3 ("*to assume responsibility for the costs of stay*": According to the *Hungarian* National Rapporteur under Hungarian law the carrier does not have to bear all costs of stay as provided for by the Directive, but only the costs of **accommodation**.
- *Latvian* and *Estonian* legislation provides that the costs of **expulsion, detention and keeping under guard** can be recovered from the carrier. However, this does not seem to create any problems, as there will rarely be a case where other costs of stay and return than those mentioned in *Latvian* and *Estonian* legislation occur.

- In *Italy* however Art. 3 has **not** been **transposed**. The Italian legislation only states that: "*The carrier, who carried the foreigner to the frontier who is without the documents specified in Art. 4 or that has to be rejected anyway in accordance with this article, is obliged immediately to assume responsibility for him and to return him to the State from which he was transported or which issued the travel document which he might hold*", (Art. 10 (3) "Refusal of entry" of Legislative Decree n. 286 of 25 July 1998). Although this existing legislation (in particular: "*to assume responsibility*") might be interpreted as comprising all elements of Art. 3, even the obligation to bear the costs of stay, this does not seem to be done in practice.

Article 3: obligation to find onward transportation and to bear the costs thereof, the costs of stay and return	
NO TRANSPOSITION	Italy
LEGAL PROBLEM	Denmark, Estonia, Hungary, Latvia, Luxembourg
PRACTICAL PROBLEM	--

Q.6.C. Have administrative measures of control and enforcement of the carrier obligations under Art. 2 and 3 been taken? If so, please specify and describe control and supervision measures and enforcement sanctions unless described under Q. 10.

The question for administrative measures of control and enforcement, once again concerning the practical implementation, could not be answered by five National Rapporteurs (from *Austria, Italy, Malta, Portugal* and *Romania*) due to missing information. In the *Netherlands* it is unclear what administrative changes have occurred resulting from the fact that now also costs of stay and accommodation of the alien can be recovered from the carrier. No information on this issue was received from the Ministry of Justice.

The measures that were taken by the remaining 20 Member States are rather disparate and only some examples shall be mentioned (for Member States not mentioned below please consult the national reports):

- In *Belgium* the return will be organised by the Ministry or a delegate, if the carrier has failed to return the third country national after two written requests. According to a Royal Regulation the carrier will have to pay the costs of the escort and identification of the passenger.
- In *Bulgaria* the Border Police controls whether the carrier fulfils the obligation to verify the validity of the passenger's identification documents and visas. In case the carrier acts contrary to the obligations it is the Border Police which will order the carrier to return the alien and to assume the costs of stay and return.

- The *Cypriote* National Rapporteur mentions that the Ministry of the Interior (Migration Department) co-operates with the Ministry of Justice (Law Enforcement Department) for the implementation of the provision: Officers of the latter are present at airports and check the travel documents of third country national passengers. If they discover irregularities they implement the provisions provided for by the Directive on Carriers Liability.
- *Finland* has implemented legal provisions according to which the carrier that deliberately or out of gross negligence fails to comply with the obligations will be sentenced to a fine.
- *Lithuania*: When the carrier can not return the third country national or find onward means of transportation the State Border Guard Service will deliver an estimation of the cost for return to the carrier. If the carrier does not reimburse these costs within 30 days from delivery, enforcement measures may be applied in accordance with the Code of Civil Procedures (distraint and sale of property).
- *Spain:* When a carrier infringes the obligation of assuming responsibility for the costs caused by a third country national can be sanctioned by a temporary suspension of activities during a maximum of six months; providing a deposit or guarantee depending on the number of people affected and the damage caused; or immobilization of the mean of transport.

3.3. Penalties, Art. 4 (1) (Q.7.A.)

Q.7. Penalties

Q.7.A. Have maximum or minimum penalties applicable to carriers under Art. 26 (2) and (3) of the Schengen Convention been introduced in legislation? (*see Art. 4, which provides for minimum amounts to be foreseen, but gives the Member States the freedom to adopt even stricter provisions*)

☐ **Yes (*please provide exact amounts below*)**

- **Maximum Amount (in Euro for each person carried):**
- **Minimum Amount (in Euro for each person carried):**
- **Maximum Amount if penalty is imposed as a lump sum irrespective of the number of persons carried (in Euro):**

In case the amounts are provided in another currency than Euro, please calculate the equivalent on the basis of the exchange rate table in annex[18] if applicable. If the table does not contain information on your national currency, please calculate the equivalent in Euro on the basis of the recent exchange rate and provide the amount in your national currency in addition.

☐ **No**

Art. 26 (2) and (3) of the Schengen Convention already obliged the Contracting Parties to implement penalties to sanction **the transportation of a third country national who is not in possession of the necessary travel documents**. Art. 4 (1) of the Directive aims at harmonising these penalties. Thus, the provision is only applicable on the transportation of a person not in possession of proper travel documents and visas. It is **not applicable on the obligation to return** a third country national specified in Art. 2 and 3 of the Directive. (Some Member States also provide for penalties in these cases, see chapter 3.5. below. Those penalties may not be based on Art. 4 (1) of the Directive, but on the optional provision Art. 5, which allows Member States to adopt additional measures.)

3.3.1. Level of penalties

Member States are obliged to introduce one of the following amounts:

(1) a maximum amount of not less than 5,000 EUR for each person carried,
(2) a minimum amount of not less than 3,000 EUR for each person carried or
(3) a maximum amount of 500,000 EUR as a lump sum irrespective of the number of people carried.

[18] Rate of Exchange published in the Official Journal on 10 August 2001.

On the basis of the amounts chosen Member States may be categorized as follows:

- Interestingly, nearly half the Member States (12 Member States) although only obliged to introduce one option has actually introduced both a minimum **and** a maximum amount. In most Member States both amounts are identical or close to the ones specified in the Directive (for details please see the table below).

- Several Member States (*Austria, Belgium, Cyprus*) have introduced only a **fixed minimum amount** for each person carried. **This is not a minimum amount in a strictly legal sense** since it can in no case be higher. It can be regarded as the characteristic feature of a minimum amount that the amount can in no case be lower. However it must be considered that the purpose of introducing the minimum amount was to make penalties "*dissuasive, effective and proportionate"* (Art. 4 (1)). This seems to be the case even with such fixed amounts at the minimum level. Only by applying this **wide interpretation approach** the fixed amounts can be regarded as proper transposition of the second alternative of Art. 4 (1) of the Directive (minimum amount). Following this approach is crucial for the following Member States:
  - In *Austria* the minimum amount is a **lump sum** of 3,000 EUR for each person carried.
  - In *Belgium* the situation is even more diverse. This Member State has two sets of fines: The **penal fine** is precisely 3,750 EUR per passenger if **at least five passengers** are carried (parents in the direct line and the spouse are not counted). This penal fine can not be regarded as sufficient transposition since the Directive does not provide for such a minimum number of passengers. The **administrative fine** is also a fixed sum of 3,000 EUR for each person carried.
  - *Cyprus* has a fixed sum of 1,725 CYP which corresponds to 2,955 EUR[19].
  - In *Finland* the situation is slightly different: This Member State has introduced the minimum amount of 3,000 EUR concerning administrative sanctions. This amount is a **flat fee** also. In addition, a penal fine between 850 EUR and up to 850,000 EUR may be imposed on legal persons.

