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

DIRECTIVE 2001/40 MUTUAL RECOGNITION OF EXPULSION SYNTHESIS REPORT by KAY HAILBRONNER & SIMONE ALT

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
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SYNTHESIS REPORT
ON THE IMPLEMENTATION OF THE DIRECTIVE 2001/40 OF 28 MAY
2001 ON THE MUTUAL RECOGNITION OF DECISIONS ON THE
EXPULSION OF THIRD COUNTRY NATIONALS

by

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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.

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III. GENERAL INTRODUCTION TO THE STUDY

GENERAL INTRODUCTION TO THE STUDY

by

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General Coordinator of the study

1. PRESENTATION OF THE STUDY

The study contains different types of reports:

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

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

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

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

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

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

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

Apart of the reports, the **Tables of Correspondence** are very important tools to check the transposition of the directives by Member States. One table has been prepared about the implementation of each of the 10 directives in each of the 27 Member States. They have been

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

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

2. METHODOLOGY OF THE STUDY

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

1. The 120 national rapporteurs in charge of the national reports and tables in each Member State for one or several directives. A lot of the rapporteurs are members of the Odysseus Academic Network, but the Network has at this occasion been extended to other persons because of the very large scope of the study and the considerable amount of work to be done;
2. The 27 national coordinators in charge of ensuring progress of the work at national level and responsible for the drafting of the Executive Summary per Member State;
3. The six thematic coordination teams in charge of the synthesis reports per directive:
 - Prof. Kees Groenendijk 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 rise 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.

IV. SUMMARY DATASHEET AND RECOMMENDATIONS

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

The questions evaluated in this Synthesis Report deal with the situation in the following Member States:

Austria, Belgium, Bulgaria, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Lithuania, Luxembourg, the Netherlands, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom.

The Synthesis report does not assess the legal situation in Cyprus, Latvia, Malta and Poland. However, where it is relevant reference is made to existing legislation with regard to Latvia, Malta and Poland. However, such an evaluation relies on the hypothesis that there will be a legal framework for mutual recognition later on as there are no norms of transposition (neither an adopted text nor a draft project) nor any existing legislation or practice on mutual recognition.

In Cyprus, the Directive is not yet applicable and there is neither an adopted text nor a draft project on the transposition of the Directive nor any existing legislation or practice.

In Latvia and Malta no draft project on the transposition of the Directive on Mutual Recognition into national law is pending. The Latvian report as well as the Maltese report have been prepared on the basis of existing legislation.

With regard to Poland, the project of transposition has not been accessible and after all has now become obsolete due to the new parliamentary elections in Poland on 21 October 2007. The national report has thus been prepared on the basis of existing legislation.

2. MEMBER STATES BOUND AND NOT BOUND BY THE DIRECTIVE

Firstly, the Member States which are bound since the adoption of the Directive on 28 May 2001 are Austria, Belgium, Finland, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal, Spain and Sweden.

In addition, Denmark and the United Kingdom are also bound by the Directive.

Under Council Decision of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen acquis, Ireland is to participate in this Directive. However, as the acquis has not yet been put into effect for Ireland under the terms of Article 4 of the above-mentioned Council Decision, Ireland is not yet bound by the Directive.

On 8 November 2007, the Council agreed in accordance with Article 3 of the Act of Accession to the conclusions on the Schengen evaluation and proposed the decision to extend the Schengen area on 21 December 2007 (abolishment of checks at internal land and sea borders) to nine of the new Member States (Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovenia, Slovakia and the Czech Republic). The European Parliament has delivered its opinion on 15 November 2007. The Council adopted the decision on the full application of the provisions of the Schengen acquis in these nine Member States on its meeting on 6 and 7 December 2007.

Cyprus on its own wish does not yet participate in the Schengen area.

The Member States where the Directive is applicable since 21 December therefore are: the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovenia and Slovakia.

In accordance with Article 4 of the Protocol concerning the conditions and arrangements for admission of the Republic of Bulgaria and Romania to the European Union, the Directive is not yet applied in Bulgaria and Romania.

3. STATE OF TRANSPOSITION OF THE DIRECTIVE

Number of Member States which have transposed the directive (meaning the norm of transposition has been adopted even if it is not yet into force; choose this solution even in case of partial transposition but explain very briefly what is still missing if it is interesting): 18

Number of Member States which have **NOT AT ALL** transposed the Directive (meaning even no project of transposition is known): 2
(4 Member States are not covered by the Synthesis Report: Cyprus, Latvia, Poland and Malta; Ireland is not yet bound by the Directive)

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

MEMBER STATES	STATE OF TRANSPOSITION
AUSTRIA	- TRANSPOSED
BELGIUM	- TRANSPOSED
BULGARIA	- NOT YET BOUND BY THE DIRECTIVE (COUNCIL DECISION NECESSARY)
CYPRUS	- NOT BOUND BY THIS DIRECTIVE (COUNCIL DECISION NECESSARY)
CZECH REPUBLIC	- NOT BOUND BY THE DIRECTIVE BUT WILL BE BOUND ON THE 21 DECEMBER 2007
DENMARK	- TRANSPOSED
ESTONIA	- NOT BOUND BY THE DIRECTIVE BUT WILL BE BOUND ON THE 21 DECEMBER 2007
FINLAND	- TRANSPOSED
FRANCE	

	- TRANSPOSED
GERMANY	- TRANSPOSED
GREECE	- TRANSPOSED
HUNGARY	- NOT BOUND BY THE DIRECTIVE BUT WILL BE BOUND ON THE 21 DECEMBER 2007
IRELAND	- NOT YET BOUND BY THE DIRECTIVE (COUNCIL DECISION NECESSARY)
ITALY	- TRANSPOSED
LATVIA	- NOT BOUND BY THE DIRECTIVE BUT WILL BE BOUND ON THE 21 DECEMBER 2007
LITHUANIA	- NOT BOUND BY THE DIRECTIVE BUT WILL BE BOUND ON THE 21 DECEMBER 2007
LUXEMBOURG	- TRANSPOSED (AND PROJECT)
MALTA	- NOT BOUND BY THE DIRECTIVE BUT WILL BE BOUND ON THE 21 DECEMBER 2007
NETHERLANDS	- NOT TRANSPOSED
POLAND	- NOT BOUND BY THE DIRECTIVE BUT WILL BE BOUND ON THE 21 DECEMBER 2007
PORTUGAL	- TRANSPOSED
ROMANIA	- NOT YET BOUND BY THE DIRECTIVE (COUNCIL DECISION NECESSARY)
SLOVAKIA	- NOT BOUND BY THE DIRECTIVE BUT WILL BE BOUND ON THE 21 DECEMBER 2007
SLOVENIA	- NOT BOUND BY THE DIRECTIVE BUT WILL BE BOUND ON THE 21 DECEMBER 2007
SPAIN	- TRANSPOSED

SWEDEN	- TRANSPOSED
UK	- NOT TRANSPOSED

4. TYPES OF TRANSPOSITION OF THE DIRECTIVE

There are no Member States which have transposed the directive or a significant part of the Directive only by administrative circulars.

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)

The Netherlands and the United Kingdom have transposed none of the provisions of the Directive, Estonia has not transposed 4 of the articles of the Directive, Austria, Germany, Lithuania and Spain have not transposed 2 articles of the Directive and the Czech Republic, Belgium, Hungary and Slovenia have not transposed 1 article of the Directive. Latvia, Malta and Poland have not transposed 5 of the articles of the Directive; however, the legal situation has only been evaluated on the basis of existing legislation (see above 1.).

In Hungary, three legal problems appear with regard to the transposition of the Directive. In Austria, Finland and Italy two legal problems appear concerning the transposition of the Directive. In Denmark and Estonia one legal problem appears.

In Spain appears one practical problem.

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)

Article 4 of the Directive has not been transposed in Estonia, the Netherlands, Slovenia and the United Kingdom.

Serious legal problems concerning the transposition of Article 4 of the Directive appear in Austria, Hungary, Romania and Slovakia.

In Austria, there appears a legal problem as it is not clearly stated in the law whether there is a remedy against an expulsion order or not. The law provides that expulsion orders issued for the purpose of recognising expulsion orders issued by another Member State could be dealt with like national expulsion orders. However, the law only refers to remedies in applying a chain of provisions. This could create difficulties for the third country national concerned to find out whether there exists a remedy or not.

In Hungary, it is not quite clear how the law has to be interpreted. Recognition can either be interpreted as a separate formal decision on expulsion and its formal escorted execution or as an action on the basis of consultation between the Hungarian authority (OIN) and the other Member State's authority which may then be enforced by the Hungarian authorities. In

the first case, upon foreigner's request judicial review is provided at Capital Court with pending effect unless his/her removal is immediately ordered by the immigration authority due to absence of accommodation or material cover on subsistence (discretionary power of the authority). In case of immediately ordered removal the pending effect may be exceptionally decided by the court upon request of the foreigner. If the second interpretation applies it is most probable that the third country national has firstly to lodge a complaint against the deportation measure to OIN. This complaint has neither suspensive effect nor can the third country national apply for a stay of execution.

With regard to Slovakian law, the remedy against the expulsion measures (decision on detention) does not have suspensive effect nor is interim judicial protection available. Therefore it could be considered as not sufficient and effective protection against expulsion. In Romania, the rule of an effective remedy operates only by means of interpretation.

Article 6 (3) of the Directive has not been transposed by Belgium, Estonia, the Netherlands, Spain and the United Kingdom.

Serious legal Problems with regard to the transposition of Article 6 (3) of the Directive appear in Austria, Italy, Luxembourg and Romania.

In Austria, it is not clearly stated by the law whether the non-refoulement clause would be applicable to foreign expulsion orders.

In Italy, in case of execution of the expulsion there is no hearing of the foreigner and the evaluation about the respect of fundamental rights is made by the Prefetto and not by impartial authorities.

In Luxembourg, the draft project as well as the already existing law provide for provisions on non-refoulement. However, a legal problem occurs with regard to the conditions applying to enforcement measures. The existing law does not provide for any rules on compulsory measures with regard to enforcement of expulsion decisions. The relevant provision introduced by the draft project is rather vague and does not explicitly provide for conditions on enforcement of expulsion decisions.

In Romania, the law explicitly provides only for checking if the decision is still in force and the cooperation between the Romanian competent authority and the foreign authorities, even when the Romanian competent authority must - according to the general principles of law - verify the observance of the international norms - does not represent a satisfactory guarantee regarding the prior examination of the situation.

In Denmark, a serious legal problem is indicated with regard to Art. 3 (1) lit. a) and b). In Denmark, the enforcement of expulsion decisions issued by other Member States by revocation of residence permits or return is limited to situations where the third country national could be expelled under the provisions of the Danish Aliens Act. Where the decision on return has been made on the basis of a criminal offence, the decision can only be enforced where the criminal offence may result in a punishment of at least one year's imprisonment in the country in question regardless of whether the offence could lead to expulsion under the Danish Alien Act.

Art. 3 (1) lit. a second indent is not explicitly reflected in Danish legislation. However, according to information obtained from an official within the Ministry of Refugee, Immigration and Integration Affairs, these situations may be encompassed by Aliens Act section 25 on danger to national security or serious threat to public order, safety or health. This will be determined on a case-by-case basis. The seriousness of this problem has to be assessed by the Commission.

In Czech law, the recognition of expulsion decisions – which is carried out through

withdrawals of residence permits - only applies to an enumerative list of residence permits leaving certain types of residence permits/visas and the situation of foreigners residing on the Czech territory without a visa (legally or illegally) uncovered by any form of recognition procedure.

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

The serious problems appear (see above) as regards Article 4 and Article 6 (3) of the Directive. Both provisions are the only provisions of the Directive which directly concern the rights of individuals.

8. IMPACT OF THE DIRECTIVE ON THE MEMBER STATES

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):

Generally, it is possible to say that in none of the Member States which have been evaluated in the Synthesis Report except France, the law provided for rules on recognition of expulsion decisions issued by other Member States previous to the transposition of the Directive. It is reported that Member States previously relied on readmission agreements or expulsions were executed on the basis of the Schengen provisions. As regards the legal situation, thus, internal law is in nine Member States (Belgium, Denmark, France, Germany, Lithuania, Luxembourg, Portugal, Slovenia and Sweden) *more effective* as regards recognition of expulsion decisions. In five Member States, there is a *status quo* regarding the evolution of internal law even though recognition was not possible before transposition of the Directive as the Directive has not been transposed or there is no information on the practice available.

