



Ad-Hoc Query on criminal penalties for illegally entering/staying TCNs update

Requested by NL EMN NCP on 4th April 2013

Compilation produced on 3th June 2013

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

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1. Background Information

The Dutch government has prepared a bill on criminalizing illegal residence. The bill has been sent to parliament on January 7 of this year. On behalf of the parliamentary handling we kindly ask you to inform us about the situation in your country concerning the penalization of illegal entry or residence.

We appreciate your answers by the **2th May 2013**.

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2. Responses¹

		Wider Dissemination?²	
	Austria	No	This EMN NCP has provided a response to the requesting EMN NCP. However, they have requested that it is not disseminated further.
	Belgium	Yes	<p>1a. The relevant Belgian national legislation has as such never been (thoroughly) evaluated, in contrast to the detention and return policy and legislation (“Commission Vermeersch”; “Sum Research”).</p> <p>1b. not applicable</p> <p>2. Although illegal stay and entry is a criminal offence according to the Belgian’s Aliens Act, an illegal residing TCN will in reality never be prosecuted for the mere fact of violation of the residence conditions. Only in combination with other criminal offences (f.i. theft, violence, human trafficking,...), the court(s) will be inclined to rule that immigration (residence) legislation has been violated. Article 75 of the Aliens act stipulates that illegal stay is an offence that is punishable by a fine (up to 200 Euro – to be multiplied by 6 because of the surtax) and/or imprisonment up to three months and up to one year in case of recidivism. According to article 4bis of the Aliens act an administrative fine of 200 Euros (to be multiplied by 6) may be imposed against a foreigner for illegal border crossing.</p>
	Cyprus	Yes	<p>I.a.) The national legislation is evaluated through the practice followed on its implementation where criminal prosecution of an illegally staying TCN has been abolished.</p> <p>According to the Aliens and Migration Law, Chapter 105, article 19 titled Offences and Fines, a person liable for a criminal offence as listed, is subject to imprisonment for a period not exceeding 12 months or for a fine not exceeding 1,000 pounds or to both penalties.</p>

¹ If possible at time of making the request, the Requesting EMN NCP should add their response(s) to the query. Otherwise, this should be done at the time of making the compilation.

² A default "Yes" is given for your response to be circulated further (e.g. to other EMN NCPs and their national network members). A "No" should be added here if you do not wish your response to be disseminated beyond other EMN NCPs. In case of "No" and wider dissemination beyond other EMN NCPs, then for the Compilation for Wider Dissemination the response should be removed and the following statement should be added in the relevant response box: "This EMN NCP has provided a response to the requesting EMN NCP. However, they have requested that it is not disseminated further."

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			<p>Moreover, Article 19 provides that a person who intentionally assists a TCN to illegally enter the Republic is liable of a criminal offence subject to imprisonment not exceeding 8 years or a fine not exceeding 20,000 pounds or to both penalties.</p> <p>1.b.) The transposition of the Return Directive and also the Decisions of the ECJ in related cases, lead to the abolition of criminal prosecution for illegal migrants.</p> <p>2). Detention of illegally staying migrants is a measure of last resort, used only in cases where illegal migrants fail to abide with the decisions for voluntary return and where there is a high risk of disappearance.</p>
	Estonia	Yes	<p>1.a. No 1b. not applicable 2.a. Yes. According to Estonian Penal Code § 260 an alien who stays in Estonia without a legal basis at least twice within a year shall be punished by a pecuniary punishment or up to one year of imprisonment. The prosecution procedure is regulated by Code of Criminal Procedure. 2.b. You may find the Code of Criminal Procedure here.</p>
	Finland	Yes	<p>1. a and b: No such evaluation has been made</p> <p>2. a and b: Criminal sanctions concerning illegal entry/stay in Finland are stated in Section 185 of Aliens Act.</p> <p>Aliens Act Penal provisions Section 185 Violation of the Aliens Act (1) An alien who:</p> <p>1) deliberately resides in the country without the required travel document, visa or residence permit, or through negligence fails to comply with the obligation to register his or her residence or apply for a residence card or permanent residence card;</p> <p>2) deliberately, without right to gainful employment is gainfully employed or pursues a trade;</p> <p>3) deliberately fails to comply with the obligation to report under section 118, another obligation under section 119, or a request under section 130 to appear before the authorities to submit information on his or her residence; or</p> <p>4) deliberately enters the country despite a prohibition of entry on grounds of public order, security or health shall be sentenced to a fine for a violation of the Aliens Act. (323/2009)</p>