- There is a **problem of transposition** in regard to the level of the amount in five Member States:
  - In *Estonia* the maximum amount for each person carried is only 3,197 EUR.
  - In *Romania* none of the amounts chosen corresponds to the level of penalties provided for by the Directive (the maximum amount is only 4,545 EUR, the minimum amount 1,515 EUR).
  - In *Luxembourg* the maximum amount is 4,000 EUR only[20] and
  - in *Denmark* the minimum amount is 1,075 EUR to 1,344 EUR[21].
  - In the *United Kingdom* the maximum penalty threshold is approximately 3,200 EUR which appears to be lower than the 5,000 Euro threshold required by the Directive in Art. 4 (1) (a). It should however be noted that the penalty threshold was higher before and was changed following a Court decision (the Roth judgment) regarding the compatibility of pre-existing sanctions with fundamental rights.

Details concerning the amounts can be seen in the table below.

[19] This amount is only slightly lower than the minimum amount provided for by the Directive. One possible explanation is that the Euro-currency has gained value after the national provision was adopted. This problem is inherent in a provision like Art. 4 (1) of the Directive as long as the national currency is not fixed to the Euro. Therefore, in the following only marginal deviations from the amounts stipulated by the Directive will not be regarded as insufficient transposition.

[20] It seems that the draft project of law which has been presented by the Government in September 2007 does not contain any changes in this regard.

[21] For further information please consult the Danish National Report.

Table on penalties (problematic amounts are marked in bold letters)

Alternative	**Member States**
Art. 4 (1) (a): **maximum amount of 5,000 EUR** for each person carried	- *Estonia:* **3,197 EUR** - *France:* 5,000 EUR - *Luxembourg:* **4,000 EUR** - *Malta:* 11,646 EUR - *The Netherlands:* 16,750 EUR[22] - *Sweden:* 5,015 EUR - the *United Kingdom:* **3,208 EUR**
Art. 4 (1) (b): **minimum amount of 3,000 EUR** for each person carried	- *Denmark:* **1,075 EUR or 1,344 EUR respectively** - *Austria:* fixed amount of 3,000 EUR - *Belgium:* fixed amount of 3,750 EUR – administrative fine - *Cyprus:* fixed amount of 2,955 EUR
Both a maximum and a minimum amount *(the maximum amount is mentioned first)*	Although this is not required by the Directive, half the Member States (12) has introduced even both a maximum and a minimum amount. ▪ However only in some Member States both amounts correspond or are close to the ones mentioned in Art. 4 (1) of the Directive: - *Bulgaria* and *Hungary: 5*,000 EUR; 3,000 EUR - *Italy*: 5,500 EUR; 3,500 EUR - *Latvia*: 5,000 EUR; 3,035 EUR - *Lithuania:* 5,213 EUR; 3,186 EUR - *Slovakia*: 4,464EUR; 3,571 EUR ▪ In the remaining Member States only one amount corresponds or is close to the ones mentioned in the Directive: - *Czech Republic:* 17,770 EUR, 3554 EUR - *Finland:* 3,000 EUR (fixed amount); up to 850,000 EUR – for legal persons - *Germany:* 5,000 EUR; 1,000 EUR - *Greece*: 20,000 EUR; 5,000 EUR - *Romania*: **4,545 EUR; 1,515 EUR** ▪ In two Member States different penalties are applied if the carrier is a company and not a natural person: - *Portugal*: natural person: 4,000 EUR; 3,000 EUR; company: 6,000 EUR; 4,000EUR - *Slovenia:* natural person: 240 EUR; 83 EUR; company: 6,259 EUR; 3,547 EUR
Art. 4 (1) (c): **maximum amount** as a lump sum irrespective of the number of persons carried	--
All three options	*Poland*: 5,000, 3,000, lump sum: 500,000 EUR *Spain*: 6,000; 3,000, minimum lump sum: 500,000 EUR

[22] The minimum amount of a fine in the *Netherlands* is always 3.00 EUR. With regard to these sanctions it should be remarked that, although the fine can be of a maximum of € 16,750, in practice a transaction will be offered by the prosecutor's office. A first offender will be offered a transaction of € 3,000 which will be raised to € 3,600 in court; in case of a onetime recidivism this will be raised to a transaction of € 4,500 (€ 5,000 in court) and in case of multiple recidivisms to € 6,000 (€ 7,000 in court). Although the system of penal sanctions works with maximum fines, in practice, by offering offenders transactions the Prosecutor's office operates a system of minimum sanctions.

3.3.2. Character of penalties

The character of the penalties is not the same in all Member States[23]. While for example *France* has a system of **administrative** financial sanctions**,** in the *Netherlands* the penalties are **penal** financial sanctions. *Finland* and *Belgium* have introduced even both sets of sanctions: One is **penal** (for not taking the **necessary precautions** to ensure that passengers are in possession of the necessary documents), the other one is **administrative** and requires only that the carrier transported a passenger not having the necessary documents.

Neither the Schengen Convention nor the Directive further specifies the word penalty.[24] Therefore it does not matter whether the penalties are real penal sanctions or only administrative ones.

There is a **problem of transposition** in *Germany*: Here penalties have no 'penal' or 'punishing' character in a strictly technical legal sense but are means of administrative coercion. The fine which may eventually be applied is only indirectly linked to one specific event in which a carrier transported an alien who did not possess proper documents: In such case, a **ban of transportation** is issued in a first step. This ban is enforced by the **threat of a financial penalty**. Hence the fine is not applied to **sanction** the specific behaviour in the **past** but aims at restraining the carrier from infringing the individualized obligations in the **future**. Such an intermediate step might be problematic to bring in accordance with the wording of Art. 4 (1) of the Directive and the original Art. 26 (2) Schengen Convention.
However it should be recalled that the core objective of Art. 4 (1) of Directive 2001/51 is to ensure that penalties in the Member States are *"dissuasive, effective and proportionate"*. Furthermore there are no indications that in the end the practical situation of carriers in regard to the imposition of penalties differs considerably from the situation in Member States which have not introduced such an intermediate step. Therefore this problem does not seem to be serious.

Article 4 (1): penalties	
NO TRANSPOSITION	--
LEGAL PROBLEM	Denmark, Estonia, Germany, Luxembourg, Romania, United Kingdom
PRACTICAL PROBLEM	--

3.4. Compliance with Member States' obligations according to the Geneva Convention, Art. 4 (2) (Q.7.B.)

Q.7.B.	**How is the provision of Art. 4 (2) ("without prejudice to Member States' obligations") interpreted in your country?** ***NB: The wording of Art. 4 (2) is ambiguous and may therefore lead to different interpretations. This problem may be more or less virulent and the different language versions of the directive. Art. 4 (2) may be interpreted as indicating that if a Member State is obliged not to refuse entry to persons seeking international protection, financial sanctions must not be imposed upon carriers who have transported these refugees, but it may as well be interpreted to the contrary way as indicating that carrier obligations apply regardless of an asylum seeker's entitlement to a temporary residence right during the asylum procedure or regardless of recognition as an asylum seeker. Please make clear which interpretation is applied in your Member State or if the provision is interpreted even differently.***

[23] A comprehensive answer on the character of the penalties can not be given as the character of the penalty was not asked for in the Questionnaires and only some National Rapporteurs have included that additional information.
[24] Art. 26 (2) of the Schengen Convention obliged the Contracting Parties to "impose penalties" on carriers which transport aliens who are not in possession of proper travel documents. Art. 4 (1) of the Directive mentions "financial penalties" that are imposed on carriers. No additional definition is given.

