Ad-Hoc Query on Existing rules on deprivation of liberty of third-country nationals suspected of staying irregularly in a Member State

Requested by COM on 03rd July 2015

Reply requested by 31st July 2015

Compilation produced on 14th September 2015

Responses from Austria, Belgium, Croatia, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, United Kingdom plus Norway (23 in Total)

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1. Background Information

The effective return of irregularly-staying third-country nationals would be undermined if it were impossible for Member States to prevent, by deprivation of liberty such as police custody, that a person suspected of staying illegally absconds before his/her situation has been clarified. A number of Member
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States seem to provide for this possibility, others do not, or only in certain circumstances. The Commission does not dispose of an exhaustive overview, since the studies it has carried out in the last years did not specifically address the rules on initial apprehension and arrest by law-enforcement authorities under national legislation. This EMN ad-hoc query aims at providing for a clear factual picture of relevant national rules.

Relevant Union law and ECJ case-law: Recital 17 of the Return Directive clarifies that the initial apprehension phase of suspected irregular migrants remains covered by national law: "... Without prejudice to the initial apprehension by law-enforcement authorities, regulated by national legislation, detention should, as a rule, take place in specialised detention facilities." In its judgement in case C-329/11 Achughbabian, the ECJ provided a clear steer related to the nature, objective and justification of this initial custody period covered by national law:

29 Since the common standards and procedures established by Directive 2008/115 concern only the adoption of return decisions and the implementation of those decisions, it should also be pointed out that that directive does not preclude a third-country national being placed in detention with a view to determining whether or not his stay is lawful.

30 That finding is corroborated by recital 17 of that directive, from which it is apparent that the conditions for the initial arrest of third-country nationals suspected of staying in a Member State illegally remain governed by national law. Moreover, as the French Government has observed, the objective of Directive 2008/115, namely the effective return of illegally-staying third-country nationals, would be undermined if it were impossible for Member States, by deprivation of liberty such as police custody, to prevent a person suspected of staying illegally from fleeing before his situation has even been able to be clarified.

31 It should be held, in that regard, that the competent authorities must have a brief but reasonable time to identify the person under constraint and to research the information enabling it to be determined whether that person is an illegally-staying third-country national. Determination of the name and nationality may prove difficult where the person concerned does not cooperate. Verification of the existence of an illegal stay may likewise prove complicated, particularly where the person concerned invokes a status of asylum seeker or refugee. That being so, the competent authorities are required, in order to prevent the objective of Directive 2008/115, as stated in the paragraph above, from being undermined, to act with diligence and take a position without delay on the legality or otherwise of the stay of the person concerned. Once it has been established that the stay is illegal, the said authorities must, pursuant to Article 6(1) of the said directive and without prejudice to the exceptions laid down by the latter, adopt a return decision.

Clarifying remarks:
- This info request only concerns the initial deprivation of liberty of suspected irregular migrants under national law until a further formal decision (e.g. imposition of detention under the Return Directive or launch of an asylum procedure) is taken.
- This info request does not concern detention in accordance with the Return Directive or in accordance with the asylum acquis.
- The term "deprivation of liberty" is broad: Please refer, in your reply, to any measures your legal order allows you to impose during an initial phase of identification, in order to avoid that the suspected irregular migrant absconds or prevents identification, notwithstanding how these measures are called under nation law (such measures may be called: arrest; custody; detention; use of immediate police coercion; confinement).
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We would like to ask the following questions:

1. Please provide a brief summary of your national legislation related to initial deprivation of liberty of third-country nationals suspected of staying irregularly.

2. Please report on the actual national practice and specify in how many cases deprivation of liberty of third-country nationals suspected of staying irregularly is applied.

We would very much appreciate your responses by 31st July 2015.

