

ACADEMIC NETWORK FOR LEGAL STUDIES ON IMMIGRATION AND ASYLUM IN EUROPE

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

DIRECTIVE 2001/55 TEMPORARY PROTECTION SYNTHESIS REPORT by GREGOR NOLL & MARKUS GUNNEFLO

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)

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TABLE OF CONTENTS

<u>I. LIST OF NATIONAL RAPORTEURS</u>	3
<u>II. GENERAL INTRODUCTION TO THE STUDY</u>	4
<u>III. SUMMARY DATASHEET AND RECOMMENDATIONS</u>	12
1. THE STATE OF PLAY REGARDING MEMBER STATES COVERED AND NOT COVERED BY THE SYNTHESIS REPORT	11
2. THE STATE OF PLAY REGARDING MEMBER STATES BOUND AND NOT BOUND BY THE DIRECTIVE	11
3. THE STATE OF TRANSPOSITION OF THE DIRECTIVE	11
4. TYPES OF TRANSPOSITION	13
5. EVALUATION OF THE NUMBER OF PROBLEMS (QUANTITATIVE ASSESSMENT)	13
6. EVALUATION OF THE SERIOUSNESS OF PROBLEMS (QUALITATIVE ASSESSMENT)	14
7. TYPES OF PROBLEMS (HORIZONTAL APPROACH)	15
8. IMPACT OF THE DIRECTIVE ON THE MEMBER STATES	20
9. RECOMMENDATIONS TO THE EUROPEAN COMMISSION	21
10. ANY OTHER INTERESTING PARTICULARITY TO BE MENTIONED ABOUT THE TRANSPOSITION AND THE IMPLEMENTATION OF THE DIRECTIVE IN THE MEMBER STATES	23
<u>IV. EUROPEAN SYNTHESIS OF THE NATIONAL REPORTS</u>	24
1 ANALYSIS OF THE CONTENT OF THE NORMS OF TRANSPOSITION	24
1.1 DURATION AND IMPLEMENTATION OF TEMPORARY PROTECTION (CHAPTER II)	24
1.1.1 <i>The mechanisms for the introduction of temporary protection (Article 5) (Q.5)</i>	24
1.1.2 <i>The duration and cessation of the temporary protection regime (Article 6) (Q.6)</i>	25
1.1.3 <i>The extension of temporary protection to additional categories (Article 7) (Q.7)</i>	27
1.2 OBLIGATIONS TOWARDS PERSONS ENJOYING TEMPORARY PROTECTION (CHAPTER III).....	27
1.2.1 <i>Residence permit for the entire duration of the protection (Article 8(1) (Q.8.A-C)</i>	28
1.2.2 <i>Facilitation of entry to the territory (Article 8(3) first sentence (Q.8.F)</i>	29
1.2.3 <i>Visas free of charge or at minimum cost (Article 8(3) last sentence) (Q.8.G)</i>	30
1.2.4 <i>Information to the beneficiaries of temporary protection (Article 9) (Q.8.D)</i>	31
1.2.5 <i>Registration of personal data (Article 10) (Q.8.E)</i>	32
1.2.6 <i>The responsibility to take back a person enjoying temporary protection (Article 11) (Q.9, Q.10)</i>	32
1.2.7 <i>Access to employed, self-employed and other activities (Article 12) (Q.11.A-B)</i>	33
1.2.8 <i>Priority to certain groups (Article 12, second sentence) (Q.11.B)</i>	34
1.2.9 <i>Remuneration and Access to social security systems (Article 12, last sentence) (Q. 11.C)</i>	34
1.2.10 <i>Accommodation and housing (Article 13(1) (Q.12.A)</i>	35
1.2.11 <i>Social Welfare and means of subsistence (Article 13(2) (Q.12.B)</i>	36
1.2.12 <i>Access to medical care (Article 13(2) last sentence) (Q.12.C)</i>	36
1.2.13 <i>Assistance to persons with special needs (Article 13(4)) (Q.12.D)</i>	37
1.2.14 <i>Access to education for minors (Article 14(1)) (Q.13.A)</i>	39
1.2.15 <i>Access to the general education system for adults (Article 14(2)) (Q.13.C)</i>	40

1.2.16	<i>Family reunification (Article 15) (Q.14.A-J)</i>	40
1.2.17	<i>Unaccompanied minors (Article 16) (Q.15.A-C)</i>	47
1.3	ACCESS TO THE ASYLUM PROCEDURE IN THE CONTEXT OF TEMPORARY PROTECTION (CHAPTER IV) .	49
1.3.1	<i>Access to the asylum procedure (Article 3 and 17(1) (Q.16.A-B)</i>	49
1.3.2	<i>Permission to remain after the end of temporary protection (Article 17(2)) (Q.16.C)</i>	50
1.3.3	<i>The Member State responsible for considering an asylum application (Article 18) (Q.16.D)</i>	50
1.3.4	<i>Temporarily protected person or asylum seeker (Article 19(1)) (Q.16.E)</i>	51
1.3.5	<i>Temporary protection after the rejection of an asylum claim (Article 19(2) (Q.16.F)</i>	52
1.4	RETURN AND MEASURES AFTER TEMPORARY PROTECTION HAS ENDED (CHAPTER V)	53
1.4.1	<i>Voluntary return (Article 21) (Q.17.A-E)</i>	53
1.4.2	<i>Enforced return (Article 22 and 23) (Q. 18.A-C and Q.19A-B)</i>	56
1.5	SOLIDARITY (CHAPTER VI)	58
1.5.1	<i>Ensuring that eligible persons have expressed their will to be received (Article 25(2)) (Q.20) ...</i>	59
1.5.2	<i>Transferral subject to the consent of the person concerned (Article 26 (1)) (Q.21.A)</i>	59
1.5.3	<i>Communication and notification regarding requests for transfers (Article 26(2) (Q.21.B)</i>	60
1.5.4	<i>Provision of information needed for transferral (Article 26(3)) (Q.21.C)</i>	60
1.5.5	<i>The administration of residence permits after transfer (Article 26(4)) (Q.21.D-F)</i>	61
1.5.6	<i>The use of the model pass for transfers (Article 26(5)) (Q.21.G)</i>	63
1.6	ADMINISTRATIVE COOPERATION (CHAPTER VII)	63
1.6.1	<i>National contact point (Article 27) (Q.22)</i>	63
1.7	SPECIAL PROVISIONS (CHAPTER VIII)	64
1.7.1	<i>Exclusion from temporary protection (Article 28) (Q.23.A-C)</i>	64
1.8	FINAL PROVISIONS (CHAPTER IX).....	67
1.8.1	<i>Judicial protection (Article 29) (Q.24.A)</i>	67
1.8.2	<i>Penalties (Article 30) (Q.25.A)</i>	68
2	SITUATION OF MEMBER STATES NOT BOUND BY THE DIRECTIVE	69

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II. GENERAL INTRODUCTION TO THE STUDY

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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 where 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. For 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 directive¹, article 15 §4 of the directive on temporary protection² or article 3, §2 of the directive on mutual recognition of expulsion decisions³, 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 extent 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.

III. SUMMARY DATASHEET PER DIRECTIVE

ABOUT THE TRANSPOSITION OF THE DIRECTIVE ON

TEMPORARY PROTECTION OF 20 JULY 2001

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1. MEMBER STATES COVERED AND NOT COVERED BY THE SYNTHESIS REPORT

The norms of transposition in Hungary and United Kingdom are not analysed in the synthesis report because information on the transposition of the Directive in these two Member States were not available at the time of finalizing the synthesis report.⁵

2. MEMBER STATES BOUND AND NOT BOUND BY THE DIRECTIVE

The Directive is applicable to all Member States except Denmark (see preambular paragraph 26). The situation in Denmark is therefore described in a separate section of the synthesis report.

3. STATE OF TRANSPOSITION OF THE DIRECTIVE

Number of Member States not bound by the Directive:	1
Number of Member States that have transposed the Directive:	26
Number of Member States that have not at all transposed the Directive:	0
Number of Member States where the process of transposition is pending:	0

⁵ For information concerning the transposition of the Directive in Hungary and United Kingdom, see the national reports.

MEMBER STATES	STATE OF TRANSPOSITION
AUSTRIA	- TRANSPOSED
BELGIUM	- TRANSPOSED
BULGARIA	- TRANSPOSED
CYPRUS	- TRANSPOSED
CZECH REPUBLIC	- TRANSPOSED
DENMARK	- NOT BOUND BY THE DIRECTIVE
ESTONIA	- TRANSPOSED
FINLAND	- TRANSPOSED
FRANCE	- TRANSPOSED
GERMANY	- TRANSPOSED
GREECE	- TRANSPOSED
HUNGARY	- TRANSPOSED
IRELAND	- TRANSPOSED ⁶
ITALY	- TRANSPOSED
LATVIA	- TRANSPOSED ⁷
LITHUANIA	- TRANSPOSED

⁶ In Ireland, the Immigration Residence and Protection Bill, which contains important amendments for the temporary protection regime, has yet to pass through both houses of parliament. The bill is subject to amendments which may be adopted at the Committee stage.

⁷ In Latvia there is a project of legislation currently pending in parliament containing important changes for the temporary protection regime in Latvia. The project of legislation will replace the asylum act in force and all the bylaws. The bylaws were not available to the national rapporteur which means that some of the gaps in the draft law may be covered in coming bylaws.

LUXEMBURG	- TRANSPOSED
MALTA	- TRANSPOSED
NETHERLANDS	- TRANSPOSED
POLAND	- TRANSPOSED
PORTUGAL	- TRANSPOSED
ROMANIA	- TRANSPOSED
SLOVAKIA	- TRANSPOSED
SLOVENIA	- TRANSPOSED
SPAIN	- TRANSPOSED
SWEDEN	- TRANSPOSED
UNITED KINGDOM	- TRANSPOSED

4. TYPES OF TRANSPOSITION OF THE DIRECTIVE

A majority of Member States have transposed the Directive mainly into pre-existing alien-specific legislation (e.g. an aliens or an asylum act). Nine Member States (the Czech Republic, France, Greece, Italy, Luxemburg, Malta, Poland, Portugal and Spain) have transposed the Directive in an act specifically dedicated to temporary protection. With the exception of Malta and Spain, all Member States have transposed the Directive mainly by means of a legislative act. The legal nature of the main norm of transposition in Spain and Malta is a government regulation.

5. EVALUATION OF THE NUMBER OF PROBLEMS (Quantitative assessment)

Based on a strict quantitative assessment of the reports (counting the occurrences of non-transposition, legal problems and practical problems in the tables of correspondence) it emerges that the transposition of the Directive is more problematic in one group of Member States than in other Member States. This group includes Austria, Bulgaria, Lithuania, the Netherlands and Spain. On the other hand, there are a couple of Member States where relatively few problems are reflected in the tables of correspondence. Among them are Cyprus, Germany, Malta, Poland, Portugal, Romania, Slovenia and Sweden.

A word of caution must accompany a quantitative assessment based on the tables of correspondence since the number of problems mentioned in the tables of correspondence does not reflect the magnitude and significance of the problems.

6. EVALUATION OF THE SERIOUSNESS OF PROBLEMS

We have selected four Member States where serious problems concerning the transposition of the Directive are at hand. To be sure, there are serious problems in other Member States as well. These will be explored in the horizontal overview reflecting serious problems in the Member States under the next section.

Austria has opted for a strikingly problematic approach to the introduction of temporary protection. There is no provision in domestic legislation mandating the Council to introduce temporary protection in Austria. Instead, an ad hoc ministerial order will have to be issued, while there are no provisions containing a legal obligation to do so. Also, the cessation of temporary protection will hinge on an ad hoc decision by the government. There are also significant gaps in the transposition of the obligations towards the persons temporarily protected. Most significantly, there is no right to family reunification. Moreover, there is no norm transposing Article 9 of the Directive, laying down the obligation to provide the temporarily protected persons with a document, in a language likely to be understood by him or her, in which the provisions relating to temporary protection are clearly set out. Finally, the transposition of the provisions concerning voluntary and enforced return as well as the provisions concerning the solidarity mechanism in Chapter VI present significant gaps.

The transposition of the Directive in Lithuania raises serious doubts on several key areas. First, the national norms of transposition do not mandate the Council to decide when temporary protection shall come to an end. Instead, we were referred to a provision which can be used for the transposition *ad hoc* of a Council decision terminating temporary protection. Second, the Lithuanian legislation fails to provide for a right to family reunification. Instead, there is a provision stating the very opposite: temporarily protected persons do not have a right to family reunification. Third, there are no specific measures regarding neither voluntary nor enforced return. Fourth, the transposition of the provisions on reception solidarity is not in conformity with the Directive. By way of example, there is no transposition of Article 26(1) concerning the *consent* of the person who is about to be transferred for such transfer to another Member State under the solidarity mechanism laid down in Chapter VI of the Directive. Fifth, the grounds for exclusion from Temporary protection go beyond the exhaustive list of criteria laid down in Article 28 of the Directive.

The transposition of the Directive in the Netherlands stands out from the rest of the Member States with regard to access to the asylum procedure. In the Netherlands, temporarily protected persons are not only able to lodge an application for asylum at any time (c.f. Article 17 of the Directive) but the persons concerned are in fact obligated to file an asylum claim in order to benefit from the temporary protection regime. At first sight, this appears to be in line with Article 3 as well as preambular paragraph 10 prescribing that temporary protection shall not prejudice the recognition of refugee status. However, the fact that Dutch legislation leaves the person with no choice but to apply for asylum raises doubts with regard to the fact that Article 18 of the present Directive as well as the domestic legislation in the Netherlands, prescribe that the so-called Dublin regulation shall apply. Having an option, rather than an obligation to apply for asylum puts the persons concerned in a better position, since the Dublin Regulation will only apply if the persons concerned indeed decides to file an asylum claim. Also, the right to family reunification has not been properly transposed in the

Netherlands. A facultative provision of community law (Article 15 of the Dublin Regulation) serves for the transposition of the right to family reunification in cases where family Members enjoy temporary protection in different Member States. We believe this to be unsatisfactory. Also there is no transposition concerning family reunification when one or some family members are not yet in a Member State. The persons concerned will not be informed of their rights in accordance with Article 9 of the Directive as a matter of law. Neither is the transfer of a person benefiting from temporary protection to another Member State under the solidarity mechanism laid down in Article 26 subject to the *consent* of the person concerned, which obviously is prejudicial for him or her.

The transposition of the Directive in Italy provides for a two-tier system. A legislative decree has been adopted laying down the framework for temporary protection in Italy. However, for certain issues, it fails to specify the details of the temporary protection regime. Should the Council decide on the existence of a mass influx of displaced persons according to Article 5, the President of the Council of Ministers in Italy shall adopt a decree specifying certain aspects of the temporary protection regime. This means that some of the gaps in the Legislative decree in force may, or indeed may not, be covered by the decree of the President of the Council of Ministers. In this context it should be mentioned that Austria and Latvia provide for similar two-tier systems.

We strongly believe that a two-tiered transposition technique postponing legislation on individual entitlements of beneficiaries raises issues of infringement. The purpose of the Temporary Protection Directive is to create a degree of predictability and uniformity in the concerted grant of temporary protection within the Union. To that effect, it is indispensable that norms of direct importance to beneficiaries be transposed in the first tier, rather than in an ad hoc law or decree. We believe that the *telos* of the Directive requires full transparency with regard to also the details of the temporary protection regime in Member States before a situation of a mass influx of displaced persons is at hand.

Reverting to the situation in Italy, the way in which access to the asylum procedure is regulated raises questions. According to Italian law, the asylum determination process may be suspended by means of a provision in the national decree on the implementation of a Council Decision on temporary protection. Where this is done, the beneficiary of temporary protection will continue to enjoy this status. However, if the asylum determination process is not suspended by the national decree, the persons concerned can continue to enjoy temporary protection only if they withdraw their asylum claim. This is particularly problematic since the benefits for persons enjoying temporary protection in Italy are better than those provided for asylum seekers. This creates incentives for beneficiaries of temporary protection to withdraw their application for asylum in order to be able to continue to enjoy the benefits provided to them as beneficiaries of temporary protection. Moreover, the fact that the applicant has withdrawn an earlier application for asylum might be held against the applicant if he or she files another application for asylum. Hence, it is doubtful whether Italian law complies with Article 3 of the Directive, obliging Member States not to “prejudge” refugee status by the grant of temporary protection, read in conjunction with article 17 and Article 19.

7. TYPES OF PROBLEMS (Horizontal approach throughout all the Member States)

7.1 The mechanisms for the introduction of temporary protection in the Member States (Article 5(1) and (3))

Four Member States (Austria, Finland, Malta and Slovenia) do not mandate the Council to introduce temporary protection in their jurisdiction. Instead, they employ an *ad hoc* mechanism for the introduction of temporary protection. As a consequence, the Council Decision in itself is not sufficient to introduce the temporary protection regime in the Member State concerned. The government might not even be obligated as a matter of domestic law to take a decision in compliance with the Council Decision.

We have come to the conclusion that sole reliance on the direct effect of a Council Decision triggering a Union-wide temporary protection scheme in domestic law is counterproductive, and will lead to significant problems the day when the directive is used. In the absence of clear domestic norms referring to the effects of a relevant Council Decision, delays will occur. As the Directive is assigned to deal with "immediate" demands for TP (see recital 2), we believe that a diligent activation of TP on the domestic level is of utmost importance to "avert the risk of secondary movements"(see recital 9).

The Austrian Federal Government may, with the consent of the Executive Committee of the National Assembly, grant a temporary right of residence to displaced persons by a government order. Were the Council to decide on the existence of a mass influx of displaced persons, a ministerial order would have to be issued, but there are no provisions containing a legal obligation to do so. The question could be raised whether a Council Decision would be directly applicable in Austrian law, with individuals deriving rights from the decision. That is, however, questionable according to the national rapporteur. In Finland there is a similar solution. The Government decides on the groups of persons to which temporary protection will apply as well as on the duration of temporary protection. This decision may be triggered *inter alia* by a Council Decision under the Directive. However, the Finnish Government is not obligated as a matter of domestic law to take such a decision.

In Slovenia the Government adopts a conclusion by which it introduces temporary protection. The conclusion defines the number of displaced persons offered temporary protection, conditions for increasing the number of protected persons, the date on which temporary protection will take effect, its duration and the deadline for return. In Malta the Refugee Commissioner decides on the existence of a mass influx of displaced persons following a Council Decision.

7.2 Facilitation of entry to the territory Article 8(3)

The Member States seem to diverge markedly with regard to formal transposition of Article 8(3) on the facilitation of entry to their territory. Given the importance of swift access to territories where protection is provided, this degree of variation is remarkable. A considerable number of Member States either rely on administrative measures *ad hoc*, intend to draw on pre-existing procedures from other areas of immigration control, or have simply not transposed the provision in question.

