

# ACADEMIC NETWORK FOR LEGAL STUDIES ON IMMIGRATION AND ASYLUM IN EUROPE

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



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

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

### **DIRECTIVE 2002/90 FACILITATION\_UNAUTHORISED ENTRY&STAY SYNTHESIS REPORT by KAY HAILBRONNER & GEORG JOCHUM**

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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of the / de l'Université Libre de Bruxelles



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**SYNTHESIS REPORT**  
**OF THE IMPLEMENTATION OF THE DIRECTIVE ON**  
**FACILITATION OF UNAUTHORISED ENTRY & STAY OF 28**  
**NOVEMBER 2002**

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## TABLE OF CONTENT

<b><u>I. ACKNOWLEDGEMENTS</u></b>	<b>5</b>
<b><u>II. LIST OF NATIONAL RAPORTEURS</u></b>	<b>6</b>
<b><u>III. GENERAL INTRODUCTION TO THE STUDY</u></b>	<b>7</b>
<b><u>IV. SUMMARY DATASHEET AND RECOMMENDATIONS</u></b>	<b>14</b>
<b>1. The State of Play Regarding Member States Covered and Not Covered by the Synthesis Report</b>	<b>14</b>
<b>2. The State of Play Regarding Member States Bound and Not Bound by the Directive</b>	<b>14</b>
<b>3. The State of Transposition of the Directive</b>	<b>14</b>
<b>4. Types of Transposition of The Directive</b>	<b>16</b>
<b>5. Evaluation of the Number of Problems (Quantitative approach based on the national tables of correspondence and not related to the seriousness of the problems)</b>	<b>16</b>
<b>6. Evaluation of the Seriousness of Problems (Qualitative approach based on the national summary datasheets and Vertical approach as it envisages the situation per Member State)</b>	<b>16</b>
<b>7. Types Of Serious Problems (Horizontal approach throughout all the Member States)</b>	<b>16</b>
<b>8. Impact of the Directive on the Member States</b>	<b>16</b>
<b>9. Recommendations to the European Commission</b>	<b>17</b>
<b>10. Any Other Interesting Particularity to be Mentioned about the Transposition and the Implementation of the Directive in the Member States</b>	<b>17</b>
<b><u>V. EUROPEAN SYNTHESIS OF THE NATIONAL REPORTS</u></b>	<b>18</b>
<b><u>1. Introduction</u></b>	<b>18</b>
<b><u>2. National Legal Basis and Competent Authorities</u></b>	<b>19</b>
<b>2.1. Norms of Transposition (Q.1, Q.4)</b>	<b>19</b>
<b>2.2. Situation in federal or assimilated Members States (Q 2)</b>	<b>19</b>
<b>2.3. Implementing Authorities (Q.3)</b>	<b>20</b>

<b><u>3. Analysis of the Content of the Norms of Transposition</u></b>	<b>20</b>
<b>3.1. Punishable acts (Q.5)</b>	<b>20</b>
<b>3.2. Exceptions for persons who act for humanitarian reasons (Q.6)</b>	<b>22</b>
<b>3.3. Instigation, Participation and Attempt (Q.7)</b>	<b>23</b>
<b>3.4. Sanctions (Q.8)</b>	<b>24</b>
<b><u>4. Impact of the Directive</u></b>	<b>26</b>
<b>4.1. Evolution of Internal Law due to the Transposition (Q.9)</b>	<b>26</b>
<b>4.2. Tendency to copy the provisions of the Directive (Q. 10)</b>	<b>26</b>
<b>4.3 Jurisprudence (Q.11)</b>	<b>26</b>
<b>4.4. Problems with the Translation? (Q. 12)</b>	<b>26</b>
<b>4.5. Other Interesting Elements (Q.13, Q.14)</b>	<b>27</b>

## **I. ACKNOWLEDGEMENTS**

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

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

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

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

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

## II. LIST OF NATIONAL RAPPORTEURS

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### III. GENERAL INTRODUCTION TO THE STUDY

by

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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 1<sup>st</sup> 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 directive<sup>1</sup>, article 15 §4 of the directive on temporary protection<sup>2</sup> or article 3, §2 of the directive on mutual recognition of expulsion decisions<sup>3</sup>, 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).

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<sup>1</sup> « *The best interest of the child shall be a primary consideration for Member States when implementing the provisions of this chapter that involve minors* ».

<sup>2</sup> « *When applying this article, the Member States shall take into consideration the best interests of the child* ».

<sup>3</sup> « *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”<sup>4</sup>.