2. Responses

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<tr>
<th>Wider Dissemination?</th>
<th>Austria</th>
<th>Yes</th>
</tr>
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1. An arrest is the infringement of the fundamental right depriving the personal liberty, custody is the maintenance of the thereby created state. According to settled case-law of the Constitutional Court, it is then an arrest if official bodies in the course of an official act by the threat or use of physical coercion in the first place, either prevent generally personal changes of location or restrict them to certain localities or areas limited on all sides, which must not be left. Pursuant to Art.39 Aliens Police Act, an arrest by public security service officers and custody shall be admissible only if the alien stays unlawfully in the federal territory, whereby a distinction has to be made between the terms of “lawful entry”, “lawful stay” and “lawful departure”. The arrest in the case of not lawful departure shall - without prejudice to any administrative responsibility – not be carried out if it is ensured that the person concerned will leave the federal territory via an external border within the meaning of Art. 2 para 5 Aliens Police Act (via an airport). The arrest and custody pursuant to Art. 39 Aliens Police Act therefore always serves to bring him/her before the police administration of the federal province and a task to be undertaken by this police administration (e.g. forcible return). The technical supervision regarding the execution of chapter 5 of the Aliens Police Act (inter alia Art.39) is organisationally the responsibility of the specialist department within the Federal Ministry of the Interior.

Art. 39 Aliens Police Act – Arrest and custody

(1) Public security service officers shall be authorised to arrest and detain an alien for up to 24 hours in order to bring him before the police administration of the federal province as an essential procedural guarantee if:
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<tbody>
<tr>
<td>1.</td>
<td>he is caught in the act of committing an administrative infraction as referred to in article 120 (unlawful entry and unlawful stay) or</td>
</tr>
<tr>
<td>2.</td>
<td>he fails to comply with his obligation under article 32, para 1 Aliens Police Act (obligations regarding the proof of residence permit)</td>
</tr>
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</table>

**Note:** The arrest aims at ensuring the indispensable presence for the procedure of the person concerned at the authority, and corresponds solely with the administrative infractions of Art. 120. The arrest of a minor therefore is therefore not possible pursuant to subpara 1.

(2) Public security service officers shall be authorised to arrest and detain for up to 48 hours an alien who entered the federal territory by virtue of an admission declaration (Art. 19).

**Note to Art. 19:** Such a declaration shall be issued at the request of a competent authority of another state for any alien who is subject to compulsory transfer from the territory of that state to the federal territory and whom the Republic of Austria is required to admit by virtue of on an intergovernmental agreement or an EU agreement or by international practice.

(3) Public security service officers shall be authorized to arrest and detain an alien for up to 24 hours for the purpose of bringing him before the police administration of the federal province if he:

1. unlawfully entered the federal territory and is discovered within seven days;
2. had to be taken back by the Republic of Austria under a readmission agreement within seven days following his entry into the federal territory or
3. is discovered within seven days from when his residence (whether exempt from or subject to the visa requirement) in the federal territory ceases to be lawful or
4. in the case of his unlawful residence in the federal territory, he is discovered in the process of leaving the country.

**Note:** The arrest serves the informal forcible return pursuant to Art.45 Aliens Police Act.

(4) In the cases referred to in para 1 or 3 above, no arrest shall take place if it is guaranteed that the alien will leave the federal territory via an external border without delay.

(5) The competent police administration of the federal province shall be informed of the arrest without undue delay and in the cases referred to in para 3 it shall be admissible to detain an alien for up to 48 hours if so ordered by the police administration of the federal province in order to guarantee his forcible return.

(5a) If forcible return pursuant to Art. 45 Aliens Police Act cannot be completed during detention pursuant to para 5 (up to 48 hours), for reasons not attributable to the police administration of the federal province, detention for a maximum period of 120 hours shall be admissible only if so ordered by the police administration of the federal province by summary decision pursuant to Art. 57 of the General Administrative Procedure Act to guarantee the alien’s forcible return.

**Note:** This is a deprivation of liberty to guarantee the forcible return and is no detention pending removal, criminal imprisonment or coercive detention. The ordering of detention is admissible only if the police administration of the federal
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<tr>
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<th>Answer</th>
<th>Notes</th>
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<tr>
<td>Belgium</td>
<td>Yes</td>
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1. The Law of 5 August 1992 on the Police Force stipulates that the police services ensure compliance with the legal provisions regarding the entry, stay, settlement and removal of foreigners (art. 21). Within the limits of their competences, police services can carry out identity checks (art. 34 §3) and apprehend foreigners who do not carry the identity documents or the documents required by the regulations on entry, stay, settlement and removal of foreigners, and take against them the measures prescribed by

province is not responsible for the fact that the alien could not be forcibly returned within 48 hours. This is for instance the case when the Member State which was requested to admit the alien, does not approve an admission within this time period. The authorities are in the cases of para 5a obligated to take into account the constitutional requirement of proportionality to a resulting individual weighing up of the public interest in securing the procedure against the protection of the personal liberty of the person concerned. If it is fruitless from the outset that the forcible return will happen within 120 hours, the order shall not take place due to the principle of proportionality.

