

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

**FACILITATION OF UNAUTHORISED ENTRY & STAY OF 28 NOVEMBER 2002**

**IN BELGIUM**

by

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<b>FIRST PART</b>
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**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*

<b>This table is about:</b> <input checked="" type="checkbox"/> a text already adopted <input type="checkbox"/> a text which is still a project to be adopted
<b>TITLE:</b> Law of 10 August 2005 amending diverse provisions with a view to intensifying the campaign against people trafficking and smuggling and slum landlordism
<b>DATE:</b> 10 August 2005
<b>NUMBER:</b>
<b>DATE OF ENTRY INTO FORCE:</b> 12 September 2005

<b>PROVISIONS CONCERNED</b> (for example if the norm is not devoted only to the transposition of the concerned directive): Articles 28 to 33
<b>REFERENCES OF PUBLICATION IN THE OFFICIAL JOURNAL:</b> <i>Belgian State Gazette</i> 2 September 2005
<b>LEGAL NATURE</b> (indicate a cross in the correct box):
<input checked="" type="checkbox"/> <b>LEGISLATIVE:</b>
<input type="checkbox"/> <b>REGULATION:</b>
<input type="checkbox"/> <b>CIRCULAR or INSTRUCTIONS:</b>

**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*

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

**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*

<b>LEGISLATIVE RULES</b>
<b>COMPETENCES OF THE FEDERAL/CENTRAL LEVEL:</b> Immigration law is a federal matter. Aspects of social assistance and access to the labour market for foreign workers also come under federal jurisdiction. General criminal law and criminal law with regard to federal matters are a federal subject matter. Hence, the transposition requires federal law.
<b>COMPETENCES OF THE COMPONENTS:</b> The Flemish, French and German

Communities have jurisdiction over integration policy and education. Within these sectors they may also introduce criminal sanctions

**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*

<b>COMPETENCE CONCERNED:</b>	Criminal prosecution
<b>CENTRAL MINISTRY OF:</b>	Public Prosecutor ( <i>Openbaar Ministerie / Ministère public</i> )
<b>DIRECTION OR SERVICE WITHIN THE ABOVE MINISTRY:</b>	
<b>OTHER LEVEL OF ADMINISTRATION:</b>	
<b>IF NECESSARY, COMMENT ABOUT THE NATURE OF THE AUTHORITY (for instance if it is independent of the competent minister)</b>	The Public Prosecutor is part of the judiciary and is independent. The Minister of Justice may instruct the Public Prosecutor to prosecute particular cases (the so-called positive injunction right), but cannot interfere in prosecutions engaged in by the Public Prosecutor.

<b>COMPETENCE CONCERNED:</b>	Criminal prosecution and monitoring
<b>CENTRAL MINISTRY OF:</b>	Services of the Prime Minister Minister of Social Integration and Equal Opportunities
<b>DIRECTION OR SERVICE WITHIN THE ABOVE</b>	

<b>MINISTRY:</b>	
<b>OTHER LEVEL OF ADMINISTRATION:</b>	Centre for equal opportunities and opposition to racism
<b>IF NECESSARY, COMMENT ABOUT THE NATURE OF THE AUTHORITY (for instance if it is independent of the competent minister)</b>	The (federal) Centre has been given jurisdiction to engage in criminal prosecution in the event of human smuggling and human trafficking and can sue for damages.

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

YES

NO

**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

**If NO, please indicate the missing text(s) in the table below**  
*Please use one line per missing text and duplicate it if necessary*

<b>MISSING TEXTS</b>
<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.** **Punishable Acts** (*see Art. 1 (1), which is mandatory, but leaves the Member States some leeway to decide on the concrete measures to be taken* )

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

Yes

No (*please specify*)

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

*Make clear how the action of assistance as referred to in Art. 1 lit. a is interpreted, e.g. if the assisting person needs to be involved in the actual act of crossing the border or if all actions that facilitate, even indirectly, the illegal entrance or transit of the third-country national are considered to fall under the scope of the provision if committed intentionally.*

The punishable offence under Belgian law (Article 77 of the Aliens Act, as amended by the Act of 10 August 2005) is described in very broad terms. Not only does it include assistance in entrance or transit without financial gain, but also assistance in residence without financial gain. All sorts of assistance are included: preparatory acts, acts facilitating entry, transit or residence and acts that have realised entry, transit or residence:

“Article 77. He who knowingly and willingly helps a person who is not a national of a member state of the European Union in entering the territory of a member state of the European Union or of a State party to an international agreement on the transit of external borders, binding upon Belgium, or in residing there or in transiting, in breach of the laws of the State concerned, be it by acts which have prepared the entry, transit or residence, facilitated them or realised them, is punished with imprisonment of eight days to one year and with a fine of 1.700 to 6.000 Euro, or with one of these punishments. The first paragraph does not apply if the assistance has been provided predominantly for humanitarian reasons.”