7.3 Information to the beneficiaries of temporary protection (Article 9)

Five Member States have not transposed Article 9 on information to the beneficiaries of temporary protection (Austria, Estonia, the Netherlands Sweden and Finland). However, the Dutch explanatory memorandum for the norms of transposition of the Directive states that the beneficiaries of temporary protection has to be provided with such a document *inter alia* to prevent the temporarily protected from entering into court proceedings against the delay of a decision on the asylum application. According to the preparatory works for transposition of

the Directive in Sweden, it is a task for the Swedish Migration Board to provide the persons enjoying temporary protection with proper information on the temporary protection regime under the Directive. Even though there is no pre-existing legislation concerning providing information to temporarily protected, it is in fact explicitly stated in the preparatory works that there is no demand for transposition of the provision in question.

7.5 Family reunification (Article 15)

A majority of Member States provide for family reunification in accordance with Article 15. However, in a few Member States (Austria, Bulgaria, Latvia, Lithuania, the Netherlands and Spain) there is a problem with the transposition of Article 15(2) and/or Article 15(3), or there is simply no right to family reunification.

The problems with regard to family reunification in Lithuania, the Netherlands and Austria have been explained above.

In Latvia, there are no detailed provisions on family reunification. As stated earlier, when implementing a Council Decision on temporary protection, the government of Latvia will enact the specifics of the obligations towards the persons enjoying temporary protection. Consequently, the draft asylum law states that a person who has obtained temporary protection shall have the right to unity with his or her family members in accordance with the procedure provided for by the Cabinet of Ministers. In Bulgaria, there is no explicit norm of transposition regarding the scenario where a family member benefits from temporary protection in another Member State. However, there is a general provision on family reunification and the national rapporteur assumes that the general provision will apply also in these cases. In Spain, the norm of transposition for Article 15(2) does not comply with the Directive which states that the “wish of the said family members” shall be taken into account.

7.6 The national legislation of the Member States regarding the facilitation of return with respect for human dignity (Article 21(1))

The concept of “human dignity” appears to cause a multitude of interpretations, ranging from abstract guarantees in the law to concrete return programmes. With a view to the formulation of the norm in Article 21(1), a minimalist form of transposition would be to stipulate domestic norms on voluntary return, which, in their aggregate outcome, would ensure human dignity. It follows already from the wording of Article 21(1) that the mere existence of provisions facilitating voluntary return is not enough. It might be helpful, but not necessarily an absolute requisite, to inscribe the protection of human dignity into the law.

Only a few Member States (Greece, Italy, Portugal, Romania, Malta and Cyprus) have introduced a specific and express provision on the facilitation of return with respect for human dignity. By way of example, the Italian national decree implementing a Council Decision on temporary protection will provide the specifics of voluntary return. There is a provision requiring the involvement of NGOs or other national or international organisations, as well as a requirement that repatriation shall be executed respecting human dignity.

Another group of Member States simply lacks any reference to human dignity in voluntary return measures (Austria, Belgium, Bulgaria, the Czech Republic, France, Lithuania, Luxemburg, Poland, Spain, Ireland and the Netherlands). There are no indications that voluntary return is comprehensively regulated in such a manner as to ensure human dignity in their aggregate outcome. Such Member States must be considered to infringe Article 21(1).

For other Member States, referral is merely made to concrete measures, or indications that concrete measures will be taken, to ensure facilitation of return. These measures are then interpreted as guaranteeing human dignity in their aggregate outcome. Beyond that, it is perceived as self-evident that human dignity is ensured in all other dimensions of return. The Swedish government relies on the voluntary return programmes to ensure both that the decision to return is taken in full knowledge of the facts as well as that the return is carried out with respect for human dignity. This implies that these programmes must be designed in a way as to ensure outcomes respecting human dignity, which is beyond the scope of this study to assess. The Finnish example is a case in point. Beneficiaries of assisted voluntary return under the Directive might have their travel expenses paid by the authorities as well as subsidies for settling again in the home country. The same applies in Estonia as regards travel expenses. From our point of view, this in itself is insufficiently detailed to ensure human dignity at all stages of return. To ensure human dignity, it is not sufficient to invoke the involvement of international organisations as IOM, or NGOs.

7.7 The national legislation of the Member States regarding enforced return with due respect for human dignity (Article 22(1))

Only a few Member States (Cyprus, Portugal, Luxemburg, Greece, Italy and Malta) provide for an equivalent to the formulation in Article 22(1) in their national legislation. Judging from the answers of national rapporteurs, the remaining Member States trust that this is ensured otherwise. References are made to the Constitution in the Member State concerned, to general principles of internal law and/or to national legislation and practice in accordance with international obligations such as the ECHR and the 1951 Refugee Convention.

Given earlier incidents of death and injury in forcible return practices of a number of EU Member States such as Belgium and Germany, there is a considerable interest by the affected individual that enforced return is carried out according to a set of rules which ensure human rights and tie in considerations of a humanitarian nature. This has evidently not been well received by Member States. Those states that lack an express provision must be considered to be in violation of their transposition obligations.

7.8 Transferral subject to the *consent* of the person concerned (Article 26(1))

A considerable number of Member States (Austria, Bulgaria, the Czech Republic, Estonia, Finland, Ireland, Lithuania, Luxemburg, the Netherlands, Slovakia and Spain) have not transposed the requirement of the *consent* of the person concerned before transfer to another Member State under the solidarity mechanism laid down in Article 26. In Latvia, the consent of the person concerned should be “taken into account”, which is a lower standard than what is required by the Directive.

7.9 Grant of temporary protection in the new host Member State (Article 26(4))

A considerable number of Member States have not transposed the last sentence of Article 26(4), requiring the new host Member States to grant temporary protection to a person that is transferred to it (Austria, Bulgaria, the Czech Republic, Estonia, Ireland, Finland, Lithuania, Luxemburg, Netherlands, Slovakia, Spain, Finland, Romania, Italy, Malta and Greece). For Luxemburg, it is indicated that there is no guarantee for a permit being given. However, some of the national rapporteurs from the other Member States referred to in the present paragraph indicate that temporary protection will be granted to the persons concerned, but that there is

no specific provision obliging the Member State to do so. Much appears to depend on speculations in practice, and the absence of explicit and unambiguous transposition on the grant of a residence permit might result in situations of legal limbo for an individual transferred.

In two Member States, there are certain preconditions for the granting of residence permits to transferees. As the new host Member State, Belgium will grant temporary protection status only if the person concerned presents themselves to the immigration authorities within 8 days after arrival in Belgium. The time limit of 8 days raises serious doubts in view of the unconditional wording of the Directive: “The new host Member State shall grant temporary protection to the persons concerned.” Slovenia will grant residence permits if the person concerned does not fulfil any of the exclusion criteria in the national law. It is important to note that the exclusion criteria in Slovenia exceed the exhaustive exclusion grounds provided in Article 28 in the Directive. This means that a transferred person who has been enjoying temporary protection in another Member State might well be excluded upon arrival in Slovenia. This might result in limbo situations for the individual concerned. It must be regarded an infringement of the transposition obligation under the present article.

7.9 The grounds for exclusion from temporary protection (Article 28)

In eight Member States (the Czech Republic, Finland, France, Italy, Lithuania, Portugal, Slovakia and Slovenia) the exhaustive list of criteria for exclusion from temporary protection provided in Article 28 is exceeded.

In the Czech Republic, two exclusion grounds have been added over and above those provided in the exhaustive list of Article 28. Firstly, there is an exclusion ground stating that an applicant may be excluded from temporary protection if he or she submits untrue information or conceals any facts that are of importance for the assessment of his or her claim. Secondly, temporary protection cannot be granted if the Czech Republic exceeds the number of temporary protected stipulated in the Council Decision. The Interior Ministry of the Czech Republic contends that the last ground can be founded on Article 5 in conjunction with Article 25(1) of the Directive. Relying on the principle of *lex specialis derogat legi generali*, we must insist that this putative exclusion ground is indeed not found among the exclusion criteria in Article 28. Furthermore, it is possible to argue that according to Article 25(3) it is the duty of the Council, not the individual Member State, to take appropriate action including recommending additional support for Member States affected, if the number of those who are eligible for temporary protection exceeds the reception capacity of a Member State. The exceeding of the number of temporary protected stipulated in the Council Decision might lead to a transferral procedure according to Article 26. It is clear from Article 26(4) that the transferral procedure presupposes that the person concerned has been received and given a residence permit in the Member State of departure.

In Slovakia, a person will be excluded if he or she was granted temporary protection on the basis of false or forged information on his or her identity. In Slovenia, a person will be excluded if he or she has been sentenced to an unconditional imprisonment for more than a year by a final judgement, and his or her conviction has not been expunged. In Lithuania, transposition is very close to a *verbatim* reproduction of the Directive text. However, it includes not just “particularly serious crimes” but also serious crimes which problematically makes for a wider scope of the exclusion ground.

In Portugal, the conviction by a final judgement of a crime punishable with a prison sentence over three years could be enough in order to exclude a person in accordance with Portuguese law, even though the person concerned is no danger to the Portuguese community. The French legislator has added the possibility to exclude a person who is “a menace to public order, to the public security or the security of the French state”. The inclusion of a public order ground overstretches the scope of article 28(1)(b). In Finland, there is a similar solution, with the applicable provision referring explicitly to the 1951 Refugee Convention. Temporary protection will not be granted in Finland, if the person concerned is perceived as a threat to the public order or security; or if there is reason to believe that the person concerned has committed acts mentioned in Article 1(F) in the Geneva Convention.

Italian law provides that a person who has committed a trafficking crime will be excluded from temporary protection. One might argue that trafficking constitutes a “serious non-political crime” in the sense of article 28(1)(a)(ii), which presupposes that it is committed prior to admission (all constituent elements of the crime must be identifiable in the period before entry). If it is committed in part or in its entirety in the Member State in question, it will fall under the exclusion provision of the Directive only if it can be considered “particularly serious” in the sense of Article 28(1)(b) and a final judgment has been passed. If a person has merely aided or abetted, the requirement of seriousness might not be fulfilled. It must be concluded that the Italian norm of transposition is overbroad and therefore not in compliance with the Directive.

The problem of Swedish law is not that the exhaustive list provided in Article 28 is explicitly exceeded. Rather, the applicable provision is not precise enough even though the preparatory works states that the provision should be understood as a reflection of the exclusion grounds in the 1951 Refugee Convention. Thus, the provision merely states that a residence permit may be refused if there are exceptional grounds for denying a residence permit in view of what is known about the alien’s previous activities or with regard to national security. As there is no state practice with regard to temporary protection, it cannot be shown that this solution remains within the limits of Article 28. Therefore, we believe that it is insufficient to be regarded as a satisfactory transposition of the Directive. It should be noted though that draft legislation is currently prepared that will correct this problem.

8. IMPACT OF THE DIRECTIVE ON THE MEMBER STATES

8.1 Evolution of internal law due to transposition (Q.29)

All rapporteurs report either the absence or ad hoc based previous experiences of temporary protection in their respective Member State. The majority of these Member States have reportedly transposed legislation more favourable than previous national rules and in line with the Directive. As a matter of course, Ireland would not be bound by Council Directives, but chose to ‘opt in’ in 2003. Nevertheless, no legislation has been adopted and a clear legal framework is still lacking. The legislation in Ireland as well as in Austria is, however, described as maintaining a status quo in relation to previous legislation and providing for a standard less favourable than the Directive. In Austria, the transposition of rules on accommodation and means of subsistence are more favourable than previous domestic legislation. However, Austria has retained an ad hoc approach regarding its implementation of temporary protection, which offers a less predicable protection in comparison with what the Directive stipulates.

8.2 Problems with the translation (Q.33)

The Estonian and Greek rapporteurs indicated translation problems.

In the Estonian translation of the Directive, several problems have been identified. While the English version of Article 13(2) says “means of subsistence”, the Estonian text refers to “social benefits”, which is a more limited concept according to the Estonian rapporteur. Further, the mandatory Article 19(2) appears as an optional provision in the Estonian language version, with the text featuring a “may” instead of a “shall”. The English-language version of Article 25 contains the phrase “eligible for temporary protection”, whereas the Estonian language version features “recipients of temporary protection”. Finally, the Estonian language version of Article 28(1)(b) has left out “final judgement” and “there are reasonable grounds for regarding him or her as”.

There is a problem with the translation of Article 16(2) in the Greek language-version of the Directive. While the Directive concerning unaccompanied minors uses the word “placement” (with adult relatives, with a foster family etcetera), the Greek version provides that “responsibility” for the unaccompanied minors will be “given to” (adult relative, with a foster family etcetera).

It is outside the scope of this study to assess whether or not a large number of linguistic versions of the Directive support the understandings in the Estonian and Greek versions.

8.3 Tendency to copy the provisions of the Directive (Q.31.A)

Nine Member States (Cyprus, Estonia, Greece, France, Luxemburg, Malta, Portugal, Romania and Spain) have reportedly wholly or partially pursued ‘cut and paste’ techniques in the transposition of the Directive. Hence, redrafting or adaptation to national circumstances has been relatively limited, and the implementing legislation adopts, in a varying degree, the same or very similar language as the Directive itself. In a few Member States, this approach has created some difficulties. By way of example, there is a problem regarding the representation of unaccompanied minors in Greece is due to a combination of poor translation of the Directive and a ‘cut and paste’ technique for the transposition of the Directive.

9. RECOMMENDATIONS TO THE EUROPEAN COMMISSION

9.1 Recommendations concerning interpretation of specific provisions

We would like to invite the European Commission to specifically consider the following issues of interpretation.

9.1.1 Taking the best interest of the child into consideration when applying the provision on family reunification

Article 15(4) requires the Member states to take into consideration the best interests of the child, when applying the provision on family reunification.

This provision has provoked a broad range of responses by the Member States. It emerges clearly that there is a further need for clarifying what is demanded of Member States when

transposing this provision. A considerable amount of Member States cannot refer to an explicit provision tailored for temporary protection or aliens legislation. Some national rapporteurs nevertheless consider the principle in force in their Member State as regards family reunification for beneficiaries of temporary protection. In this context, referral is made to a variety of normative sources, be it the ratification of the U.N. Convention on the Rights of the Child (CRC), general laws, binding or persuasive precedent.

The divergence between proactive implementation and more or less comprehensive justifications of inertia raises serious doubts on the requisite uniformity of transposition. Treaty obligations under the CRC or constitutional provisions do not necessarily create a sufficiently precise obligation pertinent to the context of family reunification in temporary protection schemes.

We find support for this position in the practice of the U.N. Committee on the Rights of the Child in monitoring the Convention on the Rights of the Child. In particular, referral is made to General Comment No. 5 (2003):

“States parties need to ensure, by all appropriate means, that the provisions of the Convention are given legal effect within their domestic legal systems. This remains a challenge in many States parties. Of particular importance is the need to clarify the extent of applicability of the Convention in States where the principle of “self-execution” applies and others where it is claimed that the Convention “has constitutional status” or has been incorporated into domestic law.”⁸

9.1.2 Exclusion from temporary protection on the ground that the number of temporary protected stipulated in the Council Decision has been exceeded

With regard to the fact that a person cannot be granted temporary protection in the Czech Republic if the number of persons received exceeds the number of temporary protected stipulated in the Council Decision we wish to emphasize that this putative exclusion ground is absent in the exhaustive listing of exclusion criteria in Article 28. The principle of *lex specialis* disallows Member States to derive additional exclusion grounds from an extensive interpretation of other provisions of the Directive.

Furthermore, it follows from Article 25(3) that it is the duty of the Council, not the individual Member State, to take appropriate action including recommending additional support for Member States affected, if the number of those who are eligible for temporary protection exceeds the reception capacity of a Member State. The exceeding of the number of temporary protected stipulated in the Council Decision might lead to a transferral procedure according to Article 26. It is clear from Article 26(4) that the transferral procedure presupposes that the person concerned has been received and given a residence permit in the Member State of departure.

9.1.3 Judicial protection

It is clear that the term “has been excluded” in Article 29 is interpreted differently. Greece relates it merely to exclusion in the technical sense, as set out in Article 28. The remaining

⁸ Committee on the Rights of the Child, General Comment No. 5 (2003), CRC/GC/2003/5 27 November 2003, para. 19.

Member States interpret the term to mean denial of protection with regard to the inclusion considerations as well. Some Member States do so by means of a specific provision stipulating the right to mount a legal challenge, in other Member States all administrative decisions can be challenged. In some cases where there is a specific provision, the issue of the meaning of ‘exclusion’ has not been determined in the norms of transposition e.g. Malta. Hence it remains to be seen if the narrow or the broad interpretation will be applied in practice.

With regards to the meaning of “has been excluded” we believe that the latter and broader interpretation is the correct one. Not only is it in harmony with international law, as a comparison with Article 13 of the ECHR might suggest. Also, in accordance with Article 31 of the Vienna Convention on the Law of Treaties (VCLT), it has not been shown that the parties intended to give the term “exclude” a special meaning as in Article 1.F of the 1951 Refugee Convention. We strongly assert that any denial of inclusion as well as exclusion in the sense of Article 28 is covered by the right to mount a legal challenge. The general meaning of the term as well as the context of the Directive’s structure lend support to this interpretation (see article 31 VCLT). In the original Commission proposal for the Directive, the provision on judicial protection regarding exclusion decision was indeed an integral part of the exclusion clause in Chapter VIII (article 28 in the adopted version of the Directive). Member States deliberately lifted out of the judicial protection clause from Chapter VIII, which reflects their intent to widen the scope of judicial protection.

10. ANY OTHER INTERESTING PARTICULARITY TO BE MENTIONED ABOUT THE TRANSPOSITION AND THE IMPLEMENTATION OF THE DIRECTIVE IN THE MEMBER STATES

After a careful review of the responses, the authors of the present report believe that all interesting particulars related to the implementation of the Directive have been integrated contextually into the report.

IV. EUROPEAN SYNTHESIS OF THE NATIONAL REPORTS⁹

1 Analysis of the content of the norms of transposition

1.1 Duration and implementation of temporary protection (chapter II)

Chapter II of the Directive includes core provisions as those on the Council Decision on the existence of a mass influx of displaced persons and the implementation of the Council Decision in the Member States (Article 5) as well as the provisions on the duration and cessation of temporary protection in Member States (Articles 4 and 6).

1.1.1 The mechanisms for the introduction of temporary protection (Article 5) (Q.5)

Article 5 prescribes that the existence of a mass influx of displaced persons shall be established by a Council Decision adopted by a qualified majority on a proposal from the Commission. The Commission shall also examine any request by a Member State that it submit a proposal to the Council.

