



## **Ad-Hoc Query on exemption from sanctions within the context of offence of solidarity**

**Requested by FR EMN NCP on 26<sup>th</sup> September 2012**

**Compilation produced on 20<sup>th</sup> December 2012**

**Responses from Austria, Belgium, Bulgaria, Czech Republic, Estonia, Finland, France, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Slovenia, Spain, Sweden, United Kingdom plus Norway (21 in Total)**

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### **1. Background Information**



The Ministry of Interior would like to gather information on the situation of people who bring a selfless/altruistic support to illegally-staying third-country nationals (TCN), for the sole purpose of offering them decent living conditions. It would be of interest to analyze how each Member State implements the exemption provided in 2 of Article 1 of Council Directive 2002/90/EC of 28 May 2002 defining the facilitation of unauthorized entry, transit and residence. Under this provision, “any Member State may decide not to impose sanctions with regard to the behaviour defined in paragraph 1(a) by applying its national law and practice for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned.”

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1. Do Member States apply the exemption provided in 2 of Article 1 of Council Directive 2002/90/EC?
2. For those Member States applying the exemption from sanctions, does it rely on legislation or national practice?
3. What is the scope of the exemption?
4. Does the exemption contain exceptions?
5. Did Member States have such a scheme/system prior to Directive 2002/90/EC?

**2. Responses**

		<b>Wider Dissemination?</b>	
	<b>Austria</b>	<b>No</b>	This EMN NCP has provided a response to the requesting EMN NCP. However, they have requested that it is not disseminated further.
	<b>Belgium</b>	<b>Yes</b>	<p>1. Chapter IV of the Belgian Aliens Act contains the penalty clauses. Article 77, 1 of the Aliens Act states that those who helps, facilitates or contributed to the illegal border-crossing or illegal residence of a TCN, is punishable with a imprisonment of 8 days to 1 year and with a fine of 1700 to 6000 Euro, or with only one of those penalties. Article 77, 2 however states that the first paragraph is not applicable if the help, contribution or facilitation has been given because of mainly humanitarian grounds.</p> <p>2. The humanitarian clause was added in 1996. The following wording was used: “<i>In case the help to the foreigner is provided on the basis of merely humanitarian considerations, the previous part does not apply.</i>” (Bulletin of Acts, Orders and Decrees 05/10/1996).</p> <p>3. However, it turned out that this formulation still led to legal uncertainty. In April 1997, Ms. Verschaeve, a Belgian woman, was condemned by a court for living together with her partner while being aware of his irregular residence status. The judge stated that the above-mentioned humanitarian clause only applied to charity organizations. Friendship and love relations were, according to the judge, not to be considered “humanitarian considerations”, since the latter should have an “objective and verifiable background”, and should be to the benefit of only one party. Ms Verschaeve was eventually acquitted in appeal.</p> <p>4. It should be noted that the Verschaeve case was not the only case, but was given a lot of publicity and evoked reaction in society. Following this case, discussion began on the genuine interpretation of this article. This led to a new change in the article (Law of 29 April 1999) as follows: “<i>In case the help to the foreigner is provided on mainly humanitarian considerations, the previous paragraph does not apply</i>” (Belgian Official Gazette 26/06/1999). So, deemed essential was the replacement of the term “merely” by the term “mainly</p>



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			5. Generally, one may conclude that helping or assisting people without legal residence is not punishable in Belgium, as far as the help mainly concerns humanitarian considerations. Consequently there is no exhaustive list of exemptions, but everything is assessed on a case-by-case basis.
	<b>Bulgaria</b>	<b>Yes</b>	No. So far the Republic of Bulgaria has not benefited from the exemption provided for in the text of Article 1, Par.2 of Council Directive 2002/90/EC. The facilitation of unauthorized entry, transit and residence is punishable under the Criminal Code. There is a special regulation which is dedicated to the topic in question – Law against human trafficking.
	<b>Czech Republic</b>	<b>No</b>	This EMN NCP has provided a response to the requesting EMN NCP. However, they have requested that it is not disseminated further.
	<b>Estonia</b>	<b>Yes</b>	1. There is no such exemption in Estonian legislation.
	<b>Finland</b>	<b>Yes</b>	<p>1. The arrangement of illegal immigration is regulated in the Criminal Code of Finland (Chapter 17, Section 8):</p> <p>(1) A person who</p> <p>(1) brings or attempts to bring to or transport through Finland a foreigner without a valid passport, other travel documents, a visa or a residence permit,</p> <p>(2) arranges or, as an intermediary, provides transportation for a foreigner referred to in paragraph 1 to Finland or</p> <p>(3) gives to another person a passport, other travel documents, a visa or a residence permit that is false, forged or issued to someone else for use to enter the country, shall be sentenced for arrangement of illegal immigration to a fine or imprisonment for at most two years.</p> <p>(2) An act which, when taking into account in particular the motives of the person committing it 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> <p>2. Subsection 2 existed as such prior to Directive 2002/90/EC and the amendment of it was not considered to be necessary. However, an intergovernmental working group led by the Ministry of Justice is currently reviewing Section 8 and 2 of Article 1 of Council Directive 2002/90/EC has been discussed. The outcome remains to be seen.</p> <p>There is not much case law regarding this matter. The idea, however, is clear: it is not considered to be a crime to provide assistance for humanitarian reasons. In practice it has been considered that assisting i.e. close relatives shall not be punishable.</p>
	<b>France</b>	<b>Yes</b>	<p>1. French law has transposed this exemption.</p> <p>2. In France, the exemption is provided by law (article L. 622-4 of the Code on Entry and Residence of Foreigners and Right of Asylum).</p>