3.4.1. Interpretation of Art. 4 (2) of the Directive

Article 4 (2) of the Directive reads:

> *"Art. 4 (1)* [which sets up the penalties applicable] *is* ***without prejudice to Member States' obligations*** *in cases where a third country national* ***seeks international protection****."*

Thus, Art. 4 (2), by referring to Art. 4 (1), only concerns the **obligation to pay financial penalties** for transporting a person not in possession of the necessary travel documents. The **obligation to return** a third country national is **not concerned**.

On a first step the wording includes one major problem of interpretation: Does the phrase "*Member States' obligations*" in Art. 4 (2) mean that a carrier shall be exempted from the obligation to pay the penalty where the person transported is seeking international protection?

a) Literal interpretation approach

The wording allows for two main ways of interpretation:

(1) Art. 4 (2) may indicate that if a Member State is obliged not to refuse entry to persons seeking international protection, **financial sanctions must not be imposed upon carriers who have transported them**.

(2) The provision may as well be interpreted to the contrary way as indicating that **carrier obligations apply regardless of an asylum seeker's entitlement** to a temporary residence right during the asylum procedure or regardless of whether international protection is sought or granted.

b) Historical interpretation approach

During the elaboration of the Directive it was discussed whether carriers should generally be exempted from the obligation to pay a penalty where the person transported seeks international protection. However from the **legislative material** available[25] no tendency towards one of the above-mentioned interpretations may be drawn. In fact it becomes more probable that the provision is rather a dilatory formulaic compromise because the EU-Member States could not agree on one option:

The ***original French Republic's Draft***[26] of the Directive contained the following provisions in regard to the asylum case:

- Recital (2): *"…the existence of such provisions* [on carriers' liability] *should not prejudice the exercise of the right to asylum…. Member States should not apply the penalties … if the third-country national is admitted to the territory for asylum purposes."*
- Art. 4 (3): *"Paragraphs 1 and 2* [i.e. provisions on penalties] *shall not apply if the third-country national* ***is admitted*** *to the territory for asylum purposes."*

The original wording ("*admitted*") implied that the penalties should be inapplicable when the third-country national **was granted** but already when the person was **admitted to the territory**

[25] The minutes of the Council of Luxembourg of 28 June 2001 which finally adopted the Directive have not been made public.

[26] Initiative of the French Republic no. 10701/00 FRONT 42 COMIX 589, forwarded to the General Secretariat of the Council by letter of 16 June 2000: Initiative of the French Republic with a view to the adoption of the Council Directive concerning the harmonisation of financial penalties imposed on carriers transporting into the territory of the Member States third-country nationals lacking the documents necessary for admission, 2000/C 269/06, OJ C 269/8 of 20.9.2000.

for the asylum determination procedure. From the word 'admitted' it can be concluded that the carrier should not be exempted from the obligation to pay the penalty in case the third country national's claim was rejected as **inadmissible**. The original wording also made it clear that the second interpretation mentioned above could not be chosen.

In an ***amended Council Draft***[27] of 29 November 2000 these provisions were changed:

- Recital (3) *"Application of this Directive is without prejudice to the obligations resulting from the Geneva Convention…."*
  The explicit reference to the penalties and the admittance as an asylum seeker was deleted.
- Most important **the reference to the asylum case was deleted in the article on penalties** (then Art. 3) **as well**.

The ***European Parliament,*** when consulted, suggested a wide exemption from penalties in case the person transported seeks or is granted asylum or the person is admitted to the asylum determination procedure.[28]

The ***Directive*** which finally was adopted is somehow in-between the two drafts mentioned above.

- Recital (3) corresponds to the one mentioned in the amended Council Draft.
- Art. 4 (2) now **mentions the asylum case again** [*"…is without prejudice…where a third country national seeks international protection."*], however using a wording which does not correspond to the original French Draft (*"is admitted … for asylum purposes"* in the French Draft *versus "is seeking international protection"* in the final Directive).

From this development two arguments can be concluded:

- Given the difference between the wording of the original Art. 4 (3) of the French Draft and of the final Art. 4 (2) of the Directive it seems improbable that the Council wanted to oblige the Member States **to exempt carriers from paying penalties in all asylum cases**. Obviously the Council did not reach an agreement on introducing the broad exemption suggested in the French Draft. In contrast to the French Draft, the final version only mentions the Member States' obligations and does not explicitly refer to a reduction, waiver or reimbursement of penalties in case of an asylum seeker. Bearing in mind the development of this provision it seems more likely that the members of the Council did agree on Art. 4 (2) by restricting its meaning.
- It has been argued that the result (meaning the possibility to sanction carriers even if the passenger is an asylum seeker admitted on the territory) would have been the same without that provision and that since Art. 4 (2) has actually been included into the Directive only the first interpretation can be correct. However, based on the legislative material it is possible to argue that without Art. 4 (2) it would be problematical for Member States to exempt carriers from penalties even when the person transported is an asylum seeker: The amended Council Draft (which followed the French Draft) did not mention the asylum case at all. Therefore one can also take the view that Art. 4 (2) just wants to make sure that Member States have at least the possibility to exempt carriers in the asylum case.
- The final wording of Art. 4 (2) of the Directive ("seeks" instead of "admitted" in the French proposal) suggests that even an interpretation according to which the penalty is waived in **any** case in which the person transported later requests international protection (even where the request is later rejected as inadmissible) should be considered as correct transposition.

---

[27] Draft Council Directive no.14074/00 FRONT 67 COMIX 868 of 29.11.2000, http://register.consilium.europa.eu/pdf/en/00/st14/14074en0.pdf.

[28] Cf. Report A5-0069/2001 of 28 February 2001 of the Rapporteur Timothy Kirkhope (Committee on Citizens' Freedom and Rights, Justice and Home Affairs), amendment 5, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A5-2001-0069+0+DOC+PDF+V0//EN, as adopted by the European Parliament on 13.3.2001, OJ C 343/21 of 5.12.2001.

Therefore, with regard to the wording and to the legislative material available none of the two interpretations mentioned above can be regarded as the only one acceptable.

c) Teleological interpretation approach

Even a teleological approach does not lead to differing results:

It can be assumed that the European legislator would not want to adopt a provision which is unlawful. Furthermore, if there is more than one possible interpretation and one of these interpretations is unlawful, it cannot be chosen. Therefore, although the subject of this report is actually the transposition of the Directive and not its lawfulness (i.e. the compatibility of Member States actions with the Geneva Convention), some comments should be noted in this regard.

It has been argued that the imposition of penalties contradicts the Geneva Convention of 1951 if the third country national is seeking international protection.