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

*Make clear how the action of assistance as referred to in Art. 1 lit. b is interpreted. Crucial points could be if the mere providing of housing to*

*a third-country national residing illegally in your Member State is considered to fall within the scope of the national provision or if the employment of illegally resident aliens is a punishable act in your Member State.*

The punishable offence under Belgian law (Article 77bis of the Aliens Act, as amended by the Act of 10 August 2005) is described in very broad terms. Not only does it include assistance in residence with a financial gain, but also assistance in entrance or transit with a financial gain.

All sorts of assistance are included by use of the general term “in any way”.

“Article 77bis. Constitutes the crime of human smuggling the contribution, in any way, directly or true an intermediary, that a person who is not a national of a member state of the European Union enters the territory of a member state of the European Union or of a State party to an international agreement on the transit of external borders, binding upon Belgium, transits, or resides there, in breach of the laws of the State concerned, in order to obtain directly or indirectly a patrimonial gain.

The crime defined in the first paragraph is punished with imprisonment of one year to five years and with a fine of 500 Euro to 50.000 Euro.

Attempts to commit the crime defined in the first paragraph is punished with imprisonment of one year to three years and with a fine of 100 Euro to 10.000 Euro.”

**Q.5.D. What “appropriate sanctions” have been adopted in your Member State according to Art. 1 (1) of the Directive in implementation of the framework decision 2002/946/JHA? (Please specify, if possible, why these concrete sanctions are considered appropriate in your Member State)**

Criminal sanctions have been provided for in Articles 77 and 77bis Aliens Act. Moreover, Articles 77ter to 77quinquies Aliens Act define particular and aggravating circumstances calling for heavier sanctions (e.g. when the victim is a minor, in case of threat to or loss of life of the victim, when the crime is committed by a criminal organisation). Article 77sexies Aliens Act allows for the forfeiture of the objects used to commit the crime.

Apart from the public prosecutor, also the Centre for equal opportunities and opposition to racism has been given jurisdiction to engage in criminal prosecution in the event of human smuggling and human trafficking and can sue for damages.

**Q.6. Exceptions for persons who act for humanitarian reasons (see Art. 1 (2), which is an optional provision)**

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

By reference to existing national laws on exceptions?

By special provisions implementing and/or determining exception clauses?

No application of Art. 1 (2)?

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

*Please point out if the interpretation applied in your Member State can be rather considered restrictive or extensive. Please give, if available, examples of types of behaviour which are considered to create an exemption from being subject to sanctions.*

The exception is incorporated in the definition of the crime for assistance, with no financial aim, in entry, transit and residence. The legislator did not use the terms “where the aim of the behaviour is to provide humanitarian assistance to the person concerned”, but the pre-existing exception that “the assistance has been provided predominantly for humanitarian reasons”. No further definition is given of what is to be understood.

**Q.7. Instigation, Participation and Attempt** (*see Art. 2, which is a mandatory provision*)

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

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

Yes

No

The general provisions on instigation (Chapter VII of the Criminal Code) have been made applicable on the infringements defined in the Aliens Act, including the aforementioned infringements.

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

Yes

No

The general provisions on accomplices (Chapter VII of the Criminal Code) have been made applicable on the infringements defined in the Aliens Act, including the aforementioned infringements.

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

Yes

No

The attempt is only mentioned explicitly for the crimes in Article 77bis: assistance in entry, transit and residence with a financial aim. The Council of State, in its advice to the proposal of legislative amendment, held that Article 2 of the Directive was not sufficiently transposed with regard to the assistance without financial aim.

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

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

Criminal sanctions (fines and imprisonment) have been provided, as well as the forfeiture of objects used to commit them.

The criminal sanctions are:

- assistance without financial aims:
  - imprisonment of eight days to one year and with a fine of 1700 to 6000 Euro, or with one of these punishments;
- assistance with financial aims:
  - imprisonment of one year to five years and with a fine of 500 Euro to 50.000 Euro;
  - attempt: imprisonment of one year to three years and with a fine of 100 Euro to 10.000 Euro;
  - committed by a person with authority over the victim or a public officer: imprisonment of five years to ten years and a fine of 750 Euro to 75.000 Euro;
  - committed against a minor, against a person in a specifically vulnerable situation, by fraud or violence, with danger to the life, resulting in physical or psychological damage, habitually or in an association: imprisonment of 10 years to 15 years and a fine of 1.000 Euro to 100.000 Euro;
  - resulting in unwanted death or committed in a criminal association: imprisonment of 15 years to 20 years and a fine of 1.000 Euro to 100.000 Euro.

The amount of the fines needs to be multiplied by an indexation factor, currently 5,5.