In general, even though the legal situation has been made more effective, there are not so many cases of mutual recognition reported by the National Rapporteurs.

Only in one Member State (Hungary) it is reported that the transposition of the Directive made recognition of decisions on the expulsion of third country nationals more difficult than previous internal rules.

In seven Member States (Czech Republic, Bulgaria, Hungary, Italy, Lithuania, Romania, Slovakia, Slovenia) it is difficult to answer the question whether the Directive from a global point of view made internal law more effective than before the directive/ less effective than before the directive or if there is a status quo as there is no official information that the rules of transposition have been applied in practice and therefore it is difficult to give any concrete answer to this question.

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):

In half of the Member States (Belgium, Bulgaria, Denmark, France, Germany, Greece, Hungary, Italy, Lithuania, Portugal and Sweden) the standard of internal law is considered as being in line with the standard of the directive.

In three Member States (the Czech Republic, Finland, Slovenia) the recognition is considered as being easier than required by the directive.

In one Member State (Luxembourg) the recognition is considered as being less favourable than the directive.

In one Member State (Spain), there is a status quo.

9. RECOMMENDATIONS TO THE EUROPEAN COMMISSION

A. Interpretation of the Directive

- The Member States are somehow divided in their opinion whether recognition has to be obligatory or optional in case the conditions provided for in Article 3 (1) lit. a and b of the Directive are fulfilled. Above all, see the example of the Netherlands and the United Kingdom which did not transpose the Directive.

For the purpose of the Synthesis Report, the Directive is interpreted as **not requiring an automatic and obligatory recognition**. However, the Directive at least provides for a **legal framework** so that one cannot argue that it does not require transposition (see the argument of the Dutch Ministry).

- **Article 3 (2) of the Directive:** The sense of this provision and in consequence its transposition is not at all clear. It is questionable to what extent the Member States shall apply the Directive with due respect for human rights and fundamental freedoms beyond the scope of Article 6 (3) of the Directive. Article 6 (3) of the Directive provides for examination of the situation of the third country national concerned prior to enforcement of the expulsion decision to ensure that its enforcement does neither conflict with the relevant international instruments nor the national rules applicable. It is difficult to determine the content then remaining for Article 3 (2) of the Directive. It is not possible that this article means that recognition shall only take place in case it does not conflict with human rights and fundamental freedoms as the wording of the provision is not clear enough and as the drafters of the Directive decided to proceed to this kind of examination only prior to enforcement.

This interpretation is also underlined by the drafting history of the Directive. The drafters deleted the former Article 3 (2) in the second draft: “The expulsion decision and the enforcement measure must comply with the European Convention for the Protection of Human Rights and Fundamental Freedoms and other applicable international instruments.”⁵ But even if this wording had been maintained in the adopted version, this would not have clearly stated that recognition depends on conformity of the expulsion decision with the ECHR and other instruments. Such an understanding would not correspond to the basic principle of every recognition mechanism in European Community law: It is assumed that a decision taken in one Member State is equivalent to a decision taken in another Member State (basic principle of Cassis de Dijon-jurisprudence).

However, such an understanding would also not be contrary to the Directive as the directive only provides for a **possibility** for recognition (see the example of Portugal).

For this reason, Article 3(2) of the Directive – for the purpose of the Synthesis Report – is interpreted as being **declaratory** contrary to Article 6 (3) of the Directive. The existence of general principles of constitutional law as well as the

⁵ CSL 13968/2000 or C5-0004/2001

reference to the ratification of the ECHR may therefore be considered as sufficient transposition of the Directive.

- **Article 4 of the Directive:**

Pursuant to Article 4, the Member States shall ensure that the third country national concerned may, in accordance with the enforcing Member State's legislation, bring proceedings for a remedy against any measure referred to in Article 1(2). Article 1(2) states "Any decision taken pursuant to paragraph 1 shall be implemented according to the applicable legislation of the enforcing Member State."

Pursuant to Article 1(1) the purpose of this Directive is to make possible the recognition of an expulsion decision issued by a competent authority in one Member State, hereinafter referred to as the "issuing Member State", against a third country national present within the territory of another Member State, hereinafter referred to as the "enforcing Member State".

Article 1(2) deals with the implementation of the recognition of an expulsion decision.

Article 4 can thus be considered as referring to implementation measures ("...bring proceedings for a remedy against any measure referred to in Article 1(2)."). Taking into account this interpretation, Article 4 provides for a remedy against enforcing measures. Article 4 does not refer to Article 1 (1) and does therefore not provide for remedies against the recognition decision itself.

In the French draft it was referred to remedies against the **enforcement measure** (Article 5 of the previous initial legislative document⁶) as in its Article 1 the purpose of the Directive was described as to make possible the **enforcement** of an expulsion decision issued by another Member State. However, the final version of Article 1 sees the purpose of the Directive in making possible the **recognition** of an expulsion decision issued by another Member State. It seems that from this change it follows that the reference in the Directive from Article 4 to Article 1 (2) of the Directive is not quite clear.

For the purpose of this Synthesis Report, the transposition of Article 4 of the Directive shall be considered as being in order if the national law provides for a remedy against enforcement measures. The Directive will be interpreted as not requiring a remedy against a recognition decision. However, it is important to stress that the remedy has to check whether the conditions of Article 3 (1) lit. a and b have been respected.

B. Implementation of the Directive

- There are only few cases of implementation.
- Belgium has made usage of the liaison officer in the Netherlands.
- Lack of information: The Belgian National Rapporteur does refer to a lack of information. Many expulsion orders would not be communicated in the SIS database. The Belgian authorities only insert expulsion orders implying a ban to re-entry for ten years. In Belgium, it seems that it is more the cooperation of the Belgian liaison officer with the national authorities and the authorities of the Netherlands which improves the application of the mutual recognition mechanism. With regard to other Member States, the readmission procedure is more likely to apply. The Directive should have dealt with the issue of communication of expulsion orders. The Spanish National Rapporteurs underline the need of a centralized European Data Register on expulsion decisions to apply the Directive on Mutual Recognition. In

⁶ CSL 10130/2000 or C5-0398/2000 or C 243 24.08.2000, p. 0001

Spain, in practice, both grounds stated by Article 3 (1) lit. a and b are inapplicable as the Police Department does not have access to the relevant information.

Pursuant to the information of the German National Rapporteur, the lack of sufficient information has also been reported by the Federal Ministry of the Interior. The implementation of the Directive would be rather difficult in case there is no relevant information in the SIS database as there is no information on the authority of another Member State having issued an expulsion order against a third country national.

- The Directive does not provide for clear mechanisms of consultation with regard to Article 3 (1) lit. a 2nd sentence as well as Article 6. Specified mechanisms are only provided for with regard to financial compensation, Article 7 of the Directive, through Council Decision 2004/191/EC of 27 February 2004 which provides for the establishment of relevant national contact points.
- Problem: There is no harmonisation on expulsion decisions. The Directive only states in its preambular paragraph 4 that expulsion orders have to be adopted in accordance with fundamental rights, in particular Articles 3 and 8 ECHR and the 1951 Geneva Convention relating to the Status of Refugees as well as the constitutional principles common to the Member States. The definition of expulsion decision in Article 2 (c) is rather vague. It results from the great variety of measures provided for the national law in the different Member States that directive can only provide for a vague and non detailed framework. Common standards and procedures would thus be necessary to render the mechanism of mutual recognition more successful. The Commission adopted on 1st September 2005 a Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals including mutual recognition⁷ (see below C.). The proposal sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals (Article 1 of the proposal).
- As recommendation it should be examined whether the national contact points which shall be appointed in transposition of Article 3(4) of Council Decision 2004/191/EC could provide the SIS database with the relevant information.

C. Legislative amendments of the Directive

- It is questionable whether the rights of individuals are sufficiently guaranteed in applying the mutual recognition procedure as neither Article 4 nor Article 6 (3) of the Directive are clearly formulated. Article 4 – contrary to respective provisions in other Directives – does not include the principle of an effective remedy in its wording. Article 6 (3) does neither further specify the relevant international instruments nor the national rules applicable (principle of non-refoulement, family unity).
- The whole wording of the Directive is rather vague and unclear. It seems that this is one reason why the Member States are so reluctant to apply the mechanism of mutual recognition.

The vague wording may result from the changes having occurred in the drafting process of the directive: The initiative of the French Republic⁸ referred in its Article 1 to the purpose of the Directive to make possible the **enforcement** of an expulsion decision issued by another Member State whereas the final version of Article 1 sees

⁷ OJ C/2006/49/37 ; COM(2005) 391

⁸ CSL 10130/2000 or C5-0398/2000 or C 243 24.08.2000, p. 0001

the purpose of the Directive in making possible the **recognition** of an expulsion decision issued by another Member State. From this change it follows later on that references in the Directive from one article to another are not quite clear (e.g. Article 3 referring to Article 1; Article 4 referring to Article 1 (2) of the Directive).

- The Commission adopted on 1st September 2005 a Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals including mutual recognition⁹.

The aim of the proposal of the above mentioned directive is an effective return policy by -inter alia- establishing – as a general principle – a harmonised two-step procedure: involving a return decision as a first step and – if necessary – the issuing of a removal order as a second step, thus aligning to a certain extent the currently divergent Member States systems. The new directive shall address situations where a third-country national who is the subject of a removal order or return decision issued by a Member State is apprehended in the territory of another Member State. Consideration was given to whether the issue of expulsion/removal for reasons of national and public security should be addressed within the context of the proposal, in particular with respect to the expulsion of presumed terrorists. The proposal does not contain an express provision on this issue for – inter alia – the reason that even if there was a case for further harmonizing the issue of “expulsion for reasons of public order/security”, such harmonization should not be proposed within the context of a Directive dealing with the ending of illegal stay/return, but rather within the context of the Directives regulating the conditions of entry and stay - and ending - of legal residence/stay. However, once the legal stay of a third country national has been ended for reasons of public order, this person becomes a third country national staying illegally in the territory of a Member State for the purposes of the present directive and the provisions of this directive will be applied to this person. The starting point for the applicability of the proposed Directive is "illegal stay".

The new Directive sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals (Article 1 of the proposal).

The new directive provides for a flexible set of rules, applicable if a third-country national who is the subject of a removal order or return decision issued in a Member State ("the first Member State") is apprehended in the territory of another Member State ("the second Member State"). Member States may select different options, depending on the circumstances of the particular case:

On the one hand, the second Member State **may recognise** the return decision or removal order issued by the first Member State. The financial compensation mechanism agreed upon in Decision 2004/191/EC is made applicable to these cases.

Alternatively, a second Member State may ask the first Member State to take back an illegally staying third-country national or decide to launch a new/autonomous return procedure under its national legislation.

Information sharing with other Member States on information on return decisions, removal orders and re-entry bans issued by other Member States shall take place in accordance with the rules concerning the establishment, operation and use of the Second Generation Schengen Information System (SIS II).

⁹ OJ C/2006/49/37 ; COM(2005) 391

The new Directive includes provisions on the recognition of return decisions or removal orders which **supersede Directive 2001/40/EC** on mutual recognition of decisions on the expulsion of third-country nationals. **That Directive should therefore be repealed** (see also Article 20 of the proposal).

Council Decision 2004/191/EC⁶ sets out criteria and practical arrangements for the compensation of financial imbalances resulting from mutual recognition of expulsion decisions, which should be applied *mutatis mutandis* when recognising return decisions or removal orders according to the proposal

The new Directive contains detailed rules on return decisions (Article 6), their compliance with obligations derived from fundamental rights as the principle of non-refoulement (Art. 6 (4)) and on effective remedies against return decisions (Article 12): The proposal provides for a right to an effective judicial **remedy** against return decisions and removal orders. The judicial remedy shall either have suspensive effect or comprise the right of the third country national to apply for the suspension of the enforcement of the return decision or removal order in which case the return decision or removal order shall be postponed until it is confirmed or is no longer subject to a remedy which has suspensive effects.

