FIRST PART

1. NORMS OF TRANSPPOSITION 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

<table>
<thead>
<tr>
<th>This table is about:</th>
<th>[ ] a text already adopted</th>
<th>[ ] a text which is still a project to be adopted</th>
</tr>
</thead>
<tbody>
<tr>
<td>TITLE:</td>
<td>Aufenthaltsgesetz; residence act</td>
<td></td>
</tr>
<tr>
<td>DATE:</td>
<td>30.07.2004</td>
<td></td>
</tr>
<tr>
<td>NUMBER:</td>
<td>Sec. 95 and Sec. 96</td>
<td></td>
</tr>
<tr>
<td>DATE OF ENTRY INTO FORCE:</td>
<td>01.01.2005</td>
<td></td>
</tr>
<tr>
<td>PROVISIONS CONCERNED (for example if the norm is not devoted only to the transposition of the concerned directive):</td>
<td>Sec. 95</td>
<td></td>
</tr>
<tr>
<td>LEGAL NATURE (indicate a cross in the correct box):</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
This table is about: [x] a text already adopted [ ] a text which is still a project to be adopted.

| TITLE: | Gesetz zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der Europäischen Union (Act on Transposition of EU-Directives on Issues of Residence and Asylum, amending the Residence Act) |
| DATE: | 28.08.2007 |
| NUMBER: | Sec. 95 and Sec. 96 |
| DATE OF ENTRY INTO FORCE: | not applicable |

**PROVISIONS CONCERNED (for example if the norm is not devoted only to the transposition of the concerned directive):** Sec. 95

**REFERENCES OF PUBLICATION IN THE OFFICIAL JOURNAL:** not applicable

**LEGAL NATURE (indicate a cross in the correct box):**

- [x] LEGISLATIVE:
- [ ] REGULATION:
- [ ] 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: | Strafgesetzbuch (penal code) |
| DATE: | 1871 |
| NUMBER: | Sec 22, 26, 27 |
| DATE OF ENTRY INTO FORCE: | 1871 |
| PROVISIONS CONCERNED: | |
| REFERENCES OF PUBLICATION IN THE OFFICIAL JOURNAL: | BGBl I 1998, 3322 (New publication) |

**LEGAL NATURE (indicate a cross in the correct box):**

- [x] LEGISLATIVE:
- [ ] REGULATION:
- [ ] CIRCULAR or INSTRUCTIONS:

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56 All answers refer to a preliminary internal draft of the Federal Ministry of the Interior, which is still in an early stage of the legislative process. The draft is available in the internet on [http://www.fluechtlingsinfo-berlin.de/fr/pdf/AendG_ZuwG_080207.pdf](http://www.fluechtlingsinfo-berlin.de/fr/pdf/AendG_ZuwG_080207.pdf)

57 Amendment of the text.
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

<table>
<thead>
<tr>
<th>LEGISLATIVE RULES</th>
<th>COMPETENCES OF THE FEDERAL/CENTRAL LEVEL: Federal law</th>
</tr>
</thead>
<tbody>
<tr>
<td>COMPETENCES OF THE COMPONENTS: Art 1, 2, 3</td>
<td></td>
</tr>
<tr>
<td>EXPLANATIONS IF NECESSARY:</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>REGULATIONS</th>
<th>COMPETENCES OF THE FEDERAL/CENTRAL LEVEL:</th>
</tr>
</thead>
<tbody>
<tr>
<td>COMPETENCES OF THE COMPONENTS:</td>
<td></td>
</tr>
<tr>
<td>EXPLANATIONS IF NECESSARY:</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>CIRCULAR OR INSTRUCTIONS</th>
<th>COMPETENCES OF THE FEDERAL/CENTRAL LEVEL:</th>
</tr>
</thead>
<tbody>
<tr>
<td>COMPETENCES OF THE COMPONENTS:</td>
<td></td>
</tr>
<tr>
<td>EXPLANATIONS IF NECESSARY:</td>
<td></td>
</tr>
</tbody>
</table>

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

<table>
<thead>
<tr>
<th>COMPETENCE CONCERNED:</th>
<th>judiciary, Public Prosecution Service</th>
</tr>
</thead>
<tbody>
<tr>
<td>CENTRAL MINISTRY OF:</td>
<td>Justice (on State Level)</td>
</tr>
<tr>
<td>DIRECTION OR SERVICE WITHIN THE ABOVE MINISTRY:</td>
<td>Office of the Attorney General</td>
</tr>
<tr>
<td>OTHER LEVEL OF ADMINISTRATION:</td>
<td></td>
</tr>
<tr>
<td>IF NECESSARY, COMMENT ABOUT</td>
<td>The judiciary is independent. The Public Prosecution Service is attached to the Ministry of Justice (State-level)</td>
</tr>
</tbody>
</table>
THE NATURE OF THE AUTHORITY
(for instance if it is independent of the competent minister)