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<sup>4</sup> COM(2007)502 of 5 Septembre 2007.

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

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

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

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

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

## **IV. SUMMARY DATASHEET AND RECOMMENDATIONS**

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

All Member States are covered.

### **2. MEMBER STATES BOUND AND NOT BOUND BY THE DIRECTIVE**

The Irish National Rapporteur states that Ireland is taking part in the directive. He explains that in Ireland only intentional facilitation of illegal entry is punishable, but not transit. Art. 1 (1) lit b. as well has not been transposed. Although the facilitation of illegal employment is subject to sanctions, there are no provisions on sanctions for assistance of illegal residence. An important element of facilitation was thus not effectively implemented.

According to the Irish Rapporteur, Ireland is taking into account the adoption and application of this Directive in accordance with the relevant provisions of the Treaties. However he points out that Ireland is not legally bound by the directive's deadlines of transposition.

To date Ireland has not adopted specific legislation to transpose the Directive. However, in 2000 the growing problems of illegal immigration led to the Illegal Immigrants (Trafficking) Act 2000. In August 2006, the Department of Justice advised that one of the purposes of the forthcoming Criminal Justice (Miscellaneous Provisions) Bill is to introduce provisions specifically to transpose the 2002 Directive. However, at the time of writing, the text of the forthcoming Bill has not been presented.

The Greek National Rapporteur notes that Greece considers itself not obliged to transpose the directive since the existing Greek law is in accordance with the directive. Therefore the report has included Greece among the states which have transposed the Directive.

The Danish and the British National Rapporteur reported that Denmark is bound by the Directive.

### **3. STATE OF TRANSPOSITION OF THE DIRECTIVE**

Number of Member States which have transposed the directive: **27**

Problems arise transposing appropriate sanctions (Estonia, Greece), the full scope of instigation (Bulgaria) or assistance and the full scope of the main provisions (Ireland).

Number of Member States which have **NOT AT ALL** transposed the Directive: **0**

Number of Member States where the process of transposition is pending: **0**

<b>MEMBER STATES</b>	<b>STATE OF TRANSPOSITION</b>
<b>AUSTRIA</b>	- TRANPOSED
<b>BELGIUM</b>	- TRANPOSED
<b>BULGARIA</b>	- TRANPOSED
<b>CYPRUS</b>	- TRANPOSED
<b>CZECH REPUBLIC</b>	- TRANPOSED
<b>DENMARK</b>	- TRANPOSED
<b>ESTONIA</b>	- TRANPOSED
<b>FINLAND</b>	- TRANPOSED
<b>FRANCE</b>	- TRANPOSED
<b>GERMANY</b>	- TRANPOSED
<b>GREECE</b>	- TRANPOSED
<b>HUNGARY</b>	- TRANPOSED
<b>IRELAND</b>	- NOT BOUND BY THE DIRECTIVE'S DEADLINE <sup>5</sup>
<b>ITALY</b>	- TRANPOSED
<b>LATVIA</b>	- TRANPOSED
<b>LITHUANIA</b>	- TRANPOSED
<b>LUXEMBOURG</b>	- TRANPOSED
<b>MALTA</b>	- TRANPOSED
<b>NETHERLANDS</b>	- TRANPOSED
<b>POLAND</b>	- TRANPOSED
<b>PORTUGAL</b>	- TRANPOSED
<b>ROMANIA</b>	- TRANPOSED
<b>SLOVAKIA</b>	- TRANPOSED
<b>SLOVENIA</b>	- TRANPOSED
<b>SPAIN</b>	- TRANPOSED
<b>SWEDEN</b>	- TRANPOSED
<b>UK</b>	- TRANPOSED

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<sup>5</sup> See IV 2 above.

#### **4. TYPES OF TRANSPOSITION OF THE DIRECTIVE**

All Member States have reported to have transposed the Directive by law.

#### **5. EVALUATION OF THE NUMBER OF PROBLEMS (QUANTITATIVE approach based on the national tables of correspondence and not related to the seriousness of the problems)**

Out of 27 Member States, 5 Member States have reported a problem (Belgium, Bulgaria, Estonia, Greece, Ireland), 1 of them (Ireland) is not bound by the directive's deadline.

#### **6. EVALUATION OF THE SERIOUSNESS OF PROBLEMS (QUALITATIVE approach based on the national summary datasheets and VERTICAL approach as it envisages the situation per Member State)**

According to the Irish National Rapporteur, Ireland (not bound by the deadline of the Directive) has transposed the Directive except that transit and attempt is not punishable.