If the impossibility arises only after the order, the detention is then to end immediately. The alien can fight the arrest and custody pursuant to Art.39 para 5a with an appeal to the responsible provincial administrative court pursuant to Art 82 Aliens Police Act.

(6) Aliens in regard to whom a handover warrant has been issued for the purpose of transit (Art. 45b para 3b Aliens Police Act) shall, following their entry, be taken into custody by public security service officers; custody shall be admissible for up to 72 hours. If the transit operation cannot be completed during that time, an additional period of deprivation of liberty of up to 48 hours shall be admissible only if so ordered by the police administration of the federal province as a measure to guarantee the transit.

The legislator has not foreseen any lenient measures in or to Art. 39 Aliens Police Act and therefore custody must always be ordered in case of affirmation that securing is needed.

In Art. 40 Federal Office for Immigration and Asylum Procedures Act those facts are defined, where an arrest can take place for the Federal Office for Immigration and Asylum. If the reason for arrest changes, e.g. arrest in order to forcibly return pursuant to Art.39 Aliens Police Act and then application for asylum during an unlawful stay and arrest pursuant to the Federal Office for Immigration and Asylum Procedures Act, the responsible authorities have to be informed immediately (transfer of responsibility to the Federal Office for Immigration and Asylum – possibly further measures under asylum law restricting liberty with territorial restriction during the asylum procedure or measures under aliens police law restricting liberty pursuant to Art. 76 Aliens Police Act – detention pending removal or Art. 77 Aliens Police Act – lenient measure by the Federal Office for Immigration and Asylum).

2. N.S

Source: Federal Ministry of the Interior
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law or by the relevant authority (art. 21). As specified in article 74/7 of the Law of 15 December 1980 on entry, stay, settlement and removal of foreign nationals, police services can submit the foreigner to an administrative arrest pending a decision by the Minister or his/her delegate. The duration of this deprivation of liberty cannot exceed 24 hours.

The administrative police officer, who makes the administrative arrest, informs the competent Officer of the Administrative Police as soon as possible. The Officer of the Administrative Police, who carries out or maintains the administrative arrest, registers the arrest and refers the matter as soon as possible to the specifically competent administrative police authority (art. 33 of the Law of 5 August 1992 on the police force), that is to say the Immigration Office in case of arrest of foreigners.

The deprivation of liberty is regulated by the Law of 5 August 1992 on the police force, which stipulates that a person under an administrative arrest:
- has the right to be informed about the deprivation of liberty; the reasons on which it is based; the maximum duration of this deprivation of liberty; the material procedure of the confinement; the possible use of coercive measures. The rights linked to the deprivation of liberty are notified to the person under administrative arrest orally or in writing, in a language that he/she understands, at the moment when the Officer of the Administrative Police carries out or confirms this deprivation of liberty (art.33ter)
- can ask for a person of trust to be notified (art. 33quater)
- has the right to medical assistance (art. 33quinquies)
- has the right, during the deprivation of liberty, to receive sufficient quantities of drinking water, to use adequate lavatories, and – depending on the moment – has the right to a meal (art. 33sexies).

2. The police have to send an administrative report to the Immigration Office for every foreign person apprehended on the Belgian territory or at the international border. This report is in a fixed format (see model in annex of circular letter of 26.09.2008 on the multidisciplinary approach of victims of human trafficking / aggravated forms of human smuggling) and contains information about the (supposed) identity of the person, the circumstances, date and hour of arrest, PV number, if the person is known in the national or SIS databases, family in Belgium, address in Belgium, documents he/she is carrying (as well as copies of these documents) and contact details of the arresting officers. This report can be sent by fax, e-mail or via a closed network (RAVIS/TARAP – more and more police branches are linked to this platform, which gives the opportunity to collect the data electronically and immediately create a new file if necessary or link up with an existing file at the Immigration Office). The Immigration Office, who has staff dealing with these reports 24/7, will respond as soon as possible. It has to respond within 12 hours of the arrest if the person is clearly identified (by documentation); if not there is a 24 hour responding time. However, the Immigration Office tries to answer within a limited time after having received the administrative reports, since it is important for everyone (as well the foreigner as all concerned services) that an answer is given quickly.