The Council Decision introduces temporary protection for the displaced persons to which it refers in all Member States. The Decision describes the specific groups of persons to whom temporary protection applies, the date on which temporary protection will take effect, information received from Member States on their reception capacity, and information from the Commission, UNHCR and other relevant international organisations (Article 5(3)).

The question to be elaborated under this heading is how a Council Decision on temporary protection under Article 5 is introduced in the Member States. Specifically, this raises the issue of what mechanisms there are for introducing temporary protection in the Member States.

The national legislation of the Member States

A vast majority of the Member States (Belgium, Bulgaria, Cyprus, the Czech Republic, Estonia, France, Germany, Greece, Ireland per draft legislation, Italy, Latvia, Lithuania, Luxemburg, the Netherlands, Poland, Portugal, Romania, Slovakia, Spain and Sweden) mandates the Council to decide on the existence of a mass influx of displaced persons, with the effect of introducing temporary protection for the displaced persons to which it refers in the respective Member State.

⁹ By Gregor Noll (gregor.noll@jur.lu.se) and Markus Gunneflo (markus.gunneflo@jur.lu.se) with Jennie Magnusson.

However, in four Member States (Austria, Finland, Malta and Slovenia), the introduction of temporary protection is effectuated through an *ad hoc* decision by the respective government. In these countries, the Council Decision in itself is not sufficient to introduce the temporary protection regime in the Member State concerned. The government might not even be obligated as a matter of domestic law to take a decision in compliance with the Council Decision.

The Austrian Federal Government may, with the consent of the Executive Committee of the National Assembly, grant a temporary right of residence to displaced persons by a government order. Were the Council to decide on the existence of a mass influx of displaced persons, a ministerial order would have to be issued, but there are no provisions containing a legal obligation to do so. The question could be raised whether a Council Decision would be directly applicable in Austrian law, with individuals deriving rights from the decision. That is, however, questionable according to the national rapporteur. In Finland there is a similar solution. The Government decides on the groups of persons to which temporary protection will apply as well as on the duration of temporary protection. This decision may be triggered *inter alia* by a Council Decision under the Directive. However, the Finnish Government is not obligated as a matter of domestic law to take such a decision.

In Slovenia the Government adopts a conclusion by which it introduces temporary protection. The conclusion defines the number of displaced persons offered temporary protection, conditions for increasing the number of protected persons, the date on which temporary protection will take effect, its duration and the deadline for return. In Malta the Refugee Commissioner decides on the existence of a mass influx of displaced persons following a Council Decision.

1.1.2 The duration and cessation of the temporary protection regime (Article 6) (Q.6)

Temporary protection may end at any time indicated in a Council Decision adopted by qualified majority on a proposal of the Commission. The Commission shall examine any request by a Member State that it submit a proposal to the Council (Article 6(1)(b)). The Council Decision shall be based on the establishment of the fact that the situation in the country of origin is such as to permit the safe and durable return of the beneficiaries of temporary protection with due respect for human rights and fundamental freedoms and Member States' obligations regarding *non-refoulement*,

Temporary protection also ends when the maximum duration has been reached (Article 6(1)(a)). The first Council Decision determines the duration of temporary protection to be one year (Article 4(1), first sentence). Unless terminated by a Council Decision, temporary protection is automatically extended for six months for a maximum of one more year. Where reasons for temporary protection persist after this second year, temporary protection may be extended by a Council Decision for up to one more year (Article 4(2)). All in all, the framework of the Directive provides for the grant of temporary protection for a maximum of three years.

The national legislation of Member States

A vast majority of Member States mandates the Council to decide when temporary protection shall come to an end (Belgium, Bulgaria, Cyprus, the Czech Republic, Estonia, France, Germany, Greece, Italy, the Netherlands, Poland, Portugal, Romania, Slovakia, and Sweden).

In eight Member States, temporary protection comes to an end through an *ad hoc* decision by the respective government (Austria, Finland, Ireland, Latvia, Lithuania, Slovenia and Malta and Spain).

Spanish law lacks a norm of transposition regarding the cessation of temporary protection in cases where a Council Decision establishes the temporary protection.

The domestic legislation in Slovenia specifically lays down the procedure for terminating temporary protection. The government shall adopt a decision, based on the Council decision, establishing that temporary protection has come to an end and shall define a deadline of the return of the temporarily protected.

In Austria, the introduction (see section 1.1.1) as well as the termination of temporary protection will have to be made through an *ad hoc* decision by the Government. The Settlement and Residence Act provides the legal basis for such decisions but it does not obligate the Government to either introduce or terminate temporary protection in compliance with a Council Decision. The Council Decision itself does not suffice as a legal basis.

Similarly, Luxemburg relies on an *ad hoc* decision by the government to transpose a termination decision by the Council. There is no explicit legal provision on termination. Instead, the government’s general prerogative to transpose Council Decisions is invoked.

According to the existing legislation in Ireland, the Minister for Justice, Equality and Law Reform maintains the discretion to extend or terminate temporary protection. However, the proposed Immigration, Residence and Protection Bill provides that temporary protection may expire following a decision by the Council stating that the requirement for temporary protection has ended.

In Latvia, the existing legislation states that it is the Government that decides on the renewal or cessation of temporary protection. Furthermore, the draft Asylum law does not make mention of a Council Decision as a basis for renewal or cessation of temporary protection.

In Lithuania, there is a provision in the Aliens law providing for the cessation of temporary protection if a foreigner can return to the country of origin. Since this ground is similar to the ground in Article 6(2) in the Directive this provision can be used for taking an *ad hoc* decision in compliance with a Council Decision. Nevertheless, there is no obligation to do so.

In Malta, the Refugee Commissioner decides to end temporary protection following a Council Decision.

Article 6, Q.6: The Duration and cessation of the temporary protection	
NO TRANSPOSITION AT ALL	Spain, Lithuania, Luxemburg
LEGAL PROBLEM	Austria, Finland, Ireland, Latvia
PRACTICAL PROBLEM	

1.1.3 The extension of temporary protection to additional categories (Article 7) (Q.7)

According to the optional provision in Article 7, Member States may extend temporary protection, as provided for in the Directive, to additional categories of displaced persons over and above those to whom the Council Decision applies where they are displaced for the same reasons and from the same country or region of origin.

The national legislation of the Member States

In approximately half of the Member States (Austria, Cyprus, Estonia, Finland, France, Greece, the Netherlands, Poland, Portugal, Spain, Malta and Sweden) the national legislation enables the introduction of temporary protection for other persons than those covered by a Council Decision.

Three Member States (Luxemburg, Spain and Belgium¹⁰) stand out as they reportedly mandated themselves to apply the temporary protection regime even in the absence of an affirmative Council Decision on temporary protection according to Article 5. Provided the Council has taken a decision on temporary protection under Article 5 and that mandate is used within the limits of Article 7, i.e. for the introduction of temporary protection to displaced persons over and above those to whom the Council Decision applies where they are displaced for the same reasons and from the same country or region of origin, there is no issue. However, if the mandate is used for the introduction of temporary protection outside the limits of article 7, “displaced for the same reasons and from the same country or region of origin” it amounts to a unilateral extension of the Directive’s scope, which clearly is at odds with the wording of article 7 (1). It implies that cooperation provisions in the area of family reunification (article 15) are extended to new groups outside the scope *ratione personae* of the Directive. We believe, therefore, that an extension of temporary protection *under the Directive* to these groups infringes the letter of article 7(1).

Matters would be different, if the granting of protection to additional groups not covered by article 7 (1) were to be made under an exclusively domestic framework of temporary protection. As this domestic framework lacks any link to the cooperation and solidarity mechanisms of the Directive, it would be without prejudice to it.

1.2 Obligations towards persons enjoying temporary protection (Chapter III)

Articles 8-16 (Chapter III) specify the obligations of the Member States towards the beneficiaries of temporary protection. To be sure, these provisions typically make explicit which *obligations* are incumbent on the Member States, leaving open the question of what *rights* persons enjoying temporary protection may – or may not – derive from these. Explicit entitlements for the individual have been introduced only regarding the admission to temporary protection as such as well as on family reunification (pursuant to Article 29, prescribing that the individual may mount a legal challenge). It is beyond doubt that Member

¹⁰ In Belgium there is no explicit provision, but merely a statement in the preparatory works that the Belgian government can adopt a “national temporary protection” if necessary even without a majority in the Council.

States are obliged as a matter of EC law to grant temporarily protected at least the minimum treatment set out in Articles 8-16 (Article 8(2)).

1.2.1 Residence permit for the entire duration of the protection (Article 8(1) (Q.8.A-C))

According to Article 8(1), Member States are obliged to provide the temporary protected with a residence permit for the entire duration of the protection. Documents or other equivalent evidence shall be issued for that purpose.

According to Article 2(g) 'residence permit' means any permit or authorisation issued by the authorities of a Member State and taking the form provided for in that State's legislation, allowing a third-country national or a stateless person to reside on its territory.

The national legislation of the Member States

The conclusion from the national reports regarding Article 8(1) is that the national legislations in most Member States are in compliance with the Directive even though the chosen solutions vary across Member States.

In most Member States the competent authority will make an individualized decision. In other Member States, for example Austria, the beneficiaries of temporary protection have a right of residence based directly on the government order. There are no provisions laying down an obligation to issue an individual residence permit. In Austria, the right of residence will nevertheless be confirmed in the travel document. In case the person does not have a travel document, the authorities will issue a travel document for displaced persons.

In certain Member States, the term "residence permit" is avoided for technical reasons. Luxemburg offers a specific document permitting persons under temporary protection (*attestation spécifique au bénéficiaire du régime de protection temporaire*) rather than a residence permit. This allows Luxemburg to uphold distinctions in treatment and entitlement between that group and other groups of immigrants.

The analysis of the Dutch rapporteur merits a quotation: "It is highly questionable whether this so-called Dutch W-document constitutes a residence permit within the meaning of Article 2 (g) of the TPD. The Article itself defines a 'residence permit' in the broadest sense as 'any permit or authorization issued by the Member State taking the form provided for in that State's legislation, allowing a third country national or a stateless person to reside on its territory'. According to the Explanatory Memorandum to the original Commission Proposal (which defines 'residence permit' in the exact same way) however a residence permit must be a clear authorization to reside and not merely a document tolerating the holder's presence on the country's territory which is true for the W-document. Another argument in favour of the proposition that a residence permit within the meaning of the TPD has to be more than just an identity document for asylum seekers can be found in article 6 of the Reception Conditions Directive (RCD). According to this provision member states have to ensure that the asylum seeker is provided with a document certifying his or her status as an asylum seeker or testifying that he or she is allowed to stay in the territory of the member state while his or her application is pending or being examined. It is clear that the Dutch W-document satisfies this requirement. If the Council would have aimed at a similar provision in the TPD it would have used the term 'document'. Furthermore, a reference to article 24 of the Qualification Directive (QD) can be made. According to this article beneficiaries of the refugee or subsidiary protection status have to be issued residence permits as soon as possible after their status has

been granted. Because of the fact that ‘residence permit’ in this Directive is defined in the exact same way as in the TPD and the fact that in the Netherlands refugees and subsidiarily protected persons do have a right to a full residence permit the claim that a W-document can also be considered as a residence permit is untenable. Finally, both in the Dublin Regulation (DR) and the Family Reunification Directive (FRD) of which the latter refers to Article 1(2)(a) of Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third country nationals, a residence authorization which is issued during the (asylum)procedure is not regarded as a ‘residence permit.’”

We believe that this analysis is doctrinally correct. Therefore, the documents referred to by Luxemburg and the Netherlands are not in conformity with the requirements of the Directive. Issues of infringement are raised in the case of both countries as well as in the case of Austria. Furthermore, the national rapporteurs for both Luxemburg and the Netherlands indicate problems concerning the period of validity of the residence permit.

Article 8(1) first sentence, Q.8.A-B: Residence permits for the entire duration of the protection	
NO TRANSPOSITION AT ALL	
LEGAL PROBLEM	Austria, the Netherlands, Luxemburg
PRACTICAL PROBLEM	

1.2.2 Facilitation of entry to the territory (Article 8(3) first sentence (Q.8.F))

Article 8(3) states that Member States shall, if necessary, provide persons to be admitted to their territory for the purposes of temporary protection with every facility for obtaining the necessary visas, including transit visas. Formalities must be reduced to a minimum because of the urgency of the situation.

The national legislation of the Member States

The Member States seem to diverge markedly on what Article 8(3) requires from them, at least with respect to formal transposition. Given the importance of swift access to territories where protection is provided, this degree of variation is remarkable. A considerable number of Member States either rely on administrative measures *ad hoc*, intend to draw on pre-existing procedures from other areas of immigration control, or have simply not transposed the provision in question.

For approximately half of the Member States, national rapporteurs indicate transposition of the provision. A number of Member States follow the rationale of Article 8(3) in a tailor-made legal provision: Greece, Cyprus, Spain, the Czech Republic, Malta, Ireland per draft legislation, Poland, Poland, Portugal, Romania, Slovenia, Latvia and Lithuania. By way of example, Greek as well as Cypriot law provides for the grant of visas and transit visas, as well as to their availability free of charge to the beneficiaries of temporary protection. Furthermore, the national legislation in Austria and Spain foresees, in accordance with the recommendations of the UNHCR¹¹, the possibility of lifting visa requirements in order to

¹¹ UNHCR annotated comments on Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof. See comment on Article 3. (www.unhcr.org/home/RSDLEGAL/3ecddebc4.pdf accessed on July 19th, 2007)

facilitate the entry to their respective territories. In the Czech Republic visa will not be required in order to enter the territory of the Czech Republic for the purpose of temporary protection. The applicable norm in Maltese legislation is a verbatim transposition of the Directive except for that the words “if necessary”, in the first sentence has been omitted. This indicates that the Maltese legislation goes further than the Directive as regards the facilitation of entry to the territory. In Malta, the option to provide visas free of charge or keeping their cost reduced to a minimum is maintained in the domestic legislation. At the end of the scale in this group is Slovenia. Even though there indeed is a tailor-made provision for beneficiaries of temporary protection, the Slovenian legislation only makes provision for persons at the Slovenian border or already at the Slovenian territory asking for temporary protection. The Slovenian legislation is apparently silent about the facilitation for obtaining the necessary visas, including transit visas, as well as visas free of charge.

In Italy and Austria, provisions on the facilitation of entry to the territory will be introduced in the implementation acts of a Council Decision on temporary protection.

A couple of Member States have not transposed the provision formally but refer to competencies of administrative organs or legislation catering for other groups of persons than those under temporary protection. Taking the example of Finland, there is no norm of transposition in Finnish law for the said provision. However, Finland intends to use the same procedure for temporary protected persons as for quota refugees, drawing on the assistance of relief organisations such as the Red Cross, to facilitate the entry to Finnish territory. The German national rapporteurs explain that a visa or transit visa can be issued to any foreigner who is subject to visa requirements for entry into the Federal territory of Germany. Therefore, persons receiving temporary protection can apply for visa or transit visa. Additionally there is a provision on “exceptional visas” issued at the border without prior application. At the end of the scale, French legislation does not specifically address the provision of visas to persons benefiting from the Directive, relying on administrative discretion *ad hoc*. Further, there seems to be no obvious solution for persons coming under the Directive in the French regime of visa charges.

Seven Member States have at present not made any active effort to transpose the provision on the facility for obtaining the necessary visas into national legislation (Bulgaria, Estonia, France, the Netherlands, Luxemburg, Slovakia, and Sweden).

Article 8(3) first and second sentence, Q.8.F: Facilitation of entry to the territory	
NO TRANSPOSITION AT ALL	Bulgaria, Estonia, France, the Netherlands, Luxemburg, Slovakia, Sweden
LEGAL PROBLEM	Austria, Greece, Slovakia
PRACTICAL PROBLEM	

1.2.3 Visas free of charge or at minimum cost (Article 8(3) last sentence) (Q.8.G)

The last sentence in Article 8(3) prescribes that visas should be free of charge or their cost reduced to a minimum.

The national legislation of the Member States

The national rapporteurs for ten Member States report on either non-transposition or problematic transposition of the last sentence in Article 8(3) providing that visas should be free of charge or their cost reduced to a minimum.

Article 8(3) last sentence, Q.8.G: Free of charge or minimum cost visas	
NO TRANSPOSITION AT ALL	Belgium, Bulgaria, Estonia, France, the Netherlands, Luxemburg, Sweden, Italy
LEGAL PROBLEM	Austria, Spain
PRACTICAL PROBLEM	

1.2.4 Information to the beneficiaries of temporary protection (Article 9) (Q.8.D)

According to Article 9, the Beneficiaries shall be provided with a document clearly setting out the provisions relating to temporary protection which are relevant to them. The document shall be in a language likely to be understood by the beneficiary of temporary protection.

The national legislation of the Member States

The majority of the Member States have introduced a provision in their national legislation guaranteeing the beneficiary of temporary protection a document containing the provisions relating to temporary protection in a language likely to be understood by him or her (Belgium, Bulgaria, Cyprus, France, Germany, Greece, Ireland per draft legislation, Italy, Latvia per draft legislation, Luxemburg, Portugal, Romania, Slovakia, Slovenia, Malta and Spain).

The national legislation of Lithuania, Poland and the Czech Republic prescribe that the beneficiaries of temporary protection are informed about the provisions relating to temporary protection. None of the three countries qualifies this information to be provided in a written document in its legislation.

Five Member States have not transposed Article 9 on information to the beneficiaries of temporary protection (Austria, Estonia, the Netherlands Sweden and Finland). However, the Dutch explanatory memorandum for the norms of transposition of the Directive states that the beneficiaries of temporary protection has to be provided with such a document *inter alia* to prevent the temporarily protected from entering into court proceedings against the delay of a decision on the asylum application. According to the preparatory works for transposition of the Directive in Sweden, it is a task for the Swedish Migration Board to provide the persons enjoying temporary protection with proper information on the temporary protection regime under the Directive. Even though there is no pre-existing legislation concerning providing information to temporarily protected, it is in fact explicitly stated in the preparatory works that there is no demand for transposition of the provision in question.

Article 9, Q.8.D: Information to the Beneficiaries of temporary protection	
NO TRANSPOSITION AT ALL	Austria, Estonia, the Netherlands, Finland, Sweden
LEGAL PROBLEM	Lithuania, Poland, the Czech Republic,
PRACTICAL PROBLEM	

1.2.5 Registration of personal data (Article 10) (Q.8.E)

The Member States shall register the personal data of persons enjoying temporary protection in order to guarantee the effective application of the regime. According to Annex II, this comprises name, nationality, date and place of birth, marital status and family relationship.