The Greek National Rapporteur points out that Greece meets the objectives of the main provisions of the Directive by domestic general law but has difficulties meeting the standard of sanctions laid down in the framework-decision and regulations on participants of the criminal acts mentioned in the Directive.

The Belgian Report states that attempts for facilitation without a financial aim are not punishable, whereas they should be under the directive.

The Bulgarian National Rapporteur reports that under Bulgarian law instigators can only be hold legally responsible if they act for financial gain.

The Estonian National Rapporteur notes that sanctions in Estonian Law are not completely coherent with the framework-decision 2002/946/JHA.

#### **7. TYPES OF SERIOUS PROBLEMS (HORIZONTAL approach throughout all the Member States)**

Problems refer mainly to the way of punishment of participators or the severity of sanctions. There are no serious problems transposing the main objectives of the Directive.

#### **8. IMPACT OF THE DIRECTIVE ON THE MEMBER STATES**

There is no major impact of the Directive on the Member States as most Member States already had provided for sanctions on unauthorised entry and stay before the adoption of the directive.

- A. Regarding the evolution of national law before and after the transposition of the directive (see the first colon of the table proposed for answering in the questionnaire); list in particular the cases of "perverse effects" when the directive

has been used to lower the national standards despite the fact it was not mandatory to do so):

In fact, it cannot be concluded that the directive has been used to lower the national standards. The opposite is the case: most Member States have well understood that the Directive's objective is to set a standard level of definitions of acts that must be punishable by law. Most member states have had stricter laws; in this case these member states left such stricter rules in force.

- B. Regarding the content of national law in comparison with the standard of the directive, indicate if there are or not a lot of cases of "more favourable provisions" in your national law (see the second colon of the table proposed for answering in the questionnaire; thanks for listing in your answer the most important examples):

Most Member States are providing for stricter rules than the provisions of the Directive (see point 3.4.Sanctions).

## **9. RECOMMENDATIONS TO THE EUROPEAN COMMISSION**

No recommendation is considered necessary

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

There is nothing to mention

## **V. EUROPEAN SYNTHESIS OF THE NATIONAL REPORTS**

### **1. Introduction**

*Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence is to combat the facilitation of illegal immigration both in connection with unauthorized crossing of the border in the strict sense and for the purpose of sustaining networks which exploit human beings.*

*Most member states have already provided for regulations in this field; therefore there are existing legal provisions that may have to be adapted to the Directive. This is frequently done by a precise definition of the infringement in question and exceptions on the one hand. On the other hand minimum rules for penalties, liability of legal persons and establishment of jurisdiction are strengthening the framework to prevent the facilitation of unauthorized entry, transit and residence. In order to meet the latter objective, the Directive takes into account the Council framework Decision 2002/946/JHA of 28 Nov. 2002 that provides for minimum regulations. According to framework Decision 2002/946/JHA each Member State shall take the measures necessary to ensure that the infringements defined in Articles 1 and 2 of Directive 2002/90/EC are punishable by effective, proportionate and dissuasive criminal penalties which may entail extradition. Each Member State shall take the measures necessary to ensure that, when committed for financial gain, the infringements defined in Article 1(1)(a) and, to the extent relevant, Article 2(a) of Directive 2002/90/EC are punishable by custodial sentences with a maximum sentence of not less than eight years where they are committed in any of the following circumstances:*

- the offence was committed as an activity of a criminal organisation as defined in Joint Action 98/733/JHA(8),*
- the offence was committed while endangering the lives of the persons who are the subject of the offence.*

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

*In addition, the framework Decision postulates a liability of legal persons.*

*The purpose of the Directive is to provide a definition of the facilitation of illegal immigration and consequently to render more effective the implementation of the framework decision.*

As most of the National Rapporteurs report the transposition of the Directive as being in order, this report summary will concentrate on the differences that still exist among member states in terms of the implementation of the optional Art. 1 (2) (exemptions for humanitarian reasons) and the scope of sanctions.

## **2. National Legal Basis and Competent Authorities**

### **2.1. Norms of Transposition (Q.1; Q.4)**

**Q.1.A.** Identify the **MAIN** (because of its content) norm(s) of transposition and indicate its legal nature

**Q.1.B.** List the others norms of transposition by **order of importance of their legal nature (first laws, secondly regulations; thirdly circulars or instructions):**

**Q.4.A.** Has the **main** regulation **foreseen** explicitly by the main norm of transposition already been adopted or not:

**Q.4.B.** If the main norm(s) of transposition foresees the adoption of one or several regulations, indicate if they have all been adopted:

The broad majority of the National Rapporteurs report that their country had implemented domestic regulations on illegal entry and stay before the directive entered into force.

