



## **EMN Ad-Hoc Query on Ad-Hoc Query on exemption of humanitarian assistance from criminalisation**

Requested by Nera KOMARIC on 25th January 2017

### **Miscellaneous**

Responses from Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Hungary, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Slovak Republic, Slovenia, Spain, Sweden, United Kingdom (21 in total)

#### Disclaimer:

*The following responses have been provided primarily for the purpose of information exchange among EMN NCPs in the framework of the EMN. The contributing EMN NCPs have provided, to the best of their knowledge, information that is up-to-date, objective and reliable. Note, however, that the information provided does not necessarily represent the official policy of an EMN NCPs' Member State.*

## **Background information:**

Necessity to work towards a secure and stable Union there is an expectation from Member States to align their national legislation with the Council Directive 2002/90/EC of 28.11.2002 (Facilitation Directive). The directive has defined the facilitation (solidarity) of unauthorized entry, transit and residence. Although the term 'solidarity' has been referred to in a number of EU documents, the research show that there is little agreement to the exact meaning and scope of the term solidarity.

Furthermore, the EU Facilitation Directive contemplate criminal sanctions for person/s who assists migrants to irregularly enter, transit or stay at the MS territory. In line with the Directive the national provisions must establish sanctions for persons who assist third country nationals to illegally enter, transit and stay in the territory. According to the Directive, sanctions may, but not need to be prescribed for the act of help committed for humanitarian reasons (Article 1, Paragraph 2 Directive).

EU Agency for Fundamental Rights (European Union Agency for Fundamental Rights - FRA) in March 2014 published a paper titled "The criminalization of migrants staying illegally and people who help them", which made a recommendation (p. 23.) that in national legislations shall be explicitly prescribed the exclusion of punishment in the following cases:

1. Humanitarian help to illegal entry because:

- Rescue at sea,
- Helping refugees to seek protection.

2. Humanitarian assistance to illegal stay because:




- Providing food,
- The provision of accommodation,
- Providing medical assistance,
- Giving legal advice,
- Renting accommodation without the intention of preventing the deportation.

Current migration crisis has in practice shown countless examples of humanitarian aiding illegal immigrants.

## **Questions**





1. 1. In line with the Facilitation Directive does your national legislation explicitly prescribes the exclusion of punishment for facilitation, if the assistance was committed only for humanitarian reasons? Yes /No
2. 2. If yes, does your national legislation prescribes explicitly which helping acts are not punishable?





## Responses



	Country	Wider Dissemination	Response
	Austria	Yes	<p>1. No (see Art. 114 para 1 and Art. 120 para 3 Aliens Police Act).</p> <p>2. N/A.</p>
	Belgium	Yes	<p>1. Yes. See Question 2.</p> <p>2. The Belgian legislation does not explicitly describe the acts that are not punishable. Article 77 of the Law of 15 December 1980 on the entry, stay, settlement and removal of foreign nationals stipulates that : any person who intentionally assists or tries to assist a person who is not a national of a Member State of the European Union to enter or to reside or to transit across the territory of a Member State of the European Union or of a State which is party to an international agreement on the crossing of external borders which is binding on Belgium, in breach of the laws of the State concerned, either through the actions that have prepared or facilitated the entry, transit or residence, or through the actions that have carried them out, shall be punished by a term of imprisonment of 8 days to one year and a fine from 1700 to 6000 euros, or one of these penalties only. The first paragraph does not apply if the assistance is provided for mainly humanitarian reasons.</p>
	Bulgaria	Yes	<p>1. In line with the Facilitation Directive Bulgarian legislation prescribes according to the Law for foreigners in Republic of Bulgaria , Article 28 , paragraph 3 : " If organization or a legal person, provided shelter or accommodation to a foreigner, they are obligated to notify the authorities responsible for the Administrative control of foreigners or the district administration of the Ministry of the Interior within 3 days after the provision of shelter or accommodation .Also their obligation is to provide a complete and genuine information such as-names of the foreigner/s, date of birth , nationality, numbers and serial numbers of the foreigner's personal ID or passport or any other kind of documents." According to Criminal code of the Republic of Bulgaria ,Article 280: "</p> <p>(1) A person who takes across the borders of this country individuals or groups of persons without</p>




permission from the responsible authorities, or with permission but not through the points designated therefor, shall be punished by deprivation of liberty for one to six years and a fine of five hundred to one thousand Bulgarian leva (BGN) (2) The punishment shall be deprivation of liberty from one to ten years, a fine from one to three thousand BGN and confiscation of part of or the entire property of the perpetrator, if: 1. the person taken across the border is less than 16 years old 2. the person has been taken across the border without his/her knowledge; 3. the person taken across the border is not Bulgarian citizen; 4. a motor vehicle, an aircraft or another means of transportation has been used; 5. the crossing of the border has been organized by a group or organization and has been carried out with the participation of an official, who has abused his official position. 6. (New, SG, No.27/2009) the crossing of the borders has been committed in a manner that endangers the life of the persons taken across. (3) In the cases under paragraph (2), item 4, the means of transportation shall be appropriated by the state, if it was owned by the perpetrator.