The national legislation of the Member States

A vast majority of the Member States provides for the registration of the personal data of beneficiaries of temporary protection in accordance with Article 10. However, In Bulgaria and Austria, explicit provisions regulating registration of persons under temporary protection are lacking. The Austrian rapporteur concludes, however, that this may be covered in the government order implementing a Council decision on temporary protection. In Lithuania and Italy, a specification of the data to be registered is lacking. With regard to Italy, the applicable provision foresees that the national decree implementing a Council Decision on temporary protection shall specify the data to be registered.

Article 10, Q.8.E: Registration of personal data	
NO TRANSPOSITION AT ALL	Bulgaria
LEGAL PROBLEM	Austria, Lithuania
PRACTICAL PROBLEM	

1.2.6 The responsibility to take back a person enjoying temporary protection (Article 11) (Q.9, Q.10)

A Member State shall, according to Article 11, take back a person enjoying temporary protection on its territory if that person without authorisation remains on, or, seeks to enter onto, the territory of another Member State during the period covered by the Council Decision: However, Member States may, on the basis of a bilateral agreement, decide that this article shall not apply.

This provision mirrors existing rules within the framework of the so-called Dublin regulation and the Schengen acquis.

The national legislation of Member States

Half of the Member States have introduced a specific provision in their respective national legislations on the responsibility to take back a person under the circumstances referred to in Article 11 (Belgium, Bulgaria, Cyprus, Estonia, France, Greece, Ireland per draft legislation, Latvia per draft legislation, Luxemburg, Portugal, Slovenia, Slovakia, Malta and Spain).

None of the Member States have made use of the option provided by the last sentence of Article 11, which allows exempting cases from its application on the basis of bilateral agreements. However, Malta has transposed the provision literally meaning that the Maltese legislation provide for the possibility of entering such bilateral agreements.

Does this mean that only a minority of Member States will be responsible to take back a person under the circumstances set out in Article 11? Not so, as the remaining Member States appear to rely on the transposition of other norms of EC acquis into domestic law, governing readmission responsibilities for third country nationals. In fact, the original Commission Proposal does not contain any provision on the responsibility to take back beneficiaries of

temporary protection should they reside unlawfully in a second Member State. Rather, its Explanatory Memorandum states that the existing rules governing the taking back of a person residing unlawfully in a Member State and holding a residence document in another, must be applicable.¹² We believe, therefore, that Member States which are bound by the Dublin regulation and apply the Schengen acquis need do nothing further to transpose article 11.

1.2.7 Access to employed, self-employed and other activities (Article 12) (Q.11.A-B)

Member States shall authorise the beneficiaries of temporary protection to engage in employed or self-employed activities as well as in activities such as educational opportunities for adults, vocational training and practical workplace experience.

The national legislation in Member States

The first sentence in Article 12 of the said provision has been generally well received in Member States. Save for France and Slovakia, all Member States gives the beneficiaries of temporary protection access to employed and self-employed activities. In order to work, a person benefiting from temporary protection in France needs a separate authorisation, which presupposes the fulfilment of certain conditions. The rapporteur emphasises that this authorization is not given automatically and notes that this might create practical problems. In Slovakia, beneficiaries of temporary protection are not allowed to engage in self-employed activities. The failure of France and Slovakia to fully transpose the present provision may raises issues of infringement, lest a stable practice develops in the future.

As regards other activities such as educational opportunities for adults, vocational training and practical workplace experience, a majority of the Member States allow the persons concerned to engage in all of these. The beneficiaries of temporary protection will not have access to practical workplace experience in Austria, Belgium and Portugal. Furthermore, in Portugal, the beneficiaries of temporary protection will not have access to educational opportunities for adults according to law.

It is important to note, however, that some Member States have chosen to implement the Directive at the level of benefits generally granted to asylum seeker as regards access to the activities mentioned in Article 12 (for example Sweden), while others have implemented the Directive at the level of recognised refugees or as nationals of the Member State (for example Ireland, Slovenia and the Czech Republic). Of course, this makes for a considerable difference for the temporarily protected. For example, in the Czech Republic, beneficiaries of temporary protection can be listed in the register of “employment candidates” and thereby have access to individual action plans which is a tailored plan for each employment candidate that is supposed to improve her chances on the labour marker. The labour office develops an individual timetable consisting of particular measures how to achieve this aim and this feature has proved to be very helpful for refugees. The beneficiaries of temporary protection also have access to vocational training and practical workplace experience that often ends with some kind of certificate allowing the employment candidate to be employed in qualified work.

¹² See paragraph 5.6 in the Proposal for a Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof *OJ C 311 E*, 31/10/2000 pp. 251-258.

Greece applies a geographical limitation for access to employment, self-employment, education and other benefits in question in that the beneficiary of temporary protection can only engage in such activities in the prefecture in which that person's residence permit was issued. This limitation is not covered by the priority options provided for in the second sentence of Article 12.

Article 12, Q.11.A: Access to employed, self-employed and other activities	
NO TRANSPOSITION AT ALL	
LEGAL PROBLEM	Greece, Slovakia
PRACTICAL PROBLEM	

1.2.8 Priority to certain groups (Article 12, second sentence) (Q.11.B)

For reasons of labour market policies, the Member States may give priority to citizens of EU and EEA countries as well as to legally resident third-country nationals who receive unemployment benefits.

The national legislation of Member States

The option to give priority to EU citizens, citizens of states bound by the EEA agreement and to legally resident third-country nationals provided in Article 12 has been utilized by ten Member States: Austria, Cyprus (with the exception of EEA citizens), Germany, Greece, Netherlands, Luxemburg, Portugal, Romania, Malta and Slovenia.

1.2.9 Remuneration and Access to social security systems (Article 12, last sentence) (Q.11.C)

The last sentence in Article 12 obliges the Member States to apply the general law in force regarding remuneration, access to social security systems relating to employed or self-employed activities and other conditions of employment.

The national legislation of Member States

A vast majority of Member States has transposed the provision in the last sentence in Article 12 providing that the general law in force in the Member States shall apply regarding remuneration, access to social security systems relating to employed or self-employed activities. There are problems as regards the access to social security systems relating to employed or self-employed activities in three Member States (Bulgaria, Latvia and Finland). In Bulgaria and Luxemburg, there are no provisions explicitly indicating that social security systems will be applicable, but the national rapporteurs nevertheless contend that the norms of transposition of the Directive imply access to the social security systems. In Latvia, the beneficiaries of temporary protection are not mentioned in the applicable law on Social security. Therefore, it remains uncertain whether they will be granted access to social security schemes. In Finland, beneficiaries of temporary protection fall partly outside the scheme for social security systems relating to employed or self-employed activities due to the temporary nature of the residence permit.

Article 12 last sentence, Q.11.C: Remuneration and access to social security systems relating to employed or self-employed activities	
NO TRANSPOSITION AT ALL	

LEGAL PROBLEM	Bulgaria, Latvia, Finland
PRACTICAL PROBLEM	

1.2.10 Accommodation and housing (Article 13(1) (Q.12.A))

It is provided that Member States shall ensure that persons enjoying temporary protection have access to suitable accommodation¹³ or, if necessary, receive the means to obtain housing.

The national legislation in Member States

All Member States except France have transposed the said provision ensuring accommodation for persons enjoying temporary protection. Most Member States seem to have introduced such accommodation at the level provided generally to asylum seekers. However, the standard of accommodation provided for asylum seekers differs between the Member States. By way of example, the Irish Refugee Act provides for access to accommodation on the same basis as Irish nationals. General social Welfare and Housing Legislation will apply to the beneficiaries of temporary protection. In practice, the Reception and Integration Agency is responsible for accommodating the temporary protected upon arrival. They will initially be accommodated in Reception Centres where immediate housing, medical and social welfare needs are met.

In the Netherlands, beneficiaries enjoying temporary protection will be accommodated in public reception centres. The question has been raised whether a stay of up to three years in such reception centres with very little privacy meets the requirements of “suitable” accommodation in the sense of Article 13(1) in the Directive. The Dutch Minister for Alien Affairs and Integration answered this question affirmatively in a parliamentary debate with reference to the exceptional circumstances that have led to the instalment of the temporary protection regime. To be sure, the some problem is at hand also in other Member States.

So far, French legislation has not explicitly addressed the question of housing for beneficiaries of temporary protection. Should such beneficiaries decide to apply for asylum, housing regimes for the latter group will become accessible. Those beneficiaries who do not apply for asylum might not have access to housing. Therefore, an issue of infringement might be raised under this article.

Article 13(1), Q.12.A: Accommodation and housing	
NO TRANSPOSITION AT ALL	
LEGAL PROBLEM	France
PRACTICAL PROBLEM	The Netherlands

¹³ The Commission proposal regarding this particular provision feature an identical wording as compared to the adopted text. In the explanatory memorandum for the Commission proposal, the following is stated: “The minimum standards laid down in this paragraph enable the Member States to provide accommodation or housing for persons enjoying temporary protection as part of their national reception scheme. These provisions may in some cases allow for temporary accommodation centres for refugees. They may also take the form of collective structures or separate flats.” See Commentary for Article 11(1) in the Proposal for a Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof. (OJ C 311 E, 31/10/2000 pp. 251-258).

1.2.11 Social Welfare and means of subsistence (Article 13(2) (Q.12.B))

If a beneficiary of temporary protection does not have sufficient resources, provision shall be made for necessary assistance in terms of social welfare and means of subsistence.

The national legislation of Member States

All Member States have transposed the first sentence in Article 13(2), providing necessary assistance in terms of social welfare and means of subsistence. In Italy and Latvia, there are merely general provisions stating that social welfare and means of subsistence will be provided and that the government will include a more detailed regulation in the implementation act of a Council Decision.

As regards the level of social welfare and means of subsistence, most Member States have implemented the temporary protection regime in a way that provides assistance as the same level as that provided to asylum seekers (for example Belgium, the Czech Republic, Finland, France, Germany, Luxemburg, the Netherlands and Sweden). In Ireland the general Social Welfare legislation is applicable to the temporary protected i.e. the beneficiaries of temporary protection are entitled to the same social welfare benefits as Irish citizens.

In Sweden, there is an interesting implementation strategy for provisions on social welfare and access to health care, employing an enhanced level of benefits supposedly as a carrot for participating in a voluntary return program. If the period of temporary protection lasts for as long as three years and a person who has benefited from temporary protection is benefiting from a voluntary return program after the period of temporary protection has ended, he or she will be registered in the national registry. This registration makes the same comprehensive social welfare and medical care available as enjoyed by Swedish nationals. In this context, it has to be recalled that Sweden has transposed the optional provision in Article 21(3), providing for beneficiaries of temporary protection to continue receive the benefits if they participate in a voluntary return program.

In Greece, the receiving of social welfare is premised on the fact that the beneficiary of temporary protection is residing in a reception centre. The fact that he or she has received the status temporary protected does not suffice in itself.

Article 13(2), Q.12.B: Social welfare and means of subsistence	
NO TRANSPOSITION AT ALL	
LEGAL PROBLEM	Greece
PRACTICAL PROBLEM	

1.2.12 Access to medical care (Article 13(2) last sentence) (Q.12.C)

According to Article 13(2), Member States shall provide medical care, which includes at least emergency care and essential treatment of illness, to the beneficiaries of temporary protection.

The national legislation of Member States

All Member States provide for access to medical care for beneficiaries of temporary protection. A majority of the Member States (Bulgaria, Cyprus, Germany, Greece, Latvia, Lithuania, Luxemburg, Portugal, Romania, Slovakia, Slovenia, Spain, Malta and Sweden) have chosen to implement this provision on the minimum level requiring “emergency medical

care and essential treatment of illness”. The exact wording chosen for transposing the essential prerequisite of “emergency medical care and essential treatment of illness” differs between the Member States. In most cases, though, there is a general wording equivalent to the wording in the Directive. In Malta and Cyprus, the national legislation repeats the wording of the Directive “the assistance necessary for medical care shall include at least emergency care and essential treatment of illness”. This means that the minimum standards are met, but there is also an option for medical care of a higher standard. The Bulgarian national rapporteur indicates that the concept “emergency medical treatment” has been left out in the norm of transposition in Bulgaria as a problem. In Greece, the same problem as mentioned above regarding social welfare and means of subsistence arise namely that the receiving of medical care is premised on the beneficiary of temporary protection being residing in a reception centre. The fact that he or she has received the status temporary protected is not sufficient in itself.

In Belgium, the Czech Republic, Finland, Ireland, Poland and the Netherlands, beneficiaries of temporary protection will receive medical care above the minimum level. In Austria, beneficiaries of temporary protection have at least access to emergency medical care and essential treatment of illness but the Federal States usually grant access to general medical care. To be sure, the beneficiaries of temporary protection have access to general medical care if they are working. This applies to Lithuania as well, where, besides temporarily protected who are working, also vulnerable groups have a right to general medical care. In Sweden, persons under the age of 18, receive the same medical treatment as nationals. Also, if a beneficiary of temporary protection has resided in Sweden for three years and participates in a voluntary return programme, he or she will be registered in the national registry and consequently receive the same benefits as nationals (see section 1.2.11).

Slovenia stands out from the rest of the Member States. Slovenian law features a very detailed provision, stating in detail the treatment afforded to beneficiaries of temporary protection. In Italy, provision is made for a future, and a more detailed regulation in the government order implementing a Council Decision on temporary protection.

So far, French legislation has not explicitly addressed the question of medical care for beneficiaries of temporary protection. However, beneficiaries of temporary protection may fall back on the medical care scheme of the *couverture maladie universelle*.

Article 13(2) last sentence, Q.12.C: Access to medical care	
NO TRANSPOSITION AT ALL	
LEGAL PROBLEM	Bulgaria, Greece
PRACTICAL PROBLEM	

1.2.13 Assistance to persons with special needs (Article 13(4)) (Q.12.D)

Article 13(4) requires that Member State give necessary medical or other assistance to beneficiaries with special needs, such as unaccompanied minors, victims of torture or other forms of serious psychological, physical or sexual violence.

The national legislation in Member States

A narrow majority of the Member States refer to a general provision reflecting Article 13(4) in their respective national legislations (Austria, Bulgaria, Cyprus, France, Germany, Greece,

Ireland per draft legislation, Italy, Lithuania, Luxemburg, Portugal, Romania, Slovakia, Malta and Spain). Several of these Member States apply the same criteria and provide the same assistance to beneficiaries of temporary protection as for asylum seekers. This is true also for the Netherlands, but the national rapporteur is in doubt whether the domestic legislation is sufficiently precise to be considered in line with the Directive.

In Austria, the Basic Welfare Support Agreement provides for special measures for unaccompanied minors. Yet there are no provisions on special assistance for persons who have undergone torture, rape or other serious forms of psychological, physical or sexual violence. However, the legislation in the Basic Support Acts in the federal states of Austria generally provides for the treatment of persons with special needs and. The treatment of persons with special needs may nonetheless be restricted for beneficiaries of temporary protection.

Four Member States (Sweden, Poland, Finland and the Czech Republic) apparently trust that the medical care provided is sufficient in order to provide for special assistance for vulnerable groups. In the case of Finland, Poland, and the Czech Republic, that might well be the case since the medical care provided to all beneficiaries of temporary protection, and consequently not only persons with special needs, is the same as for nationals in these Member States. In Sweden, there are general provisions on medical assistance that may cover the special needs as provided in Article 13(4). However, after the Swedish norms of transposition were circulated for comments, a joint statement by a number of NGOs such as Amnesty International (Swedish section), Caritas and the Swedish Refugee Advice Centre, stated a need for a more precise legislation in order for Sweden to meet the terms in Article 13(4). This critique does not, however, concern persons under the age of 18, since they will receive the same medical and other assistance as nationals.

We believe that a reference to regimes of general medical care might be problematic for all of the four Member States named in the preceding paragraph. It is by no means clear that such a reference is sufficient to generate a positive obligation to create suitable care resources for the groups named in the present article under domestic law. This lack of clarity might result in situations where beneficiaries with special needs are unable to access those.

In Slovenia, there is no provision obliging the State to provide for necessary medical or other assistance to persons with special needs. However, there is an administrative arrangement for determining who will benefit from special assistance because of special needs. The administrative arrangement consists of a medical commission, appointed by the minister, who approves in which cases a medical care of a higher standard than otherwise will be provided.

The national rapporteurs for three Member States report that there is no transposition in their respective Member States (Belgium, Estonia and Latvia).

Article 13(4), Q.12.D: assistance to persons with special needs	
NO TRANSPOSITION AT ALL	Belgium, Czech Republic, Estonia, Latvia
LEGAL PROBLEM	Austria, France, the Netherlands, Poland, Slovenia, Sweden, Lithuania
PRACTICAL PROBLEM	

1.2.14 Access to education for minors (Article 14(1)) (Q.13.A)

Beneficiaries of temporary protection under the age of 18 years shall have access to the education system under the same conditions as nationals of the host Member State. Such access may be confined to the state education system.

The national legislation in Member States

Beneficiaries of temporary protection under 18 years of age are granted access to the education system under the same conditions as nationals in almost all Member States.

However, certain problems with the transposition of this particular provision are indicated for the Czech Republic, Bulgaria, Finland and Luxemburg.

In the Czech Republic, third-country nationals are granted access to primary, secondary and higher secondary education under the same conditions as nationals. As concerns access to other forms of education (for example, pre-schooling, art and language schools, conservatories, which is not comprised by the term “primary, secondary and higher secondary education”), third-country nationals are not prevented from access but they are provided with a less favourable treatment. For example, they have to pay a higher fee than the Czech citizens for the provision of school services (such as accommodation and catering), contribute to expenses of school facility related to their attendance in pre-schools etcetera. The amount of a fee depends upon the decision of a headmaster of each school and varies from one school to another.

According to pre-existing legislation in Bulgaria, minors who seek “protection” are entitled to education under the conditions and procedures established for Bulgarian citizens. It is not clear whether the reference to “protection” will include also temporarily protected and this lack of clarity creates conditions for misinterpretation and hinders the access of minors to the educational system according to the national rapporteur.

In Finland, the right to education is not premised on nationality. In fact, the constitution guarantees everyone access to free basic education. However, the municipalities are only obliged to offer basic education to children permanently resident in Finland. The municipalities can offer basic education to other children than those permanently resident in Finland but they are not obliged to do so.

Luxemburg can refer to a provision opening the education system for beneficiaries of temporary protection. The law does not state that such access has to be on an equal footing with nationals, but this is reported to be the case in practice.

A number of Member States (Sweden, France, Poland, Portugal, Romania, Slovakia, Cyprus, Estonia, the Netherlands and Germany) guarantee access to education on equal footing with nationals in the state education system only, in accordance with the optional provision in the last sentence of Article 14(1).