In terms of the way of transposition into national law, Member States can be categorised into three groups:

The first group (22 Member States) consisting of Austria, Belgium, Bulgaria, the Czech Republic, Denmark, Finland, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Slovakia, Slovenia, Spain, Sweden and the United Kingdom, refers to already existing regulations. Therefore no – or only a formal – transposition was needed. National Reports of this group also conclude that the Directive has raised the awareness for a possible exception for humanitarian reasons.

Another group of Member States (Cyprus, Portugal, Romania) has recently completed the transposition of all the objectives of the Directive into national law.

A third group, consisting of **Ireland** (not bound) and **Bulgaria** only, have not yet fully transposed the provisions of the Directive. The National Rapporteurs of Bulgaria stressed that Bulgaria did not fully transpose Art. 2 lit. a into national law as under Bulgarian law instigation is punishable only in cases of financial gain. The Irish reporter pointed out that the provisions of the Directive concerning transit and residence (Art. 1 (1) lit. b) have not been transposed yet; however Ireland is not bound by the deadline of the directive (see below 3.1).

### **2.2. Situation in Federal Member States (Q.2)**

**Q.2.A.** Explain which level of government is competent to **adopt** the norms of transposition.

**Q.2.B.** In case, explain if the federal structure and the distribution of competences between the different levels pose **any problem or difficulty** regarding the transposition and/or the implementation of the directive.

The National Rapporteurs of Member States with a federal structure report that regulations transposing provisions of the Directive are a matter of federal law.

An exception has been reported as regards Spain: According to the Spanish Rapporteur, the Spanish administrative structure grants some competences to the Autonomous Communities by the Statutes of Autonomy. Inspection and sanctions in labour matters are one of the competences which can be transferred to the Autonomous Communities. Catalonia and Andalusia are the only ones using this probability so far (other Statutes pending). This means they will be able to commence criminal proceedings and determine administrative sanctions,

but have no competence to determine what constitutes a crime. Currently the procedure of carrying out this competence is being negotiated with the central administration.

### **2.3. Implementing Authorities (Q.3)**

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

In general the police and public prosecution offices are the competent authorities of implementation of the regulations in practice.

Some National Rapporteurs report that their country provides for special border control forces which are implementing immigration regulations. The Finnish reporter noted that Finland is providing for such a special border control force. The French report points out that a Central Office for the repression of unauthorized immigration and employment has been established to deal with these kinds of problems. The Hungarian National Rapporteur mentions that there is a special Central Immigration Authority (OIN). The Garda Síochána is the competent authority according to the Irish National Rapporteur. Luxembourgian law determines the Parquet to be competent. The National Rapporteur for Portugal says that his country provides for an Immigration and Border Service. For Romania, the National Rapporteur stated that Romania has established a Romanian Office for Immigration and the United Kingdom has established a Borders and Immigration Agency.

The National Rapporteurs state that courts are competent to decide on sanctions imposed by the authorities for facilitation of unauthorised entry.

## **3. Analysis of the Content of the Norms of Transposition**

### **3.1. Punishable Acts, Art. 1 (1) (Q.5)**

**Q.5.A.** Does the domestic law of your Member State consider actions as referred to in Art. 1 (1) lit. a and lit. b as punishable actions?

**Q.5.B.** If yes, please describe the exact scope of the national provision that reflects Art. 1 (1) lit. a.

**Q.5.C.** If yes, please describe the exact scope of the national provision that reflects Art. 1 (1) lit. b.

**Q.5.D.** What “appropriate sanctions” have been adopted in your Member State according to Art. 1 (1) of the Directive in implementation of the framework decision 2002/946/JHA?

Most National Rapporteurs report that both Art. 1 (1) lit. a and Art. 1 (1) lit. b of the directive are punishable acts under national law. They point out that there has been hardly any need to pursue a difficult procedure of transposition as domestic law had already provided for sanctions for acts described in the Directive. Therefore all National Rapporteurs referred to pre-existing national regulations.

There are only slight differences in terms of the coherence of domestic law with the scope of the provisions of the Directive. These differences refer mainly to the transposition of Art. 2, not referring to the transposition of Art. 1 (1) lit. a and b.