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

<table>
<thead>
<tr>
<th>MISSING TEXTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>INDICATE HERE THE MISSING TEXTS</td>
</tr>
</tbody>
</table>

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

The main provisions of the Directive 2002/90 have already been transposed by Sec. 95-96 of the Residence Act. Some further changes were made by the reform of the Residence Act in 2007 particularly with respect to the pluralisation of attempted assistance to illegal immigration for non profit-gaining purposes (Art. 2 first alternative lit. c of the Directive). The transposition is realised by punishing only such assistance, which is made for profit reasons. The reform also provides an enlargement of the scope of the Art 1 para 1 lit b. of the directive. The directive will punish the assistance of illegal residence within the Member States for “fininacial gain”. The transposition into German law will punish the assistance not only for financial gains but also for all kind of advantages, specially sexual return services.


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

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

The systematic structure of the national provision differs from the structure laid down in the directive. National regulations however still consider actions as referred to in Art. 1 (1) lit. a and lit. b as punishable actions.

Art. 1 (1) lit. a foresees sanctions for an assistant to a person who enters or transits across the territory of a Member State in breach of the laws of this state. Referring to Art. 1, Art. 2 lit. a of the directive is to make sure that the instigator of this assistant (stated in Art. 1) incurs a penalty, too.

Sec. 95 of the German residence act provides in a first step for sanctions referring to the third-country national himself. Third-country nationals incur a penalty if they reside within German territory and do not hold a valid passport or a valid residence permit, if they are therefore obliged to leave the country, if they enter the country breaching immigration regulations, if they disobey an order to leave, if they give false information relating to their identity or do not comply with investigative measures relating to their identity, if they do not obey orders of territorial limitations or obligations to report their location in case of repetition, and/or if the third-country national is a member of a group that consists of a majority of foreigners and that is kept secret in order to escape an official prohibition of this group. Sanctions for these offences reach from fines up to imprisonment of up to one year.

If a third-country national enters or resides in Germany disobeying an order of exit or uses false information in order to obtain a permission of stay, sanctions reach from fines up to imprisonment of up to 3 years.

The reform of the Residence Act added penalties for intentional illegal employment or breaches of local limitation orders and if the foreigner holds a Schengen-visa or is a short term visitor and would in fact need a regular visa for a long term residence permit or a residence permit for taking up employment. In addition, foreigners will incur penal sanctions if they have obtained a formally valid residence permit by fraud due to threat, bribery or collusion.

Sec. 96 of the German residence act provides for more severe sanctions for the following offences:

- Persons (meaning German nationals as well) who instigate or help foreigners to enter or reside illegally in(to) Germany, whether or not an order to leave is pending, and in addition act in repetition or draw a profit, incur penalties of fines or up to imprisonment of up to 5 years.

- Persons acting like described above and in addition act for gain, as member of a gang, carrying guns or endangering the life or wellbeing of the foreigners involved incur sanctions from 6 months up to 10 years of imprisonment.
The reform transforms the amendments of sec. 95 onto the provisions of sec. 96.

In the above cases instigators can be sanctioned, too. In addition, the Residence Act refers for these purposes to the general chapter of the Penal Code.

The instigator therefore does not necessarily have to be actively involved in the actual act of crossing the border to be punishable. The instigator needs to intentionally influence the decision of the alien to intentionally take unlawful action. However, if the third-country national has already decided to breach national regulations on immigration, the instigator cannot be punished as an instigator (omnimodus facturus).

An accomplice is punishable who intentionally supports (physically or psychologically) the alien’s action.

Based on Sec. 26 of the Penal Code in conjunction with the corresponding sec. of the Residence Act (particularly sec. 96), the instigator of the instigator (“chain-instigation”) can also be punished, whether acting as an accomplice or instigator himself.

Even though the structure of the German regulation differs compared to the directive, persons who intentionally support those who intentionally assist aliens entering or travelling illegally through the territory of the Federal Republic of Germany are punishable.

The attempt to commit an illegal entry is punishable, too.

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

The mere providing of housing to a third-country national does not necessarily lead to sanctions, even if the assisting person knows of the illegal status of the third-country national. This action itself does not lead to sanctions if the third-country national has already decided that he will not leave that country by all means. In this case the person providing housing for the third-country national can be sanctioned only if he objectively encourages the third-country national to stay or facilitates the residence.

