

**QUESTIONNAIRE FOR THE NATIONAL REPORT ON THE IMPLEMENTATION
OF THE DIRECTIVE:**

CARRIERS LIABILITY OF 28 JUNE 2001

IN PORTUGAL

by

*Tânia Carvalhais Pereira
Trainee lawyer
tcprm@hotmail.com*

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The person in the team of thematic coordination in charge of this directive that you can contact if you have a question or need help when completing this questionnaire is: Marcel Kau, +49 7531 883634, marcel.kau@uni-konstanz.de

FIRST PART

1. NORMS OF TRANSPOSITION AND JURISPRUDENCE

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

- This question includes even norms adopted before the adoption of the directive but ensuring its transposition (what is called a pre-existing norm in the table of correspondence).
- Quote the norm of transposition and not only the norm modified by it (the same is true in case of existence of a code of aliens law)
- About legal nature in the table below: legislative refers to a norm adopted in principle by the Parliament; regulation refers to a norm complementing the law and adopted in principle by the executive power; circular or instructions refer to practical rules about implementation of laws and regulations and adopted in principle by the administrative authorities

*Please **duplicate** the table below if there is more
than one MAIN norm of transposition*

This table is about: <input checked="" type="checkbox"/> a text already adopted <input type="checkbox"/> a text which is still a project to be adopted ¹
TITLE: Law n. ° 23/2007 on the conditions of entry, stay, exit and removal of foreigners from the Portuguese territory
DATE: 4 July 2007

¹ The Law n.° 23/2007 revokes the Decree-Law n. ° 244/98, 8th August and “re-traduz” (it is a new translation) the Directive.

NUMBER: 23/2007
DATE OF ENTRY INTO FORCE:
PROVISIONS CONCERNED (for example if the norm is not devoted only to the transposition of the concerned directive): 41, 42, 44, 194
REFERENCES OF PUBLICATION IN THE OFFICIAL JOURNAL:
LEGAL NATURE (indicate a cross in the correct box):
<input checked="" type="checkbox"/> LEGISLATIVE:
<input type="checkbox"/> REGULATION:
<input type="checkbox"/> CIRCULAR or INSTRUCTIONS:

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):

- This question includes even norms adopted before the adoption of the directive but ensuring its transposition (what is called a pre-existing norm in the table of correspondence).
- Quote the norm of transposition and not only the norm modified by it (the same is true in case of existence of a code of aliens law)

*Please use one table per norm and **duplicate** as much as necessary*

TITLE:
DATE:
NUMBER:
DATE OF ENTRY INTO FORCE:
PROVISIONS CONCERNED : (for example if the norm is not devoted only to the transposition of the concerned directive)
REFERENCES OF PUBLICATION IN THE OFFICIAL JOURNAL:
LEGAL NATURE (indicate a cross in the right box):
<input type="checkbox"/> LEGISLATIVE
<input type="checkbox"/> REGULATION
<input type="checkbox"/> CIRCULAR OR INSTRUCTIONS

Q.2. THIS QUESTION IS IN PRINCIPLE ONLY FOR FEDERAL OR ASSIMILATED MEMBER STATES LIKE AUSTRIA, BELGIUM, GERMANY, ITALY, SPAIN

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

Please include your answer in the tables below

LEGISLATIVE RULES
COMPETENCES OF THE FEDERAL/CENTRAL LEVEL:
COMPETENCES OF THE COMPONENTS:
EXPLANATIONS IF NECESSARY:

REGULATIONS
COMPETENCES OF THE FEDERAL/CENTRAL LEVEL:
COMPETENCES OF THE COMPONENTS:
EXPLANATIONS IF NECESSARY:

CIRCULAR OR INSTRUCTIONS
COMPETENCES OF THE FEDERAL/CENTRAL LEVEL:
COMPETENCES OF THE COMPONENTS:
EXPLANATIONS IF NECESSARY:

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.

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

Please use one table per competence concerned and duplicate it if necessary

COMPETENCE CONCERNED:	Administrative decisions on carriers liability
CENTRAL MINISTRY OF:	Home Affairs
DIRECTION OR SERVICE WITHIN THE ABOVE MINISTRY:	Immigration and Borders Service
OTHER LEVEL OF ADMINISTRATION:	
IF NECESSARY, COMMENT ABOUT THE NATURE OF THE AUTHORITY (for instance if it is independent of the competent minister)	The Immigration and Borders Service is dependent of the Minister of Home Affairs and vertically organized

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

YES

NO

Not applicable

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:

YES

NO

Not applicable

If NO, please indicate the missing text(s) in the table below

Please use one line per missing text and duplicate it if necessary

MISSING TEXTS
<i>INDICATE HERE THE MISSING TEXTS</i>

Add if necessary some explanations (specify in particular if the missing texts are at least under preparation or foreseen in the very near future):