According to the Irish National Reporter this does, however, not apply to **Ireland**, because Ireland is not bound by the directive concerning the deadline of transposition. To date Ireland has not adopted specific legislation to transpose the Directive. However, in 2000 the growing problems of illegal immigration led to the Illegal Immigrants (Trafficking) Act 2000. In August 2006, the Department of Justice advised that one of the purposes of the forthcoming Criminal Justice (Miscellaneous Provisions) Bill is to introduce provisions specifically to transpose the 2002 Directive. However, at the time of writing, the text of the forthcoming Bill has not been presented. Ireland has reported that only intentional facilitation of illegal entry is punishable, but not transit.

The Irish National Rapporteur explains that the term “organises or knowingly facilitates” is understood in a broad manner. Therefore, indirect facilitation (e.g. supplying of a false document) is considered to be covered by the above quoted term as well.

**Latvia** reports practical problems of implementation. The national rapporteur is of the opinion that practical problems may arise because there is a provision in the Code of Administrative Offences on administrative liability for transportation of third-country nationals to Latvia by violating immigration regulations. It is up to the courts to decide whether criminal or administrative liability provisions are applicable.

The **Estonian** Rapporteur reports that domestic sanctions are not coherent with sanctions of the Framework Decision 2002/946/JHA. There is no inconsistency mentioned in the report that the main provision has not been transposed as this refers to the incoherency with sanctions of the framework-decision 2002/946/JHA only. Therefore it is to be noted – and has been clarified with the Estonian Rapporteur – that in reference to Art. 1 (1) lit. a and b the issue of sanctions is a practical problem only because there is no problem transposing Art. 1 (1) lit. a and b itself. Art. 1 (1) lit. a and b have been fully transposed into Estonian law. The mention of the Estonian Rapporteur that domestic sanctions are not coherent with sanctions of the Framework-Decision refers to the transposition of Art. 3 concerning appropriate sanctions. In reference to Art. 3 a legal problem has been reported due to incoherence with the Framework-Decision.

The **Romanian** Rapporteur pointed out that there is pre-existing domestic law in **Romania** which covers actions as described in art. 1 (1) lit. a. Art. 1(1) lit. b is covered by a new law of transposition which is in order.

Referring to “appropriate sanctions” and accordance to framework decision 2002/946/JHA it is to point out that since most member states are providing for maximum sentence of 8 years and above for qualified actions these member states are in line with the framework decision. In **Finland and Sweden**, however, there is a maximum sentence of 6 years only (see below 3.4). The Swedish Rapporteur takes into account that maximum sentences have to fit into the domestic regime of sanctions. Therefore, according to the Swedish National Rapporteur, it does not seem appropriate to increase the maximum sentence to 8 years in Sweden.

Both the Finnish and the Swedish Rapporteurs did not indicate a legal or practical problem referring to sanctions compared to the framework decision. Art. 1 No. 4 of the framework decision allows a maximum sentence of not less than 6 years if this is imperative to preserve the coherence of the national penalty system.

The **Hungarian** National Rapporteur mentions that concerning Art. 1(1) lit. b transposition into the national Criminal Code does not reflect the full scope of sanctions of the Directive. However, the Hungarian National Rapporteur does not report a legal problem, as criminal acts not covered by the national Criminal Code are dealt with in administrative law. It is therefore categorized as a practical problem.

<b>Art. 1 (1) lit. a</b>	
Not yet transposed	
Legal Problem	Ireland (not bound by deadline)
Practical Problem	Estonia, Latvia
<b>Art. 1 (1) lit. b</b>	
Not yet transposed	Ireland (not bound by deadline)
Legal Problem	
Practical Problem	Estonia, Hungary, Latvia

### **3.2. Exemptions for humanitarian reasons, Art. 1 (2) (Q.6)**

**Q.6.A.** How are the exceptions in Art. 1 (2) (aim to provide humanitarian assistance) applied in national law or practice?

**Q.6.B.** If exceptions are made for persons who act for humanitarian aims, please explain how the term “aim to provide humanitarian assistance” is interpreted in your Member State.

Differences among member states exist as regards exemptions for humanitarian reasons.

Member states can be divided into a few groups:

There are member states which grant exemptions for humanitarian reasons in a rather generous way. The Scandinavian Countries fall into this category. According to the Danish Rapporteur, **Denmark** does not hold family members and persons helping others due to a shared religious belief responsible as long as they do not act for personal profit. According to the Swedish report, **Sweden** as well grants exemptions to persons providing assistance for non-profit purposes. **The Finnish** National Rapporteur explains that Finnish law only grants exemptions if there are vindicating circumstances and the safety of the alien is in danger.