**2.** According to Criminal code of the Republic of Bulgaria ,Article 280: " (1) A person who takes across the borders of this country individuals or groups of persons without permission from the responsible authorities, or with permission but not through the points designated therefor, shall be punished by deprivation of liberty for one to six years and a fine of five hundred to one thousand Bulgarian leva (BGN) (2) The punishment shall be deprivation of liberty from one to ten years, a fine from one to three thousand BGN and confiscation of part of or the entire property of the perpetrator, if: 1. the person taken across the border is less than 16 years old 2. the person has been taken across the border without his/her knowledge; 3. the person taken across the border is not Bulgarian citizen; 4. a motor vehicle, an aircraft or another means of transportation has been used; 5. the crossing of the border has been organized by a group or organization and has been carried out with the participation of an official, who has abused his official position. 6. (New, SG, No.27/2009) the crossing of the borders has been committed in a manner that endangers the life of the persons taken across. (3) In the cases under paragraph (2), item 4, the means of transportation shall be appropriated by the state, if it was owned by the perpetrator. According to the Law for Foreigners in Republic of Bulgaria Article 28, paragraph 3 the law gives three days to disclose the act of providing: " If organization or a legal person, provided shelter or accommodation to a foreigner, they are obligated to notify the authorities responsible for the Administrative control of





			foreigners or the district administration of the Ministry of the Interior within 3 days after the provision of shelter or accommodation."
	Croatia	Yes	<p>1. No</p> <p>2. N/A</p>
	Cyprus	Yes	<p>1. No. The only exception provided in the national legislation refers to rights of the asylum seekers, as derived from the 1951 Refugee Geneva Convention and its related protocol.</p> <p>2. n/a</p>
	Czech Republic	Yes	<p>1. No. Czech legislation which reflects the above-mentioned Directive is situated in the Section 340 and Section 341 of the Criminal Code – however, the articles 1 and 2 of the mentioned Directive is not reflected in these provisions. As regards the term “humanitarian assistance”, it is theoretically possible to consider the application of Section 28 of the Criminal Code which adjusts the term “necessity” (krajní nouze), respectively Section 41 character g) of the Criminal Code which regulates the mitigating circumstances which might be relevant in relation to the subject. However, application of both mentioned provisions always depends on the specific circumstances of the case. Czech law does not include the general term “humanitarian assistance” among the circumstances excluding illegality or among attenuating circumstances.</p> <p>2. N/A.</p>
	Estonia	Yes	<p>1. No, the Penal Code of Estonia does not explicitly prescribe the exclusion of punishment for facilitation, if the assistance was committed only for humanitarian reasons.</p> <p>2. N/A</p>

	Finland	Yes	<p><b>1.</b> Yes</p> <p><b>2.</b> The national legislation does not explicitly describe the acts, which are not punishable. Please find the exact wording below. The Criminal Code of Finland (39/1889) Section 8 - Arrangement of illegal immigration (2) An act which, when taking into account in particular the humanitarian motives of the person committing it or his or her motives relating to close family relations, and the circumstances pertaining to the safety of the foreigner in his or her home country or country of permanent residence, and when assessed as a whole, is to be deemed committed under vindicating circumstances, does not constitute arrangement of illegal immigration.</p>
	France	Yes	<p><b>1.</b> Yes. See question 2.</p> <p><b>2.</b> Article L. 622-1 of the Code on Entry and Residence of Foreigners and Right of Asylum (Code de l'entrée et du séjour des étrangers et du droit d'asile, CESEDA) stipulates that any person that facilitates or tries to facilitate by aiding directly or indirectly the unauthorised entry, movement or residence of an alien in France, shall be punished by a term of imprisonment of five years and a fine of 30 000 euros. According to Article L. 622-4 of CESEDA the punishment foreseen in Article L. 622-1 does not apply to the facilitation of unauthorised residence if the assistance did not give rise to any direct or indirect remuneration and was in form of legal advice, catering, accommodation or medical care in order to ensure dignified and decent living conditions for the alien. The same applies to any other form of assistance intended to uphold the dignity and the physical integrity of the afore-mentioned.</p>
	Germany	Yes	<p><b>1.</b> No. The statutory definitions of crimes in the Residence Act do not contain a right of exemption for cases of assistance to illegal entry or smuggling of foreigners if they are carried out for humanitarian reasons.</p> <p><b>2.</b> n/a</p>
	Hungary	Yes	<p><b>1.</b> No. Pursuant to the laws in force (Act C of 2012 on the Criminal Code), any person who provides aid to another person for crossing state borders in violation of the relevant statutory</p>