SECOND PART

2. INDIVIDUAL PROVISIONS OF THE DIRECTIVE

Q.5. Necessary steps to ensure that the obligation of carriers to return third country nationals (Art. 26 (1)(a) of the Schengen Convention) applies when entry is refused to a third country national in transit (see Art. 2, which is a mandatory provision)

Q.5.A. Has the existing legislation providing for a carrier obligation to return been amended? *(Please keep in mind that this question is about explicit changes, not about a mere change in the interpretation of already existing legislation. The term "Legislation" includes regulations in connexion with this question)*

Yes

No

Q.5.B. If yes, please specify

The legislation providing for a carrier obligation to return third country nationals has been amended, but the new article 41 of the Law n. ° 23/2007 concerns the same obligation of carriers to return third country nationals as the article 21 of the Decree-Law n. ° 244/98. Carriers are obliged also to return third country nationals in transit as provided for by article 2 of the Directive.

Q.5.C. Have administrative practices been changed?

Yes

No

Q.5.D. If yes, please specify

Q.6. Necessary measures to oblige carriers which are unable to effect the return of a third country national whose entry is refused to find means of onward transportation and to bear the costs thereof or assume responsibility for the costs (see Art. 3, which is a mandatory provision)

Q.6.A. Have legislative provisions stipulating the obligations or responsibilities of carriers been adopted?

Yes

No

Q.6.B. If yes, please specify

Article 41- Law n. ° 23/2007

This article stipulates the obligations and responsibilities of carriers:

- Promote third country national return to the point where he began the trip on this carrier;
- Support the expenses of the third country national while the return isn't carried out;
- Support the expenses of the escort, carried out by SEF.

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

The SEF as competence to apply penalties to the carriers that break the Law. According SEF's information, they applied 310 penalties in 2003; 397 in 2004; 192 in 2005 and 365 in 2006. As the Law n.° 23/2007 (articles 194 and 195) has analogous provision as the Decree-Law n.° 244/98 this information can be used comparably data.

Q.7. Penalties

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

Yes (please provide exact amounts below)

Art. 194 - Project of Law n°. 93/X.

- Maximum Amount (in Euro for each person carried):
€6000 if the carrier is a company
€4000 if the carrier is a person
- Minimum Amount (in Euro for each person carried):
€4000 if the carrier is a company
€3000 if the carrier is a person
- Maximum Amount if penalty is imposed as a lump sum irrespective of the number of persons carried (in Euro):

It wasn't introduced.

In case the amounts are provided in another currency than Euro, please calculate the equivalent on the basis of the

exchange rate table in annex2 if applicable. If the table does not contain information on your national currency, please calculate the equivalent in Euro on the basis of the recent exchange rate and provide the amount in your national currency in addition.

No

Q.7.B. How is the provision of Art. 4(2) (“without prejudice to Member States’ obligations”) interpreted in your country?

NB: The wording of Art. 4 (2) is ambiguous and may therefore lead to different interpretations. This problem may be more or less virulent and the different language versions of the directive. Art. 4 (2) may be interpreted as indicating that if a Member State is obliged not to refuse entry to persons seeking international protection, financial sanctions must not be imposed upon carriers who have transported these refugees, but it may as well be interpreted to the contrary way as indicating that carrier obligations apply regardless of an asylum seeker’s entitlement to a temporary residence right during the asylum procedure or regardless of recognition as an asylum seeker. Please make clear which interpretation is applied in your Member State or if the provision is interpreted even differently.

It doesn’t have direct transposition, but the Portuguese law can’t dispose against the Convention of Geneva and the International Status of the Refugees (New York Status).

Article 8 n. ° 1 and 2 of the Portuguese Constitution and article 5° n. ° 2 of the Law n. ° 23/2007

—The Article 8 (International Law) n. ° 1 and 2 of the Portuguese Constitution provide that the international law and principles take part (directly or after transposition) and need to be respected by Portugal.

The article 5° n.° 2 of the Law n. ° 23/2007 provide the same idea, with clear mention to the Convention of Geneva, signed on the 28th of July, 1951.

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

Yes

No

Q.9. Does your Member State apply a policy according to which carriers will not be subject to sanctions if they can prove that they have complied with

² Rate of Exchange published in the Official Journal on 10 August 2001.

“best practices”, a “memorandum of understanding between the transport industry and the administration”, “handbooks of due diligence” or other codes of conduct? (This possibility is not explicitly foreseen in the directive but is a big issue in the discussions about the system of carriers liability)

Yes

No

If yes, please specify!

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

Normally the re-embark takes place in 48 hours
(Art. 38 n. ° 4 - Law n. ° 23/2007.)