According to the **Belgian** National Rapporteur Belgian law provides for exemptions if assistance has been provided predominantly for humanitarian reasons. The exception is incorporated in the definition of the crime for assistance, with no financial aim, in entry, transit and residence. The law does not use the terms “where the aim of the behaviour is to provide humanitarian assistance to the person concerned”, but the pre-existing term that “the assistance has been provided predominantly for humanitarian reasons”. No further definition is given of what is to be understood.

For a second group of member states, consisting of **Cyprus, France, Germany and Italy**, National Rapporteurs report that they provide for exemptions from criminal liability if an alien’s life is in danger. It is considered disproportionate to punish someone who acts for saving lives.

For the National Rapporteurs of the **Netherlands and Hungary** the question of disproportionate punishment in case of humanitarian motivations is covered by the general rules of penal law only. There are no explicit exemptions.

The **Irish** National Rapporteur has stated that Irish law provides for possible exceptions for humanitarian reasons.

The National Rapporteur for **Malta** answers that Malta is providing for a rather formal view of exemption. There, exemptions are only applicable for housing family members up to 7 days.

<b>Art. 1 (2) exemptions for humanitarian Reasons</b>	
Providing for exemptions: 10 Member States	Belgium, Cyprus, Denmark, Finland, France, Germany, Ireland, Italy, Malta, Sweden
Providing for exemptions, but no explicit regulation (exemptions derive from general legal principles): 2 Member States	Netherlands, Hungary
No exemptions: 15 Member States	Austria, Bulgaria, Czech Republic, Estonia, Greece, Latvia, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, United Kingdom

### 3.3. Instigation, Participation and Attempt, Art. 2 (Q.7)

Are the aforementioned sanctions (see Q.6.) also applicable to persons who

**Q.7.A.** are instigators of an infringement as referred to in Art. 1 (1)?

**Q.7.B.** are accomplices in an infringement as referred to in Art. 1 (1)?

**Q.7.C.** attempt to commit an infringement as referred to in Art. 1 (1)?

An overview of the reports shows that instigation, participation and attempt are being sanctioned in all Member States; however, some National Rapporteurs have reported limitations in domestic law.

National Rapporteurs refer to their general Penal Codes and their regulations on instigation, participation and attempt.

According to the **Bulgarian** report, instigators are punishable only in cases of financial gain. Referring to the **Belgian** report, attempts are punishable only in cases of financial gain.

The National Rapporteur for **Greece** notes that art. 15.6 and art. 15.7 of law 3536/2007 provide for criminal penalties against specific categories of individuals who facilitate the issuance of falsified travel documents or constitute a group of more than three individuals, who have committed or intended to commit acts of facilitation of illegal entry. These articles are limited in scope and do not fully reflect art. 2 lit. a of the directive.

<b>Instigation, Art. 2 lit. a</b>	
Not yet transposed	
Legal problems	Greece, Bulgaria
Practical problems	
<b>Accomplices, Art. 2 lit. b</b>	
Not yet transposed	
Legal problems	Greece
Practical problems	
<b>Attempt, Art. 2 lit. c</b>	
Not yet transposed	
Legal problems	Belgium, Greece
Practical problems	

### 3.4. Sanctions, Art. 3 (Q.8)

#### Q.8. Sanctions (Art. 3)

**How has the term “measures necessary to ensure that the infringements are subject to effective, proportionate and dissuasive sanctions” been interpreted and transposed in your member state?**

In every national report domestic sanctions ranging from fines to imprisonment are mentioned.

#### 3.4.1. Imprisonment

In average, imprisonment ranges from up to one year for less severe offences (e.g. assistance of transit) up to 10 years for severe offences (e.g. organized crime), so most member states are in line with or slightly stricter than the framework decision 2002/946/JHA. This applies to **Austria, Bulgaria, Estonia, France, Germany, Ireland, Latvia and Lithuania.**

A maximum imprisonment of 8 years is in effect in: **Belgium, Denmark, Poland, Slovenia and Spain.**

**Finland and Sweden** have implemented a maximum imprisonment of only 6 years.

With 12 years of maximum imprisonment in the **Czech Republic** (in most serious cases) and 15 years of maximum imprisonment in **Italy, the Netherlands and Romania** these member states have implemented maximum imprisonment above average. In **Romania**: for the “ordinary” offence the maximum penalty is imprisonment of 5 years; only in “aggravated circumstances” – the death of the alien – the penalty raises up to imprisonment of 15 years.