Article 16 of the new Directive dealing with the apprehension in other Member States reads as follows:

Where a third-country national who does not fulfil or who no longer fulfil the conditions of entry as set out in Article 5 of the Convention Implementing the Schengen Agreement and who is the subject of a return decision or removal order issued in a Member State (“the first Member State”) is apprehended in the territory of another Member State (“the second Member State”), the second Member State may take one of the following steps:

- (a) **recognise** the return decision or removal order issued by the first Member State and carry out the removal, in which case Member States shall compensate each other for any financial imbalance which may be caused, applying Council Decision 2004/191/EC *mutatis mutandis*;
- (b) request the first Member State to take back the third-country national concerned without delay, in which case the first Member State shall be obliged to comply with the request, unless it can demonstrate that the person concerned has left the territory of the Member States following the issuing of the return decision or removal order by the first Member State;
- (c) launch the return procedure under its national legislation;
- (d) maintain or issue a residence permit or another authorisation offering a right to stay for protection-related, compassionate, humanitarian or other reasons, after consultation with the first Member State in accordance with Article 25 of the Convention Implementing the Schengen Agreement.

Taking into consideration the Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals it seems that mutual recognition is still not the mechanism Member States will prefer to others. Recognition and its conditions are not further elaborated in the proposal as emphasis is made on detailed

rules concerning return decisions. The new Directive sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals (see Article 1 of the proposal). This could be an aspect making mutual recognition an easier way for Member States to go; however recognition remains only one opportunity among others.

The creation of EU-wide re-entry bans (Article 9 of the proposal) could provide the basis for a common data system (SIS II) and thus for easier access to relevant information as the lack of information seems to be one of the reasons why Directive 2001/40/EC has rarely been applied in practice.

The proposal was transmitted to the Council and the European Parliament on 2 September 2005. Two supplements were issued on 2 September 2005 and 5 October 2005.

The Committee of Regions gave his opinion on 27 April 2006¹⁰.

On 20 September 2007 the European Parliament tabled its draft legislative resolution on the proposal for a directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals¹¹.

The Presidency updated the members of the Mixed Committee on the latest developments concerning the proposal on its meeting on 6 and 7 December 2007.

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

There is no further specific element about the directive and synthesis report which has not been mentioned above.

¹⁰ OJ C/2006/206/ 27 ; Opinion COR/2006/51/

¹¹ A6-0339/2007

V. EUROPEAN SYNTHESIS OF THE NATIONAL REPORTS

1. National Legal Basis and Competent Authorities

1.1. 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

a. Situation of the different Member States, in particular of the Member States not bound by the Directive

With regard to the question whether the Directive has or has not been transposed it is important to differentiate between three main groups of Member States.

Firstly, the Member States which are bound since the adoption of the Directive on 28 May 2001 are Austria, Belgium, Finland, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal, Spain and Sweden.

When the Schengen Convention (Convention implementing the Schengen Agreement of 14 June 1985, signed at Schengen on 19 June 1990) was incorporated in the Amsterdam Treaty in 1999, Art. 69 of this Treaty provided for exceptional rules as regards Denmark, Ireland and the United Kingdom.

Denmark decided in accordance with Article 5 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community to implement this Directive into national law.

As Ireland is not yet bound by the Directive and as the Member State has not transposed the Directive, the special situation of Ireland will be dealt with under point 4 (Situation of Member States not bound by the Directive).

In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, the United Kingdom has given notice by letter of 18 October 2000 of using its power to opt-in and participated in the adoption of the Directive.

Finally, the Member States which acceded to the European Union on 1 May 2004 and on 1 January 2007 have to transpose the Schengen acquis as part of the *acquis communautaire* into their domestic law. Article 3 of the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded as well as Article 4 of the Protocol concerning the conditions and arrangements for admission of the Republic of Bulgaria and Romania to the European Union provide that acts building upon the Schengen acquis or otherwise related to it not referred to in the respective annexes, while binding

on the new Member States from the date of accession, shall only apply in a new Member State pursuant to a Council decision to that effect after verification in accordance with the applicable Schengen evaluation procedures that the necessary conditions for the application of all parts of the *acquis* concerned have been met in that new Member State and after consulting the European Parliament.

On 8 November 2007, the Council agreed to the conclusions on the Schengen evaluation and proposed the decision to extend the Schengen area on 21 December 2007 (abolishment of checks at internal land and sea borders) to nine of the new Member States (Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovenia, Slovakia and the Czech Republic). The European Parliament delivered its opinion on 15 November 2007. The Council adopted the decision on the full application of the provisions of the Schengen *acquis* in these nine Member States on its meeting on 6 and 7 December 2007.

Cyprus on its own wish does not yet participate in the Schengen area.

The Member States where the Directive is applicable since 21 December therefore are: the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovenia and Slovakia.

The Czech Republic, Hungary and Slovenia have transposed the Directive. In Estonia and Lithuania, a draft project is pending. However, the Estonian and the Lithuanian draft project do not really transpose the Directive. In Slovakia, the draft project has been adopted in July 2007 and will enter into force when Slovakia will be joining the Schengen area. However, the draft does not contain any reference to this Directive.

In Latvia and Malta no draft project on the transposition of the Directive on Mutual Recognition into national law is pending. The Latvian as well as the Maltese report have been prepared on the basis of existing legislation.

With regard to Poland, the project of transposition has not been accessible and after all has now become obsolete due to the new parliamentary elections in Poland on 21 October 2007. The national report has thus been prepared on the basis of existing legislation.

In Cyprus, Bulgaria and Romania, the Directive is not yet applicable. In Bulgaria and Romania, the Directive will only be applicable after a Council decision to that effect.

However, Bulgaria and Romania have already transposed the Directive. In Cyprus, there is neither an adopted text nor a draft project on the transposition of the Directive nor any existing legislation or practice.

The questions evaluated in this Synthesis Report therefore deal with the situation in the following Member States:

Austria, Belgium, Bulgaria, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Lithuania, Luxembourg, the Netherlands, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom.

The Synthesis report does not assess the legal situation in Cyprus, Latvia, Malta and Poland (Ireland see below under 4.). However, where it is relevant reference is made to existing legislation with regard to Latvia, Malta and Poland. However, such an evaluation relies on the hypothesis that there will be a legal framework for mutual recognition later on as there are no norms of transposition (neither an adopted text nor a draft project) nor any existing legislation or practice on mutual recognition.

b. Norms of transposition

With the exception of the Netherlands and the United Kingdom the Directive was transposed by all¹² Member States into the domestic legal order by one or several laws.

In all Member States except Bulgaria, France, Hungary and Greece, the Directive has been transposed by law. In Bulgaria, France and Hungary, the Directive has been transposed by law as well as by regulation (Bulgaria, France and Hungary: Governmental Decree) and in Greece the Directive has only been transposed by Presidential Decree.

In most Member States (Austria, Bulgaria, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Italy, Lithuania, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden) the norms of transposition have been included in a more general text (mostly in the Aliens Act).

In a minority of Member States (Belgium and Greece) the transposition law was only devoted to the Directive. In Belgium, transposition was only devoted to the Directive but in the same time to amend and to introduce new provisions in the existing law on access to the territory, stay, establishment and expulsion of aliens.

In Luxembourg, the law of transposition has transposed a package of different directives. In addition to the already adopted law of transposition, there is a draft project pending providing for a general revision of Luxembourgian immigration law.

With regard to the Member States already bound by the Directive, the Directive according to its Article 8 (1) had to be transposed before 2 December 2002. However, only four Member States did transpose the Directive in due time (Austria, Denmark, Finland and Sweden).

c. Particular Situation of the Netherlands and the United Kingdom

The Dutch government argues that the Directive would only create an opportunity and no obligation to recognise expulsion decisions of other Member States. Thus no further transposition is considered to be necessary. Therefore the Dutch government has only issued a circular, a “Notice on the implementation of Directive 2001/40/EC on Mutual Recognition and Expulsion”. To the knowledge of the National Rapporteur, there has not been a single case of explicit recognition of an expulsion decision of another Member State.

The United Kingdom has not enacted any specific implementing legislation. According to comments of the Home Office, the Home Office will consider any request for recognition of an expulsion decision issued by another Member State. In their view, in practice expulsion decisions will be recognised and the general domestic rules on expulsion will apply. Pursuant to information of the Home Office given by the National Rapporteur, the United Kingdom has not yet been required to implement the Directive operationally.

¹² With regard to all the indicators in the Synthesis report (all, half, majority, minority of the Member States etc.), reference is made to the 22 Member States enumerated as being evaluated in this Synthesis Report under 1.1.a – Norms of transposition - Situation of the different Member States, in particular of the Member States not bound by the Directive.

1.2. Situation in federal or assimilated Members 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.

This question only concerns Austria, Belgium, Germany, Italy and Spain.

In Austria, Belgium, Germany, Italy and Spain legislative rules in the field of aliens law are exclusively adopted by the federal/central level. In none of these Member States problems regarding the transposition or the implementation of the directive have occurred.

1.3. Implementing Authorities (Q.3.)

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

In a majority of Member States (Austria, Czech Republic, Denmark, France, Germany, Greece, Hungary, Italy, Romania, Slovakia, Slovenia, Sweden, United Kingdom), a subordinated administrative authority (aliens authority or police authorities) is responsible for the recognition and the implementation of an expulsion decision issued by another Member State.

In the Czech Republic, the Ministry of the Interior is exceptionally responsible for the recognition of an expulsion decision (in fact for the withdrawal of a residence permit based upon the existence of an expulsion order as the recognition is carried out through the withdrawal of residence permits). This level of administration is in general subordinated to the Ministry of the Interior.

In two Member States (Denmark: Danish Immigration Service; Hungary: Central Immigration Authority OIN), a special administrative body being in general responsible for the implementation of alien issues is competent for the recognition and the enforcement. In Denmark, the Danish Immigration Service is responsible for the revocation of residence permits and for the enforcement of expulsion decisions issued by other Member States. Police authorities are responsible for deportation.

In a minority of Member States, the recognition of decisions on the expulsion of third country nationals is taken by the Ministry of the Interior (Belgium: Foreigners Office, repatriation service; Bulgaria: directors of one of the following units within the Ministry: national services, General departments and Migration Directorate; Lithuania: Migration department; Spain) or the Ministry for Foreign Affairs and Immigration (Luxembourg) In Bulgaria, enforcement is also made by the Ministry of the Interior (services responsible for administrative control of foreigners or border control services).

In two Member States (Finland and Portugal), the competent authority differs depending on whether the third country national is in possession of a residence permit or not (Finland: either Border Guard, police or Directorate of Immigration; Portugal either General Director of the Immigration and Borders Service or a judge in case of a residence permit).

In Estonia, there are no rules on the competent authorities as the draft law only regulates that an alien, who has been issued an expulsion order according to the Directive 2001/40/EC, Article 3, will be expelled from Estonia without prescription to leave and without court order but does not

provide for procedural rules on recognition. The draft law only mentions that the expulsion order issued by another Member State should be recognised according to Directive 2001/40/EC. The practical implementation of the directive is thus questionable.

2. Analysis of the content of the norms of transposition

2.1. Procedure and Conditions for recognizing expulsion decisions (Q.5. – Q.7.)

Q.5. Have provisions governing the procedure for recognition of expulsion decisions issued by a competent authority of another Member State been adopted in your Member State?

Q.6. Which authorities examine and decide on the recognition of expulsion decisions? Please specify.

Q.7. Conditions for recognizing expulsion decisions (Article 3 (1) lit. a and b of the directive)

Q.7.A. Is there a provision in your national law defining the cases in which an expulsion decision must be recognised?

Q.7.B. If yes, does this provision include all the cases listed in Art. 3 (1) lit. a) and b)?

Q.7.C. If there is no such provision, is it nevertheless safeguarded in your Member State that expulsion decisions on the grounds referred to in Art. 3 (1) lit. a) and b) are recognised?

a. Interpretation of Art. 1 (1) of the Directive

Art. 1 (1) states that the purpose of this Directive is *to make possible* the recognition of an expulsion decision issued by a competent authority in one Member State, hereinafter referred to as the “issuing Member State”, against a third country national present within the territory of another Member State, hereinafter referred to as the “enforcing Member State”.