The employment of illegal residents is illegal in conjunction with the act against illegal employment (see “Schwarzarbeitsbekämpfungsgesetz”). The amended Residence Act will foresee penalties for illegal employment and instigation or accomplice for illegal employment directly.

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?

The above explained structure foresees sanctions to persons assisting third-country nationals in violating national immigration regulations as regular instigation implementing the same sanction as for the illegal entry itself.
Sanctions for accomplices are usually less in practice, since the law regulates a possibility to reduce the measure of punishment for accomplices.

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

German law does not provide for an explicit exception for persons who act for humanitarian reasons. The ministries of interiors of the Laender argue that the general provisions of the criminal law are sufficient. The NGO’s however demand a special provision, because the general provisions of the criminal law only cover exceptional cases.

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

There is no explicit application of Art. 1 (2), however an act of humanitarian reasons is to be taken into due account when determining the measure of penalty. According to the amended provision of sec. 96, assistance to illegal entry in Germany is only punishable if the assistance pursuit financial interests. The aim of this regulation is to make an exception for humanitarian reasons, because such reasons are not related to any financial interests.

Q.6.B

n/a

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

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

YES

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

YES

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?
The term is a basic constitutional principle which must be taken into due account in every decision of any state official. The sanctions are imprisonment from one year in the cases of Sec 95 up to three years in Case of Sec 96 or fine. This opens a wide spread of possible sanctions to react in proportionate an effective way to the single case.
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.

<table>
<thead>
<tr>
<th>OBJECT</th>
<th>EVALUATION REGARDING THE EVOLUTION OF NATIONAL LAW</th>
<th>EVALUATION IN COMPARISON WITH THE STANDARD OF THE DIRECTIVE</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Assisting to unauthorised entry as referred to in Art. 1 para 1 (a) of the Directive</strong></td>
<td>In fact, no transposition would be necessary – even not in advance in view of the directive – as the appropriate regulations had already been into effect in national law. However, a reform of the Residence Act will intensify sanctions.</td>
<td>The reform will transform the exception of Art 1 par. 2 of the directive in German law. The assistance is only punishable if the assistance pursues financial aims.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>OBJECT</th>
<th>EVALUATION REGARDING THE EVOLUTION OF NATIONAL LAW</th>
<th>EVALUATION IN COMPARISON WITH THE STANDARD OF THE DIRECTIVE</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Assisting to unauthorised entry as referred to in Art. 1 para 1 (b) of the Directive</strong></td>
<td>In fact, no transposition would be necessary – even not in advance in view of the directive – as the appropriate regulations had already been into effect in national law. However, a reform of the</td>
<td>The reform of the aliens law will intensify the punishment of assistance of illegal stay in enlarging the scope of every assistance for every kind of advantages</td>
</tr>
</tbody>
</table>
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

<table>
<thead>
<tr>
<th>General Passport Act</th>
<th>Residence Act will intensify sanctions</th>
</tr>
</thead>
</table>

NO

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

NO

Q.10.B

n/a

Q.10.C.

n/a

Q.10.D.

n/a

Q.11. 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.

OLG Frankfurt, StV 1999, 95

Formally correct papers that have been obtained giving false information do not incur sanctions based on illegal residence (however, may incur sanctions based on giving false information).

BGH, 27.4.2005, 2 StR 457/04

It is no punishable instigation or accomplice in favour to a person entering or residing illegally, as long as this person holds a formally valid residence permit. Neither the third-country national himself nor an instigator or accomplice incur penal sanctions even if the third-country national breaches the provisions of the residence permit.
However, third-country nationals who have entered the country with a three-month-tourist-visa from a third-country still require a separate work permit. Persons who assist “tourists” finding employment or giving them employment or housing incur sanctions.

Note: These problems that have evolved in practice are to be dealt with by an amended Residence Act. NGO reported also proceedings against Taxi-drivers, who transported an illegal immigrant and also against employees of a kindergarten who attended children without a legal status. It is also to mention that the courts in general interprete the provisions of sec. 95, 96 residence act in a restrictive way.

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

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 form the Member State any interesting or innovative practice in your Member State.

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

Some NGO’s mention, that the provisions of Sec 95, 96 are very unclear. Especially the scope of the punishable actions are not clearly defined. In deed the law is quite complicated because sec 95, 96 did not describe the punishable action itself. Instead the text refers to other sec of the Residence Act. The Ministries of Interior of a couple of Laender report a decline of numbers of infringements of sec. 95, 96 Residence Act.