Article 14, first sentence Q.13.A: Access to education for minors	
NO TRANSPOSITION AT ALL	Finland, Bulgaria
LEGAL PROBLEM	Luxemburg, the Czech Republic
PRACTICAL PROBLEM	

1.2.15 Access to the general education system for adults (Article 14(2)) (Q.13.C)

Access for adults to the general education system is not mandatory. Article 14(2) states however that such access “may” be granted.

The national legislation of Member States

Less than half of the Member States have transposed the optional provision in Article 14(2) allowing adults access to the general education system (Cyprus, the Czech Republic, France, Lithuania, the Netherlands, Ireland, Italy, Latvia per draft legislation, Slovenia, Spain). In Malta, access to the general education system for adults is subject to the conditions imposed by the Refugee Commissioner.

1.2.16 Family reunification (Article 15) (Q.14.A-J)

Under certain circumstances laid down in Article 15, family members of beneficiaries are provided the possibility of receiving a residence permit under temporary protection. However, according to Article 15(1), the provisions on family reunification only applies in cases where families already existed in the country of origin and were separated due to circumstances surrounding the mass influx. Furthermore, the Directive distinguishes between the closer family and the extended family (Article 15(1)(a) and (b)). The closer family consists of the spouse of the sponsor¹⁴ or his/her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens, as well as the minor unmarried children of the sponsor or of his/her spouse born in or out of wedlock. The extended family consists of other close relatives who lived together as part of the family unit at the time of the events leading to the mass influx and who are wholly or mainly dependent on the sponsor at the time.

Furthermore, the Directive distinguishes between two scenarios:

In the first scenario (Article 15(2)), the separated family members enjoy temporary protection in different Member States. In these cases Member States *shall* (mandatory) reunite a family member with a beneficiary where they are satisfied that the family member is part of the closer family according to Article 15(2). Member States *may* (optional) reunite a family member with a beneficiary where they are satisfied that the family member is a part of the extended family, taking into account on a case by case basis the extreme hardship which they would face if the reunification did not take place.

In the second scenario (Article 15(3)), the sponsor enjoys temporary protection in a Member State but his or her family members are not yet in a Member State. In these cases a Member State where the sponsor enjoys temporary protection *shall* reunite a family member *who is in need of protection* with a family member, where it is satisfied that the former is part of the closer family of the latter. Furthermore, a Member State *may* (optional), reunite a family member *who is in need of protection* with a beneficiary, where it is satisfied that the former is part of the extended family of the latter, taking into account on a case by case basis the extreme hardship which they would face if the reunification did not take place. In these cases,

¹⁴ A definition of ‘sponsor’ is found in Article 2(h) defining ‘sponsor’ as a third-country national enjoying temporary protection in a Member State in accordance with a decision taken under Article 5 and who wants to be joined by members of his or her family.

it is important to note that each family member to be admitted to the EU has to be in need of protection. This is an additional requirement. In doctrine, it is held that the family members coming from the same conflict area as their relatives will always be in need of protection.¹⁵

It follows from Article 29 that a person who has been excluded from family reunification shall be entitled to mount a legal challenge against the Member State concerned (see section 1.8.1).

The national legislation of Member States regarding the scope of the provisions on family reunification (Articles 15)(2) and (3)) (Q.14.A-B)

A great majority of Member States have transposed both Article 15(2) and Article 15(3) granting family reunification according to the first scenario (the separated family members enjoy temporary protection in different Member States), and the second scenario (the sponsor enjoys temporary protection in a Member State, but his or her family members are not yet in a Member State). A few Member States, for example Sweden and Finland, do not distinguish between the two scenarios. In doing so, they offer more favourable conditions than suggested by the Directive: they do not require that each family member in order to be admitted to the EU has to be in need of protection in accordance with Article 15(3). France provides a different example, where the optional second scenario is also transposed, yet with a double clawback. Family members must not only be in need of protection, as suggested by the wording of article 15(3). There is also a requirement of accommodation capacity for the authorisation of a permit.

However, in a few Member States (the Netherlands, Austria, Latvia, Lithuania, Bulgaria and Spain) there is either problem with the transposition of Article 15(2) and/or Article 15(3) or there is simply no right to family reunification. Among the cases of problematic transposition, the case of the Netherlands is of particular concern, as it relies on a facultative provision of Community law to bring about the effects required by Article 15.

In the Netherlands there is a provision stating that an alien who applies for asylum will not be removed from the country if that alien a) belongs to the specific group designated in the Council Decision, b) is the spouse or unmarried partner of the person under a), c) is the minor unmarried child of the person under a) or b), or d) is a close relative of the person mentioned under a). Thus, in order for a family member to benefit from the temporary protection regime he/she has to file a claim for asylum. Because of the fact that an asylum claim can only be filed at Dutch territory, the filing of that claim indicates that these family members wish to be reunited. According to the Dutch government, this may not be taken to indicate that temporary protection will be provided in the Netherlands in all cases. At this point the government refers to the applicability of Article 15 of the Dublin Regulation (humanitarian clause). It is, quite obviously, questionable if this particular provision can be considered a norm of transposition for article 15 in the directive, since the obligations of the Member State are much more circumscribed according to the Dublin regulation. Moreover, according to the Aliens circular in the Netherlands, the humanitarian clause will only be used by the Minister in exceptional cases which further lessens the effectiveness of this provision for family members of beneficiaries of temporary protection in the Netherlands. As regards Article 15(3), in order for a family member (whether in a EU Member State or still in the country of origin) to benefit from the temporary protection regime, it is compulsory that he or she files an asylum claim in the Netherlands. This means that a family member who is not yet in the

¹⁵ Kerber, Karoline, 2002, "The Temporary Protection Directive", *European Journal of Migration and Law*, Vol. 4 pp 193-214.

Netherlands has to come to the Netherlands in person first and apply for asylum there. Article 15(3) of the Directive have has thus not been transposed in national legislation. The explanatory memorandum for the transposition of the Temporary Protection Directive refers to an advice by the Dutch Advisory committee on Aliens Affairs. This is, however, quite obviously not a sufficient transposition measure.

In Austria the norms of transposition do not contain any provisions on family reunification. If the Council takes a decision on temporary protection according to Article 5, the Council Decision may be implemented in Austria by means of a government order. This government order may *inter alia* cover family reunification, yet no explicit obligation is spelt out. Only if temporary protection is upheld for a long time (which is not further specified), the person enjoying temporary protection may file and receive a settlement permit. In that case the general provisions on family reunification will be applicable.

A similar problem is indicated for Latvia, where no detailed provisions on family reunification exist. When implementing a Council Decision on temporary protection, the government of Latvia will enact the specifics of the obligations towards the persons enjoying temporary protection. Consequently, the (draft) asylum law states that a person who has obtained temporary protection shall have the right to unity with his or her family members in accordance with the procedure provided for by the Cabinet of Ministers.

In Lithuania the Aliens law plainly states that foreigners granted temporary protection do not have a right to family reunification.

In Bulgaria there is no explicit norm of transposition regarding the scenario where a family member benefits from temporary protection in another Member State. However, there is a general provision on family reunification and the national rapporteur assumes that the general provision will apply also in these cases.

In Spain, the norm of transposition for Article 15(2) does not comply with the Directive as regards taking the “wish of the said family members” into account.

Article 15(2) first sentence, Q.14.A: Family reunification where the family member is temporarily protected in another Member State	
NO TRANSPOSITION AT ALL	Austria, Lithuania
LEGAL PROBLEM	Bulgaria, The Netherlands, Spain
PRACTICAL PROBLEM	

Article 15(3), first sentence Q.14.B: Family reunification where the family member is not yet present in a Member State	
NO TRANSPOSITION AT ALL	Austria, the Netherlands, Lithuania
LEGAL PROBLEM	Latvia
PRACTICAL PROBLEM	

The national legislation of Member States determining the personal scope of the family concept (Article 15(1)(a) and (b)) (Q.14.C)

All Member States which have transposed Article 15 on family reunification consider the spouse of the person enjoying temporary protection and the minor unmarried children of the person enjoying temporary protection or of his/her spouse, without distinction as to whether they were born in or out of wedlock or adopted, to be part of the family when applying the national legislation on family reunification.

In the case of Bulgaria, national legislation does not explicitly state “without distinction as to whether they were born in or out of wedlock or adopted” but family law in Bulgaria generally does not make any distinction between children born in and out of wedlock. As regards adopted children, family law embraces the idea of a legal bond between the parents and the adopted children that, from a legal point of view, is as strong as the one between natural children and their parents. It remains unclear, though, to what extent the Bulgarian family law will inform admission decisions for temporary protection. The Bulgarian rapporteurs further mentions that the Bulgarian legislation is not sufficiently clear with regard to the distinction between “the minor unmarried children of the sponsor or of his/her spouse” stating that family members are the husband, the wife and “their” minor and unmarried children.

A considerable amount of the Member States chose not to consider the unmarried partner in a stable relationship as a family member when applying the rules on family reunification (Bulgaria, Estonia, France, Greece, Ireland, Italy, Luxemburg, Cyprus, Poland, Romania and Slovakia). However, among these Member States, only Bulgarian legislation or practice treats unmarried couples in a way comparable to married couples under its law relating to aliens. Hence, there is an issue of infringement of the Directive in Bulgaria, but not in the other Member States mentioned above.

This notwithstanding, the French rapporteur has indicated a practical problem in transposition, as the Conseil d’Etat has indicated that cohabitation shall be seen as an element of private life as protected under Article 8 of the ECHR. Significant as it is, this line fails to appreciate cohabitation as “family life” in the sense of Article 8 of the ECHR over and above its private dimensions. Therefore, we believe that the French law raises issues of infringement as of today.

As regards the delimitation of members of the extended family who *may* be reunited according to Article 15(2) and (3), only a few Member States (Cyprus, Greece, Luxemburg, Malta, Portugal and Slovakia) have chosen to consider them eligible for family reunification without additional qualification requirements. In Finland other persons outside the family concept are eligible for family reunification if there is a strong bond of dependency between the sponsor and the person concerned. In Sweden, there is the possibility of family reunification for an alien who is a parent of an unmarried alien child if the child arrived in Sweden separately from both parents or from another adult person who may be regarded as having taken the place of the parents, or if the child has been left alone after arrival. A second group of Member States (Belgium, Bulgaria, France, Poland and Ireland) considers them a part of the family but adds further criteria or leaves it within the discretion of authorities to grant these persons family reunification. In France, such discretion is to be exercised with a view not only to the urgency and necessity from the perspective of the individuals concerned, but also to the availability of accommodation.

As regards evidence to verify family membership, some Member States, for example Sweden Belgium and Italy accept the factual expression of family life as proof of family membership

in accordance with the recommendation of the UNHCR.¹⁶ In Luxemburg, exemptions from ordinary documentary requirements are made in cases where the beneficiary left his or hers country of origin urgently.

Austria and Lithuania have not been mentioned above since both Austria and Lithuania does not permit family reunification.

Article 15(1)(a), Q.14.C: Family reunification of the “closer family”	
NO TRANSPOSITION AT ALL	Austria, Lithuania,
LEGAL PROBLEM	Bulgaria
PRACTICAL PROBLEM	

The national legislation of Member States regarding the “best interest of the child” (Article 15(4)) (Q.14.E)

According to Article 15(4), the Member States shall take into consideration the best interest of the child when applying the provisions on family reunification.

This provision has provoked a broad range of responses by the Member States. It emerges clearly that there is a further need for clarifying what is demanded of Member States when transposing this provision.

A first group of Member States (Italy, Portugal, Bulgaria, Romania, Finland, Cyprus, Greece, Malta and Sweden) refer to explicit provisions in their national law stating that the best interest of the child shall be taken into consideration. In some cases these provisions are pre-existing general statements in Aliens legislation, applicable in a variety of cases where children are affected. In other cases they are specific norms of transposition of the temporary protection directive.

A second group of Member States (Austria, Belgium, the Czech Republic, France, Germany, Ireland, Italy, Luxemburg, Poland, Spain and Slovakia) cannot refer to an explicit provision tailored for temporary protection or aliens legislation. Certain national rapporteurs (the Czech Republic, Italy, Poland, Belgium and Germany) nevertheless consider the principle in force in their Member State as regards family reunification for beneficiaries of temporary protection. In this context, referral is made to a variety of normative sources, be it the ratification of the U.N. Convention on the Rights of the Child (CRC), general laws, binding or persuasive precedent.

In the Netherlands, which also belongs to the latter group of states, a statement in the explanatory memorandum to the decision in order to implement the Temporary Protection Directive indicates that the best interest of the child will be taken into account regarding the decision in which Member State family reunification shall take place.

Slovenia has taken specific measures in accordance with the principle of the best interest of the child but there is no general provision stating that this principle shall be accounted for in cases of family reunification.

¹⁶ UNHCR annotated comments on Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof. See comment on Article 15. (www.unhcr.org/home/RSDLEGAL/3ecdeebc4.pdf accessed on July 19th, 2007)

The divergence between proactive implementation and more or less comprehensive justifications of inertia raises serious doubts on the requisite uniformity of transposition. Treaty obligations under the CRC or constitutional provisions do not necessarily create a sufficiently precise obligation pertinent to the context of family reunification in temporary protection schemes.

We find support for this position in the practice of the U.N. Committee on the Rights of the Child in monitoring the Convention on the Rights of the Child. In particular, referral is made to General Comment No. 5 (2003):

“States parties need to ensure, by all appropriate means, that the provisions of the Convention are given legal effect within their domestic legal systems. This remains a challenge in many States parties. Of particular importance is the need to clarify the extent of applicability of the Convention in States where the principle of “self-execution” applies and others where it is claimed that the Convention “has constitutional status” or has been incorporated into domestic law.”¹⁷

Since Austria and Lithuania do not permit family reunification, neither has been mentioned in this subsection.

The national legislation of Member States regarding the decision in which Member State the reunification shall take place (Article 15(5)) (Q.14.F-G)

Article 15(5) prescribes that Member States shall decide, taking account of Articles 25 and 26, in which Member State the reunification shall take place.

In most Member States (Slovakia, Slovenia, Spain, Greece, Germany, Ireland, Italy, Latvia, Luxemburg, Belgium, Poland, Estonia, Finland, France, Cyprus, the Czech Republic, Portugal, Romania and the Netherlands) there is either an authority that is specifically appointed for the task, or an authority with the general competence to coordinate such a decision. However, only five Member States (Cyprus, the Czech Republic, France, Portugal, Romania and the Netherlands) have a specific provision regarding the procedure for the coordination between the Member States. In the Netherlands, there is only a specific provision for the situation that family reunification will take place in another Member State than the Netherlands (thus only ‘one way’). In that case the temporary protection beneficiary concerned will be transferred to that other Member State and his or her lawful residence in the Netherlands will come to an end (Article 3.1a (2)(c) Aliens Decree 2000). The Czech Republic provides another example, pivoting on a provision stipulating that the Ministry of the Interior shall contact the relevant authority in the other Member State and jointly decide, with due respect to the wish of the family being reunited, in which Member State the family will be reunited.

In the group of Member States which have not yet introduced any procedure under Article 15 (5), the coordination decision is quite apparently not curtailed by any norms suggesting that the interests of the other Member States involved in the case shall be taken into account. Hence, it is unclear to which “the spirit of Community solidarity” evoked in Article 25(1) will inform such decisions.

¹⁷ Committee on the Rights of the Child, General Comment No. 5 (2003), CRC/GC/2003/5 27 November 2003, para. 19.

The national rapporteurs for three Member States (Sweden, Bulgaria and Malta) claim that there is neither an appointed authority nor a procedure foreseen in the national legislation. In Germany there is neither an appointed competent authority. German legislation stands out in as it leaves the decision where the reunification shall take place to the temporarily protected. After having exercised his/her right to family reunification the German authorities are bound to follow the application of the temporarily protected and adopt his/her choice as their own in the negotiations with the other Member State.

Austria and Lithuania have not been mentioned above since these two Member States have not transposed the provisions on family reunification.

The national legislation of Member States concerning residence permits for reunited family members (Article 15(6)) (Q.14.H-I)

Article 15(6) stipulates that reunited family members shall be granted residence permits under temporary protection. Documents or other equivalent evidence shall be issued for that purpose.

A majority of Member States have transposed the said provision. In Spain and Bulgaria, there are no specific provisions on the issuing of residence permits for reunited family Members. However, there are provisions stating that the same benefits apply for reunited family members as for beneficiaries of temporary protection and that will probably include residence permits as well. Family members to beneficiaries of temporary protection in Finland receive a residence permit on the ground of family ties i.e. not a residence permit under temporary protection. However, they will be granted the same benefits as the sponsor and proof of the residence permit is marked in the passport or travel document.

In Ireland, the reunited family members are not granted residence permits under the current legislative framework. Persons entitled to family reunification are in effect granted leave to remain for such a time as their family member is entitled to remain. For that purpose they receive a stamp from the Garda National Immigration Bureau (GNIB). This confirms that the person has leave to remain and the same rights and entitlements as the family member that they are reunited with. However, the Immigration Residence and Protection Bill proposes that residence permit are to be introduced for all immigration matters i.e. also for beneficiaries of temporary protection and their family members.

Luxemburg and the Netherlands offer beneficiaries of family reunification the same document as the one issued to the family member. Hence, the critique raised under 2.1 regarding the 'residence permits' issued to beneficiaries of temporary protection in Luxemburg and the Netherlands applies also for the residence permits issued to their family members under the present article.

In Latvia, all the details of entry and stay of beneficiaries of temporary protection and their family members shall be defined by a government regulation that has not yet been issued. However, it is clear that a residence permit will be issued to reunited family members.

In Austria, and Lithuania, where no right to family reunification is stipulated, there are obviously no provisions on residence permits for reunited family members.

Article 15(6) second sentence, Q.14.I: Residence permits for reunited family members

NO TRANSPOSITION AT ALL	Austria, Lithuania
LEGAL PROBLEM	Latvia
PRACTICAL PROBLEM	

The national legislation in Member States regarding the providing of information needed to process a matter of family reunification (Article 15(8)) (Q.14.J)

A majority of the Member States offering family reunification have introduced stipulations on the providing of information to other Member States necessary to process a matter of family reunification.¹⁸ Five Member States (Estonia, Finland, Bulgaria, the Netherlands and Poland) have no such provision. In Latvia, the details of the procedure will be laid down in a coming governmental regulation that will be adopted when the new law on asylum has been decided on.

1.2.17 Unaccompanied minors (Article 16) (Q.15.A-C)

Article 16 demands that special measures be taken regarding unaccompanied minors. A definition of “Unaccompanied minor” is given in Article 2(f). The term is defined as third-country nationals or stateless persons below the age of eighteen who arrive on the territory of the Member States unaccompanied by an adult responsible for them whether by law or custom, and for as long as they are not effectively taken into the care of such a person, or minors who are left unaccompanied after they have entered the territory of the Member States.