For the purpose of the Synthesis report, the Directive will be interpreted as not requiring an automatic and mandatory recognition of an expulsion decision issued by another Member State.

This interpretation is also underlined by Art. 1 (2) of the Directive where it is said that any decision taken pursuant to Art. 1 (1) shall be implemented according to the applicable legislation of the enforcing Member State and by Art. 3 (2) ordering that Member States shall apply the Directive with due respect for human rights and fundamental freedoms.

The Commission in its Communication to the European Parliament and the Council in view of the European Council of Thessaloniki (COM/2003/0323 final) outlines that a binding regime of mutual recognition and common standards needs to be established in order to facilitate the work of the services involved and to allow enhanced co-operation among Member States. The Commission thus sheds light on its intention to prepare a proposal for a Council Directive on minimum standards for return procedures and mutual recognition of return decisions. The Commission announces in this Communication that the proposal will build upon the existing Directive on mutual recognition of expulsion decisions which *has not established a binding framework for the mutual recognition of all return decisions*. The Commission therefore has drafted a Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (COM/2005/0391 final - COD 2005/0167) on 1 September 2005 whose provisions on recognition shall replace the Directive on mutual recognition (see preambular paragraph 13 of the proposal).

b. Procedure for recognition of expulsion decisions and competent authority

The competent authorities have already been described under question Q.3. (See 1.3.).

With regard to the procedure for recognition, the Directive is based upon the principle that an expulsion order issued by another Member State can be enforced without the need for the enforcing Member State to issue a separate, national expulsion order.

However, the Directive in its Article 1 (2) states that a recognition decision and an expulsion order issued by another Member State (as the Directive says “any decision” with reference to Article 1 (1)) shall be implemented according to the applicable legislation of the Member States. Pursuant to Article 2 lit. c an enforcement measure is any measure taken by the enforcing Member State with a view to implementing an expulsion decision.

The choice which decisions and measures have to be taken to implement the Directive is thus up to the Member States.

It has to be underlined that there is a high diversity in implementing the Directive in the different Member States. The recognition is either an explicit separate decision or taken implicitly in issuing a national expulsion order or withdrawing a residence permit.

Bearing in mind the broad wording of Article 1 (2) and Article 2 lit. c of the Directive, all those ways of implementing the Directive are considered as being in conformity with the Directive.

Six Member States issue a separate national expulsion order notwithstanding the above mentioned basic principle (Austria, Finland, France, Greece, Portugal and Sweden). Three Member States recognise an expulsion order issued by another Member State through the withdrawal of a residence permit (Czech Republic, Denmark and Sweden).

In the Czech Republic, no specific procedure was set up for the recognition of expulsion decisions issued by another Member State. The recognition of the expulsion decision will be carried out through withdrawal of residence permit of a third country national against whom an expulsion order was issued by another Member State.

It should be noted that the withdrawal only covers an enumerative list of residence permits leaving certain types of residence permits/visas and the situation of foreigners residing on the Czech territory without a visa (legally or illegally) uncovered by any form of recognition procedure:

In case of an entry without a visa (legally, i.e. when no visa is necessary) or with a short-term visa, the Czech authorities only rely on the Schengen Information System and there is no mechanism according to the Directive. In case of illegal entry or stay, the reason of the expulsion will be the illegal entry/stay in the Czech territory not taking into account an eventual existence of an expulsion order issued by another Member State. The further evaluation in the Synthesis report only applies to the cases when the recognition through the withdrawal of residence permits is provided for by Czech law.

In Denmark, recognition is carried out through withdrawal of residence permits. In case the third country national is not in possession of a Danish residence permit, the recognition takes place through deportation on the basis of the expulsion decision made by another Member State.

In all the Member States mentioned above, recognition is carried out implicitly in issuing a national expulsion order or withdrawing a residence permit.

In two Member States (Estonia and Slovenia), the expulsion order issued by another Member State will be automatically recognised by deporting the third country national concerned without new review or court order.

In four Member States (Belgium, Italy, Luxembourg and Portugal), a separate recognition decision is issued.

In Luxembourg, the law differs between third country nationals residing illegally within the

territory of Luxembourg and those who are in possession of a residence permit issued by Luxembourg. In the first case, only a recognition decision is made, in the second case, withdrawal of the residence permit or denial of its renewal is necessary.

In Portugal, the law refers to recognition decisions in the context of Art. 3 (1) lit. a and b and to decisions of execution of an expulsion decision in the context of remedies. However, it seems that the content of both decisions is the same.

In four Member States (Germany, Bulgaria, Slovakia and Spain), recognition is carried out implicitly and the competent authorities simply enforce the expulsion order which has been issued by another Member State.

In Hungary, it is not quite clear how the law has to be interpreted. Recognition can either be interpreted as a separate formal decision on expulsion and its formal escorted execution or as an action on the basis of consultation between the OIN and the other member state's authority which may then be enforced by the Hungarian authorities.

The Lithuanian draft project provides for recognition of expulsion decisions of another Member State without further elaborating the procedure of recognition. To implement the project, regulations shall be adopted which possibly provide for this elaboration.

The particular position of the Dutch government has already been mentioned above. The Netherlands consider that the directive only creates an opportunity and no obligation to recognise expulsion decisions of other Member States and conclude that no further transposition would be necessary as under the current Dutch Aliens Act the competent Minister has the power to expel any alien not having lawful residence in the Netherlands without need for a further expulsion decision. Hence, the Dutch law does not provide for any recognition procedure.

Generally, in case the national law already provides for the rules and mechanisms required by a directive, no further transposition is necessary.

However, interpreting the Directive as only creating an opportunity to recognise expulsion decisions issued by another Member State does not disengage the Member States from transposing the Directive by providing for a legal framework which allows the recognition of expulsion decisions issued by another Member State under the conditions enumerated in the Directive (Art. 3 (1) lit. a and b).

The Directive contains the obligation to exchange information between Member States and the obligation of Member States to compensate each other for any financial imbalances.

Moreover, Article 4 of the Directive obliges the Member States to ensure the possibility for the concerned third country national to bring proceedings for a remedy against any measure referred to in Article 1 (2) of the Directive. Being not without prejudice to individual rights – even if the wording imposes a duty on the Member States - each third country national has to be able to derive from provisions in national law that he or she has the right to bring proceedings for a remedy against enforcement measures resulting from the recognition of an expulsion decision issued by another Member State.

The non-transposition by the Netherlands may thus constitute an infringement of the Directive as the Dutch law does not already provide for the relevant rules and mechanisms required by Articles 4, 6 and 7 of the Directive.

The same applies to the United Kingdom which has not enacted any specific implementing legislation but pursuant to the Home Office will consider any request for recognition of an expulsion order issued by another Member State.

c. Conditions for recognizing expulsion decisions

As has been elaborated above, for the purpose of this Synthesis Report the Directive is interpreted as not requiring an automatic and mandatory recognition of an expulsion decision issued by another Member State. The recognition is therefore not considered as being obligatory in case one of the conditions of Article 3 (1) lit. a and b is fulfilled.

Eight Member States (Belgium, Denmark, Finland, Germany, Hungary, Luxembourg, Sweden and the United Kingdom) follow this interpretation of the Directive. The recognition is therefore interpreted as being **optional**.

In Portugal the recognition is obligatory in case the conditions required by Art. 3 (1) lit. a and b are fulfilled. However, due respect for human rights and fundamental freedoms have to be guaranteed. Therefore the Portuguese law states that the expulsion decisions are only recognised if the Constitution, international treaties and Portuguese legislation do not provide otherwise.

The Lithuanian draft project does not mention the conditions listed in Article 3 (1) lit. a and b. The project considers expulsion decisions issued by another Member State as valid basis for expulsion from Lithuania only on the condition that the other Member State has to be bound by the Directive. Presumably, the list of conditions will be added in implementing acts that are mentioned in the project.

In the Netherlands, no provisions governing the procedure for recognition of expulsion decisions issued by another Member State have been adopted as the Dutch government argues that the Directive would only create an opportunity and no obligation to recognise expulsion decisions of other Member States.

Almost half of the Member States (Austria, Bulgaria, the Czech Republic, Estonia, France, Greece, Italy, Romania, Slovakia and Slovenia), consider the recognition as being **obligatory** in case one of the conditions enumerated in Article 3 (1) lit. a and b is met. However, in Estonia, the draft project includes only a general reference to Article 3 of the Directive without further elaborating the conditions and without any reference to recognition as such. It only provides that an alien will be expelled from Estonia without prescription to leave and without court order.

In Spain, the recognition procedure is carried out implicitly and the competent authorities simply will execute immediately an expulsion decision issued by another Member State without the need to initiate new expulsion proceedings. Art. 3 (1) lit. a and b are not mentioned in Spanish law as there is only a general reference to “expulsion decisions issued by another Member State of the EU”.

In relation to the conditions listed in Article 3 (1) lit. a and b, a majority of Member States (Austria, Belgium, Bulgaria, the Czech Republic, Finland, France, Greece, Hungary, Italy, Luxembourg, Portugal, Romania, Slovakia, Slovenia and Sweden) have included a provision in their national law defining the cases in which an expulsion decision must or may be recognised. In this case, the provision also includes all the cases listed in Art. 3 (1) lit. a and b.

In Italy, explicit reference is made to Article 96 Schengen Convention.

The Czech law has not transposed the sentence in Art. 3 (1) lit. a requiring that the foreigner has to be subject of an expulsion decision based on a “serious and present threat to public order or to national security and safety” which presumably by means of interpretation will not hinder recognition in these cases and instead of the existence of solid evidence of the intention to commit offences only requires “reasoned suspicion” which however can be seen as more favourable transposition.

Hungarian law enumerates a serious and actual threat to national or public security as a separate condition contrary to what is stated in the Directive.

In one Member State (Germany), the national law does not cover the cases listed in Art. 3 (1) lit. a and b, but it is nevertheless safeguarded that expulsion decisions on the grounds referred to in Art. 3 (1) lit. a and b may be recognised. There are no rules or fixed procedures on recognition. Decisions are made by the aliens authorities of the Länder. They have been informed by the Federal Office for Migration and Refugees (BAMF) about the Directive. BAMF also offers counselling to the aliens authorities to help them with the correct interpretation of the directive. Given that the aliens authorities respect the provisions of the directives expulsion decisions on the grounds referred to in Art. 3 (1) lit. a and b will be recognised.

The United Kingdom has not enacted any legislation transposing the Directive. Pursuant to information provided for by the Home Office to the National Rapporteur, domestic standards on expulsion will apply to expulsion orders issued by other Member States, covering the cases in Art. 3 (1) lit. a and b.

In Denmark the national law does not enumerate all cases listed in Art. 3 (1) lit. a and b and it is also not safeguarded otherwise that those expulsion decisions may be recognised.

In Denmark, the enforcement of expulsion decisions issued by other Member States is limited to situations where the third country national could be expelled under the provisions of the Danish Aliens Act except to cases where an expulsion decision has been issued on the basis of a criminal offence. The residence permit can only be revoked respectively the alien can only be returned where the criminal offence may result in a punishment of at least one year's imprisonment in the issuing Member State regardless of whether the offence could lead to expulsion under the Danish Alien Act.

Art. 3 (1) lit. a second indent is not explicitly reflected in Danish law. It could however be encompassed by a provision on danger to national security or serious threat to public order, safety or health, which includes threats to other Member States. This will be determined on a case-by-case basis.

In Spain, Art. 3 (1) lit. a and b are not mentioned in the law as there is only a general reference to "expulsion decisions issued by another Member State of the EU". To this extent, there may not be infringement of the Directive as the implicit recognition in Spain even goes beyond the scope of the Directive. In practice, however, the grounds stated by Art. 3 (1) lit. a and b are inapplicable and execution of expulsion decisions issued by other Member States are rendered impossible as the Police Department does not have access to the relevant information whether there are expulsion decisions issued by another Member State. The Spanish National Rapporteurs therefore underline the need of a European Register on expulsion decisions in order to centralize all the information and to allow an easy, complete and direct access for the competent authorities of the Member States.