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			<p>(2) A person who deliberately or through gross negligence fails to comply with the obligation under section 174 or 175 shall also be sentenced for violation of the Aliens Act.</p> <p>(3) A person who deliberately or through gross negligence fails to comply with the obligation under section 174 or 175 of this Act or section 19 or 20 of the Act on the Processing of Personal Data by the Border Guard is also sentenced for violation of the Aliens Act. (581/2005)</p> <p>Violation of Aliens Act is sanctioned by fine. Thus in most (clear and undisputed) cases violations can be dealt with in summary criminal process i.e. police officer fines the offender on the spot. The full sum of the fine varies depending on several factors, such as the net income of the offender and the length of the illegal stay.</p> <p>72 % of all violations of Aliens Act in 2012 were handled in summary criminal process.</p> <p>In minor cases Violation of Aliens Act can also be handled with written or oral notice with no actual penalty. The offender can always have his/hers case tried in court if he/she so chooses.</p>
	France	Yes	<p>1a. No, French national legislation concerning criminal penalties for third-country nationals who have illegally entered or who are illegally staying in the territory of France has never been evaluated.</p> <p>1b. not applicable</p> <p>2. a. and b. Since the entry into force of the law of 31 December 2012 , irregular stay of third-country nationals is no longer considered as a criminal offense punishable by law. However, third-country nationals can be subject to criminal penalties in the case of:</p> <ul style="list-style-type: none"> - Irregular entry into French territory (maximum penalties: one-year imprisonment, a € 3,750 fine, and three-year re-entry ban into French territory); - Irregular stay on French territory without a legitimate reason, after they have been subject to a measure of detention or house arrest which ended without the execution of a removal order (maximum penalties: one-year imprisonment, a € 3,750 fine, and one-year re-entry ban into French territory); - not complying with a refusal of entry or a removal order or returning on French territory after they have been subject to a re-entry ban into French territory (maximum penalties: three-year imprisonment and 10-year re-entry ban into French territory). <p>The decision to prosecute is left to the discretion of the public prosecutor.</p> <p>Prosecutions for irregular entry or stay in the territory are carried out according to the common law procedure, in accordance with the Code of Criminal Procedure. Third-country nationals who irregularly enter the territory may be prosecuted only if they are caught in the act.</p>
	Germany	Yes	<p>1.a. No. b. N/A</p> <p>2. a. and b. The provisions as to punishments for criminal offences and fines concerning the residence law on illegal entry and illegal residence are enforced according to the general procedure and procedural rules for the prosecution of crime and the punishment of</p>

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			offences.
	Greece	Yes	<p>1) Yes. According to article 83 of Law 3386/05, a third country national leaving or entering the Hellenic territory without the legal formalities shall be punished by imprisonment for at least three months and by a fine of at least 1.500 euro. Third country national who tries to leave the country in an illegal way and is wanted by the judicial or police authorities or has tax liability or obligations of any kind whatsoever to the state or he is repeat infringer, shall be punished by imprisonment for at least six months and by a fine of at least 3000.</p> <p>If a third country national enters or exits the Hellenic territory without legal formalities, the public prosecutor with the approval of the public prosecutor at the court of appeal, to whom he shall report without delay, may refrain from criminal proceedings in this action, and notify immediately of his decision the Commander of the police or the port authority that found illegal entry or exit so that the third country national be immediately returned, by his decision, to the country of origin or provenance. If the immediate return of the third country national can not be made possible, the Commander of the police or the port authority shall refer the third country national to the administrative authority responsible for expulsion, in accordance with article 76 of this law which provides the following.</p> <p>2) The administrative expulsion of a foreigner is permitted if:</p> <p>i) a. he has been sentenced by a final judgment to imprisonment of one year, or regardless of the sentence, for crimes regarding the offence of the regime, betray of the Court, trading and trafficking of drugs, legalization of proceeds from illegal activities, international economic crimes, crimes through the use of high technology, currency crimes, resistance, kidnapping of minors, crimes against sexual freedom and promotion of prostitution, theft fraud, economic crimes, blackmail, usury against the law on mediators, forgery, false certification, libeling, smuggling, crimes regarding guns, antiquities, promotion of illegal immigrants in the Country or facilitation of their transfers or promotion, acquisition of accommodation for them for their dissimulation, since his expulsion has not been ordered by any competent court.</p> <p>b. He has violated the provisions of the present law</p> <p>c. His presence in the Hellenic Territory is dangerous for public order and security of the country.</p> <p>d. His presence in the Hellenic Territory is dangerous for public health and he does not conform to the measures determined by medical authorities for the protection of public health, even though he has received the relevant information</p>
	Hungary	Yes	<p>1 a and b. Yes, it has. As a result of this, mainly due to non-conformity with the Return Directive as established by the Commission, the new Hungarian Criminal Code (Act No. C of 2012) that entered into force on 1 January 2013, does not contain the provision criminalizing the violation of an entry ban by a third-country national anymore.</p> <p>2) Given that the new Criminal Code replaced the old one in its entirety, it also repealed former Article 214 of the old Criminal Code penalizing the violation of an entry ban by a previously expelled third-country national. Therefore, as of now, Hungarian law is not criminalising illegal stay in the country.</p>
	Italy	Yes	<p>1a. No evaluation has been undertaken so far.</p> <p>1b. Not applicable</p> <p>2 a and b. A foreigner recognized being illegal on the territory is subject to expulsion. There are various cases in which an expulsion may be ordered: the administrative expulsion, ordered by the Ministry of the Interior for reasons of public order and national security; the administrative expulsion, ordered by the Prefect; the expulsion ordered by the court as a security measure against a foreign citizen convicted of certain crimes provided for in the Code of Penal Procedure, if he is found to be socially dangerous; the expulsion as an alternative sanction to detention, ordered by the judge in case the foreign citizen has been sentenced either to imprisonment for more than two years, or to restraining order for specific crimes against the State or for the crime of illegal entry and stay.</p>