Unaccompanied minors shall, as soon as possible, be provided with a legal guardian of some sort in order to ensure representation (Article 16(1)). During the period of temporary protection, Member States shall provide for unaccompanied minors to be placed with adult relatives, with a foster-family, in reception centres with special provisions for minors or in other accommodation suitable for minors or with the person who looked after the child when fleeing (Article 16(2)). The views of the child shall be taken into account when arranging placement for the child (Article 16(2)).

The national legislation of Member States regarding representation (Article 16(1)) (Q.15.A)

All Member States have ensured the representation of unaccompanied minors enjoying temporary protection. The Member States enjoy great freedom on deciding how to arrange the representation of minors. Consequently, the concrete measures taken by the Member States vary to quite some degree. One strategy is to fall back on the framework provided for unaccompanied minors seeking asylum e.g. France, Austria, Belgium and Sweden. Another is to draw on the general legislation for the protection of children e.g. Luxemburg and the Czech Republic.

Amongst Member States, the chosen representative might be a person who is appointed as an individual guardian for the minor, a director or a social worker at a social welfare authority, a foundation subsidized by a ministry etcetera.

In Greece, a special problem related to poor translation of the Directive emerged. According to the decree on temporary protection the Ministry of Health and Social Solidarity shall see to that representation is arranged by mandating adult relatives, a foster family, a director of a

¹⁸ Ireland per draft legislation.

reception centre with the capacity to host minors or other shelters appropriate for minors or the person who took care of the child when fleeing. Apparently, the list of possibilities for placement of the unaccompanied minor is used for representation purposes. This is most likely due to the fact that in the Greek language version of Article 16(2) employs the Greek term for “responsibility” rather than “placement”.

The national legislation of Member States regarding placement (Article 16(2)) (Q.15.B)

The placement of unaccompanied minors who are beneficiaries of temporary protection is also provided for in most Member States. As regards the alternatives for placement, in approximately half of the Member States (Austria, Belgium, Bulgaria, Cyprus, Estonia, Luxemburg, Poland, Portugal, Romania, Finland, Germany, Sweden, Malta and Slovenia) domestic law embraces all the alternatives in Article 16(2). France, Spain, Lithuania and Italy provides for the reception of all unaccompanied minors in reception centres with special provisions for minors and some other Member States uses one or more of the possibilities provided for in Article 16(2).

There are problems related to placement of unaccompanied minors in two member states (the Czech Republic and Greece). In the Czech Republic, there is no norm of transposition regarding the placement of unaccompanied minors. However, according to the national rapporteur, the placement will be ensured in practice. Greece, as partially indicated under the previous heading, does not explicitly provide that unaccompanied minors will be “placed” with any of the alternatives in Article 16(2). This flows from the main norm of transposition for the Directive. Rather, the national legislation states that adult relatives, a foster family, a persons responsible for reception centres or the person who took care of the child when fleeing will have the responsibility for the unaccompanied minor. This is most likely due to poor translation into Greek by the provision in question. However, in practice it is likely that those responsible for the minors will also host them.

The national legislation of Member States regarding taking the views of the child into account when arranging with placement (Article 16(2)), last sentence, (Q.15.C)

Less than half of the Member States (Belgium, Bulgaria, Cyprus, Estonia, Finland, Germany, Greece, Romania, Malta, Slovenia and Sweden) operate specific stipulations explicitly providing that the views of the child should be taken into account either generally when taking decisions regarding the child or more specific regarding arranging with placement. In the Czech Republic this particular provision in the Directive is more or less ensured by a statement in the applicable law that the unaccompanied minor will be placed in the custody of a person different from his or her parent if the child consents with this placement.

In a second group of Member States (Austria, France, Ireland, Latvia, the Netherlands, Luxemburg, Portugal, Slovakia, Spain, Poland, Italy and Lithuania) there is no transposition of the provision on taking the views of the child into account. However, in Poland general principles on taking the views of the child into account apply and in Italy the views of the child are taken into account in practice. Furthermore, since there is only the option of staying at a reception centre in Lithuania, there is, according to the national rapporteur, no room for taking the views of the child into account when arranging with placement.

1.3 Access to the asylum procedure in the context of temporary protection (Chapter IV)

It follows from Article 3(1) that the grant of temporary protection shall not prejudice the grant of refugee status. Para 2 of the same provision obliges Member States to apply temporary protection with due respect for human rights and fundamental freedoms and their obligations regarding non-refoulement. Furthermore in preambular paragraph (10), a general reference to the “Member States’ international obligations as regards refugee” has been inserted. As an example of such obligations, the 1951 Refugee Convention is named.¹⁹

1.3.1 Access to the asylum procedure (Article 3 and 17(1) (Q.16.A-B))

According to Article 3, temporary protection shall not prejudice recognition of refugee status under the Geneva Convention. Also, Article 17 prescribes that persons enjoying temporary protection must be able to lodge an application for asylum at any time.

The national legislation of Member States

All Member States allow persons enjoying temporary protection to apply for asylum at any time during the period of temporary protection. Consequently, temporary protection does not prejudice recognition of refugee status under the Geneva Convention in any of the Member States (see however section 1.3.4 concerning the case of Italy). It is important to note, however, that an alien who wishes to benefit from temporary protection regime in the Netherlands *has to* file an asylum claim. It is questionable whether this is in conformity with the Directive. Article 17 of the Directive seems to start from the idea that a person who already has been granted temporary protection should be able to lodge an asylum application in addition to that. The fact that a person has to file an asylum claim in order to benefit from the temporary protection regime can create a problem with respect to the applicability of the Dublin Regulation in cases where a person spontaneously arrived at the Dutch territory since, according to Dutch legislation, temporary protection can be denied if another Member State is responsible for examining the asylum application in accordance with the Dublin Regulation. (see section 1.3.3).

In a number of Member States there are explicit provisions stating so (e.g. France, Luxemburg, Malta and Sweden). In other Member States, this can be inferred from the absence of legal obstacles to lodging an asylum application. In the alternative, statements in preparatory works explain that temporary protection in no way hinders the application for asylum.

A much-debated aspect of the Directive is the fact that Article 17 implicitly permits Member States to delay processing of asylum applications. The opportunity to suspend the processing of asylum applications, under all or certain circumstances, has been seized by a considerable number of Member States. Belgium, Bulgaria and Germany will suspend the determination of the asylum application until the end of temporary protection. Also, in Germany, the person concerned has to declare his/her intention to proceed with the asylum application within one month from the date of the expiry of the residence permit under temporary protection. In

¹⁹ United Nations Convention Relating to the Status of Refugee of 28 July 1951, U.N.T.S vol. 189, 150, as amended by the United Nations Protocol Relating to the Status of Refugees of 31 January 1967

Estonia the processing of asylum claims will be suspended until three months before the end of the temporary protection. In Finland the asylum application will not be examined before temporary protection has ended, unless there are weighty reasons for doing so. The Swedish approach is on the contrary to suspend only if there are special grounds for doing so. In the Netherlands the decision on the asylum application has to be taken in the period between the date of application and six months after temporary protection has ended. The decision on the asylum claim can however be extended further on several individual and categorical grounds. The norms of transposition in Italy provides for the possibility of suspending the processing of asylum claims in the implementation act of a Council Decision on temporary protection.

1.3.2 Permission to remain after the end of temporary protection (Article 17(2)) (Q.16.C)

According to Article 17(2), the examination of any asylum application not processed before the end of the period of temporary protection shall be completed after the end of that period.

An important question is, obviously, if former beneficiaries of temporary protection will be allowed to stay in the Member State during the examination of their asylum claim, even though the period of temporary protection has ended.

The national legislation of the Member States

All Member States do admit the beneficiaries of temporary protection to stay in the Member State during the examination of their asylum claim, even though the period of temporary protection has ended. Usually, domestic transpositions of international norms on non-refoulement in the 1951 Refugee Convention or in human rights law are referred to, blocking removal while an application for asylum is pending (e.g. in the case of France).

In Belgium, the application for asylum will be handled and the asylum seeker will have a provisory right of residence if the claim was introduced within eight days after the end of temporary protection.

1.3.3 The Member State responsible for considering an asylum application (Article 18) (Q.16.D)

According to Article 18, the criteria and mechanisms for deciding which Member State is responsible for considering an asylum application shall apply. This implies a referral to the mechanisms of the so-called Dublin Regulation. Furthermore, Article 18 sets out that, in particular, a Member State that has accepted the transfer of a person onto its territory for purposes of temporary protection is responsible for examining the asylum application of such a person.

Considering the criteria laid down in the Dublin Regulation for determining the Member State responsible for the examination of an asylum claim it is clear that a Member State that accepted the transfer of a person onto its territory for purposes of temporary protection will be responsible for the examination of an asylum claim in accordance with either Article 9(1) (the Member State in question issued a residence permit to the person concerned) or Article 9(2) (the Member State in question issued a visa to the person concerned). This means that the Dublin Regulation will imply a transfer of a temporary protected to another Member State

following the person filing a claim for asylum only if the person concerned has arrived spontaneously onto the territory of a Member State.

The national legislation of the Member States

A rather large group of Member States relies on the applicability of the Dublin Regulation in the absence of a formal transposition of Article 18, and has refrained from transposing the provision. Most national rapporteurs state that the Dublin Regulation will apply (Bulgaria, Cyprus, the Czech Republic, Finland, Germany, Greece, Lithuania, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia and Sweden).

A minority of Member States has transposed the provision into domestic law (e.g. France, Luxemburg and Malta).

In this respect Austria stands out from the rest of the Member States in that the Dublin regulation will apply only if the asylum claim is lodged before temporary protection applies. If the application were filed later, the applicant would remain in Austria and her or his asylum claim would be determined there.

1.3.4 Temporarily protected person or asylum seeker (Article 19(1)) (Q.16.E)

According to the optional provision in Article 19(1) the Member States may provide that temporary protection may not be enjoyed concurrently with the status of asylum seeker while applications are under consideration. This means that the Member States may withdraw or rather suspend the status of temporarily protected, if a person enjoying temporary protection files an asylum claim.

The national legislation of the Member States

A majority of the Member States have chosen not to transpose this optional provision. This means that a beneficiary of temporary protection who files an application for asylum will be able to continually enjoy the status of temporarily protected. This solution has been chosen by a majority of Member States, among them Luxemburg and France. In Slovakia and Romania applicants may not, in accordance with the optional provision in Article 19(1), maintain the status of temporarily protected when making a claim for asylum.

Where the processing of asylum claims is suspended (see 3.1) Article 19 is superfluous. In these states, the beneficiaries of temporary protection will continue to enjoy the status of temporarily protected until the period of temporary protection is over and after that alter status to asylum seeker.

According to the Italian law, the asylum determination process may be suspended by means of a provision in the national decree on the implementation of a Council Decision on temporary protection. Where this is done, the beneficiary of temporary protection will continue to enjoy this status. However, if the asylum determination process is not suspended by the national decree, the persons concerned can continue to enjoy temporary protection only if they withdraw their asylum claim. This is particularly problematic, since the benefits for persons enjoying temporary protection in Italy are better than those provided for asylum seekers. This provides incentives for beneficiaries of temporary protection to withdraw their application for asylum in order to be able to continue to enjoy the benefits provided to them as beneficiaries of temporary protection. Moreover, the fact that the applicant has withdrawn an earlier application for asylum might be held against the applicant if he or she files another

application for asylum. Hence, it is doubtful whether Italian law complies with Article 3 of the Directive, obliging Member States not to “prejudge” refugee status by the grant of temporary protection, read in conjunction with article 17 and Article 19.

In the Czech Republic, the optional provision in Article 19(2) has been partially transposed i.e. only for certain material reception conditions. Since the benefits granted to temporarily protected persons are, at least to some extent, better than the benefits granted to asylum seekers this provides incentives for the beneficiaries of temporary protection not to apply for or even to withdraw an application for asylum.

In Malta, it is within the discretion of the Refugee Commissioner to decide whether or not temporary protection may be enjoyed concurrently with the status of asylum seeker.

1.3.5 Temporary protection after the rejection of an asylum claim (Article 19(2) (Q.16.F))

According to Article 19(2) addresses the situation after the examination of an asylum application. If refugee status or, where applicable, other kind of protection is not granted to a person eligible for or enjoying temporary protection, the member States shall provide for that person to enjoy or to continue to enjoy temporary protection for the remainder of the period of temporary protection.

The national legislation of Member States

It is worth recalling that the scenario suggested in Article 19(2) will not materialize in Member States suspending the asylum determination procedure during temporary protection. In nearly all other Member States, though, a beneficiary of temporary protection whose claim for refugee status or other forms of protection is rejected will be allowed to enjoy, or continue to enjoy, temporary protection. Presumably, in most Member States, this will be the case automatically.

Slovenia and Slovakia stand out. When an application for asylum has been rejected, the person concerned will have to apply for temporary protection again. If this is evidently only a formality, it cannot be considered an infringement of Article 19(2). The Spanish and the Swedish rapporteurs suggest that, since the refusal of an asylum claim is no ground for withdrawal of the residence permit under temporary protection, the persons concerned can continually benefit from temporary protection after the asylum application has been turned down.

The Irish rapporteurs claim that the provision in question has not been transposed and that any practice that may conform to Article 19(2) is unknown at present.

Article 19(2), Q.16.F: temporary protection after the rejection of an asylum claim	
NO TRANSPOSITION AT ALL	Ireland
LEGAL PROBLEM	Slovakia
PRACTICAL PROBLEM	

1.4 Return and Measures after temporary protection has ended (Chapter V)

After the end of a temporary protection regime, the directive foresees first and foremost the voluntary return of the temporarily protected (Articles 20-21). Member States' obligations regarding enforced return are also laid down in this chapter (Articles 22-23).

1.4.1 Voluntary return (Article 21) (Q.17.A-E)

As an overarching principle, Member States shall ensure that the provisions governing voluntary return of persons enjoying temporary protection facilitate their return with respect for human dignity (Article 21(1)). Furthermore, Member States shall ensure that the decision of those persons to return is taken in full knowledge of the facts. For that purpose, Member States may provide for exploratory visits (Article 21(1) subparagraph 2). If a person has voluntarily returned but decides to seek protection again in the host Member State, favourable consideration shall be given to requests for return (Article 21(2)). Lastly, participants in voluntary return programs may be granted the treatment in chapter II of the directive in the period between the end of temporary protection and the actual return (Article 21(3)).

The national legislation of Member States regarding the facilitation of return with respect for human dignity (Article 21(1)) (Q.17.A)

The concept of “human dignity” appears to cause a multitude of interpretations, ranging from abstract guarantees in the law to concrete return programmes. With a view to the formulation of the norm in Article 21(1), a minimalist form of transposition would be to stipulate domestic norms on voluntary return, which, in their aggregate outcome, would ensure human dignity. It follows already from the wording of Article 21(1) that the mere existence of provisions facilitating voluntary return is not enough. It might be helpful, but not necessarily an absolute requisite, to inscribe the protection of human dignity into the law.

Only a few Member States (Greece, Italy, Portugal, Romania, Malta and Cyprus) have introduced a specific and express provision on the facilitation of return with respect for human dignity. By way of example, the Italian national decree implementing a Council Decision on temporary protection will provide the specifics of voluntary return. There is a provision requiring the involvement of NGOs or other national or international organisations, as well as a requirement that repatriation shall be executed respecting human dignity.

Another group of Member States simply lacks any reference to human dignity in voluntary return measures (Austria, Belgium, Bulgaria, the Czech Republic, France, Lithuania, Luxemburg, Poland, Spain, Ireland and the Netherlands). There are no indications that voluntary return is comprehensively regulated in such a manner as to ensure human dignity in their aggregate outcome. Such Member States must be considered to infringe Article 21(1).

For other Member States, referral is merely made to concrete measures, or indications that concrete measures will be taken, to ensure facilitation of return. These measures are then interpreted as guaranteeing human dignity in their aggregate outcome. Beyond that, it is perceived as self-evident that human dignity is ensured in all other dimensions of return. The Swedish government relies on the voluntary return programmes to ensure both that the decision to return is taken in full knowledge of the facts as well as that the return is carried

out with respect for human dignity. This implies that these programmes must be designed in a way as to ensure outcomes respecting human dignity, which is beyond the scope of this study to assess. The Finnish example is a case in point. Beneficiaries of assisted voluntary return under the Directive might have their travel expenses paid by the authorities as well as subsidies for settling again in the home country. The same is true in Estonia as regards travel expenses. In our view, this in itself is insufficiently detailed to ensure human dignity at all stages of return. The same is true where human dignity is seen as ensured merely by involving international organisations as IOM, or NGOs.

The national legislation of Member states regarding decisions of voluntary return in full knowledge of the facts (Article 21(1) second paragraph, first sentence) (Q.17.B)

The provision on ensuring that the decisions to return voluntarily is taken in full knowledge of the facts has been transposed into national law in but a few Member States (Cyprus, Luxemburg, Poland, Romania, Malta and Slovenia).

Among those Member States that do not operate such a provision, there are a variety of approaches. In Italy the rules on return should be provided in the national decree on the implementation of a Council Decision on temporary protection. In Sweden, the preparatory works states that the voluntary return programmes ensures both return with respect for human dignity and that the decision of those persons to return is taken in full knowledge of the facts. Yet there is no specific provision to that effect. Neither Finland has stipulated a specific provision on the duty to inform but this is, according to the national rapporteurs, nevertheless ensured in practice. In Portugal, the national law envisage that a decision to return should be taken with a free and clear conscience. It does not foresee any obligation on the Portuguese authorities to certify that the individual decision for voluntary return is made in full knowledge of the facts. With regard to Germany, the national rapporteurs claim that even though there is no specific provision guaranteeing that the person enjoying temporary protection who decides to return voluntarily does so in full knowledge of the facts. In their view, this follows from constitutional principles of the German constitution, in particular the respect to human dignity, that government authorities must provide for the necessary and relevant information about the respective country of return. We cannot support the position taken by the German rapporteurs. We consider a reference to abstract constitutional principles such as a guarantee of human dignity not precise enough to guarantee that the persons concerned receive the relevant information. Therefore, German legislation is in violation with the Directive.

In Greece, there is indeed a norm of transposition reflecting Article 21(2), but that norm is rather problematic. Greek law prescribes that extensive information on the situation in the country of origin and possible consequences of return shall be provided to the beneficiaries of temporary protection who participate in a vocational training programme. However, this obviously excludes persons outside such programmes from the information.