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			<p>3. Under French law, the following persons cannot give rise to criminal prosecution on the basis of unauthorized residence:</p> <p>a) The ascendants or descendants of the TCN, of his/her spouse, brothers and sisters of the TCN or of his/her spouse, unless the spouses are legally separated, have a separate residence or were allowed to reside separately ;</p> <p>b) The spouse of the TCN, unless the spouses are legally separated, were allowed to reside separately or if the community of life has ceased, or the person is openly in marital situation with him/her;</p> <p>c) Any natural or legal person, when the alleged act was, faced with an imminent or current danger, necessary to protect the TCN, unless there is a disproportion between the means employed and the seriousness of the threat or if it has resulted in any direct or indirect counterpart.</p> <p>4. Under French law, cases 1 / and 2 / above mentioned may not apply if the TCN is in a polygamous relationship or if this TCN is the spouse of a polygamous person living in France with the first spouse.</p> <p>5. A first immunity from prosecution regime with regard to family members of the TCN (ascendants, descendants and spouse) was introduced into French law by a Law of July 1996.</p>
	<b>Germany</b>	<b>Yes</b>	<p>1. No, no exemption from sanctions for the smuggling of foreigners for humanitarian reasons in this form has been explicitly regulated. It is only not punishable in accordance with the relevant provisions (sections 96 and 97 of the Residence Act [<i>Aufenthaltsgesetz</i>]) if the smuggler merely facilitates the unauthorised entry of one single person without receiving a pecuniary advantage or the promise of a pecuniary advantage in return and does not repeat the smuggling in any instance. The smuggler may not act for gain or as a member of a gang, carry a weapon and endanger the smuggled person in any way.</p> <p>2. to 4. See answer re 1.</p> <p>5. The provisions listed in the answer re Question 1 applied in a comparable manner under the former Aliens Act (<i>Ausländergesetz</i> – section 92a) and b) even before Directive 2002/90/EC came into force.</p>
	<b>Hungary</b>	<b>Yes</b>	<p>1. Yes, the Hungarian law has transposed this exemption.</p> <p>2. Act of 1978 on Criminal Code</p> <p>3. – 4. Any person who engages in conduct to save his own person or property or the person or property of others from an imminent danger that cannot otherwise be prevented, or acts so in the defence of the public interest shall not be liable for prosecution, provided that the occurrence of the danger is not imputable to him and his act results in lesser harm than that for the prevention of which he made efforts. No punishment shall be imposed upon a person who causes harm of the same or greater extent than the one for the prevention of which he made efforts for he was unable to recognize the magnitude of the harm due to shock or justifiable aggravation. The punishment may be reduced without limitation if the shock or justifiable aggravation deprived the perpetrator of the capacity to recognize the magnitude of harm. The concept of extreme necessity shall not apply to any person whose professional duty includes exposure to danger.</p>




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			<p>The purpose of humanitarian aid to protect the lives and alleviate human suffering in the case of natural disasters, man-induced disasters or crises caused by structural crisis within the following framework: 1. saving and protection of the population, 2. assistance for barrier-free and ensure getting to vulnerable populations.</p> <p>5. Yes</p>
	<b>Italy</b>	<b>Yes</b>	<p>1. In Italy such exemption is provided by Italian law.</p> <p>2. The exemption from sanctions derives from national legislation and, in particular, from art. 12 of Consolidated Immigration Act no. 286/98.</p> <p>3. As envisaged by art. 12, comma 2, relief efforts and humanitarian assistance provided to irregular foreigners in need still present in the territory of the State do not constitute crimes. Moreover, since comma 5 of the same article punishes aiding and abetting of irregular stay to take unfair advantage, those who help an irregular migrant in need and prove to have acted for humanitarian reasons, with non-profit purposes, will not incur penalty. On the contrary, as affirmed by Law 94/2009 (the so-called “Security package”), imprisonment from 6 months to 3 years and the possible confiscation of the property is envisaged towards those offering accommodation upon payment "to draw undue profit" to irregular immigrants without a stay permit at the inception or renewal of the contract.</p> <p>4. No.</p> <p>5. Yes, since 1998.</p>
	<b>Latvia</b>	<b>Yes</b>	<p>1. No, Latvia has not transported into the national legislation 2 of Article 1 of Council Directive 2002/90/EC of 28 May 2002.</p>
	<b>Lithuania</b>	<b>Yes</b>	<p>1. No, there is no <i>expressis verbis</i> exemption in Lithuanian legislation with regard to 2 of Article 1 of Council Directive 2002/90/EC.</p> <p>2. Not applicable</p> <p>3. Not applicable</p> <p>4. Not applicable</p> <p>5. Not applicable</p>
	<b>Luxembourg</b>	<b>Yes</b>	<p>1. No. Luxembourg has not transposed the exemption provided in 2 of Article 1 of Council Directive 2002/90/EC of 28 May 2002 defining the facilitation of unauthorized entry, transit and residence.</p>