The Lithuanian draft project does not mention the conditions listed in Article 3 (1) lit. a and b. The project considers expulsion decisions issued by another Member State as valid basis for expulsion from Lithuania only on the condition that the other Member State has to be bound by the Directive. Presumably, the list of conditions will be added in implementing acts that are mentioned in the project.

The Estonian draft project provides for an automatic recognition of expulsion orders issued by another Member State by deporting the third country national concerned without specification of the cases enumerated in Article 3 (1) lit. a and b.

The Dutch government argues that the Netherlands would be free to decide whether they will recognise an expulsion decision or not. There is thus no provision transposing Art. 3 (1).

Article 3 (1) lit. a and b, Q.7	
No Transposition At All	Germany, Estonia ¹³ , Lithuania ⁹ , the Netherlands, the United Kingdom
Legal Problem	Denmark, Hungary ⁹
Practical Problem	Spain

2.2. Special rules for Consultation (Q.8.)

(Article. 3 (1) lit. a, 2nd sentence of the directive)

Have special rules been adopted for the consultation by the enforcing state with the issuing state?

Almost half of the Member States (Austria, Bulgaria, Czech Republic, Estonia, Germany, Lithuania, the Netherlands, Romania, Spain and United Kingdom) did not transpose this provision of the Directive.

In Austria, the Ministry of the Interior has not submitted information on the existence of relevant bilateral agreements; no law or administrative regulations exist.

In the Czech Republic, no explicit norms for the transpositions of Article 3 (1) lit. a, 2nd sentence have been adopted. The national authorities will directly apply Title IV of the Convention implementing the Schengen Agreement of 14 June 1985.

In a minority of Member States (Belgium, Finland and Hungary), legal problems occur concerning the national provisions transposing Art. 3 (1) lit. a, 2nd sentence.

In Belgium, an authorisation to stay more than three months in Belgium is required as additional condition.

In Finland, no explicit norm for carrying out the consultation has been adopted. However, in case of implementation, it is foreseeable that the same channels of contact are used which are used in the implementation of the Dublin Regulation and the Schengen Convention.

In Hungary, consultation is required between the OIN and the other Member State which made an alert in the SIS (ban of entry and residence) related to the third country national being in possession of a residence permit. It includes consultation in case of expulsion order but there is no direct reference to residence permits and their withdrawal.

Nine Member States (Denmark, France, Greece, Italy, Luxembourg, Portugal, Slovakia, Slovenia and Sweden) have included a provision in their national law transposing Art. 3 (1) lit. a, 2nd sentence.

The Danish law refers to consultation pursuant to Article 25 Schengen Convention and differentiates between third country nationals in possession of a residence permit issued by another Member State and third country nationals in possession of a residence permit issued by Denmark.

In Greece, the law only mentions that consultations should take place before recognition of an expulsion order but does not refer to any special rules according to which these consultations have to take place.

¹³ Member State bound since 21 December 2007

In Luxembourg, the consultation of competent authorities of the Member State issuing the expulsion order respectively the residence permit is provided for by national law in case the third country national is in possession of a residence permit issued by another Member State or by Luxembourg but no procedure or special rule concerning consultation has been adopted.

Article 3 (1) lit. a, 2nd sentence, Q.8	
No Transposition At All	Austria, Bulgaria ¹⁴ , Czech Republic ⁹ , Estonia ⁹ , Germany, Lithuania ⁹ , the Netherlands, Romania ¹⁰ , Spain, the United Kingdom
Legal Problem	Belgium, Finland, Hungary ⁹
Practical Problem	

2.3. Respect for human rights and fundamental freedoms (Q.9.)

(Article 3 (2) of the directive)

Is “due respect for human rights and fundamental freedoms” ensured in proceedings of recognition of expulsion decisions?

a. Interpretation of Art. 3 (2) of the Directive

Pursuant to Article 3 (2), Member States shall apply the Directive with due respect for human rights and fundamental freedoms.

In most Member States, the law provides for explicit provisions on the respect for human rights and basic rights, in most cases provisions on non-refoulement implementing Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Article 33 of the 1951 Geneva Convention relating to the Status of Refugees. The majority of the National Rapporteurs at least refer to the Constitution and the ratification of the ECHR. However, it seems not to be clear whether in this case the transposition of the Directive has to be considered as being in order or if the Directive requires an express transposition.

The Court of Justice of the European Communities ruled in its Judgment of 23/05/1985, Commission / Germany (Rec.1985, p.1661) that it follows from the third paragraph of Article 189 of the EEC Treaty (now Art. 249 EC) that the implementation of a directive does not necessarily require legislative action in each Member State. In particular, the existence of general principles of constitutional or administrative law may render implementation by specific legislation superfluous, provided however that those principles guarantee that the national authorities will in fact apply the directive fully and that, where the directive is intended to create rights for individuals, the legal position arising from those principles is sufficiently precise and clear and the persons concerned are made fully aware of their rights and, where appropriate, afforded the possibility of relying on them before the national courts.

The Directive in its Article 3 (2) does not create new individual rights but orders the Member States to respect for human rights and fundamental freedoms in applying the Directive. This request is more or less declaratory as it only sheds light on the already existing basic principles in the Member States.

In addition, it is questionable to what extent the Member States shall apply the Directive with due respect for human rights and fundamental freedoms beyond the scope of Article 6 (3) of the

¹⁴ Member State to be bound after Council decision will have been taken

Directive. Article 6 (3) of the Directive provides for examination of the situation of the third country national concerned prior to enforcement of the expulsion decision to ensure that its enforcement does neither conflict with the relevant international instruments nor the national rules applicable. It is difficult to determine the content then remaining for Article 3 (2) of the Directive. It is not possible that this article means that recognition shall only take place in case it does not conflict with human rights and fundamental freedoms as the wording of the provision is not clear enough and as the drafters of the Directive decided to proceed to this kind of examination only prior to enforcement.

This interpretation is also underlined by the drafting history of the Directive. The drafters deleted the former Article 3 (2) in the second draft: “The expulsion decision and the enforcement measure must comply with the European Convention for the Protection of Human Rights and Fundamental Freedoms and other applicable international instruments.”¹⁵ But even if this wording had been maintained in the adopted version, this would not have clearly stated that recognition depends on conformity of the expulsion decision with the ECHR and other instruments. Such an understanding would not correspond to the basic principle of every recognition mechanism in European Community law: It is assumed that a decision taken in one Member State is equivalent to a decision taken in another Member State (basic principle of *Cassis de Dijon*-jurisprudence).

For the purpose of this Synthesis Report, the existence of general principles of constitutional law as well as the reference to the ratification of the ECHR may therefore be considered as sufficient transposition of the Directive.

b. Transposition

In a minority of Member States there are no special provisions (Belgium, Estonia, and Romania) but all Member States ratified relevant international human rights treaties, especially the European Convention on Human Rights and provide for relevant provisions in their Constitution.

In a majority of Member States (Bulgaria, the Czech Republic, Denmark, Finland, France, Germany, Hungary, Italy, Lithuania Luxembourg, Portugal, Slovakia, Slovenia, Spain and Sweden) the provisions which are in general applicable on decisions on expulsion/withdrawal of residence permit/deportation are also applicable in case an expulsion order issued by another Member State shall be implemented. Those provisions contain inter alia the principle of non-refoulement pursuant to Article 33 1951 Geneva Convention relating to the Status on Refugees and Article 3 ECHR (Bulgaria, Denmark, Finland, France, Germany, Hungary, , Lithuania, Luxembourg, Slovenia and Sweden) and family unity implementing Article 8 ECHR (Denmark, Finland, Hungary). Besides, those Member States provide for provisions on human rights and fundamental freedoms in their Constitution and have ratified the ECHR.

In Luxembourg, the draft project as well as the already existing law provide for provisions on non-refoulement.

Spanish law prevents the enforcement of the expulsion order when the third country national applies for the recognition as refugee.

Greek law provides for an examination of the situation of the person concerned to ensure that neither the relevant international instruments nor the national rules applicable conflict with the enforcement of the expulsion decision.

In Austria, the relevant provision does not explicitly mention human rights. The legislative materials for that provision state that all international law requirements would have relevance (arg.

¹⁵ CSL 13968/2000 or C5-0004/2001

Art 3 (2) Directive) so there is an indirect hint to international human rights obligations like the ECHR. It is however not clearly stated by the law whether the non-refoulement clause (transposing Art. 3 ECHR and Art. 33 1951 Geneva Convention relating to the Status on Refugees) would be applicable to foreign expulsion orders.

In Romania, the law explicitly provides only for checking if the decision is still in force and the cooperation between the Romanian competent authority and the foreign authorities, even when the Romanian competent authority must - according to the general principles of law - verify the observance of the international norms - does not represent a satisfactory guarantee regarding the prior examination of the situation.

In the Netherlands and the United Kingdom, no rules on proceedings of recognition of expulsion decisions were adopted. Therefore, there is no provision transposing Article 3 (2) of the Directive.

In Latvia, Malta and Poland, the existing legislation provides for respect for human rights and fundamental freedoms. However, as there are no provisions on the recognition of expulsion decisions, the application rests hypothetical.

Article 3 (2), Q.9	
No Transposition At All	the Netherlands, the United Kingdom
Legal Problem	Estonia ⁹
Practical Problem	

2.4. Remedies against recognition decisions (Q.10.)

(Article 4 of the directive)

Q.10.A. Are remedies against recognition decisions available for the third-country national?

Q.10.C. Do these remedies have suspensive effect?

Q.10.D. Is interim judicial protection available against recognition decisions?

a. Interpretation of Art. 4 of the Directive

Pursuant to Article 4, the Member States shall ensure that the third country national concerned may, in accordance with the enforcing Member State's legislation, bring proceedings for a remedy against any measure referred to in Article 1(2).

Article 1(2) states "Any decision taken pursuant to paragraph 1 shall be implemented according to the applicable legislation of the enforcing Member State."

Pursuant to Article 1(1) the purpose of this Directive is to make possible the recognition of an expulsion decision issued by a competent authority in one Member State, hereinafter referred to as the "issuing Member State", against a third country national present within the territory of another Member State, hereinafter referred to as the "enforcing Member State".

Article 1(2) deals with the implementation of the recognition of an expulsion decision.

Article 4 can thus be considered as referring to implementation measures ("...bring proceedings for a remedy against any measure referred to in Article 1(2)."). Taking into account this interpretation, Article 4 provides for a remedy against enforcing measures. Article 4 does not refer to Article 1 (1) and does therefore not provide for remedies against the recognition decision itself.

In the French proposal of the Directive it was referred to remedies against the enforcement measure

(Article 5 of the previous initial legislative document) as in its Article 1 the purpose of the Directive was described as to make possible the enforcement of an expulsion decision issued by another Member State.¹⁶ However, the final version of Article 1 sees the purpose of the Directive in making possible the recognition of an expulsion decision issued by another Member State. It seems that as a consequence of this change the reference in the Directive from Article 4 to Article 1 (2) of the Directive is not quite clear.

For the purpose of this Synthesis Report, the transposition of Article 4 of the Directive shall be considered as being in order if the national law provides for a remedy against enforcement measures. The Directive will be interpreted as not requiring a remedy against a recognition decision. However, it is important to stress that the remedy has to check whether the conditions of Article 3 (1) lit. a and b have been respected.

As has already been pointed out above (under 2.1.b.), the Member States have chosen different ways to implement the Directive.

Six Member States issue a separate national expulsion order (Austria, Finland, France, Greece, Portugal and Sweden) whereas a minority of Member States recognises an expulsion order issued by another Member State through the withdrawal of a residence permit (Czech Republic, Denmark and Sweden).

In those Member States, recognition is therefore carried out implicitly in issuing a national expulsion order or withdrawing a residence permit.

In case of a separate national (second) expulsion order, the national law provides for a remedy against the expulsion order (Finland, France, Greece, Portugal and Sweden). In case the Member State has chosen to withdraw the residence permit, remedies are available against the decision on withdrawal of the residence permit (Czech Republic, Denmark and Sweden).

In Denmark, recognition is also carried out through deportation if the third country national is not in possession of a Danish residence permit. Remedies are thus available against deportation.