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			<p>This crime was introduced in August 2009 by Law no. 94 of July 15, 2009, also known as the “security package”. As provided in Article 6(3) of the Consolidated Immigration Act, if a foreigner, at the request of law enforcement officers, fails without reasonable justification to show documents certifying his/her stay on Italian territory, he/she can be punished with imprisonment for up to one year and fined up to 2,000 Euros. Additionally, Article 10bis provides that entry or stay in contravention to the Consolidated Immigration Act shall be punished with a fine between 5,000 and 10,000 Euros.</p> <p>In line with Article 14(1) of the Consolidated Immigration Act, when immediate expulsion or refusal of entry is not possible (need to ascertain alien’s identity or nationality, acquire travel documents, or arrange a suitable means of transport), a person may be detained at the nearest CIE (Identification and Expulsion Centre). Upon arrest of a non-citizen who appears to have violated immigration law, the police are to notify the competent magistrate (<i>giudice di pace</i>) within 48 hours of the apprehension. Following a “validation hearing” in the presence of a lawyer, the magistrate shall issue a detention order within 48 hours. Each subsequent extension of detention has to be endorsed by the magistrate (article 14(3)-(5) of the Consolidated Immigration Act).</p> <p>So-called alternatives to detention were introduced in the 2011 amendment to the Consolidated Immigration Act, transposing the EU Return Directive. Article 14(1bis) provides for three kinds of non-custodial measures: a) relinquishing passport or other equivalent document; b) an obligation to live in a previously identified location; and/or c) reporting obligations. However, these measures may be applied only with respect to migrants who have their passport or other equivalent document.</p>
	Latvia	Yes	<p>1.a. Latvia’s national legislation concerning criminal penalties for third-country nationals who have illegally entered or who are illegally staying in the territory hasn’t been evaluated. However, there have been made amendments in the Criminal law, stipulating criminal penalties for intentional illegal border crossing from the first time of infraction. Previously criminal penalty was applied if person intentionally illegally crossed State border and commission thereof was repeated within one year.</p> <p>1.b. –</p> <p>2.a. In accordance with Criminal law, there are criminal penalties for third-country nationals who have intentionally illegally crossed State border. When third country national is recognized being illegal on the territory, a person may be prosecuted only if there are sufficient evidences that he has intentionally illegally crossed State border. Prosecution is made under ordinary procedure accordance with Criminal law.</p> <p>2.b -</p>
	Lithuania	No	<p>1a. There is no available information about any evaluation.</p> <p>1b. not applicable</p> <p>2a and b. .In Lithuania illegal entry is considered as a criminal offence (fine, arrest or imprisonment up to 2 years can be imposed). Other migration related offenses (Violation of legal regime rules of the state border; Negligence border crossing; Violation of the local border traffic regime; Violation of rules regulating foreigners' entry to Republic of Lithuania, stay, residence or transit) are considered as administrative and are covered by the Code of Administrative offences.</p> <p>An alien can be prosecuted just for illegal entry, while for other migration related offenses administrative procedures are started.</p> <p>Prosecution procedure is established in Criminal Procedure Code also there are Lithuanian Prosecutor General Recommendations for the pre-trial performance.</p>
	Luxembourg	Yes	<p>1.a. No.</p> <p>1.b. N/A</p>