The **Slovakian** Rapporteur has answered that there is a 20 year maximum imprisonment for the offences described by the Directive.

However it is understood that the above mentioned maximum sentences of 15 or 20 years only apply in severe cases implying the death of persons.

<b>Imprisonment</b>	
Maximum of 20 years	Slovakia
Maximum of 15 years	Italy, Netherlands, Romania
Maximum of 12 years	Czech Republic
Maximum of 10 years	Austria, Bulgaria, Estonia, France, Germany, Ireland, Latvia, Lithuania
Maximum of 8 years	Belgium, Denmark, Poland, Slovenia, Spain
Maximum of 6 years	Finland, Sweden

Member States not listed here have stated that they are in line with the framework decision and the objectives of the Directive, therefore they are providing for punishments of maximum imprisonment of 8 years.

With the exception of **Estonia**, no National Rapporteur has reported a problem concerning effective, proportionate and dissuasive sanctions.

According to the Estonian National Rapporteur, Estonia is not fully in line with the sanctions laid down in the framework decision. This refers to sanctions concerning acts of Art. 1 (1) lit. a and b as well as Art. 3. The sanctions are not appropriate and incoherent with the Framework Decision 2002/946/JHA and in practice sanctions may consist of conditional sentences .

In **Latvia** the National Rapporteur explains a practical problem: In general there is growing problem of efficient application of criminal punishment in terms of confiscation of property. A Person who suspects or is facing criminal charges re-registers it's property and financial assets on the name of family members. Thus, when the court orders confiscation there is nothing left to confiscate.

3.4.2. Fines

Looking at fines there is a very diverse picture. There is no specific tendency.

While **Bulgaria, Greece, Lithuania, Malta, Romania, Slovenia** are providing for maximum fines below 10.000 EUR, other member states like **Belgium, France and Ireland** may impose fines of more than 100.000 EUR. However, it can hardly be concluded that member states with a lower level of average income have implemented lesser maximum fines. The member state with the lowest maximum fines is **Greece** (3.000 EUR). According to the French National Rapporteur, in **France** fines of up to 750.000 EUR may be imposed. But also member states like the **Czech Republic** (71.080 EUR), **Hungary** (12.000 EUR) or **Latvia** (17.143 EUR) have implemented provisions which provide for rather high fines. **Austria** and **Germany** are calculating fines based on daily unites (penalty up to 360) which are multiplied by a daily fine that is calculated by a formula taking into account the perpetrator's financial situation.

3.4.3. Other Sanctions

The **Czech** Rapporteur points out that it is also possible to order the prohibition of activities (e.g. for companies to continue the activity which lead to the crime) on persons convicted as well as a forfeiture of property.

The **Hungarian** Rapporteur states that there are also sanctions of expulsion, ban of entry and residence. The **Hungarian** National Rapporteur mentions that concerning Art. 3 transposition into the national Criminal Code does not reflect the full scope of sanctions of the Directive. However, the Hungarian National Rapporteur does not report a legal problem, as criminal acts not covered by the national Criminal Code are dealt with in administrative law. It is therefore categorized as a practical problem.

According to the **Latvian** report, it is as well possible to confiscate property as a sanction.

<b>Art. 3 appropriate sanctions</b>	
Not yet transposed	
Legal problems	Estonia, Greece
Practical problems	Hungary, Latvia

## **4. Impact of the Directive**

### **4.1. Evolution of Internal Law due to the Transposition (Q.9)**

**Q.9.** Did the transposition of the directive make the rules related to the punishment of facilitation of unauthorised entry become from the point of view of a potential perpetrator more favourable or less favourable regarding the evolution of national law?

Due to the fact that most member states had already provided for national regulations on illegal entry and stay (exceptions see above 3.1) more or less equivalent to the objectives of the directive, the impact of the directive is rather insignificant. Therefore, the question has frequently not been answered in the national reports.

All member states have stated that national regulations are in line with or even stricter than the directive with the exceptions of the limitations described above (see above 3.1 and 3.4).

### **4.2. Tendency to copy the provisions of the Directive? (Q.10)**

**Q.10.** From your point of view, did the transposition of the directive imply other interesting changes for a potential perpetrator regarding other elements than the ones mentioned in the previous question. Make also a comparison with the standard of the directive in the last column of the table below.

**Q.10.A.** Mention if there is a general tendency to just copy the provisions of the directive into national legislation without redrafting or adaptation them to national circumstances.