In Finland, the remedy against the removal decision includes the recognition since recognition is implicitly included in a decision of refusal of entry.

In Austria, there appears a legal problem as it is not clearly stated in the law whether there is a remedy against an expulsion order or not. The law provides that expulsion orders issued for the purpose of recognising expulsion orders issued by another Member State could be dealt with like national expulsion orders. However, the law only refers to remedies in applying a chain of provisions. This could create difficulties for the third country national concerned to find out whether there exists a remedy or not.

In a minority of Member States, recognition of an expulsion order issued by another Member State occurs through an explicit separate decision.

In this case, the national law provides for a remedy against the recognition decision itself (Belgium, Italy, Luxembourg and Romania).

In Romania, however, considering the fact that the national law does not specifically transpose the obligation of a remedy against foreign decisions and that the rule of an effective remedy operates only by means of interpretation, this can be qualified as a legal problem.

In Lithuania, according to the current Draft Amendment to Aliens Law, the grounds of the original expulsion order are not analysed and recognition is carried out implicitly. However, the Migration Department is required to assess feasibility of expulsion with a separate decision, i.e. whether principle of non-refoulement may be breached. National law provides for a remedy against this decision.

¹⁶ CSL 10130/2000 or C5-0398/2000 or C 243 24.08.2000, p. 0001

In four Member States (Germany, Bulgaria, Slovakia and Spain), where recognition is carried out implicitly and the competent authorities simply enforce the expulsion order issued by another Member State, remedies are available against enforcing measures.

In Bulgaria, in case the third country national has been granted residence permit, the residence permit is withdrawn and a compulsory administrative measure which forbids the person concerned to enter the country is imposed. In fact, remedies are available against all these measures.

In Slovakia, the remedy is available against the decision on detention without suspensive effect and without the possibility of interim judicial protection.

In two Member States (Estonia and Slovenia), the expulsion order issued by another Member State will be automatically recognised by deporting the third country national concerned without new review or court order. Remedies thus are not available.

In Hungary, it is not quite clear how the law has to be interpreted. Recognition can either be interpreted as a separate formal decision on expulsion and its formal escorted execution or as an action on the basis of consultation between the OIN and the other member state's authority which may then be enforced by the Hungarian authorities. In both cases, remedies are available but there are differences with regard to the availability of interim judicial protection.

The Netherlands and the United Kingdom did not transpose the Directive.

In Latvia, the already existing rules provide for remedies against expulsion orders.

Taking into consideration the diversity of implementing the Directive in the Member States, Article 4 will thus be regarded as correctly transposed if the national law provides for a remedy against

- the enforcement measures
- the expulsion decision in case the Member State issues a separate national expulsion order
- the withdrawal of the residence permit in case the Member State recognises an expulsion decision issued by another Member State through the withdrawal of residence permits or
- the recognition decision.

Article 4 refers to Article 1 (2) of the Directive. Article 1 (2) leaves it open to the Member States how to implement the Directive. Remedies against expulsion decisions, withdrawal of residence permits or against recognition decisions can be considered as being sufficient to transpose Article 4 because in all those cases it can be assumed that this will also prevent the enforcement of a recognition decision and thus achieve the aim of Article 4.

In addition, Article 4 is only considered to be transposed in order if the effectiveness of the remedy is guaranteed, i.e. if either the remedy has suspensive effect or interim judicial protection is available/

b. Transposition

Firstly, it can be pointed out that the Member States in general did not create special remedies to transpose the Directive but refer to general remedies provided for by the domestic administrative law (Austria, Belgium, Bulgaria, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Lithuania, Luxembourg, Portugal, Romania, Spain and Sweden).

In the majority of Member States, the remedy has either suspensive effect or judicial protection is available.

In nine Member States the remedy has suspensive effect (Austria, Bulgaria, Czech Republic, Denmark, Greece, Lithuania, Romania and Sweden).

In Denmark, remedies do not in general have suspensive effect, only in case the third country national is in possession of a Danish residence permit or has applied for asylum.

In Austria, the remedies have suspensive effect in case the alien is in possession of an Austrian residence permit. In case they are not in possession of a residence permit, the suspensive effect of the remedy has to be deprived of suspensive effect if the alien has to leave the Austrian territory instantaneously for reasons of public order and public security. In practice, reasons of public order and security will in general prevail.

A majority of the Member States provide for interim judicial protection (Belgium, Bulgaria, Czech Republic, Denmark, Finland, France, Germany, Hungary, Lithuania, Luxembourg, Portugal, Romania, Spain and Sweden).

In Finland, it is in principle possible to apply for a stay of execution. However, there is no time limit for executing the expulsion, unless the third country national has had a residence permit or is an asylum-seeker. Therefore, interim judicial protection may be rather a theoretical option and the effectiveness of the remedy is thus not guaranteed in either case.

In Romanian law, there is no specific norm in the field of recognition, being applicable norms regarding the Romanian decisions. The national law does not specifically transpose the obligation of a remedy and the rule of an effective remedy operates only by means of interpretation.

In Hungary, however, it is not quite clear how the law has to be interpreted. Recognition can either be interpreted as a separate formal decision on expulsion and its formal escorted execution or as an action on the basis of consultation between the Hungarian authority (OIN) and the other Member State's authority which may then be enforced by the Hungarian authorities. In the first case, upon foreigner's request judicial review is provided at Capital Court with pending effect unless his/her removal is immediately ordered by the immigration authority due to absence of accommodation or material cover on subsistence (discretionary power of the authority). In case of immediately ordered removal the pending effect may be exceptionally decided by the court upon request of the foreigner. If the second interpretation applies it is most probable that the third country national has firstly to lodge a complaint against the deportation measure to OIN. This complaint has neither suspensive effect nor can the third country national apply for a stay of execution.

In two Member States (Italy and Slovakia), the remedy has neither suspensive effect nor is interim judicial protection available.

In Latvia, hypothetically interim judicial protection will be available against expulsion decisions pursuant to the general law on administrative procedure.

In Poland, there are no special rules concerning the procedure on recognition of expulsion decisions. However, it can be assumed that the procedure, when introduced, will be based on general administrative law. Thus, the general administrative rules on remedies would also apply with regard to mutual recognition

Article 4, Q.10

No Transposition At All	Estonia ⁹ , the Netherlands, Slovenia ⁹ , the United Kingdom
Legal Problem	Austria, Italy, Finland, Hungary ⁹ , Romania ¹⁰ , Slovakia ⁹
Practical Problem	

2.5. Data protection (Q.11.)

(Article 5 of the directive)

Are special procedures in place to ensure protection of personal data security for the third-country national concerned?

In a majority of Member States, no special procedures are in place to ensure protection of personal data security for the third-country national concerned but the general law on data protection is applicable (Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Luxembourg, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden).

The general national law on data protection was enacted to transpose Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (Belgium, Bulgaria, Czech Republic, Denmark, Finland, Hungary, Italy, Luxembourg, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden). In Germany, the respective rules have been amended according to Directive 95/46/EC.

Pursuant to Article 5 of the Directive, protection of personal data and data security shall be ensured in accordance with Directive 95/46/EC.

In Austria, domestic law does also not provide for special procedures but the general provisions on data protection are applicable. However, the relevant provision on international data transfer refers to bilateral agreements but there is no information available on the existence and applicability of such agreements.

In Portugal, the national law contains a special provision on the collection of personal data saying that the personal data only has to be used for the purpose of the recognition procedure which has to be in accordance with the general legal rules on data protection (inter alia transposing Directive 95/46/EC).

In Lithuania, the draft project does not provide for procedural rules on recognition. No procedural safeguards with regard to data protection have been introduced into the project. However, the Law on Protection of Personal Data of 1996 June 11 provides general rules regarding data protection implementing the Directive 95/46/EC which could also be applicable with regard to mutual recognition procedure.

In Romania, a legal problem may occur as there is no explicit provision regulating that personal data only has to be used for the purpose of the Directive. There is only a general norm regarding the cooperation between the Romanian Office for Immigration with the competent authorities from EU member states.

The Netherlands did not transpose the Directive. With regard to the United Kingdom, it is unclear whether expulsion decisions issued by another Member State will be treated as domestic expulsion decisions and general rules on data protection will apply.

In Latvia, Malta and Poland, the national law provides for data protection transposing Directive 95/46/EC – however this is hypothetical as there is no procedure on the recognition of expulsion decisions.

Article 5, Q.11	
No Transposition At All	Austria (no information available), the Netherlands, the United Kingdom
Legal Problem	Estonia ⁹ , Romania ¹⁰
Practical Problem	

2.6. Process of cooperation and exchange of information (Q.12.)

(Article 6 of the directive)

What legal and administrative measures have been taken to arrange the process of cooperation and exchange of information?

With regard to legal and administrative measures to arrange the process of cooperation and exchange of information, the transposition varies substantially in the different Member States.

In Austria, no information about the administration's practice is available. The Federal Ministry of the Interior stated that exchange of information would be done by the Ministry and by the SIRENE office. The provisions on personal data are applicable to any use of personal data. As regards international data transfer, the law refers to bilateral governmental agreements. There is however no information available about the existence of any agreements and/or its application.

The Belgian norms of transposition do not contain any rules on cooperation or exchange of information. In practice, the authorities are working on a case-by-case basis according to bilateral conventions and practices.

In seven Member States (Bulgaria, Finland, France, Hungary, Lithuania, Portugal and Romania), the law does not regulate in detail the process of cooperation and exchange of information but only provides for general rules.

In Bulgaria, the expulsion decision shall be enforced after having received all relevant documents and after implementation of the enforcement measure, the enforcing Member State shall provide the issuing Member State with the relevant information.

In Hungary, the law provides that, following consultation with the Member State issuing the expulsion decision, deportation may be implemented. The Member State issuing the expulsion order shall be notified about the accomplishment or the impossibility of the implementation of the deportation.

In four Member States (Denmark, Greece, Italy and Slovakia) the law provides for details with regard to the process of cooperation and exchange of information, including demanding for information from the issuing Member State and providing information to the issuing Member State on the enforcement of the expulsion order. Greek law also refers to the relevant provisions of the SIRENE manual.

In Slovenia, Article 6 has only been partially enacted. The law states that deportation will not be carried out as long as the complete documentation has not been delivered. If the documentation will not be delivered, the police are not obliged to deport the alien.

The law of the Czech Republic does not provide for explicit provisions but Title IV of the Convention implementing the Schengen Agreement of 14 June 1985 will be directly applied. It is not yet clear if special rules will apply as the procedure of recognition has not yet been applied and

the transposition norms may still be subject to changes.

In six Member States (Estonia, Luxembourg, the Netherlands, Spain, Sweden and the United Kingdom), the law does not regulate the process of cooperation and exchange of information.

In Estonia, the draft just states that an expulsion order has to be recognised. In Luxembourg, there is also no specific procedure applying in practice. In Sweden, the travaux préparatoires (Government proposal) of the main norms of transposition provide however that the Swedish SIRENE Agency is a suitable channel for information from Swedish authorities and the Migration Board should be the authority in Sweden responsible for cooperation and exchange of information with other Member States. The travaux préparatoires also provide for the content of the information on the Swedish expulsion decision to deliver to the enforcing Member State. In Sweden, expulsion decisions are issued by the courts and thus the Directive is not applicable (see Article 2(b) of the Directive). The travaux préparatoires function as an important source for interpretation and are followed in legal practice, although they are not formally binding.

In Spain, the mechanism of exchange of information is not provided for by the law. Besides the Spanish authorities told the National Rapporteurs that the main problem is to have access to the SIS database to see if against an alien arrested in Spain an expulsion order has been issued by another Member State. A priori, the Spanish Sirene Office should be the Spanish organ responsible of deliver this kind of information. But in practice the official way of communication between the Spanish Sirene Office and the Aliens authorities seems not to work as should be. Only unofficial information exchange centres have been created however with very limited possibilities as the information channels and procedures are unofficial at present. (CCPA: Police and Frontiers Coordination Centres among France and Spain to cooperate and to exchange information).