The problem is, that Art. 31 of the Geneva Convention only clearly exempts the refugee from penalties, not the carrier. The argument frequently repeated in this debate is that carrier sanctions seriously limit the right to seek and enjoy asylum from persecution. Hence the sanctions would indirectly contradict the non-refoulement clause in the Geneva Convention. This reasoning rests on the premise whereby the Geneva Convention impedes Member States to actively hinder persons from getting access to their territory for the purpose of seeking asylum. On the other hand, Contracting States have persistently maintained the view that the non-refoulement prohibition of Art. 33 of the Convention does have no bearing on the right of states to enforce their rules on controlling entry and prohibit carriers to transport passengers who do not dispose of the necessary travel documents. In particular it has been argued that carrier sanctions can only be applied effectively if there are no exemptions admitted for persons claiming international protection regardless of their admission to an asylum procedure and reception as a refugee.
Community law especially in Art. 63 of the Treaty of the European Community provides for the compliance of the European legislation with the Geneva Convention. Yet, the reference to the Convention in Community law does not imply that the Convention as such becomes Community law. It means that European legislation intends to implement the Geneva Convention's provisions. Whether under the Geneva Convention carriers must be exempt from sanctions when they transport undocumented passengers who apply for asylum and/or qualify for international protection under the Convention is highly controversial in state practice and legal writing.
UNHCR, during the negotiations in a comment on the project for Carriers Liability Directive, suggested including an explicit provision exempting carriers from liability if the passenger lodges an asylum application and has a plausible claim to be in need of international protection without however referring to the Geneva Convention.[29] The proposal however did not receive the support of a sufficient number of member states

However, one may recall that the European Council in Tampere agreed to base the EU's common policies on asylum and immigration on principles which *"offer guarantees to those who seek protection in or **access** to European Union."*[30] Therefore it can be argued that at least as a political statement access to the European Union was to be guaranteed although it is fairly obvious that the existing restrictions in the EU-Member States on entry, visa obligations and travel documents as well as carrier sanctions were not discussed by the heads of state when adopting the resolution.

[29] UNHCR, Tool Box II: The Instruments, pp. 565-566, http://www.unhcr.org/pub/PUBL/406a8c432.pdf.
[30] Presidency conclusions of the Tampere summit of 15 and 16 October 1999, no. 3, http://www.europarl.europa.eu/summits/tam_en.htm.

d) Conclusion and evaluation in the Tables of Correspondence

Neither from the wording nor from the legislative material or the purpose of the Directive it is possible to conclude that only one of the two interpretations mentioned above is correct.
Due to the controversy mentioned the Member States which followed the second interpretation were asked to indicate "**problem**" in the Table of Correspondence. This will also help to identify easily which Member State followed the first and those which followed the second approach.

3.4.2. Transposition by the Member States

Among the Member States there is no major tendency as to the interpretation of this provision: Whereas nearly half the Member States follows the first interpretation, the other half applies the second one:

(1) 11 out of 26 Member States bound by the Directive follow the first approach, i.e. they take into account whether the person transported who does not have the necessary documents is an asylum seeker.
These Member States are: *Austria, Belgium, Finland, France, Greece, Lithuania, Luxembourg, the Netherlands, Spain, Sweden* and *United Kingdom.*

The Directive does not contain a precise definition of who should be regarded as a person *"seeking international protection"* in terms of Art. 4 (2) of the Directive. Hence two more problems of interpretation arise: First: which situations are to be understood as 'international protection' and second: when is a person 'seeking' such protection. The Member States show three different interpretations:

(a) In the *United Kingdom* the penalty is waived or reimbursed (if it has been paid already) once the passenger is **granted asylum or refugee status according to the Geneva Convention, including non-refoulement**. The corresponding National Rapporteur mentions that a **practical problem of implementation** might arise in the light of the fact that waiver of penalty is discretionary, not legally binding and ex post. (**Please note:** The terminology among the Member States in this regard varies. The meaning of 'asylum' is not the same in all Member States: In some Member States asylum is identical with refugee status. Other Member States, such as *Austria* and *Germany* distinguish between asylum, refugee status and non-refoulement (where rejection is inadmissible), hence in these Member states asylum is not identical with the refugee status. To make this clear all three cases are mentioned explicitly above.)

(b) The second interpretation provides that the carrier is exempted from the obligation to pay the penalty when the passenger is
- **granted asylum, refugee status or non-refoulement** or
- **granted or subsidiary protection** and even when
- **the third country national enjoys temporary protection**

This interpretation has been chosen by *Austria, Belgium*[31]*, Finland* and *Sweden.* In *Sweden* it is even sufficient that the carrier had **good reason to believe** that the person transported was entitled to asylum or protection status.

(c) The third interpretation
- takes into account all situations considered by the second interpretation and
- **in addition** waives the penalty already when the passenger is only **seeking asylum**.

This interpretation has been chosen by the following Member States: *France, Greece, Lithuania, Luxembourg, the Netherlands*[32] and *Spain.* The *Dutch* National Rapporteurs

[31] In *Belgium* the administrative fine paid is reimbursed if the passenger is later recognized as a refugee or granted subsidiary or temporary protection.

mention a practical problem of implementation as the exemption is only contained in an administrative guideline which is even below the level of a circular. Given the low level of this provision its actual application remains unclear. On the other hand the *Dutch* system seems – at least in theory – to be the most sophisticated. There are special immigration officers a carrier can call to ask what to do with an undocumented passenger that wants to claim asylum. It may however be a practical problem of implementation that at busy airports the practical implementation of this provision is unclear.

It seems in fact problematic to combine this broad understanding with the system of carriers' liability, bearing in mind that a large number of undocumented third country nationals will apply for asylum. The choice of the word 'seeking' in Art. 4 (2) of the Directive instead of 'admitted' (as it was suggested before in the French proposal) implies that it is unnecessary that the person seeking asylum is actually admitted to the territory (which would only be the case if the claim is not rejected as **inadmissible**). Consequently, for the purposes of the study even this case will be regarded as correct transposition of Art. 4 (2) of the Directive.

The legal situation of the following Member States should be noted:

- *France* exempts carriers from the fines in case asylum seekers lodged an asylum claim which is not considered as manifestly unfounded.
- *Greece* does not exempt all carriers: Only in case a carrier rescues people over board or transports a person who needs international protection according to **international maritime law**, penalties are not applied. Hence, the exemption only concerns maritime carriers.

(2) The other 15 Member States bound by the Directive have adopted the view that **sanctions on carriers are applied regardless of whether the passenger is an asylum seeker**. The corresponding national legislation is in general characterized by an absence of explicit rules on asylum seekers in regard to the financial penalties imposed on carriers. The **absence of explicit** provisions leads to conclude that **sanctions are applied regardless of whether asylum etc. is sought or granted**.

This interpretation has been chosen by the following Member States: *Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Germany, Hungary, Italy, Latvia, Malta, Poland, Portugal, Romania, Slovakia and Slovenia.*

Two of these Member States reduce the penalty to be paid in case the third country national is later granted international protection.

- *Czech* legislation does not provide for an exemption from the obligation to pay the sanction where the person transported is an asylum seeker. However the National Rapporteur of the *Czech Republic* mentions unofficial pieces of information which suggest that the situation may be taken into account by the authorities when deciding on the amount which will be imposed as a penalty (and tend to impose lower penalties).
- *Danish* legislation itself does not provide for such an exemption. However the preparatory notes of the Aliens Act state that the provision on penalties should not be applied in cases in which an asylum-seeker enters the country directly and he is subject to persecution encompassed by the Geneva Convention. However the practical implementation of this provision is unclear since according to a notice of the Attorney General the criminal case against the carrier and the asylum case must be kept separately.

[32] In case asylum is not granted but the account of the asylum seeker has been plausible the carrier may apply for an exclusion from prosecution.