**THIRD PART**

**3. IMPACT OF THE DIRECTIVE ON NATIONAL LAW**

**Q.9.** Did the transposition of the directive make the rules related to the punishment of facilitation of unauthorised entry become from the point of view of a potential perpetrator more favourable or less favourable regarding the evolution of national law (for example because of abolition or introduction of more favourable provisions). Make also a comparison with the standard of the directive in the last column of the table below

<b>OBJECT</b> Assisting to unauthorised entry as referred to in Art. 1 para. 1 (a) of the Directive		<b>EVALUATION REGARDING THE EVOLUTION OF NATIONAL LAW</b>	<b>EVALUATION IN COMPARISON WITH THE STANDARD OF THE DIRECTIVE</b>
<p>Assistance in unauthorised <b>entry</b> of any alien in Belgium or a State party to an internal agreement on the transit of external borders binding upon Belgium was punishable (imprisonment of eight days to three months and/or fine of 1.700 to 6.000 Euro).</p>	<p>Assistance in unauthorised entry and transit (but also residence) by a third country national in any EU State is punishable with imprisonment of eight days to one year and with a fine of 1.700 to 6.000 Euro, or with one of these punishments.</p>	<ul style="list-style-type: none"> <li>• <i>Less favourable than previous national rules</i></li> </ul>	<ul style="list-style-type: none"> <li>• <i>Stricter than the minimum requirements of the directive</i></li> </ul>
<p>Assistance in unauthorised <b>transit</b> through Belgium only was punishable in the event of fraud or violence or abuse of a specifically vulnerable position of an alien due to his illegal status, age, health conditions or mental or physical incapacity (imprisonment of one year to five years and fine of 500 Euro</p>	<p>Assistance in unauthorised entry and transit by a third country national in any EU State with financial aims is punishable with imprisonment of one year to five years and with a fine of 500 Euro to 50.000 Euro (or more, when aggravating conditions exist)</p>		

to 25.000 Euro)			
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<b>OBJECT</b> <b>Assisting to unauthorised residence as referred to in Art. 1 para. 1 (b) of the Directive</b>		<b>EVALUATION REGARDING THE EVOLUTION OF NATIONAL LAW</b>	<b>EVALUATION IN COMPARISON WITH THE STANDARD OF THE DIRECTIVE</b>
<p>Assistance in unauthorised <b>residence</b> of any alien in Belgium or a State party to an internal agreement on the transit of external borders binding upon Belgium was punishable (imprisonment of eight days to three months and/or fine of 1.700 to 6.000 Euro).</p> <p>Assistance in unauthorised <b>residence</b> in Belgium only was punishable in the event of fraud or violence or abuse of a specifically vulnerable position of an alien due to his illegal status, age, health conditions or mental or physical incapacity (imprisonment of one year to five years and fine of 500 Euro to 25.000 Euro)</p>	<p>Assistance in unauthorised residence (but also entry and transit) by a third country national in any EU State with financial aims is punishable with imprisonment of one year to five years and with a fine of 500 Euro to 50.000 Euro (or more, when aggravating conditions exist)</p>	<ul style="list-style-type: none"> <li>• <i>Less favourable than previous national rules</i></li> </ul>	<ul style="list-style-type: none"> <li>• <i>Stricter than the minimum requirements of the directive</i></li> </ul>

**Q.10.**

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

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

NO

YES

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

NO

YES

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

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

**Q.11.** Quote *interesting decisions of jurisprudence* related to the directive, its transposition or implementation (so this question concerns in principle decisions later than 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*

<b>DECISION OF SUPREME COURTS</b>	<b><u>DATE:</u></b>	<b><u>REFERENCE OF PUBLICATIONS:</u></b>	<b><u>SUMMARY OF CONTENT:</u></b>
<b>DECISION OF APPEAL COURTS</b>	<b><u>DATE:</u></b>	<b><u>REFERENCE OF PUBLICATIONS:</u></b>	<b><u>SUMMARY OF CONTENT:</u></b>
Court of Appeal Brussels	22 September 2006		The new Article 77bis Aliens Act on assistance on illegal residence with aggravating circumstances now requires a financial advantage on behalf of the perpetrator. It is no longer applicable on residence by Hungarians in Belgium after 1 May 2004.
Court of Appeal Brussels	4 April 2006		Providing housing for illegal migrants, even for free, constitutes assistance

			with an indirect financial aim, as the network in which the defendant co-operated received money.
<b>DECISION(S) IN FIRST RESORT</b>	<b><u>DATE:</u></b>	<b><u>REFERENCE OF PUBLICATIONS:</u></b>	<b><u>SUMMARY OF CONTENT:</u></b>

ANY SUPPLEMENTARY COMMENT ABOUT THE TREND OF THE JURISPRUDENCE:

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

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

*Please use one table per practice and duplicate it if necessary*

<b>OBJECT OF THE PRACTICE</b>	<b>EXPLANATIONS</b>

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

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