In Germany, every case is handled on an ad-hoc basis as there are no fixed rules on the procedure for cooperation. The German Office for Migration and Refugees (BAMF) has been established as national contact point for expulsion matters but, however, mainly for reimbursement purposes (see Art. 3(4) of Council Decision 2004/191/EC). Nevertheless, a first contact between the issuing Member State and Germany can be made by addressing BAMF which is however not competent to recognise expulsion decisions but can contact and counsel the Aliens Authorities responsible for recognition. However, BAMF has no competence to give any binding advice. No further information about the exchange of documents has been available.

Article 6(3) of the Directive requires the prior examination of the situation of the third country national concerned to ensure that neither the relevant international instruments nor the national rules applicable conflict with the enforcement of the expulsion decision. Article 6 (3) can be considered as focusing on two dimensions: a procedural one relating to examination prior to the enforcement of the expulsion decision and one referring to the relevant content of the law, i.e. international instruments and national rules applicable.

If Article 3 (2) may be interpreted as being declaratory as it only sheds light on the already existing basic principles in the Member States, Article 6 (3) – by contrast – may be considered as requiring explicit national rules which prevent the enforcement of the expulsion decision.

As has already been outlined above, a minority of Member States did not enact special provisions (Belgium, Estonia, and Romania) but all Member States ratified relevant international human rights treaties, especially the European Convention on Human Rights and provide for relevant provisions in their Constitution.

In a majority of Member States (Bulgaria, the Czech Republic, Denmark, Finland, France,

Germany, Hungary, Italy, Portugal, Lithuania, Luxembourg, Slovakia, Slovenia, Spain and Sweden) the provisions which are in general applicable on decisions on expulsion/withdrawal of residence permit/deportation are also applicable in case an expulsion order issued by another Member State shall be implemented. Those provisions contain inter alia the principle of non-refoulement pursuant to Article 33 1951 Geneva Convention relating to the Status on Refugees and Article 3 ECHR (Bulgaria, Czech Republic, Denmark, Finland, France, Germany, Hungary, Lithuania, Luxembourg, Slovenia and Sweden) and family unity implementing Article 8 ECHR (Denmark, Finland, Hungary).

Danish and Greek law provides for an examination of the situation of the person concerned to ensure that neither the relevant international instruments nor the national rules applicable conflict with the enforcement of the expulsion decision.

Besides, those Member States provide for provisions on human rights and fundamental freedoms in their Constitution and have ratified the ECHR.

In Finland, the obligations under Article 6(3) are ensured by hearing the third country national which constitutes part of the expulsion procedure in general alien law.

In Luxembourg, the draft project as well as the already existing law provide for provisions on non-refoulement.

However, a legal problem occurs with regard to the conditions applying to enforcement measures. The existing law does not provide for any rules on compulsory measures with regard to enforcement of expulsion decisions. The relevant provision introduced by the draft project is rather vague and does not explicitly provide for conditions on enforcement of expulsion decisions.

In Czech law, there is no examination of the situation of the person concerned prior to the issuance of the decision on the withdrawal of his/her residence permit, however international obligations of the Czech Republic (non-refoulement) will be considered before such decision on the withdrawal of the residence permit will be enforced.

Spanish law only prevents the enforcement of the expulsion order when the third country national applies for the recognition as refugee.

In Austria, the relevant provision does not explicitly mention human rights. The legislative materials for that provision state that all international law requirements would have relevance (arg. Art 3 (2) Directive) so there is an indirect hint to international human rights obligations like the ECHR. It is however not clearly stated by the law whether the non-refoulement clause (transposing Art. 3 ECHR and Art. 33 1951 Geneva Convention relating to the Status on Refugees) would be applicable to foreign expulsion orders.

In Romania, the law explicitly provides only for checking if the decision is still in force and the cooperation between the Romanian competent authority and the foreign authorities, even when the Romanian competent authority must - according to the general principles of law - verify the observance of the international norms - does not represent a satisfactory guarantee regarding the prior examination of the situation.

In Italy, the assessment whether an expulsion decision infringes human rights and fundamental freedoms is made without consultation of the third country national concerned.

In the Netherlands and the United Kingdom, no rules on proceedings of recognition of expulsion decisions were adopted. Therefore, there is no provision transposing Article 6 (3) of the Directive.

Belgian law does not demand the administrative authorities to proceed to a prior examination of the situation of the concerned person whether either international or national rules conflict with the enforcement of the expulsion order.

Article 6 (3), Q.12	
No Transposition At All	Belgium, Estonia ⁹ , the Netherlands, Spain, the United Kingdom
Legal Problem	Austria, Italy, Luxembourg, Romania ¹⁰
Practical Problem	

2.7. Financial compensation (Q.13.)

(Article 7 of the directive)

Have rules been adopted or administrative arrangements been concluded with regard to financial compensation?

In answering this question, Council Decision 2004/191/EC of 27 February 2004 has to be taken into consideration which provides for detailed rules concerning the practical implementation of Article 7 of the Directive and thus constitutes the basis for any agreements on financial compensation between Member States.

Article 2 of the Decision states that reimbursement shall take place at the request of the enforcing Member State on the basis of the minimum actual costs and on the basis of the principles enumerated in Article 2 (2) of the Decision.

According to Article 3 (4) of this Decision each Member State shall establish a national contact point for the implementation of this Decision and communicate the relevant data to the other Member States. Any request for reimbursement shall be sent by the national contact point of the enforcing Member State to the national contact point of the issuing Member State, which shall inform the national contact point of the enforcing Member State of the receipt of the request.

Article 7 of the directive is considered to be transposed in order of not only the wording of Article 7 has been transposed into domestic law but if the arrangements required by Article 7 and by the above mentioned Council Decision have been adopted.

Bilateral and multilateral agreements on financial compensation are considered as a “transposition otherwise”.

In Belgium, no general rules on financial compensation have been enacted. The financial compensation is carried out on a case-by-case basis according to bilateral conventions and practices with other Member States. The evaluation of the debt is made according to Article 2 of the above mentioned Council Decision.

A minority of Member States (Bulgaria, France, Germany and Slovenia) have enacted rules on communication of the expenses arising through the implementation of the expulsion decision to the issuing Member State in compliance with the rules and procedure set down in Council Decision 2004/191/EC.

Bulgaria has not yet established a national contact point.

Germany has established the Office for Migration and Refugees (BAMF) as national contact point.

Slovenia has appointed the police as national contact point.

In France, no information on the establishment of national contact points has been available.

In three Member States (Czech Republic, Denmark and Sweden), the Council Decision 2004/191/EC will be directly applied. The Czech Republic has not yet appointed the national contact point.

The Council Decision did not result in any changes in Danish legislation. The Danish authorities are to apply the criteria in the Council Decision in specific cases. The law authorises the Minister of Refugee, Immigration and Integration Affairs to lay down more detailed provisions on the payment.

However, the Minister has not found the need for issuing an executive order as the Directive has not yet been applied in Denmark.

In Sweden the Migration Board is appointed as contact point in these matters and the Council Decision has been handed over for application. Since a statement in a government proposal cannot be considered as a formal transposition in accordance with Swedish law, Article 7 is not transposed.

In eight Member States (Estonia, Finland, Hungary, Luxembourg, the Netherlands, Spain and the United Kingdom) no rules on financial compensation have been enacted. However, in Hungary, the OIN has been appointed as national contact point.

In four Member States (Greece, Italy, Lithuania and Portugal), the law only refers to Council Decision 2004/191/EC and does not further elaborate the rules on financial compensation.

In Greece, Article 7 of the Directive has been transposed verbatim. However, no detailed rules have been adopted or administrative arrangements have been concluded. The Director of the Department of Deportations (Expulsions) within Ministry of Interior and Public Order has been appointed as national contact point.

Italian law states that Italy and the issuing Member State will provide for an arrangement in order to compensate the financial imbalance according to Council Decision 2004/191/EC in case the costs cannot be charged on the third country national concerned. No national contact point has been appointed, at least not by law or by other rules made public.

In Lithuania, the draft project states that it will be possible to address another Member State for financial compensation on the basis of Council Decision 2004/191/EC. However, this general provision is not further elaborated in the project. Moreover, the project does not provide for a possibility for another Member State as enforcing Member State to address the Republic of Lithuania as issuing Member State for financial compensation. The Government Decision of 22 August 2007 (in effect since 31 August 2007) designated Pabrade Foreigners Registration Centre as national information centre for financial compensation issues. As of 12 November 2007, detailed instructions on practical functioning of the Centre in this competence were not yet available.

Portuguese law provides that financial compensation is established according to the criteria listed in the Council Decision but does not contain any further concretion. In Portugal, the Immigration and Border Service has been established as national contact point.

In Austria, the Ministry of the Interior has not submitted information on the establishment of a national contact point according to Council Decision 2004/191/EC. No relevant bilateral agreements have been adopted.

In two Member States (Romania and Slovakia), the law partially transposes Council Decision 2004/191/EC, however without listing the principles of reimbursement enumerated in Article 2 (2) of the Decision. In Romania, those principles shall be determined by Government Decision. The national contact point is the Romanian Office for Immigration by the Ministry of Internal Affairs and Administrative Reforms.

Slovakia has appointed the national contact point. The NCP's are governed by the Methodic Regulation for the Activity and Utilization of the Common Police Contact Points at the Borders of Slovak Republic with some neighboring States, as well as the Regulation for the Activity and Utilization of Police Attachés and Contact Officers by the Police Forces Departments.

Article 7, Q.13

Without object	Austria, Czech Republic ⁹ , Denmark, Estonia ⁹ , Finland, Luxembourg, the Netherlands, Spain, Sweden, the United Kingdom
Legal Problem	Bulgaria ¹⁰ , France, Greece, Hungary ⁹ , Lithuania ⁹
Practical Problem	
Transposition otherwise	Belgium

3. Impact of the Directive

3.1. Statistical Information (Q.14.)

In how many cases did your Member State enforce an expulsion decision which has been issued by another Member State since the Directive has been adopted?

In a majority of Member States, an expulsion decision which has been issued by another Member State has not yet been enforced.

Only Belgium and Germany have enforced expulsion decisions issued by another Member State.

In Belgium, one case is reported concerning an expulsion order issued by the Netherlands regarding a Turkish national. In addition, the Belgian Rapporteur reports that the Netherlands have executed two expulsion orders on behalf of the Belgian authorities. Pursuant to the Dutch Rapporteur, with regard to the Netherlands, none of the mechanisms provided for by the Directive has been made usage of as the Directive has not been transposed in the Netherlands.

In Germany, the recognition mechanism took place three times. In all three cases, the expulsion decision was issued by the Netherlands.

In Bulgaria, Greece, Italy, Spain and Sweden no statistical information on the number of cases in which the Member State enforced an expulsion decision issued by another Member State since the adoption of the Directive is available.

With regard to Spain, the National Rapporteurs only have notice of a sentence of a Spanish Court (see 3.5. on jurisprudence below). According to this sentence, the Spanish authorities have enforced a Greek expulsion order.

3.2. Evolution of Internal Law due to the Transposition (Q.15, Q.16.)

Q.15. Did the transposition of the Directive make recognition of decisions on the expulsion of third country nationals become easier or more difficult regarding the evolution of internal law? Make also a comparison with the standard of the Directive in the last column of the table below.

Q.16. Express if you consider that the Directive made from a global point of view internal law more effective than before the directive/ less effective than before the directive/there is a status quo.

In Austria, there was no specific provision on the recognition of expulsion decisions until 2002. No information on the practice before the transposition and after the transposition of the Directive is available.

In almost half of the Member States (Belgium, Denmark, France, Germany, Lithuania, Luxembourg, Portugal, Slovenia and Sweden) the transposition of the Directive made recognition of decisions on the expulsion of third country nationals *easier* than previous internal rules.

In fact, in none of these Member States except France, the law provided for rules on recognition of expulsion decisions issued by other Member States previous to the transposition of the Directive.

Since 1992, French law had already contained provisions applying articles 25 and 26 of the Convention implementing the Schengen agreements. French law frames and simplifies the mechanism of Schengen by proceeding to the addition of recognition. The procedure is framed by the use of national law guarantees, it legalises the cooperation with the other Member States and it prevents the national administrative authority from taking the national expulsion measures by itself.