**Q.10.B.** If yes, please indicate if this general tendency may or not create problems (for example difficulties of implementation, risk that a provision remain unapplied).

**Q.10.C.** If yes, give some of examples:

**Q.10.D.** If only some provisions of the directive have been copied and if this may create any problem, please quote them and explain the problem.

In general the reports show no tendency to copy the provisions of the directive. Only the Rapporteurs of Cyprus, Hungary, Latvia and France stated that there is a general tendency to copy provisions of the directive. Therefore it can be pointed out that new member states tend to copy the provisions of the directive more than traditional member states.

### **4.3. Jurisprudence (Q.11)**

**Q.11.** Quote *interesting* decisions of jurisprudence related to the directive, its transposition or implementation

Please check 4.5 below.

### **4.4. Problems with the translation (Q.12)**

**Q.12.** Specify if there are or not problems with the translation of the text of the directive in the official language of your Member State and give in case a list of the worst examples of provisions which have been badly translated.

Only the **Spanish** Rapporteur has mentioned that the word “unauthorized” of the title of the Directive has been translated into “irregular” in the Spanish version.

According to the **Estonian** National Rapporteur, in article Article 1.1, “entry” is sometimes translated as “border crossing”, “national” is translated as “citizen”.

Both the Estonian and the Spanish National Rapporteurs have not indicated this to be a legal problem.

#### **4.5. Other interesting elements (Q.13; Q.14)**

**Q.13.** Following your personal point of view, mention from the point of view of **third country nationals, potential perpetrators and/or from the Member State any interesting or innovative practice in your Member State**

**Q.14.** Please add here **any other interesting element** in your Member State which you did not had the occasion to mention in your previous answers

Some National Rapporteurs have given an insight on other interesting elements connected to the Directive. As no specific topics can be identified, we are listing the statements given in alphabetical order.

The **Belgian** Rapporteur points out that in its advice on the legislative proposal, the Council of State remarked that the incriminations set in Belgian law would go further than Article 1 (1) and (2) of the directive in that also assistance in residence without financial aim and assistance in transit and entry with financial aim were added as specific criminal acts. The government replied that the directive does not inhibit the member states from adopting stricter criminal legislation.

The **Danish** report mentions that there have been court convictions for organisations facilitating illegal immigration, e.g. providing false papers.

The **German** Rapporteur points out that courts have a rather strict perception of the wording “residence” which leads to the understanding that e.g. taxi-drivers who transport illegal aliens cannot be punished for facilitation of illegal entry.

The **Portuguese** Rapporteur says that regulations have in general become stricter implementing the objectives of the Directive.

The **Spanish** Rapporteur stresses that sanctions generally may be considered as effective, proportionate and dissuasive, with the exception of sanctions in cases of expulsion.

According to the answer of a Spanish NGO, it was not common to be released on bail in the difficult areas - such as Algeciras, San Roque, Barbate, La Línea, amongst others, in the south of Spain - therefore that could be considered as a dissuasive measure. From the point of view of the Spanish Rapporteur this is not a sanction itself and it has not the aim of being dissuasive.

The Spanish Rapporteur also points out that article 1 (2) of the directive should be transposed into Spanish law. The reason for this comment is that the administration asks many NGOs for help dealing with illegal immigrants. The administration even subsidized NGOs very often for assisting immigrants at the border and on Spanish territory. This funding is forbidden by the law. So the Spanish rapporteur argues that a transposition of art. 1(2) implementing exceptions for humanitarian reasons could not only help persons acting for humanitarian reasons, but also stop the illegal practice of funding NGOs.

In the **Swedish** report it has been mentioned that NGOs are criticising the directive in general. Many of the comments by the Swedish NGOs are directed towards the directive itself rather than the norms of transposition of the Directive. An example is the issue raised by *Save the Children Sweden* that there is a need for a more comprehensive approach to the issue of human smuggling and that the tightening up of sanctions against traffickers does not solve the problem. *Amnesty International, Caritas, the Bureau for counselling to Asylum seekers and Refugees* et al, state that the tightening up of sanctions makes it harder and more dangerous for people in need of protection to reach the territory of Sweden.

There was, however, also a critique against the transposition of the directive into Swedish law raised by the *Swedish Red Cross* which is of the opinion that the humanitarian clause in article 1(2) of the Directive should have been literally transposed into national law. This opinion was shared by the UNHCR, according to direct contacts with the UNHCR regional office for the Baltic and Nordic countries.

The Rapporteur of the **United Kingdom** points out that the UK plans to extend sanctions for certain actions committed outside British territory.