Article 4 (2) : consideration of Member States' obligations	
NO TRANSPOSITION	--
LEGAL PROBLEM	Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Germany, Hungary, Italy, Latvia, Malta, Poland, Portugal, Romania, Slovakia, Slovenia
PRACTICAL PROBLEM	The Netherlands, the United Kingdom

3.5. Introduction of additional measures, Art. 5 (Q.8.)

Q.8. Have other measures like immobilisation, seizure and confiscation been adopted or retained in your country? (*see Art. 5, which is an optional provision and gives the Member States the freedom to adopt additional provisions with regard to sanctions*)

Art. 5 is an optional provision. This article refers to Art. 26 (2) and (3) Schengen Convention as well as Art. 2 of the Directive. Thus it states the Member States' right to adopt or retain additional provisions when a carrier does not comply with

(1) the **obligations not to transport** third country nationals lacking proper travel documents (*cf.* Art. 26 (2) and (3) of the Schengen Convention) or

(2) the **obligation to return** third country nationals in transit (Art. 2 of the Directive).

There is no reference to the obligations mentioned in Art. 3 of the Directive nor to those mentioned in Art. 26 (1) Schengen Convention (which provides for the obligation to return and the obligation to ensure that third country nationals are in possession of the required travel documents).

Art. 5 mentions measures such as

- immobilisation,
- seizure and confiscation of the means of transport,
- temporary suspension of withdrawal of the operating licence.

Only nine Member States have used this option *(Belgium, Bulgaria, Cyprus, Denmark, Finland, Greece, Italy, Spain* and *Sweden).*

Those Member States which used the option are hardly to pool:

- In *Belgium* the **vehicle of transportation** can be **immobilized or seized** if a carrier has no seat in Belgium in case of prosecution for a criminal fee or if the carrier does not immediately pay the administrative fee.
- In *Bulgaria* the carrier may choose between paying the fee of 3,000-5,000 EUR or the confiscation of their property in the same amount.
- In *Cyprus* **immobilisation** and **seizure** have been adopted.
- *Finnish* legislation does in principle allow for all of the above-mentioned measures.
- In *Greece* the means of transport are retained until fulfilment of the carriers' obligations.
- In *Italy* means of transport can be confiscated and then reused by the public authorities or destroyed. In the most serious cases, the operating licence with reference to the professional activity of transport and to the mean of transport is suspended from one to twelve months or withdrawn.
- In *Spain* the means of transport can be confiscated only when inducting, promoting or facilitating, for financial gain, the irregular immigration of persons.
- *Sweden* applies a fine also in case the carrier refuses to take the expelled person on board. If the carrier does not pay the fine the authority may contact the Enforcement Service.

3.6. Exculpation from sanctions (Q.9.)

Q.9.	**Does your Member State apply a policy according to which carriers will not be subject to sanctions if they can prove that they have complied with "best practices", a "memorandum of understanding between the transport industry and the administration", "handbooks of due diligence" or other codes of conduct? (*This possibility is not explicitly foreseen in the directive but is a big issue in the discussions about the system of carriers liability)***

The possibility to exempt carriers is not explicitly stipulated in the Directive.

No information is available in this regard in *Denmark* and *Malta*. In the *Czech Republic* the Aliens Act contains a general provision according to which a person will not be liable for administrative misconduct offence if the person can prove a maximum reasonable effort to prevent the breach of an obligation. However, to the knowledge of the National Rapporteur this provision is not applied in practice in regard to carriers.

Only ten National Rapporteurs indicated that their Member States apply a policy according to which carriers will not be subject to sanctions if they can prove that they have complied with certain standards (*Belgium, Cyprus, Finland, France, Germany, Lithuania, Luxembourg, the Netherlands, Poland* and *the United Kingdom*):

- *Belgian* law provides the legal basis for reducing the administrative fine on the basis of a prior **memorandum of understanding** between the carrier and the Minister or his delegate.
- The *Cypriote* Ministry of Communication and Works (Civil Aviation Department) adopts international codes of conduct defining the carriers' rights and obligations.
- According to *Finnish* law the penalty is applicable if the carrier has broken the obligations to check travel documents or failed the legal duty of inspection or reporting of passengers. Hence, the penalty could be waived if the carrier has acted diligently. The competent authority conducts trainings with airline carriers on document verification.
- In *France* the fine is reduced to 3,000 EUR if the carrier uses a registered digitisation and transmission device on passengers' boarding location. This is to prevent passengers from destroying their papers and travel documents after boarding. In that case the carrier has a proof that the passenger showed the required documents.
- *German* law provides a legal basis for *ad hoc* arrangements and memoranda of understanding. Standard memoranda of understanding are currently under preparation.
- *Lithuanian* and *French* laws provide that financial sanctions are not imposed if the carrier made sure that the passenger had the documents necessary or the competent authority determines that travel documents were falsification. In the *Lithuanian* legislative material it becomes clear that these rules are not applied where the carrier took all necessary measures to ensure that the third country national had necessary travel documents. In *Poland* as well such due diligence may lead to a reduction of the fines.
- The *Netherlands* have a memorandum of understanding with the Royal Airline KLM only. On the basis of this memorandum KLM is provided with expertise and has since the signing of the memorandum of understanding not been prosecuted[33]. There are also guidelines for other carriers; these other carriers however will be liable to sanctions.
- In the *United Kingdom* charges for transporting improperly documented passengers are normally waived if the carrier can demonstrate security procedures at a port of embarkation, a good level of co-operation and satisfactory records in respect of its responsibilities.

[33] For details please refer to the National Report pp.11-13.

3.7. Measures of defence and appeal, Art. 6 (Q.10)

Q.10. Measures of Defence and Appeal (*see Art. 6, which is a mandatory provision. Please pay attention to the fact that Art. 6 requires "effective rights of defence and appeal" and make clear if any practical problems hinder the effectiveness of system of appeal in your Member State)*

Q.10.A. If proceedings are brought against carriers with a view to imposing penalties, are carriers entitled to the following defence or appeal measures (Art. 6)?

- ☐ **Administrative appeal rights**
- ☐ **Judicial appeal rights**

Q.10.B. Measures of defence and/or appeal have…

- ☐ **suspensive effect with regard to administrative appeal**
- ☐ **suspensive effect with regard to judicial appeal**
- ☐ **no suspensive effect**

Q.10.C. If there is no suspensive effect, how is effectiveness of defence and appeal ensured?

Art. 6 is a mandatory provision and requires Member States to ensure that if proceedings are brought forward against carriers with a view to **imposing penalties**, carriers *"have effective rights of defence and appeal"*.

The criteria under which effectiveness of defence and appeal is ensured are not further specified in the Directive. The Member States' legislation in this regard varies a lot. For the purposes of this study effectiveness of defence and appeal will be regarded as "**in order**" if national legislation provides the possibility to obtain a judicial review before the administrative decision is enforced. There are mainly two approaches possible:

(1) The appeal has suspensive effect or

(2) it is otherwise ensured that a decision on the imposition of a penalty is not enforced before a decision upon the appeal has been taken. Such will be the case if the carrier has the possibility to apply for an interim relief.[34]

All Member States actually grant appeal rights. There are however several variants:

- Nearly half the Member States grant **both administrative and judicial appeal rights** (thirteen Member States: *Cyprus, Czech Republic, France, Germany, Greece, Hungary, Italy, Latvia, Luxembourg, Malta, Poland, Slovakia* and *Spain*).
  Out of these Member States only in *Greece* both appeals have suspensive effect. In five Member States (the *Czech Republic, Hungary,* Malta, *Poland* and *Slovakia*) only the administrative appeal has suspensive effect whereas in *Latvia* there is suspensive effect only in regard to the judicial appeal. In the remaining six Member States (*Cyprus, France, Germany, Italy, Luxembourg* and *Spain*) both appeals have no suspensive effect but in these Member States effectiveness of defence and appeal is ensured otherwise.
- *Austria* grants **administrative appeal rights only** which have however suspensive effect.
- All other Member States (12 Member States: *Belgium, Bulgaria, Denmark, Estonia, Finland, Lithuania, the Netherlands, Portugal, Romania, Slovenia, Sweden and the United Kingdom)* grant **judicial appeal rights only**. In all these Member States the appeal does not have automatic suspensive effect but the effectiveness of appeal is ensured otherwise as follows: With the exception of *Belgium* all these Member States provide for the possibility to grant interim judicial protection. Missing this possibility, *Belgian* law explicitly provides that the judge has one month only to rule about a case. The logic behind this seems to be that within such short delays no major harm can be caused to the carrier. However, it should be noted that according to the National Rapport such quick decisions do not seem to happen in practice.