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			<p>2. Not applicable</p> <p>3. Not applicable</p> <p>4. Not applicable</p> <p>5. Not applicable</p>
	<b>Netherlands</b>	<b>Yes</b>	<p>1. Yes, by means of the general notions of justification grounds.</p> <p>2. 3. 4. There is no formal legislation concerning "the humanitarian provision". The transposition of the optional exemption of 2 article 1 Directive 2009/20 was skipped during the parliamentary debate implementing the directive.</p> <p>Although the first draft of the transposition law said: In article 1, second limb, of the Guideline it is stated: Any Member State may decide not to impose sanctions with regard to the behaviour defined in paragraph 1(a) by applying its national law and practice for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned. The Dutch government has during the negotiations asked for such a provision. Without such a provision free and merely on humanitarian grounds given aid to TCN's at arrival would, to the letter of the law, be punishable. That's the reason to adopt this provision in the law. The proposed law stated in its explanation that when in a given case the sole reason of the given help to the TCN was of a humanitarian nature prosecution or punishment should be omitted. Humanitarian reasons could arise when clerical or non profit organisations from a religious belief or spiritual point of view solely aim to alleviate the distress of the TCN.</p> <p>However, during parliamentary debate this provision was skipped. The majority of parliament accepted that the exemption wasn't limited enough. From an evidence point of view the proposed text, identical to the text in the Directive, wasn't clear. In order to prevent abuse this limb of the article was thus withdrawn from the text. The existing law could offer enough possibilities to appeal to grounds for justification.</p> <p>5. As the exemption is -still- dependant on general grounds for justification, the system prior to 200/90 EC is identical to the system after the transposition.</p>
	<b>Poland</b>	<b>Yes</b>	Poland doesn't apply the exemption provided in paragraph 2 of article 1 Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence.
	<b>Portugal</b>	<b>Yes</b>	1. In Portugal the exemption is applied


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			<p>2. The exemption is not explicitly stated in the immigration law (article 183 of Law 23/2007). In fact, it is unequivocally understood that in the light of the humanitarian principles of the Portuguese legal framework the act of providing humanitarian aid to persons in those conditions is out of the subjective scope of the legal provision on the classification of the crime of aid to illegal.</p> <p>3. and 4. In abstract terms any person or category of persons are excluded from scope of the legal classification of the crime of aid to illegal immigration. The “exemption” is focused on conducts aimed to provide humanitarian assistance to the person concerned.</p> <p>5. The current system is prior to Directive 2002/90/EC.</p>
	<b>Slovenia</b>	<b>Yes</b>	Exemption provided in 2 of Article 1 of Council Directive 2002/90/EC has not been transposed into national legislation.
	<b>Spain</b>	<b>Yes</b>	Spain does not apply the exemption provided in 2 of Article 1 of Council Directive 2002/90/EC.
	<b>Sweden</b>	<b>Yes</b>	<p>1. Sweden has also transposed this exemption.</p> <p>2. It is provided by law in the Swedish Aliens Act (2005:716) Chapter 20 section 8.</p> <p>3. The law says “Any person who, for financial gain, plans or organises activities designed to enable aliens to travel to Sweden without passports or the permits required for entry shall be sentenced for organisation of human smuggling to imprisonment for not more than two years”. It is the financial gain that is crucial.</p> <p>4. From case to case. There is no list of exemptions.</p> <p>5. No.</p>
	<b>United Kingdom</b>	<b>Yes</b>	<p>1. UK law has applied the exemption</p> <p>2. It is contained in Section 25A of the Immigration Act 1971, as inserted by section 143 of the Nationality, Immigration and Asylum Act 2002</p> <p>3. Under section 25A, a person is exempt from committing an offence of helping an asylum-seeker to enter the United Kingdom if it is done by a person acting on behalf of an organization which aims to assist asylum-seekers and does not charge for its services.</p> <p>4. No</p> <p>5. Section 25A was introduced to enable the United Kingdom to comply with Article 27 of the Schengen Convention, and to assist</p>

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			compliance with European Directive 2002/90/EC which replaced that Article. It commenced on 10 February 2003.
	<b>Norway</b>	<b>Yes</b>	<p>1. Norwegian law has not transposed the exemption provided in 2 of Article 1 of Council Directive 2002/90/EC.</p> <p>5. Under Norwegian law, helping a person to unauthorized residence give rise to criminal prosecution, unless the aim is to help a person seeking asylum (utlendingsloven 108, 4. ledd bokstav b).</p>

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