Article 21(1) second paragraph, first sentence, Q.17.B: Decision on voluntary return taken in full knowledge of the facts	
NO TRANSPOSITION AT ALL	Austria, Belgium, Bulgaria, the Czech Republic, Estonia, Ireland, Lithuania, the Netherlands, Portugal, Spain, Slovakia, Italy, Finland,
LEGAL PROBLEM	Greece, Latvia, Sweden
PRACTICAL PROBLEM	

The national legislation of Member States regarding exploratory visits (Article 21(2)) (Q.17.C)

The optional provision suggesting that Member States provide for exploratory visits according to national law has been transposed by only a few Member States (Cyprus, Greece and Slovenia). Some states have accumulated experience with the ramifications of exploratory visits from the Kosovo crisis (for example Austria, Finland and the Netherlands). While they are open to further attempts, they have nevertheless decided not to transpose the provision. In a couple of Member States (for example Estonia, Luxemburg and Ireland), exploratory visits might be permitted, yet a specific provision is lacking. Also, in a few Member States (the Netherlands, Bulgaria, Germany, Sweden and Finland), the residence permit will not expire if a beneficiary leaves the country. This means that the persons concerned may visit their home country and return to the country offering temporary protection at will.

The national legislation of Member States on the consideration of requests for return (Article 21(2)) (Q.17.D)

Approximately half of the Member States will give favourable considerations to requests for return according to national law (Cyprus, Germany, Greece, Slovenia, Romania, Latvia, Luxemburg Italy²⁰ and Malta).

In Finland, the residence permit of a voluntary returnee will only expire if the returnee indicates that he or she is moving permanently. This gives the voluntary returnee the opportunity to state that he or she is moving on a non-permanent basis. In that case, it is fully possible to turn back to Finland. If the residence permit has expired and the person concerned wants to return to Finland during the time of temporary protection, the immigration authorities will assess his or her request for a residence permit favourably but there is no norm in domestic law obliging the authorities to do so.

The national law of Portugal states that the authorities are obliged to assess any requests from a beneficiary of temporary protection to return. However, there is no explicit prescription that the authorities should give favourable considerations to such requests. It is merely stated that the assessment will be based on respects for human dignity and with due respect for human rights and fundamental freedoms, as well as obligations regarding non-refoulement.

In Bulgaria and Sweden, residence permits will not expire as a consequence of the beneficiary leaving the country. In the Netherlands, residence permits can expire on that ground. But due to the use of the word 'can' in the applicable provision in Dutch law, it is not mandatory for the authorities to end temporary protection of someone who returns voluntarily to his or her country of origin before the temporary protection regime has come to an end. If a person, who has left the Netherlands voluntarily, returns to the Netherlands and applies for asylum, expulsion will be postponed as long as the temporary protection regime is in force. This means that there is no need for the authorities giving favourable considerations to a request for return in Bulgaria, Sweden and the Netherlands, since return is possible even in the absence of a decision.

²⁰ There is no specific provision on return before temporary protection has ended. It might be permitted, though, since there is a provision on return which does not specify that it applies only when temporary protection has ended.

Article 21(2), Q.17.D: favourable consideration of requests for return	
NO TRANSPOSITION AT ALL	Portugal, Austria, Belgium, the Czech Republic, Estonia, France, Ireland, Lithuania, Poland, Spain
LEGAL PROBLEM	Finland, Portugal, Slovakia
PRACTICAL PROBLEM	

The national legislation of Member States regarding the extension of benefits for participants in voluntary return programs (Article 21(3)) - Optional provision (Q.17.E).

Only a few Member States have chosen to transpose this optional provision (Belgium, Germany, Greece, Cyprus, Italy, Malta and Sweden). In Greece, the extension of benefits for participants in voluntary return programmes is made by way of exception. In Belgium as well as in Luxemburg, there is no specific provision. However, the competent Belgian minister is not obliged to take away the residence permit at the end of temporary protection. In Luxemburg, there is a practice of continued benefits up to return. In Italy, the national decree implementing the Council Decision shall provide for the rules related to the stay after temporary protection has ended.

Sweden stands out from the rest of the Member States in this respect. It provides for the opportunity of receiving even more generous benefits under certain circumstances. If a programme to prepare for the voluntary return of the alien has started when the residence permit for temporary protection expires, the permit of a person taking part in the programme may be extended for a maximum of two years. This permit is named a “residence permit after temporary protection”. Furthermore, if the beneficiary of temporary protection resides in Sweden for three years or more (which may occur if the Council extends temporary protection to the maximum length of three years), and the third-country national decides to participate in a voluntary return programme after three years of temporary protection, he or she will be registered in the national registry. From that point in time, he or she will receive the same social and medical benefits as nationals.

1.4.2 Enforced return (Article 22 and 23) (Q. 18.A-C and Q.19A-B)

Member States are to ensure that the enforced return of persons whose temporary protection has ended and who are not eligible for admission shall be conducted with due respect for human dignity (Article 22(1)). Any compelling humanitarian reason, which may make return impossible or unreasonable in specific cases, shall be considered (Article 22(2)).

It should be noted that Article 22 combines a prohibition with an obligation to consider specific aspects of return cases. First, any action or omission taken in the context of enforced return and in contravention with international human rights law obligations will automatically contravene the obligation to respect human dignity in the first paragraph of the provision. The concept of human dignity is, however, not fully consumed by the sum total of particular human rights obligations.²¹ Therefore, the second paragraph specifies particular considerations. To comply with the second paragraph, national law needs to provide for some form of possibility to consider the compelling humanitarian reasons named in Article 22(2). Hence, it is not enough to refer to the general obligations under the ECHR.

²¹ As pointed out by Karoline Kerber (2002) this formulation is wider than the legal obligations laid down in Article 33 of the 1951 Refugee Convention, which evidently also has to be observed by the Member States.

Article 23 is a specific provision addressing the case of persons who cannot, considering their state of health, reasonably be expected to travel where for example they would suffer serious negative effects if their treatment were interrupted. Such persons shall not be expelled so long as the situation continues (para. 1). This is a substantive rule in the form of a prohibition and can be seen as a specification of the prescriptions in Article 22.

The Member States may furthermore allow families whose children are minors and attend school in a Member State to benefit from residence conditions allowing the children concerned to complete the current school period (Article 23(2)).

The national legislation of Member States regarding enforced return with due respect for human dignity (Article 22(1) (Q.18.A)

Only a few Member States (Cyprus, Portugal, Luxemburg, Greece, Italy and Malta) provide for an equivalent to the formulation in Article 22(1) in their national legislation. Judging from the answers of national rapporteurs, the remaining Member States trust that this is ensured otherwise. References are made to the Constitution in the Member State concerned, to general principles of internal law and/or to national legislation and practice in accordance with international obligations such as the ECHR and the 1951 Refugee Convention.

Given the occurrence of death and injury in forcible return practices of a number of EU Member States such as Belgium and Germany, there is a considerable interest by the affected individual that enforced return is carried out according to a set of rules which ensure human rights and tie in considerations of a humanitarian nature. This has evidently not been well received by Member States. Those states that lack an express provision must be considered to be in violation of their transposition obligations.

The national legislation of the Member States regarding enforced return and consideration of any compelling humanitarian reasons which may make return impossible or unreasonable (Article 22(2) (Q.18.B)

The observations regarding Article 22(1) reflect to great extent the state of transposition regarding Article 22(2). Only a few Member States have introduced a specific provision regarding the consideration of compelling humanitarian reasons which may make return impossible or unreasonable. In Cyprus, Malta as well as in Luxemburg, the law features a norm of transposition close to the Directive's wording. Greece also provides specifically for the return of beneficiaries of temporary protection. However, the Greek provision merely states that return may be postponed by way of exception when compelling humanitarian reasons apply which render return impossible. There is no equivalent to the term "unreasonable" in the Greek legislation. The same problem occurs in the draft legislation in Latvia. In Spain, there is a provision stating that a person shall be allowed to stay when a "reasonable justification" is alleged and in Bulgaria there is a provision prescribing that a person should not be expelled if there are reasons of a humanitarian or health related nature.

The conclusion must be that most Member States presumably trust their existing legislation on humanitarian residence permits and non-refoulement obligations to meet the requirement of Article 22(2) in the Directive. However, the Dutch, the Swedish and the Romanian national rapporteurs are in doubt if that indeed is the case.

In the absence of a specific legal obligation mirroring Article 22(2), we believe that a Member State cannot be considered to have complied with its transposition obligation.

The national legislation of the Member States regarding enforced return and the suspension of expulsion decisions for health reasons (Article 23(1)) (Q.19.A)

Less than half of the Member States (Belgium, Bulgaria, Cyprus, Estonia, France, Latvia, Luxemburg, Portugal, Malta and Greece) have formally transposed Article 23(1). However, in other Member States (the Czech Republic, Germany, Slovakia, Poland, Slovenia, Finland, Lithuania, The Netherlands and Sweden) there are pre-existing provisions allowing suspension of return or permanent stay due to health reasons.

The national rapporteurs for the Austria, Ireland, Italy, Spain, and Romania claim that the national legislation in their Member State is not in compliance with Article 23(1).

In Slovenia, there is a provision on suspension of return due to health reasons but the suspension is limited in time (maximum 2 years)). This raises an issue of infringement since there is no time limit for the suspension in Article 23 "...as long as that situation continues."

Article 23(1), Q.19.A: The suspension of expulsion decision for health reasons	
NO TRANSPOSITION AT ALL	Austria, Ireland, Italy, Spain, Romania
LEGAL PROBLEM	Slovenia
PRACTICAL PROBLEM	

The national legislation of Member States regarding the completion of the current school period (Article 23(2) - Optional provision) (Q.19.B)

Seven Member States have transposed the optional provision on allowing families benefit from residence conditions in order for minor children who attend school to complete the current school period (Belgium, Cyprus, Greece, Estonia, Italy, Portugal and Slovenia). In five Member States the authorities might permit families to stay under the circumstances provided in Article 23(2) but are not obliged to do so according to law (Germany, Luxemburg, Sweden and Malta).

1.5 Solidarity (Chapter VI)

There are two elements in the Solidarity mechanisms in the Directive. First, there is the financial sharing (financial solidarity), the modalities of which are laid down in Article 25. In addition, Article 24 states that the measures provided for in the Directive shall benefit from the European Refugee Fund set up by decision 2000/596/EC. Second, the sharing of the actual reception of persons is provided for (reception solidarity).

Articles 25 and 26 on reception solidarity are based on the principle of "double voluntariness". This means that the reception of persons is voluntary both on the side of the receiving state and on the side of the person in search of protection.

Reception solidarity and the procedure for allocation of temporarily protected persons among the Member States are addressed in Article 26.

1.5.1 Ensuring that eligible persons have expressed their will to be received (Article 25(2)) (Q.20)

Member States are, according to Article 25(2) to ensure that eligible persons defined in the Council Decision who have not yet arrived in the Community have expressed their will to be received onto their territory.

The national legislation of the Member States

The Member States are obviously of the opinion that they are not required to transpose this particular provision. In fact, only five Member States (Cyprus, Germany, Greece, Malta and Romania) operate a provision in their respective national legislation reflecting Article 25(2). In Latvia this may be covered in an order of the Cabinet of Ministers following a Council Decision on temporary protection.

Article 25(2), Q.20: Ensuring that eligible persons have expressed their will to be received	
NO TRANSPOSITION AT ALL	Austria, Bulgaria, the Czech Republic, Estonia, Finland, France, Ireland, Latvia, Italy, Lithuania, Luxemburg, the Netherlands, Poland, Portugal, Slovakia, Spain, Sweden
LEGAL PROBLEM	Belgium, Slovenia
PRACTICAL PROBLEM	

1.5.2 Transferral subject to the *consent* of the person concerned (Article 26 (1)) (Q.21.A)

The requirement of voluntariness on the side of the person in search of protection reappears in Article 26(1). This norm provides that the transferral of persons enjoying temporary protection from one Member State to another is “subject to the consent of the persons concerned”.

The national legislation of the Member States

A considerable number of Member States (Austria, Bulgaria, the Czech Republic, Estonia, Finland, Ireland, Lithuania, Luxemburg, the Netherlands, Slovakia and Spain) have not transposed the requirement of the consent of the person prior to transferral.

In most of those Member States that have transposed this particular provision, there is a provision simply stating that the transferral is subject to the consent of the person concerned. In Latvia, the consent of the person concerned should be “taken into account”, which obviously is a lower standard than what is required by the Directive. In Cyprus, the consent of the person concerned has to be in writing. In Germany temporary protection cannot be granted if the person concerned has not given his or hers prior consent to stay in Germany. Furthermore, German law sets out a procedure by which a person can apply for transferral to another Member State. Hence, the consent of the person concerned is guaranteed also for transfers from Germany to another Member State.

Article 26(1) last sentence Q.21.A: Transferral subject to the *consent* of the person

concerned	
NO TRANSPOSITION AT ALL	Austria, Bulgaria, Finland, the Czech Republic, Estonia, Ireland, Lithuania, the Netherlands, Slovakia, Spain
LEGAL PROBLEM	Latvia
PRACTICAL PROBLEM	

1.5.3 Communication and notification regarding requests for transfers (Article 26(2) (Q.21.B))

Article 26(2) states that the Member States shall communicate requests for transfers to the other Member States and notify the Commission and the UNHCR.

The national legislation of the Member States

A considerable amount of the Member States have failed to transpose the provision on the obligation to communicate requests for transfers to the other Member States and notify the Commission and the UNHCR (Austria, Bulgaria, the Czech Republic, Estonia, Finland, Italy, Latvia, Luxemburg, Netherlands and Spain). In addition, in five Member States (Belgium, Ireland, Slovenia and Slovakia) the national law does not cover communication to Member States, the UNHCR and the Commission in their totality.

In two Member States, the national provisions transposing this article are somewhat problematic. In Portugal the national provision is simply a copy of the wording of the said provision in the Directive. Consequently, the provision obliges the Portuguese State to inform the applicant Member State even when the transfer is carried out at the latter's request. In Lithuania there is a provision stating that other Member States, the Commission and the UNHCR should be informed about the number of foreigners granted temporary protection in Lithuania, but it does not say anything about the duty to inform the above-mentioned as regards requests for transfers.

Article 26(2), Q.21.B: Communication and notification regarding requests for transfers	
NO TRANSPOSITION AT ALL	Austria, Bulgaria, the Czech Republic, Estonia, Finland, Italy, Latvia, the Netherlands, Slovakia, Spain, Finland,
LEGAL PROBLEM	Ireland, Slovenia, Belgium, Lithuania
PRACTICAL PROBLEM	

1.5.4 Provision of information needed for transferral (Article 26(3)) (Q.21.C)

According to Article 26(3), Member States shall, at the request of another Member State, provide information set out in Annex II of the Directive²² on a person enjoying temporary protection which is needed to process a matter of transferral.

²² Annex II states that the information referred to in Article 26 (among others) shall include to the extent necessary one or more of the following documents or data: (a) personal data on the person concerned

The national legislation of the Member States

Approximately a third of the Member States have not transposed the provision (Austria, Bulgaria, the Czech Republic, Estonia, Finland, Luxemburg, Lithuania, Netherlands and Malta).

As regards the Czech Republic, it should be pointed out that a norm of transposition for Article 15(8) exists (regarding providing of information to another Member State in matters of family reunification). However, there is no analogous duty in matters of transferrals according to Article 26 in the Directive. In Finland, there is no norm of transposition, but the Government claims that they would, if needed, provide the information based on the direct applicability of the Directive.

In Latvia, Slovakia and Slovenia, there are indeed norms of transposition but they are somewhat problematic. In the draft legislation in Latvia there is a provision stating that in order to transfer a person to another Member State, a document will be issued. The form of the document and procedure of issuance as well as what information the document will contain shall be determined by the Cabinet of Ministers. In Slovakia, the problem is that there is only a very general provision stating that the competent ministry shall register the personal data of the beneficiaries of temporary protection and that this information shall be provided to other Member States. In Slovenia the problem is that not all the information in Annex II will be registered according to national law. The Italian norm of transposition merely states that the national contact point “shall cooperate” with the administrations in other Member States in order to exchange data. There is no indication if this includes providing of information as set out in Annex II of the Directive. Apparently this is meant to be specified in the national decree implementing a Council Decision on temporary protection in accordance with Article 5 of the Directive.

Article 26(3), Q.21.C: Provision of information needed for transferral	
NO TRANSPOSITION AT ALL	Austria, Bulgaria, the Czech Republic, Estonia, Finland, Lithuania, Malta, the Netherlands,
LEGAL PROBLEM	Slovenia, Latvia
PRACTICAL PROBLEM	

1.5.5 The administration of residence permits after transfer (Article 26(4)) (Q.21.D-F)

Where a transfer is made from one Member State to another, the residence permit of departure shall expire and the obligations towards the person concerned relating to temporary protection in the Member State of departure shall come to an end (Article 26(4)). The new host Member State shall grant temporary protection to the person concerned (Article 26(4)).

(name, nationality, date and place of birth, marital status, family relationship), (b) identity documents and travel documents of the person concerned (c) documents concerning evidence of family ties (marriage certificate, birth certificate, certificate of adoption) (d) other information essential to establish the person's identity or family relationship (e) residence permits, visas or residence permit refusal decisions issued to the person concerned by the Member State, and documents forming the basis of decisions (f) residence permit and visa applications lodged by the person concerned and pending in the Member State, and the stage reached in the processing of these.

The national legislation of Member States regarding the expiry of the residence permit and expiry of obligations in the Member State of departure (Article 26(4)), first sentence (Q.21.D, E,)

A majority of the Member States have transposed the named provision regarding the expiry of residence permit in the Member States of departure. Ireland and Latvia are currently in the process of developing legislation to this effect. However, in Austria, Bulgaria, Estonia, Luxemburg, Spain, Italy and the Czech Republic, there are no relevant provisions for expiry. In Belgium, the expiry of residence permits upon transferral is not automatic, but the minister “may” withdraw the residence permit and in Italy the expiry of the residence permit can, according to the national rapporteur be considered implicit in the measure of transferral. Luxemburg has not foreseen automatic expiry of the residence permit. As it is of limited temporal validity, though, protection obligations will automatically come to an end once it expires.

By way of conclusion, obligations towards the persons concerned relating to temporary protection will come to an end in most Member States upon transferral to another Member State. Not all Member States have transposed the said provision, but the ending of the obligations relating to temporary protection is rather considered implicit in the fact that the person concerned leaves the country by way of a transferral to another Member State.

The national legislation of Member States regarding the grant of temporary protection in the new host Member State Article 26(4), last sentence (Q.21.F)

A considerable number of Member States have not transposed the last sentence in Article 26(4) requiring the new host Member States to grant temporary protection to a person that is transferred to it (Austria, Bulgaria, the Czech Republic, Estonia, Ireland, Finland, Lithuania, Luxemburg, Netherlands, Slovakia, Spain, Finland, Romania, Italy, Malta and Greece). For Luxemburg, it is indicated that there is no guarantee for a permit being given. However, some of the national rapporteurs from the other Member States referred to in the present paragraph indicate that temporary protection will be granted to the persons concerned, but that there is no specific provision obliging the Member State to do so. Much appears to depend on speculations in practice, and the absence of explicit and unambiguous transposition on the grant of a residence permit might result in situations of legal limbo for an individual transferred.