[34] *Cf.* ECJ, case C-432/05, judgement of 13 March 2007 (*Unibet),* the decision concerned however the conformity of national law with Community law, no. 77: *"…the principle of effective judicial protection of an individual's rights under Community law must be interpreted as requiring it to be possible in the legal order of a Member State for interim relief to be granted until the competent court has given a ruling on whether national provisions are compatible with Community law, where the grant of such relief is necessary to ensure the full effectiveness of the judgment to be given on the existence of such rights."*

To conclude: effectiveness of defence and appeal is ensured by an automatic suspensive effect of administrative or judicial appeal rights in the majority of the Member States (to be exact: in 17 Member States, these are: *Austria, Bulgaria, the Czech Republic* (only in regard to administrative appeal), *Denmark, Finland, Greece, Hungary* (only in regard to administrative appeal), *Latvia, Lithuania, Malta, the Netherlands, Poland, Romania, Slovakia, Slovenia, Sweden* and the *United Kingdom*).

A smaller group of 10 Member States (*Cyprus, Czech Republic* (only in regard to the judicial appeal), *Estonia, France, Germany, Hungary* (only in regard to the judicial appeal), *Italy, Luxembourg, Portugal* and *Spain)* ensures effectiveness of defence otherwise by granting the possibility to apply for an interim relief suspending the enforcement of an administrative act on penalties.
In *Belgium* none of these possibilities exists but effectiveness of defence shall be ensured by a very speedy procedure.

Article 10: measures of defence and appeal	
NO TRANSPOSITION AT ALL	--
LEGAL PROBLEM	--
PRACTICAL PROBLEM	--

4. Impact of the Directive

4.1. Evolution of internal law due to the transposition (Q.11. and Q.12.)

Q.11.	**Did the transposition of the Directive make the rules related to carrier obligations to return third country nationals become from the point of view of carriers concerned more favourable or less favourable regarding the evolution of internal law (for example because of abolition or introduction of more favourable provisions, more restrictive conditions or amendments)? Make also a comparison with the standard of the Directive in the last column of the table below.**
Q.12.	**From your point of view, did the transposition of the directive imply other interesting changes for the carriers concerned regarding other elements than the ones mentioned in the previous question. Make also a comparison with the standard of the directive in the last column of the table below**

Concerning the evolution of law the Member States can be divided into two main groups:

- The first and largest group consists of Member States which already had implemented the carriers' obligations and sanctions mentioned in Art. 26 of the Schengen Convention before the Directive was adopted. Consequently, the transposition implied only minor changes to the existing legislation, such as raising the amounts of the penalties. By referring to the new penalties most National Rapporteurs consider the new rules to be less favourable than previous internal rules. The *Austrian* National Rapporteur however mentions that the national provisions on carriers' liability are now **more detailed** than before and therefore regards the situation as more favourable than before.
- The second group consists of Member States *(Bulgaria and Cyprus)* which prior to the transposition did not have any obligation to return third country nationals in transit. These National Rapporteurs also consider the new set of rules to be less favourable.

4.2. Tendency to copy the provisions of the Directive? (Q.13)

Q.13.A. Mention if there is a general tendency to just copy the provisions of the directive into national legislation without redrafting or adapting them to national circumstances.
Q.13.B. If yes, please indicate if this general tendency may or may not create problems (for example difficulties of implementation, risk that a provision remains unapplied).
Q.13.C. If yes, give some of examples:
Q.13.D. If only some provisions of the directive have been copied and if this may create any problem, please quote them and explain the problem.

Out of the Member States only eight (*Cyprus*, *Finland*, *France*, *Greece*, *Hungary*, *Italy*, *Malta* and *Romania*) show a general tendency to just copy the provisions of the directive. Out of these Member States only the *Hungarian* Report mentions that this tendency may create problems. The National Rapporteur stresses that all aspects of carriers liability relating to onward transportation, bearing costs and which costs are not regulated in details. The criteria of careful control on travelling documents and the consideration of repetition of trespassing are unclear.

4.3. Problems with the translation (Q.15.)

Q.15. Specify if there are or not problems with the translation of the text of the directive in the official language of your Member State and give in case a list of the worst examples of provisions which have been badly translated.
☐ **There are no problems with the translation of the directive**
☐ **There are some problems with the translation of (indicate the number of the articles concerned) of the directive.**
Explain the difficulties that this could create:

A problem with the translation of the text of the directive into the official language of the Member State concerned is mentioned by the *Lithuanian* National Rapporteur only in regard to Art. 4 (1)(c) of the Directive:
The English original wording is "…***the maximum amount of the penalty imposed as a lump sum for each infringement*** *is not less 'that'*[35] *EUR 500,000…irrespective of the number of persons carried.*" The Lithuanian version can be translated as follows: "…***the lump sum of penalties for each infringement*** *is not less than EUR 500,000…irrespective of the number of persons carried.*"
According to the National Rapporteur the Directive just wants to make sure that Member States do not impose very low lump sums but the Lithuanian version implies that the amount of EUR 500,000 is just a minimum amount. This might in theory lead to the introduction of disproportionate penalties in case of numerous infringements. In practice the translation has not lead to problems since *Lithuania* has not introduced a maximum amount of lump sum of penalties.

4.4. Jurisprudence (Q.14.)

Q.14. Quote *interesting* decisions of jurisprudence related to the directive, its transposition or implementation (so this question concerns in principle decisions later that the directive, but previous ones might be quoted if relevant). Quote in particular decisions of supreme Courts; limit yourself to the appeal Courts and ignore the first resort if there are too many decisions at this level, unless there is a certain jurisprudence made of a group of decisions.

[35] This seems to be a spelling mistake and should be replaced with "than".