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			<p>2. a and b. First of all, the Ministry of Immigration takes a return decision and can order at the same time of the return decision of the irregular migrant an entry ban of five years (article 112 of the modified Law of 29 August 2008).</p> <p>The modified Law of 29 August 2008 punishes the persons that have entered or stayed illegally on the territory or that has entered legally but has overstayed. They can be punished with 8 days to 1 year imprisonment and a fine of 251 to 1250 Euros. These fines can be imposed simultaneously or only one of them.</p> <p>These sanctions will be imposed by the judicial courts.</p> <p>In Luxembourg once the Public prosecutor office is informed of the violation, the procedure will begin and it is the instruction judge to determine if there are enough elements to judge the third country national.</p> <p>In case that there is an imprisonment judgment, the expulsion can be carried out after the imprisonment judgment has been served.</p>
	Netherlands	Yes	<p>1a No</p> <p>2. not applicable</p>
	Portugal	Yes	<p>1a. No</p> <p>1b. not applicable.</p> <p>2a. not applicable</p> <p>2b. not applicable.</p>
	Slovak Republic	Yes	<p>1a. No.</p> <p>1b. NA</p> <p>2a. No criminal penalties are set in the Slovak legislation for illegal stay or illegal entry. Only administrative expulsion from the territory of the SR and the entry ban (to the SR and thus to the whole Schengen area) is being applied in these cases. The criminal penalties may be set only in cases these foreigners do not respect the provisions of the decision on administrative expulsion and entry ban or in cases they are in a possession of false or altered documentation.</p> <p>2b. NA</p>
	Spain	Yes	<p>1. Not applicable. The illegal stay and the illegal border-crossing are not criminal offences in Spain.</p> <p>2. Not applicable.</p>
	Sweden	Yes	<p>1. No evaluation made.</p> <p>2. No, it's quite uncommon with prosecution.</p>
	United Kingdom	Yes	<p>1a. no</p> <p>1b. not applicable</p> <p>2a. and b. It is policy, in most cases, to pursue removal of persons who illegally enter or stay in the UK, rather than to seek prosecution and the criminal penalty. The criminal penalty may be sought where a person cannot be removed, or in addition to other criminal offences. Guidance and instructions on the practical use of the removal powers and criminal powers can be found here:</p>

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			http://www.ind.homeoffice.gov.uk/policyandlaw/guidance/enforcement/
	Norway	Yes	<p>1a. To the knowledge of the National Police Immigration Service (NPIS) of Norway, no recent evaluations have been made of the criminal penalties for third-country nationals illegally entering or staying in Norway.</p> <p>1b. not applicable</p> <p>2. a Yes, Norwegian national legislation does provide for criminal penalties for third-country nationals who have illegally entered or who are illegally staying in Norway.</p> <p>2. b. According to the Norwegian immigration act of 2008, paragraph. 108 second clause, letter a, violation of several provisions of the immigration act are punishable with a fine or with prison up to six months:</p> <ul style="list-style-type: none"> - illegal entry when an entry ban has been imposed as a part of an expulsion decision, or when entry is refused according to fundamental national interests (violation of the Norwegian immigration act §§ 7, 71 or 124(1). - overstay of the Schengen-visa/ visa-free period of three months (violation of the Norwegian immigration act § 9(1) and (4) - border crossing on other places than official border crossings designated by the Ministry of Justice and emergency services (violation of the Norwegian immigration act § 14 (1) and (2), - failure to report with the police or border control when entering/ exiting Schengen-external borders (ibid.) - when a foreign passenger or blind passenger of a boat or aircraft enters Norway without permission from the police (violation of the Norwegian immigration act § 16 (1) and (3), - when a third country national works or stays in Norway without necessary permission (violation of the Norwegian immigration act § 55), - breach of the duty to leave the country after an application for residence permit has been refused (violation of the Norwegian immigration act § 90 (6), - and breach of the duty to report or to stay at a designated location in situations where the police has made a decision about this because the person's ID is unclear, or because there is a risk that the person will abscond (violation of the Norwegian immigration act § 105 (1). <p>There are exemptions for cases where the third country national who has entered the country illegally qualifies for asylum/ international protection according to the Norwegian immigration act § 28.</p> <p>Please note that for many of the same violations of the Norwegian immigration act, the third country national may also receive an expulsion decision according to the act's § 66, followed by registration in the Schengen information system. In some instances, the Norwegian authorities choose this (administrative) reaction instead of penalizing the third-country national, followed by speedy deportation, in order to cut costs connected with penal cases and prison sentences.</p> <p>The Norwegian immigration act is supplemented with the Norwegian immigration regulation, and together with decisions by the Supreme Court they provide the complete framework on how the criminal legislation on illegal entry and stay is being enforced.</p>