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

Administrative appeal rights

Judicial appeal rights

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

suspensive effect with regard to administrative appeal

suspensive effect with regard to judicial appeal

no suspensive effect

Articles 39 (Judicial appeal) and 150 (Judicial appeal) of the Project Law n. ° 23/2007. This articles provides the judicial appeal of the administrative decisions, without suspensive effect.

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

The effectiveness of defence and appeal is ensured. There is a possibility to ask the Court for suspensive effect of a remedy in the meantime before the Court reaches its final decision.

THIRD PART

3. IMPACT OF THE DIRECTIVE ON NATIONAL LAW

Q.11. Did the transposition of the Directive make the rules related to carrier obligations to return third country nationals become from the point of view of carriers concerned more favourable or less favourable regarding the evolution of internal law (for example because of abolition or introduction of more favourable provisions, more restrictive conditions or amendments)? Make also a comparison with the standard of the Directive in the last column of the table below.

Please use one box per object and duplicate it if necessary

OBLIGATIONS OF CARRIERS TO RETURN THIRD COUNTRY NATIONALS WHEN ENTRY IS REFUSED TO A THIRD COUNTRY NATIONAL IN TRANSIT		EVALUATION REGARDING THE EVOLUTION OF INTERNAL LAW	EVALUATION IN COMPARISON WITH THE STANDARD OF THE DIRECTIVE
<p><u>Explain the situation before transposition</u></p> <p>Portugal had already adopted legislation with this kind of obligations when the directive was adopted: art. 21 of the Decree-Law n. ° 244/98 of 8th August</p>	<p><u>Explain the situation after transposition</u></p> <p>There hasn't been any alteration with the transposition, except the value of the penalties, which is higher. The Law n. ° 23/2007 doesn't change these subjects.</p>	<p>Complete this box by keeping the right appreciation and deleting the two others:</p> <ul style="list-style-type: none"> • <i>Less favourable than previous internal rules</i> <p>(with the Law n. ° 23/2007)</p>	<p>Complete this box by keeping the right appreciation and deleting the other one:</p> <ul style="list-style-type: none"> • <i>In line with the directive</i>

Q.12. From your point of view, did the transposition of the directive imply other interesting changes for the carriers concerned regarding other elements than the ones mentioned in the previous question. Make also a comparison with the standard of the directive in the last column of the table below

Please use one box per object and duplicate it if necessary

OBJECT (to be <u>precisely</u> indicated by the national rapporteur)	EVALUATION REGARDING THE EVOLUTION OF NATIONAL LAW	EVALUATION IN COMPARISON WITH THE STANDARD OF THE DIRECTIVE

<p>Portugal had already adopted legislation before transposition.</p>	<p>Explain the situation after transposition</p> <p>The impact of the directive wasn't appreciable, take into consideration national norms that have been adopted before the deadline for transposition. Portugal amended their national legislation but the new legislation only changed the value of the penalties, on the relevant matter.</p>	<p>Complete this box by keeping the right appreciation and deleting the two others:</p> <ul style="list-style-type: none"> • <i>Status quo</i> 	<p>Complete this box by keeping the right appreciation and deleting the other one:</p> <ul style="list-style-type: none"> • <i>In line with the directive</i>
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Q.13.A. Mention if there is a general tendency to just copy the provisions of the directive into national legislation without redrafting or adaptation them to national circumstances.

NO

YES

Q.13.B. If yes, please indicate if this general tendency may or may not create problems (for example difficulties of implementation, risk that a provision remain unapplied).

NO

YES

Q.13.C. If yes, give some of examples:

Q.13.D. If only **some** provisions of the directive have been copied and if this may create any problem, please quote them and explain the problem.

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

Please use one box per decision and duplicate it if necessary

DECISION OF SUPREME COURTS	DATE:	REFERENCE OF PUBLICATIONS:	SUMMARY OF CONTENT:
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DECISION OF APPEAL COURTS	<u>DATE:</u>	<u>REFERENCE OF PUBLICATIONS:</u>	<u>SUMMARY OF CONTENT:</u>
DECISION(S) IN FIRST RESORT	<u>DATE:</u>	<u>REFERENCE OF PUBLICATIONS:</u>	<u>SUMMARY OF CONTENT:</u>

Portugal doesn't have jurisprudence related to the directive, its transposition or implementation.

ANY SUPPLEMENTARY COMMENT ABOUT THE TREND OF THE JURISPRUDENCE:

Q.15. Specify if there are or not problems with the translation of the text of the directive in the official language of your Member State and give in case a list of the worst examples of provisions which have been badly translated.

There are no problems with the translation of the directive

There are some problems with the translation of (indicate the number of the articles concerned) of the directive.

Explain the difficulties that this could create:

4. ANY OTHER INTERESTING ELEMENT

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

Please use one table per practice and duplicate it if necessary

OBJECT OF THE PRACTICE	EXPLANATIONS

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