Interesting decisions have been quoted by eight National Rapporteurs:

- The *Austrian* Constitutional Court repealed the whole section on sanctions in 2001 ruling them unconstitutional because the carriers' obligations had not been stipulated clearly enough.
- The *Belgian* Constitutional Court ruled in 2003 that the special system of appeal is not contrary to the principle of equality regarding judicial protection as long as the judge has the same competence as the administration to check if the fine is justified *de facto* and *de jure* and in particular that the carrier has committed a mistake or not.
- The *Danish* Supreme Court had to decide a case in which seven airline companies had been charged a fine for transporting third country nationals not in possession of the required travel documents. The Court ruled that they were not liable where they **could not or should not** have avoided the detection of the identification, passport or visa as forgeries. In the situation where they should or could have discovered this, the fine was set at DKK 8,000 (EUR 1,073).
- The *Finnish* National Rapporteur mentions four cases currently pending before the Supreme Administrative Court. Furthermore the Administrative Court has overturned two administrative decisions. Both cases concerned forgeries of travel documents which were not visible with plain eye but required technical analysis to be detected.
- The *French* Constitutional Council ruled in 2005 that an air carrier must check whether the passenger fulfils the conditions of entry onto French soil but also the conditions of entry into the country of final destination (if the trip is not to end in *France*).
- The *German* Federal Administrative Court overturned administrative decisions on the imposition of fines against carriers. The Court held that the authority which had imposed the fines had actually acted beyond its competence as there was no sufficient legal basis for the competence to impose fines. The necessary regulation has afterwards been adopted.
- In 2000 the *Dutch* Supreme Court ruled on the question how the burden of proof should be divided between the Public Prosecutor and the carrier. The Court ruled that for the carrier to be liable negligence is required. Such negligence may be assumed in case a passenger without proper documents is brought in as this is a serious indication that controls have not been executed thoroughly. In this case the carrier will have to proof that he took the necessary measures to prevent this from happening. As a consequence of the judgement the plaintiff, the airline KLM, had to pay a fine of about 4.5 million Euro.
- The *Dutch* National Rapporteur cites three more decisions reached by first resort courts: One case dealt with a shipping company which had transported stowaways and refused to re-transport them or to let them on board. The company referred to several international regulations which confirm the role of the shipmaster in exercising his professional judgement over decisions necessary to maintain the security of the ship.[36] The court found that the authorities should consider such grounds for refusing the re-transportation.
  The other two cases concerned air carriers which complained that they were subjected to a stricter prosecution policy than the Dutch Royal Airline (KLM) since the competent authority has a special agreement with KLM. The Court dismissed the claim by emphasising that there was enough justification to apply a different prosecution policy (for example the fact that the Schiphol Airport based KLM can be considered as the "home carrier").
- The *United Kingdom* Court of Appeal had to examine the compatibility of the provision on fixed penalties of GBP 2,000 with the European Convention on Human Rights (ECHR) and Community law (free movement). In the *International Transport Roth GmbH and Other v SSHD* judgement the Court ruled that the sanctions were compatible with EC law but that the fixed fee (which was regarded as a criminal penalty for the purposes of Article 6 ECHR) with no possibility of mitigation and with no flexibility was unfair. This judgement resulted in changes to domestic law.

[36] The International Convention for the Safety of Life at Sea. (SOLAS) 1974; Regulation (EC) no. 725/2004 of 31 March 2004 On enhancing ship and port facility security OJ L 129/6 29.4.2004; and the International Ship and Port Facility Security Code (ISPS Code).

4.5. Other interesting elements (Q.16. and Q.17.)

Q.16. Following your personal point of view, mention from the point of view of third country nationals and/or from the Member State any interesting or innovative practice in your Member State.

From the point of view of third country nationals and/or from the Member State interesting or innovative practices have been identified by five National Rapporteurs:

- In *Belgium* the system of administrative fines was added to the system of penal fines which proved not efficient enough from the point of view of *Belgium*.
- The *Estonian* National Rapporteur points out that the sanctions in the transposition act are declaratory and not efficient. The Directive is not fully transposed and may therefore create practice which differs from other EU countries.
- In *Finland* the imposition of the penalty requires a measure of negligence by the carrier. Moreover, the penalty shall be waived in two cases: First, when the person transported is permitted to stay thanks to international protection and second when the carrier is convicted under criminal charges for aiding in illegal entry. The waiver is carried out ex officio and does not require any separate applications or appeals by the carrier. Furthermore the carrier has the possibility to be heard in writing before the penalty fee is imposed.
- In *France* the fine of 5,000 EUR is reduced to 3,000 EUR if the carrier has used a registered digitisation and transmission device to control travel documents and visas. Prior to boarding the carrier creates digital pictures of the travel documents and of required the visa. These pictures are then sent in a sealed envelope to the pilot and delivered to the authority in charge at the Roissy airport. This procedure ameliorates the checking of the documents during border control and allows identifications of aliens who after having presented their travel documents when boarding are not on possession of these documents when arriving in *France*.[37]

Q.17. Please add here any other interesting element in your Member State which you did not had the occasion to mention in your previous answers

Eight National Rapporteurs mentioned other interesting elements:

- *Belgium* applies administrative fines also on carriers for transporting EU citizens not able to prove their identity and nationality upon arrival in Belgium.[38]
- In *Finland* statistics show an increasing number of investigations concerning the administrative penalty fee (2004: 31, 2005: 89 and 2006: 169). Out of these investigations the number of investigations that ended with the imposition of the penalty has risen much more when compared to the number of investigations that ended with no penalty fee.[39]
- The *Polish* Report contains figures on the number of prosecutions of carriers as well: During nearly one year (between 1 September 2003 and 30 June 2004) 281 decisions imposing administrative fines, usually 3,000 EUR, were issued. All these decisions involved air carriers. Interestingly, after implementation of the Directive the number of decisions imposing the penalties has significantly diminished.
- In *France* carriers are exonerated from the responsibility when they assure that the documents presented to them did not comprise elements of obvious irregularity. This is delicate since it can mean that the carrier has to perform a minimal control only.
- The *Netherlands* apply a similar policy as *France* (*cf.* French National Report, Q.16.) by requiring the carrier to hand over transcripts of passengers' documentation (copies or scans). This obligation applies in about 20 airports which are listed in the Aliens Regulation of 2000. Flights from these airports are regarded as 'risk flights' since they generally transport some

[37] For further information please consult the French National Report, pp. 14-15.
[38] This legislation is not contrary to the Directive but possibly infringes the right to free movement of European citizens.
[39] For more details and figures *cf.* Finnish National Report, Q.17.

asylum seekers. The *Dutch* National Report contains several more interesting elements, e.g. on the case of transport of asylum seekers.[40]

- In *Hungary* the fines paid by carriers help to finance a fund which provides grants and supports projects on the prevention of crime and illegal migration. The fund is managed by the Ministry responsible for combating illegal migration. Project proposals can be submitted by NGOs, refugee camps, temporary shelters etc. For instance, in 2005 an information campaign was financed from that fund.
- The *Swedish* National Rapporteur had contacted several NGOs concerning the Directive. All of them state that the system of carrier's liability impairs the right to seek asylum. UNHCR Stockholm is of the meaning that the responsibility to assess who can be qualified as a refugee shall not be delegated to private actors in this way.
- As for the *United Kingdom* it is worth flagging up again the emphasis on Home Office Guidelines and the operation of schemes aimed at encouraging self-regulation and best practice.

5. Member States not bound by the Directive: The situation of Ireland

5.1. National legal basis (Q.1., Q.4.)

Ireland is the only Member State not bound by the Directive. However, the Directive has influenced the Irish legislator: The Immigration Act was amended twice, in 2003 and 2004, to transpose provisions of the Directive. Furthermore three regulations were issued.