The Immigration Office will send a decision by fax, mail or through the platform RAVIS/TARAP, which can be:
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- person can be released (for the Immigration Office), because of legal stay, pending procedures, recent return decision (with still valid delay), … - if border case: the person may enter, because entry conditions are fulfilled, …
- person will receive a confirmation of the previous return decision (which could be accompanied by an entry ban, if no entry ban has been given previously)
- person will receive a return decision (“order to leave the country” – annex 13 of the royal decree of 08.10.1981 on the access of the territory, the stay on the territory, the establishment on the territory and the removal of the territory), which may be accompanied by an entry ban + he / she will receive information on the possibilities of (voluntary) return in a language he /she understands – if border case: the person will receive a refusal of entry decision (annex 11 of the royal decree of 08.10.1981)
- the return decision / refusal of entry decision may be including a detention decision in order to enforce the return of the foreigner \( \Rightarrow \) we then talk about a removal decision; if the person is apprehended on the Belgian territory and has not yet received an entry ban, he / she normally will receive an entry ban as well

Statistics: these statistics show the number of received administrative reports of police forces on the Belgian territory (these do not include the statistics of the border units, since the statistics at the border only reflect on the number of negative decisions). All these persons were in police custody pending the decision of the Immigration Office.

<table>
<thead>
<tr>
<th>Year</th>
<th>All nationalities</th>
<th>Released*</th>
<th>Order to leave the country</th>
<th>Detention (person does not have identity documents)</th>
<th>Detention (person has identity documents)</th>
<th>TOTAL</th>
</tr>
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<tbody>
<tr>
<td>2014</td>
<td></td>
<td>8740</td>
<td>13034</td>
<td>1880</td>
<td>1127</td>
<td>24781</td>
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<table>
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<tr>
<th>Year</th>
<th>All nationalities</th>
<th>Released*</th>
<th>Order to leave the country</th>
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<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>2015 (30/06)</td>
<td></td>
<td>3868</td>
<td>5526</td>
<td>875</td>
<td>575</td>
<td>10844</td>
</tr>
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</table>

*As explained above, an undetermined number of persons in this category are staying irregularly in Belgium (for ex., those for whom a return decision has recently been issued).

Croatia | Yes | 1. Brief summary of national legislation

Conditions for restricting the freedom of movement of migrants have been prescribed in the:
- Foreigners’ Act (Official Gazette OG No. 130/11, 74/13) Art. 100, Art. 123-126;
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- Ordinance on the Treatment of Foreigners (OG No. 14/2013) Art. 42;
- Rules of Stay in the Reception Centre for Foreigners (OG No. 66/2013);
- Act on the Protection of Population against Infectious Diseases (OG No. 79/07, 113/08, 43/09 and 22/14);
- Act on Compulsory Health Insurance and Health Protection of Foreigners in the Republic of Croatia (OG 80/2013);

A foreigner who is being accommodated in the Centre must have a decision on his/her accommodation in the Centre, which is being adopted by a competent Police Administration or a Police Station.

A decision on extending the accommodation shall be adopted by the Centre.

An appeal shall not be permissible against the decision on the accommodation in the Centre, however an administrative dispute may be initiated. The Administrative Court shall decide about a complaint lodged against the decision after an oral hearing and within 15 days from the delivery of the case file. The complaint shall not postpone the enforcement of the decision.

The Centre shall deliver to the Administrative Court the case file on accommodation of a foreigner in the Centre at latest 10 days before the expiration of three months of the day when a foreigner was accommodated in the Centre. The Administrative Court shall, within 10 days from the delivery of the case file, decide whether a foreigner is to be released from the Centre.

The Centre shall, immediately after the adoption of the decision on extending the accommodation, deliver the case files referring to the extension of accommodation to the Administrative Court. The Administrative Court shall adopt a decision either annulling or confirming the decision extending the accommodation in the Centre, after an oral hearing and within 15 days of the delivery of the case file.

2. Report on the actual national practice

Pursuant to Article 125 of the Foreigners’ Act, a foreigner shall have his freedom of movement restricted by accommodation in the Centre if deportation cannot be carried out immediately, and if:

1. he failed to leave the EEA within the deadline set by a decision on return;
2. the deadline for return was not set;
3. there is a reasonable doubt that a foreigner is not a minor;
4. his identity should be established.