Two Member States operate certain preconditions for the granting of residence permits to transferees. Belgium will, as the new host Member State, grant temporary protection status only if the person concerned presents themselves to the immigration authorities within eight days from the arrival in Belgium. The time-limit of 8 days raises serious doubts in view of the unconditional wording of the Directive: “The new host Member State shall grant temporary protection to the persons concerned.” Slovenia will grant residence permits if the person concerned does not fulfil any of the exclusion criteria in the national law. It is important to note that the exclusion criteria in Slovenia exceed the exhaustive exclusion grounds provided in Article 28 in the Directive. This means that a transferred person who has been enjoying temporary protection in another Member State might well be excluded upon arrival in Slovenia. This might result in limbo situations for the individual concerned. It must be regarded an infringement of the transposition obligation under the present article.

Article 26(4), last sentence Q.21.F: Grant of temporary protection in the new host Member State	
NO TRANSPOSITION AT ALL	Austria, Belgium, Bulgaria, the Czech Republic, Estonia, Ireland, Lithuania,

	Malta, the Netherlands, Luxemburg, Romania, Slovakia, Spain, Finland, Italy and Greece
LEGAL PROBLEM	Slovenia, Romania
PRACTICAL PROBLEM	

1.5.6 The use of the model pass for transfers (Article 26(5)) (Q.21.G)

According to Article 26(5), Member States shall use the model pass set out in Annex 1 in the Directive for the transfers between Member States of persons enjoying temporary protection.

The national legislation of Member States

Approximately one third of the Member States (Belgium, the Czech Republic, Ireland, Luxemburg, Austria, Finland, Lithuania and Sweden) has not provided for the use of the model pass. The case of Belgium is unusual. In Belgium, there is a reference to the content of the Model Pass, while norms on the usage of the Model Pass.

In Latvia, the obligation to use the Model Pass for transfers is supposed to be laid down in a coming government regulation.

Article 26(5), Q.21.G: Use of Model Pass for transfers	
NO TRANSPOSITION AT ALL	Austria, Finland, Lithuania, Luxemburg, Sweden
LEGAL PROBLEM	Belgium, the Czech Republic, Ireland, Latvia
PRACTICAL PROBLEM	

1.6 Administrative Cooperation (Chapter VII)

Chapter VII contains provisions on the appointing of a national contact point and prescribes the cooperation mechanism between Member States under the temporary protection regime.

1.6.1 National contact point (Article 27) (Q.22)

According to Article 27, Member States are obliged to appoint a national contact point whose address they shall communicate to each other and to the Commission.

The national legislation of Member States

The following Member States have not yet appointed a national contact point: Sweden, the Netherlands, France, Ireland, Spain, Portugal, the Czech Republic, Italy, Bulgaria, Malta and Slovenia.

1.7 Special Provisions (Chapter VIII)

Article 28 (Chapter VIII) concerns the matter of exclusion from temporary protection.

1.7.1 Exclusion from temporary protection (Article 28) (Q.23.A-C)

There are certain grounds laid down in Article 28 which a Member State *may* evoke to exclude a person from temporary protection even though the Directive would cover her or him *ratione personae* otherwise. The wording of Article 28 suggests that it is exhaustive. Exclusion on other grounds than those listed would infringe upon obligations under the Directive.

The core formulations in the exclusion grounds according to Article 28 correspond to the exclusion grounds for refugees in Article 1.F of the 1951 Refugee Convention.

Firstly, a person may be excluded from temporary protection if there are serious reasons for considering that he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes (Article 28(1)(a)(i))²³. Secondly, a person may be excluded from temporary protection if there are serious reasons for considering that he or she has committed a serious non-political crime outside the Member States of reception prior to his or her admission to that Member State as a person enjoying temporary protection. The severity of the expected persecution is to be weighed against the nature of the criminal offence of which the person concerned is suspected. Particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes. This applies both to the participants in the crime and to its instigators (Article 28(1)(a)(ii))²⁴. Thirdly, a person may be excluded if there are serious reasons for considering that he or she has been guilty of acts contrary to the purposes and principles of the United Nations (Article 28(1)(a)(iii))²⁵. Fourthly, a person may be excluded from temporary protection if there are reasonable grounds for regarding him or her as a danger to the security of the host Member State or, having been convicted by a final judgment of a particularly serious crime, he or she is a danger to the community of the host Member State.

Finally, it is stated in Article 28(2) that the grounds for exclusion shall be based solely on the personal conduct of the person concerned. Moreover, exclusion decisions or measures shall be based on the principle of proportionality.

²³ This provision corresponds to Article 1F(a) of the 1951 Refugee Convention.

²⁴ This provision corresponds to Article 1F(b) of the 1951 Refugee Convention.

²⁵ This provision corresponds to Article 1F(c) of the 1951 Refugee Convention.

The national legislation of Member States regarding the grounds for exclusion from temporary protection (Article 28(1)) (Q.23.A-B)

With the exception of Austria, all Member States have introduced grounds for exclusion from temporary protection in their national legislation. Approximately half of the Member States have transposed the provision either *verbatim* or in equivalent norms (Bulgaria, Belgium, Estonia, Greece, Germany, Latvia, Luxemburg, Cyprus, the Netherlands, Malta, Poland, Romania and Spain). In these countries, the exhaustive list of grounds for exclusion is not exceeded.

In eight Member States (the Czech Republic, Finland, France, Italy, Lithuania, Portugal, Slovakia and Slovenia) the exhaustive list provided in Article 28 is exceeded.

In the Czech Republic, two exclusion grounds have been added over and above those provided in the exhaustive list of Article 28. Firstly, there is an exclusion ground stating that an applicant may be excluded from temporary protection if he or she submits untrue information or conceals any facts that are of importance for the assessment of his or her claim. Secondly, temporary protection cannot be granted if the Czech Republic exceeds the number of temporary protected stipulated in the Council Decision. The Interior Ministry of the Czech Republic contends that the last ground can be founded on Article 5 in conjunction with Article 25(1) of the Directive. Relying on the principle of *lex specialis derogat legi generali*, we must insist that this putative exclusion ground is indeed not found among the exclusion criteria in Article 28. Furthermore, it is possible to argue that according to Article 25(3) it is the duty of the Council, not the individual Member State, to take appropriate action including recommending additional support for Member States affected, if the number of those who are eligible for temporary protection exceeds the reception capacity of a Member State. The exceeding of the number of temporary protected stipulated in the Council Decision might lead to a transferral procedure according to Article 26. It is clear from Article 26(4) that the transferral procedure presupposes that the person concerned has been received and given a residence permit in the Member State of departure.

In Slovakia, a person will be excluded if he or she was granted temporary protection on the basis of false or forged facts on his or her identity. In Slovenia, a person who has been sentenced to an unconditional imprisonment for more than a year by a final judgement, and whose conviction has not been expunged, will be excluded. In Lithuania there is an almost *verbatim* transposition. However, it includes not just “particularly serious crimes” but also serious crimes which naturally makes for a wider scope of the exclusion ground.

In Portugal the conviction by a final judgement of a crime punishable with a prison sentence over three years, could be enough in order to exclude a person in accordance with Portuguese law even though the person concerned is no danger to the Portuguese community. The French legislator has added the possibility to exclude a person who is “a menace to public order, to the public security or the security of the French state”. The inclusion of a public order ground overstretching the scope of article 28(1)(b). In Finland, there is a similar solution, with the applicable provision referring explicitly to the 1951 Refugee Convention. temporary protection will not be granted in Finland, if the person concerned is perceived as a threat to the public order or security; or if there is reason to believe that the person concerned has committed acts mentioned in Article 1(F) in the Geneva Convention.

Italian law provides that a person who has committed a trafficking crime will be excluded from temporary protection. One might argue that trafficking constitutes a “serious non-political crime” in the sense of article 28(1)(a)(ii), which presupposes that it is committed prior

to admission (all constituent elements of the crime must be identifiable in the period before entry). If it is committed in part or in its entirety in the Member State in question, it will fall under the exclusion provision of the Directive only if it can be considered “particularly serious” in the sense of Article 28(1)(b) and a final judgment has been passed. If a person has merely aided or abetted, the requirement of seriousness might not be fulfilled. It must be concluded that the Italian norm of transposition is overbroad and therefore not in compliance with the Directive.

The problem of Swedish law is not that the exhaustive list provided in Article 28 is explicitly exceeded. Rather, the applicable provision is not precise enough even though the preparatory works states that the provision should be understood as a reflection of the exclusion grounds in the 1951 Refugee Convention. Thus, the provision merely states that a residence permit may be refused if there are exceptional grounds for denying a residence permit in view of what is known about the alien’s previous activities or with regard to national security. As there is no state practice with regard to temporary protection, it cannot be shown that this solution remains within the limits of Article 28. Therefore, we believe that it is insufficient to be regarded as a satisfactory transposition of the Directive. It should be noted though that draft legislation is currently prepared that will correct this problem.

Article 28, Q.23.A-D: The grounds for exclusion from temporary protection	
NO TRANSPOSITION AT ALL	Austria
LEGAL PROBLEM	The Czech Republic, France, Finland, Italy, Lithuania, Portugal, Slovakia, Slovenia, Sweden, Bulgaria, Ireland
PRACTICAL PROBLEM	

The national legislation of Member States regarding that the grounds for exclusion shall be based solely on the personal conduct of the person concerned (Article 28(2)) (Q.23.C)

A minority of the Member States have introduced a specific provision requiring that a decision to exclude a person from temporary protection shall be based solely on the personal conduct of the person concerned (Belgium, Estonia, Cyprus, Greece, Italy, Luxemburg, Romania, the Netherlands, Malta, Spain and Portugal).

However, national rapporteurs for a group of Member States (Poland, Latvia, Finland, Slovenia, Germany and Slovakia) either claim transposition is effectuated by general principles of law, preparatory works, or otherwise. Alternatively, it is argued that all exclusion grounds require personal conduct and that an explicit transposition of Article 28(2) therefore is not necessary. While the former may be true, an explicit provision remains desirable, as there is evidently no state practice of temporary protection under the Directive confirming this yet. In France, any trace of transposition is lacking.

The national rapporteurs for six Member States (the Czech Republic, France, Ireland, Lithuania, Sweden and Bulgaria) claim that there simply is no norm of transposition regarding that exclusion decisions shall be based solely on the personal conduct of the person concerned

As regards Austria, there are no grounds for exclusion at all, why the absence of an express transposition of Article 28(2) cannot be considered to infringe transposition obligations.

The national legislation of Member States regarding that exclusion decisions shall be based on the principle of proportionality (Article 28(2)) (Q.23.D)

A minority of the Member States have introduced a specific provision requiring that a decision to exclude a person from temporary protection shall be based on the principle of proportionality (Belgium, Cyprus, Greece, Italy, Luxemburg, Romania, the Netherlands, Malta, Spain and Portugal). In Estonia, there is a constitutional as well as a general provision in the Aliens legislation guaranteeing the proportionality of exclusion decisions. In Ireland, the draft legislation proposes to “weigh the severity of the expected persecution against the nature of the criminal offence of which the foreign national is suspected”.

National rapporteurs for a group of Member States (Finland, Germany, Slovenia, Poland and Latvia) claim that the proportionality principle is ensured by general principles of law, preparatory works, or otherwise. While this may be true, an explicit provision remains desirable, as there is evidently no state practice of temporary protection under the Directive confirming this yet. In the draft bill prepared by the Irish legislator, the second sentence in Article 28(1)(a)(ii) is transposed, but not Article 28(2). In France, Bulgaria, the Czech Republic, Lithuania, Sweden and Slovakia, any trace of transposition is lacking.

As regards Austria, there are no grounds for exclusion at all, why the absence of an express transposition of Article 28(2) cannot be considered to infringe transposition obligations.

1.8 Final provisions (Chapter IX)

Chapter IX in the Directive contain provisions *inter alia* on judicial protection and the standard provision on penalties applicable to infringements of the national provisions adopted pursuant to the Directive.

1.8.1 Judicial protection (Article 29) (Q.24.A)

According to Article 29, persons who have been excluded from the benefit of temporary protection or family reunification by a Member State shall be entitled to mount a legal challenge.

The national legislation of Member States

A vast majority of the Member States provide for the right to mount a legal challenge in accordance with Article 29. Some Member States have even gone further than the Directive and allow for the possibility of legal challenge of e.g. denied access to benefits.

It is clear, though, that the phrase “has been excluded” in Article 29 is interpreted differently. Greece relates it merely to exclusion in the technical sense, as set out in Article 28. The remaining Member States interpret the term to mean denial of protection with regard to the inclusion considerations as well. Some Member States do so by means of a specific provision stipulating the right to mount a legal challenge, in other Member States all administrative decisions can be challenged. In some cases where there is a specific provision, the issue of the meaning of ‘exclusion’ has not been determined in the norms of transposition e.g. Malta.

Hence it remains to be seen if the narrow or the broad interpretation will be applied by the courts.

With regards to the meaning of “has been excluded” we believe that the latter and broader interpretation is the correct one. Not only is it in harmony with international law, as a comparison with Article 13 of the ECHR might suggest. Also, in accordance with Article 31 of the Vienna Convention on the Law of Treaties (VCLT), it has not been shown that the parties intended to give the term “exclude” a special meaning as in Article 1.F of the 1951 Refugee Convention. We strongly assert that any denial of inclusion as well as exclusion in the sense of Article 28 is covered by the right to mount a legal challenge. The general meaning of the term as well as the context of the Directive’s structure lend support to this interpretation (see article 31 VCLT). In the original Commission proposal for the Directive, the provision on judicial protection regarding exclusion decision was indeed an integral part of the exclusion clause in Chapter VIII (article 28 in the adopted version of the Directive). Member States deliberately lifted out of the judicial protection clause from Chapter VIII, which reflects their intent to widen the scope of judicial protection.

Luxemburg is an example of a Member State where there are no explicit provisions for a legal challenge of an exclusion decision. As any administrative decision can be challenged, this might not be a problem for those persons present in Luxemburg. However, those who have not yet entered its territory will not have access to this mechanism.

Three Member States (Austria, Greece and Poland) provide for the right to a legal challenge regarding exclusion from temporary protection but not regarding exclusion from family reunification. In Lithuania there is a right to legal challenge against exclusion from temporary protection but since there is no right to family reunification in Lithuania there is no possibility to mount a legal challenge. An application for family reunification would instead simply be denied without any decision.

In Ireland, the persons concerned have a right to judicial review proceedings in order to challenge an exclusion from temporary protection or denial of family reunification. Judicial review is, however, a procedural remedy and therefore is not concerned with the substantive element of the case. Furthermore, an applicant must show that they have ‘substantial grounds’ in order to be granted leave to initiate judicial review proceedings.

As regards the procedure for legal challenge, the persons concerned will have access to a court procedure in most Member States.

Article 29, Q.24.A: Judicial protection	
NO TRANSPOSITION AT ALL	
LEGAL PROBLEM	Cyprus, Austria, Greece, Poland, Ireland, Lithuania
PRACTICAL PROBLEM	

1.8.2 Penalties (Article 30) (Q.25.A)

Article 30 states that the Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to the Directive. The penalties provided for must be effective, proportionate and dissuasive.

The national legislation of Member States

Initially, it should be stated that most Member States have not transposed this provision. Three Member States (France, Slovenia and Greece) are reported to have done so due to what we believe to be an obvious misinterpretation of the provision. In such cases, the provision is interpreted to refer to penalties for beneficiaries or applicants transgressing national legislation on temporary protection. However, Article 30 explicitly refers to the transgression of legislation “pursuant to” the Temporary Protection Directive. It must be emphasized that the Directive does not contain norms to the effect that individual beneficiaries or applicants for protection be obliged in any way. Hence, Article 30 refers to penalties for the infringement of norms regulating benefits by the authorities of the Member State. The examples given in the explanatory memorandum for the original commission proposal concerns cases where beneficiaries of temporary protection are illegally expelled from accommodation centres or where a required medical centre refuses access to emergency care.²⁶ Quite remarkably, these Member States have transposed a provision that was intended to protect the rights of the beneficiaries of temporary protection in a way that instead, under certain circumstances, punishes the temporarily protected.

In Slovenia, there are penalties for infringement of: limitation of movement, the obligation to register any change of residence, the obligation to notify the Interior Ministry about employment, assets, income, and other data; and the obligation to carry an identity card and to present the card upon request of the competent authority. In Greece infringements of the national provisions on temporary protection are penalized, in particular the entry of a person who has been excluded, and the obtaining of temporary protection status without falling under its ambit. Furthermore, the German rapporteur indicates that there is pre-existing legislation applicable to beneficiaries of temporary protection as well. Aliens purporting to belong to a group in need of temporary protection or giving false or incomplete information might face imprisonment.

A few national rapporteurs report that there are pre-existing penalties for the infringement of the obligations towards beneficiaries of temporary protection on the side of the state *inter alia* public official liability. However, pre-existing norms on public official liability that may be invoked in these cases exist undoubtedly in most Member States.

2 Situation of Member States not bound by the Directive

In accordance with Article 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not participating in the adoption of the Temporary Protection Directive and is therefore not bound by it nor subject to its application (see preambular paragraph (25)). Denmark has not

²⁶ Proposal for a Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof *OJ C* 311 E, 31/10/2000 pp. 251-258

taken any steps towards implementing the Directive. Nor does it seem like the Danish government at present is considering any legislative reform concerning temporary protection.

In the 1990s, Denmark introduced ad hoc legislation in order to deal with the mass influx of displaced persons from Bosnia and Kosovo. This ad hoc legislation did not provide access to the asylum procedure and did not grant rights at the level of recognised refugees. The rationale behind the ad hoc temporary protection regime was that the persons granted temporary protection would soon be able to return to their countries of origin. The legislation concerning Bosnians was in force from 1992 to 2002, while that concerning Kosovars was in force between 2000 and 2002. A provision applicable for Kosovars holding or formerly holding a residence permit pursuant to the ad hoc legislation was maintained. This provision stipulates that a residence permit may be issued to a person belonging to this group if the alien must be assumed to need temporary protection in Denmark. Even though the provision in question employs the concept of temporary protection, the scope of the legislation is strictly humanitarian. The preparatory works state that it applies to persons considered by the UNHCR to be in a particularly vulnerable situation if they were to return to Kosovo. At present, there are no persons in Denmark holding a residence permit under this law. Either they have had their permits withdrawn, or have been granted a residence permit on other grounds.