5.2. Competent authorities (Q.3.)

The competence to issue administrative decisions in regard to carriers' obligations is with the Garda National Immigration Bureau (GNIB). GNIB is responsible for points of entry into state and combating trafficking in illegal immigrants and their removal. GNIB is a division of An Garda Síochána (AGS) which is responsible for all immigration matters in the States. The GNIC's head is responsible to the AGS's head. The latter is appointed by the Government. He is responsible to the Minister for Justice, Equality and Law Reform and runs the organisation on a day-to-day basis. The Minister in turn is responsible to the Government for the performance of AGS.

The Minister for Justice, Equality and Law Reform himself may issue circulars and regulations. He defines *Ireland*'s policy and procedures in relation to immigration and immigration related matters. The implementation of the immigration policy is with the Immigration and Citizenship (Operations) Division which is a division of the Ministry Department of Justice, Equality and Law Reform.

5.3. Obligation to return third country nationals in transit, Art. 2 (Q.5.)

With the Immigration Act 2003 *Ireland* adopted provisions in regard to the obligation of carriers to return third country nationals **in transit** which correspond to the obligations stated in Art. 2 of the Directive: This act provides that where the identity of the carrier is known the immigration officer or member of the AGS can give directions to the carrier to remove the person from the State. *Irish* law explicitly stipulates the two cases also mentioned by Art. 2 of the Directive in which a third country national may be in transit: (a) the carrier who was to take the person to the

[40] For further information please consult the Dutch National Report, Q.17.

country of destination refused to take the person on board or (b) the person was refused entry by the country of final destination and was sent back.

5.4. Obligation under Art. 3 (Q.6.)

Art. 3 of the Directive has been transposed into *Irish* law as well: The Immigration Act 2003 provides that the carrier is obliged to return the third country national. *Irish* law does not contain an explicit provision according to which a carrier unable to return this person is obliged to find means of onward transportation (as provided for by Art. 3 of the Directive). However the general obligation to return the person transported comprises the obligation to find means of transportation.
The Immigration Act 2003 provides that where a carrier fails or is unable to comply **without delay** with a direction to remove the person, the Immigration Officer or member of the AGS may make alternative arrangements for the removal of the person. The costs incurred by the Minister in respect of the maintenance, detention and removal may be recovered from the carrier.

5.5. Measures of control and enforcement (Q.6.C.)

Ireland has also taken administrative measures of control and enforcement of the carrier obligation under Art. 2 and Art. 3 of the Directive.
The GNIB has commenced the deployment of Airline Liaison Officers in 2005 to various airports. They have up-to-date knowledge of the relevant legal and operational issues and can provide advice of carriers.
Where a person fails to produce a valid Irish transit visa, an immigration officer may exercise his discretion and decide to issue that individual passenger with a warning, rather than a removal direction, and permit onward travel to their destination. In such case the carrier will nevertheless be issued with a carriers' liability notice.

5.6. Penalties, Art. 4 (1) (Q.7.A.)

The situation concerning the penalties to be imposed on carrier who transport third country nationals without the necessary travel documents slightly differs from what is provided for by Art. 4 (1) of the Directive.

Ireland has introduced provisions according to which a carriers is liable to a summary conviction of a fine for transporting a third country national without the necessary travel documents (passports or equivalent and, if necessary, visa).
The fine is a **fixed** sum of **3,000 EUR** for each person carried. The amount can in no case be lower, which seems to be the characteristic feature of a minimum amount. However, there is also no possibility that the amount imposed is higher. Therefore, only by adopting a wide approach of interpretation this fixed amount can be interpreted as conforming to the **minimum amount** prescribed by Art. 4 (1) (b) of the Directive.

In practice the carrier will receive a carrier liability notice asking him to pay the fine. However, the carrier may even reduce the fine to 1,500 EUR by paying this amount within 28 days from receiving the notice. In case the 28-day period has expired without payment a **prosecution** in respect of the alleged offence will be instituted. In this case the carrier will be liable still on **summary conviction** to a fine of 3,000 EUR.

5.7. Art. 4 (2) (Q.7.B.)

Under Irish legislation the carrier is liable where the person transported fails to produce the valid passport or equivalent and the necessary visa, as the carrier has ultimately failed to ensure compliance with the requirements under the Immigration Act.

5.8. Introduction of additional measures, Art. 5 (Q.8.)

Ireland has adopted other sanctions with regard to carriers' obligations: Imprisonment is an available sanction where a carrier fails to comply with the direction to remove a person concerned. In regard to carriers liability no other measures have been chosen. However in other areas such as human trafficking legislation has been enacted which mainly provides for detention of vehicles and seizure of other values.

5.9. Exculpation (Q.9.)

Irish legislation provides that it is a suitable defence for a carrier to show that he took all steps as were reasonably open to him to ensure compliance with the legal provisions. However this is legislation and – due to missing jurisprudence – it is not yet possible to say how this provision will be interpreted.

The *Irish* Immigration Act furthermore provides the legal basis for the Minister to publish Guidelines for carriers in this regard. Following such guidelines would establish a defence as mentioned above and could constitute a "code of conduct". However up to date no such guidelines have been issued.

5.10. Measures of defence and appeal, Art. 6 (Q.10.)

In *Ireland*, effective measures of defence and appeal in regard to penalties as mentioned in Art. 6 of the Directive are ensured as follows: A carrier may dispute a fine of 3,000 EUR for transporting an improperly documented person at the District court. A convicted carrier may lodge the appeal to the Circuit Court. The Circuit Court's decision is final and as a rule not appealable, appeal to the High Court is only permissible on a point of law. Prior to the conviction the fine will not be collected. After conviction, the appeal to the Circuit Court has suspensive effect.
Furthermore the applicant will receive legal aid if he can establish that his means are insufficient to enable him to pay for legal aid independently.

5.11. Impact of the Directive (Q.11. and Q.12.)

Prior to the implementation of the Directive, *Ireland* did not have specific legislative provisions dealing with carriers' liability. This resulted in missing checks of documents and many illegal immigrants arriving in *Ireland*. From a carrier's point of view however, the evolution of internal law is **less favourable** than previous internal rules.
The *Irish* National Rapporteur considers the rules to be in line with the Directive.

Prior to the enactment there were also no provisions concerning the obligation to remove third country nationals. This task was entirely done by the Department of Justice, Equality and Law Reform. Today national rules provide that the immigration officer may give directions to the carrier to remove the person concerned. The carrier who fails to comply may be convicted to a

fine but also to **imprisonment**. Imprisonment is not a sanction provided for by Art. 4 of the Directive. **Irish** rules in this regard are therefore stricter than the Directive but in line with it (cf. recital 4 of the Directive which allows for Member States to adopt even stricter provisions).

5.12. Other elements (Q.13-Q.16)

a) Q.13: The *Irish* legislator **does not tend to just copy provisions of the Directive**.

b) Q.14: So far there have been **no decisions of jurisprudence** on carriers' liability.

c) Q.15: There are no problems with the **translation** of the Directive.

d) Q.16: The *Irish* National Rapporteur mentions an **innovative practice** concerning dispute of carrier liability notices: A carrier who wishes to dispute that notice must address a written complaint to the head of the GNIB (the so-called Detective Superintendent). On a monthly basis the Detective Superintendent meets with carriers and discusses their grievances in relation to the alleged offences. The Superintendent can exercise his discretion and decide whether to proceed with the fine or issue a caution. Meanwhile the fine is suspended.
The National Rapporteur considers this process to be very positive given the fact that there have been no cases taken to courts to challenge a carrier liability notice. However, he doubts that this system could work in larger Member States since it would be difficult to hold monthly meetings.