The Belgian Rapporteur explains that before transposition of the Directive, each alien found on the Belgian territory was delivered to the responsible Member State for his/her expulsion if any element proves this responsibility on the basis of the bilateral or Benelux readmission agreement. For the time being, the mechanism of mutual recognition enhances the cooperation between the Netherlands and Belgium. Instead of a classical readmission procedure which takes time and may extend the eventual detention period, recognition of an expulsion order takes place as far as it helps to shorten the detention period and facilitates the repatriation procedure (for example because a special flight to the origin country is taking place). According to the Belgian administrative authority the Directive made recognition of decisions on the expulsion of third country nationals easier than previous internal rules but the practice is still limited.

The Danish Rapporteur explains that regarding revocation of residence permits, it is stated in the Explanatory Remarks to the Draft Bill implementing the Directive that the existing rules in the Aliens Act did not provide for a legal basis to revoke a residence permit when an administrative authority in another Schengen country has made a decision on expulsion on the basis of circumstances which, in Denmark, could lead to expulsion, but where an alert has not been made to the Schengen Information System.

In one Member State (the Czech Republic), the Directive has not been completely transposed and has not yet been applied in practice, thus a comparison is not possible. The Czech Aliens Act did not contain any rules governing the recognition of expulsion decisions. The Aliens Act now contains provisions enabling the Czech authorities to withdraw a foreigner's residence permit if an expulsion decision was issued against him or her in another Member State. In this way, for most types of residence permit, the "recognition" is enabled. However the provisions are not in force yet, the entry into force is postponed until the Czech Republic joins the Schengen area. Therefore the transposition norms may still be subject to changes and it is difficult to evaluate.

In Bulgaria, it seems that the transposition of the Directive made recognition of decisions on the expulsion of third country nationals more difficult than previous internal rules as the situation has previously been regulated in detail with regard to readmission agreements, however, it is difficult to make any genuine comparison as there is no information available on the practical implementation of the directive.

In five Member States (Finland, Greece, Italy, Spain and the United Kingdom), there is a *status quo* regarding the evolution of internal law.

In Finland, before transposition, there was no specific basis in the law for mutual recognition. The directive has been formally transposed, but application of it always entails a separate decision and full assessment of a removal case. Hence, the practical impact of the Directive is small.

In Italy, before the transposition of the directive, police executed expulsions on the basis of the Schengen provisions. There were no public rules outlining the Police procedure in these cases. However there are no public data available in order to evaluate if the mechanism worked well. With

the directive and its transposition the knowledge of the mechanism is improved, while the data are still unknown and not available to the large public.

In the United Kingdom, no specific rules on the recognition of expulsion decisions have been enacted. However, the Home Office implies that such recognition would be easy in practice

In one Member State (Hungary) the transposition of the Directive made recognition of decisions on the expulsion of third country nationals *more difficult* than previous internal rules.

In half of the Member States (Belgium, Bulgaria, Denmark, France, Germany, Greece, Hungary, Italy, Lithuania, Portugal and Sweden) the standard of internal law is considered as being *in line* with the standard of the directive.

In three Member States (the Czech Republic, Finland, Slovenia) the recognition is considered as being *easier* than required by the directive.

In one Member State (Luxembourg) the recognition is considered as being *less favourable* than the directive.

In one Member State (Spain), there is a *status quo*.

In four Member States (Belgium, Denmark, Germany, Portugal) the Directive from a global point of view made the internal law *more effective* than before the Directive.

Previous to the transposition of the Directive, recognition of expulsion decisions issued by other Member States was not possible.

The Belgian Rapporteur stresses however that the procedure has only been applied when cooperating with the Netherlands but not with other Member States.

In Germany, some difficulties remain as the enforcement of administrative acts which have been issued by another Member State is to some extent a foreign element in the system of the Residence Act. Although it is formally transposed, some questions about the practical implementation still remain unclear. According to the German Rapporteur, one can say that the internal law became more effective with regards to the enforcement of expulsion decisions which are issued by another Member State as there were no such provisions before. However, the law does not explicitly say what happens if the concerned alien holds a German residence permit. The recognition of a foreign expulsion decision as such does not affect the validity of the residence permit. It must therefore be abolished before the alien can be removed. As the law does not provide for a special procedure which applies in such cases, it remains to be seen how this is done in practice.

In seven Member States (Czech Republic, Bulgaria, Hungary, Italy, Lithuania, Romania, Slovakia, Slovenia) *it is difficult to answer the question* whether the Directive from a global point of view made internal law more effective than before the directive/ less effective than before the directive or if there is a status quo.

In Bulgaria, there is no official information that the rules of transposition have been applied in practice and therefore it is difficult to give any concrete answer to this question. The same applies to Hungary, Italy, Romania and Slovakia.

As regards Lithuania, provisions of the Directive are not yet reflected in existing laws of the Republic of Lithuania and it is difficult to assess their future effect. The rules related to the Directive that are provided for in the Project on Amendment of Law on Legal Status of Aliens are of rather general nature. If left in the current form, they would be hard to apply in practice. However, the evaluation of the impact of the Directive on internal law only on the basis of the Project appears to be too simplistic. Certain sections of the Project (including those directly related to the Directive) are supposed to enter into force together with the full entry into force of the Schengen Convention for Lithuania. The project provides that till that date regulations will be adopted in order to implement the project. Without taking into account the future projects of these

regulations, it is hard to measure the impact of the Directive on national law.

In eight Member States (Finland, France, Greece, Luxembourg, the Netherlands, Spain, Sweden and the United Kingdom) there is a *status quo*.

The Directive did not change the expulsion practice in the Netherlands.

In Sweden, there is a status quo or internal law is just slightly more effective. The practical significance of recognition of decisions on expulsion made by other Member States is small. The new provisions transposing the directive only come into application when the third country national for some reason has not been registered in the SIS.

In the United Kingdom, it is not clear whether the Directive has made any impact whatsoever on domestic law or practice.

In one Member State (Estonia), as the Directive has not been transposed, such an evaluation is not possible.

3.3. Tendency to copy the provisions of the directive? (Q.17.)

Q.17.A. Mention if there is a general tendency to just copy the provisions of the directive into national legislation without redrafting or adapting them to national circumstances.

Q.17.B. If yes, please indicate if this general tendency may or not create problems (for example difficulties of implementation, risk that a provision remains unapplied).

Q.17.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 five Member States (France, Italy, Romania, Slovakia and Slovenia) the norm of transposition has been included in a more general text but with a tendency to copy the provisions of the Directive but this tendency does not create any problems of implementation.

In a minority of Member States (Belgium, Greece and Portugal) the norm was only devoted to the Directive. In this case, there is – with exception to Portugal - also a tendency to just copy the provisions of the directive. This does however not result in any problems of implementation.

3.4. Problems with the translation? (Q.19.)

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.

No problems with the translation are mentioned.

3.5. Jurisprudence (Q.18.)

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

In France, the Conseil d'Etat ruled on 22 May 1996 that escort to the border decisions can only be subjected to a cancellation request presented to the ordinary law administrative judge.

In Italy, the Constitutional Court ruled on 3 March 2006 that an expulsion decision shall not be based only and automatically on the record of the data in the SIS by other Member States' authorities. The Regional administrative court ruled on 17 May 2004 that Article 96 Schengen Agreement and Directive 2001/41/EC must be interpreted as denying the automatic recognition of expulsion decisions. Each decision shall be based on the specific situation of the person concerned.

In the Netherlands, there is only one published court decision in a case where the Spanish authorities refused to extend the residence permit of a national of Columbia after the Netherlands had issued an entry ban for that person and had registered him in the SIS for refusal of entry in the Schengen area. The District Court held on 24 August 2005 that neither Article 25 (2) of the Schengen Agreement nor the Directive provide an obligation for the Spanish authorities to refuse the extension of the residence permit. The Colombian national should seek redress in Spain against the interference in his right to family life under Article 8 ECHR resulting from the Spanish refusal to prolong his residence permit.

In Spain, the Superior Court of Justice of Castilla la Mancha held in revising the judgment of a court of first instance that according to Directive 2001/40, expulsion decisions have to be adopted and executed in accordance with fundamental rights, as safeguarded by the European Convention for the Protection of Human Rights and Fundamental Freedoms. Both the ECHR and Articles 9 and 54 of the Spanish Constitution guarantee effective judicial protection and the right to a due process of law. The Greek authorities issued an expulsion decision which however – pursuant to the court – lacked sufficient reasoning why the third country national had to be expelled. Thus, the third country national is deprived of his fundamental right to correct and prompt information in order to exercise his judicial power in his best interest. Moreover, according to Article 1 (2) of Directive 2001/40 any expulsion decision shall be implemented according to the applicable legislation of the enforcing Member State. In the absence of relevant information on the proceedings of expulsion in Greece, the Spanish Administration is unable to comply with this requirement. Furthermore, resolving in accordance with an “unknown” situation implies the dictation of an administrative resolution which lacks reasoning and which, consequently, derives in an arbitrary action by the Spanish public administration. In effect, the Court of Instance did not have sufficient information to deny appellant the right to work and reside in Spain, especially the when appellant has demonstrated sufficient roots with our country and enjoys an employment offer.

Thus, because the Spanish administrative resolution denying or granting residence and work permit is based on the foreign administrative act, it is essential that both, appellant and judicial power, have full knowledge of the latter. The court repeals the resolution denying appellant permit to work and reside in Spain, with proceedings move back to the foreign resolution reception so that file acknowledging proceedings in Greece are included.

The strict interpretation of the clause would provoke a grave defencelessness of one of the parties, thereupon depriving him of his fundamental right to turn to the predetermined Judge for the law.

3.6. Other Interesting Elements (Q.20, Q.21.)

Q.20. Following your personal point of view, mention from the point of view of the concerned Member States any interesting or innovative practice in your Member State.

Q.21. Please add here any other interesting element in your Member State which you did not had the occasion to mention in your previous answers

The Belgian authorities apply the mutual recognition procedure only in case the detention duration can be reduced to use the procedure in the interest of the alien.

The Belgian National Rapporteur mentions that Belgium and the Netherlands have been the first EU States bound by the Directive to cooperate according the mutual recognition mechanism in view of executing a Belgian expulsion order in the Netherlands. The Netherlands have executed two expulsion orders on behalf of the Belgian authorities.

In general, mutual recognition would not be applied very often as Member States would prefer the

mechanism of readmission.

The Belgian National Rapporteur does also refer to lack of information. Many expulsion orders are not communicated in the SIS database. The Belgian authorities only insert expulsion orders implying a ban to re-entry for ten years. In Belgium, it seems that it is more the cooperation of the Belgian liaison officer with the national authorities and the authorities of the Netherlands which improves the application of the mutual recognition mechanism. With regard to other Member States, the readmission procedure is more likely to apply. The Directive should have dealt with the issue of communication of expulsion orders.

The Spanish National Rapporteurs underline the need of a centralized European Data Register on expulsion decisions to apply the Directive on Mutual Recognition. In Spain, in practice, both grounds stated by Art. 3 (1) lit. a and b are inapplicable as the Police Department does not have access to the relevant information.

Pursuant to the information of the German Rapporteur, the lack of sufficient information has also been reported by the Federal Ministry of the Interior. The implementation of the Directive would be rather difficult in case there is no relevant information in the SIS database as there is no information on the authority of another Member State having issued an expulsion order against a third country national.

The Danish National Rapporteur poses the question whether the Directive requires the Member States to provide for a legal basis to revoke a residence permit in case an administrative authority of another Member State has made a decision on expulsion.

The National Rapporteur for the United Kingdom points out that the position of the United Kingdom not to implement the Directive by way of legislation has led to a lack of rules dealing with the specificities of the recognition process itself. Expulsion of third country nationals seems to be equated with the procedure for recognising such decisions.

4. Situation of Member States not bound by the Directive

Under Council Decision of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen acquis, Ireland is to participate in this Directive. However, as the acquis has not yet been put into effect for Ireland under the terms of Article 4 of the above-mentioned Council Decision, Ireland is not yet bound by the Directive. Ireland has currently no legislative framework to deal with mutual recognition of expulsion decisions. Various legislative and operational initiatives are under way to deal with such related issues as mutual assistance in criminal matters and the operation of the Schengen Information System in Ireland.