			<p>provisions is guilty of a felony punishable by imprisonment between one to five years. However, pursuant to the provisions of the General Part of the Criminal Code, the law enforcement authorities (especially the investigating authorities, and at a later stage of the proceeding the independent Hungarian Court) - according to the degree of danger to society - may determine the initiation of the procedure or even the level of penalty.</p> <p>2. N/A.</p>
	Latvia	Yes	<p>1. There is no explicit exclusion from the punishment for facilitation of illegal entry of foreigners, if the assistance is committed for humanitarian reasons, defined in the national legislation. There are general provisions on circumstances which exclude criminal liability determined in the national legal acts.</p> <p>2. The Law on the State Border of the Republic of Latvia Article 10 (6) prescribes the exclusion of punishment in the following case: "During a search and rescue operation of persons the head of this operation is entitled to take a decision regarding the crossing of the State border outside the border crossing points in order to take the rescued persons to a medical treatment institution, if actual threats to the life or health of the persons exist, concurrently informing the State Border Guard regarding the medical treatment institution where the persons have been taken, the number of persons taken and personal data if such is available. The State Border Guard shall organise a border check at the medical treatment institution to which the person has been taken". Article 32 of the Criminal Law determines the exclusion from punishment in case of extreme necessity: "An act of extreme necessity is an act which a person commits to prevent harm, which threatens the interests of the State or the public, the rights of the person or another person, or the person or another person, if in the actual circumstances it has not been possible to prevent the relevant harm by other means and if the harm caused is less than that which was prevented. Extreme necessity excludes criminal liability".</p>
	Lithuania	Yes	<p>1. No. According to the Criminal Code of the Republic of Lithuania, the exclusion of punishment for facilitation, if the assistance was committed only for humanitarian reasons, is not prescribed. However, the Court can release a person from the criminal liability following the common terms</p>

			<p>of the Criminal Code Paragraph VI „Release from Criminal Liability“ (Articles 36, 37, 39, 40). There were no recent cases in practice, when a person was released from the criminal liability for the facilitation which was committed only for humanitarian reasons.</p> <p>2. n/a</p>
	Luxembourg	Yes	<p>1. No. When article 1 of the Facilitation Directive was transposed by the law of 21 December 2006 which amended article 33 of the now abrogated law of 28 March 1972 on entry and stay of foreigners the exception was not included. Also articles 382-4 and 382-5 of the Penal Code which punish smuggling do not foresee this exception.</p> <p>2. N/A.</p>
	Netherlands	Yes	<p>1. Facilitation of illegal stay is punishable only if committed with the intent to profit financially thereof (article 197a, second limb, of the Penal Code). To be sure, facilitation of illegal entry or travel is punishable regardless of the financial objective.</p> <p>2. This is not prescribed in law, leaving room for reasonable interpretation. Providing food and or shelter without (financial) compensation by the migrant would not be prosecuted, as can be construed from our parliamentary history. The necessity of medical assistance is at the discretion and a responsibility of the medical personnel (e.g. art. 47 BIG, Wet op de beroepen in de individuele gezondheidszorg). There is a national scheme to reimburse medical practitioners if the illegal migrant is not insured and is not able to pay for the treatment. Legal advice is available regardless of the legal position of the migrant.</p>
	Poland	Yes	<p>1. Polish legislation does not relate to humanitarian aid prerequisite. It defines only prerequisite of existence of special case when there is no perpetrator's profiting.</p>



			<p>2. Article 264a § 2 of polish penal code: “In exceptional cases, when perpetrator did not profiting, court can apply an extraordinary mitigation of penalty, even renounce from inflicting a punishment”.</p>
	Slovak Republic	Yes	<p>1. No.</p> <p>2. N/A</p>
	Slovenia	Yes	<p>1. Our legislation prescribes only the acts that are aimed at facilitation of irregular migration. Acts described in the AHQ are not among them.</p> <p>2. Please refer to previous answer.</p>
	Spain	Yes	<p>1. 1. Yes, it does. Article 318.bis.1.2º Criminal Code: The facts will not be punishable when the objective pursued by the author is only to provide humanitarian aid to the person in question.</p> <p>2. 2. No, it does not.</p>
	Sweden	Yes	<p>1. No</p> <p>2. NA</p>
	United Kingdom	Yes	<p>1. Yes.</p> <p>2. It does not prescribe specific helping acts which are not punishable, but does prescribe acts in general undertaken by a specific provider. The offence of knowingly and for gain helping an asylum seeker to enter the UK “does not apply to anything done by a person acting on behalf of an organisation which- (a) aims to assist asylum seekers, and (b) does not charge for its services.” More information can be found here: <a href="http://www.legislation.gov.uk/ukpga/1971/77/section/25A">http://www.legislation.gov.uk/ukpga/1971/77/section/25A</a></p>