A foreigner will not be placed in the Centre if it may be reasonably expected that the same purpose may be attained with the application of the obligations referred to in Article 136, including:

1. depositing travel documents, travel papers and travel tickets;
2. depositing certain funds;
3. prohibiting leaving a particular address of accommodation;
4. reporting to a Police Station at a particular time.

During the course of 2014, freedom of movement was restricted in the Reception Centre for Foreigners for a total of 421 foreigners, while the number stood at 117 foreigners during the period from 1 January to 30 June 2015.
<table>
<thead>
<tr>
<th>Country</th>
<th>Yes</th>
<th>1. Please provide a brief summary of your national legislation related to initial deprivation of liberty of third-country nationals suspected of staying irregularly.</th>
</tr>
</thead>
</table>
| Czech Republic | Yes | - Police Act No 273/2008 Coll. enables to deprive the liberty of third-country national in the case of:  
  - act of third-country national resulting in termination of the staying in the Czech Republic or initiation of the removal procedure,  
  - the procedure on removal has been initiated and there is a reason to detain a third-country national according to return directive or Dublin regulation,  
  - an enforceable decision on removal in the case of third-country national or  
  - reasons to believe that third-country national has entered or resided on the territory of the Czech Republic irregularly.  
  The time limit for deprivation of liberty under this regime is 48 hours maximum. |
| Estonia        | Yes | 1. Please provide a brief summary of your national legislation related to initial deprivation of liberty of third-country nationals suspected of staying irregularly.  
  In Estonia the Obligation to Leave and Prohibition on Entry Act regulates the apprehension of irregularly staying third-country nationals. Article 15 (3) of that Act stipulates that Police and Border Guard Board or the Security Police can detain a third-country national without a court order for 48 hours, when:  
  - there is a risk of absconding;  
  - person, who is staying irregularly is not cooperating with the authorities;  
  - third-country national does not have necessary documents for return or receiving the documents from transit or receiving country delays.  
  Risk of absconding is defined in the same Act and it applies in the following cases:  
  1) the third-country national has not left Estonia or a member state of the Schengen convention after the term has passed for voluntary compliance with the obligation to leave imposed by return decision;  
  2) the third-country national has submitted false information or falsified documents upon application for the legal basis for the stay in Estonia or the extension thereof, the Estonian citizenship, international protection or identity document;  
  3) there is a reasoned doubt in the identity or citizenship of the third-country national;  
  4) the third-country national has repeatedly committed intentional criminal offences or has committed a criminal offence for which he or she has been sentenced to imprisonment; |
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<tr>
<th>Country</th>
<th>Answer</th>
<th>Response</th>
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<tbody>
<tr>
<td>Finland</td>
<td>Yes</td>
<td>1. In Finnish legislation, there are no separate grounds for initial apprehension of third-country nationals suspected of staying in Finland illegally. A third country-national suspected of staying in Finland illegally may be ordered to immigration detention. According to Aliens Act (301/2004), Section 117a, an interim measure (or ‘preventive measure’) may be imposed on an alien, if it is necessary either for 1) establishing that he or she meets the requirements for entry into or stay in the country; or 2) preparing or ensuring the enforcement of a decision on removing the alien from the country, or for otherwise supervising that the alien leaves the country. The interim measure can ordered by the authorities, who are preparing the matter referred to in point 1. This means that the law-enforcement authorities, for example the police establishing whether an alien meets the requirements for entry or stay in the country, can order the interim measure. Interim measures include a variety of measures, such as obligation to report to the authorities, obligation to surrender a passport or a travel document, or release on bail (Aliens Act, Sections 118-120). According to Aliens Act, Section 121, if other interim measures are not sufficient, an alien can be detained, if one of the following conditions is fulfilled: 1) there are reasonable grounds to believe that the alien will prevent or hinder the issue of a decision concerning him or the enforcement of a decision on removing him/her from the country by hiding, fleeing or some other way; 2) holding an alien in detention is necessary for establishing his/her identity; 3) the alien has committed or is suspected of having committed a crime and detention is necessary for preparing or ensuring the enforcement of a decision on removing the alien from the country; 4) the alien has made a subsequent application for international protection in order to delay or hamper the enforcement of a decision on removing the alien from the country; 5) detention is based on Dublin II regulation; or 6) taking account of the alien’s personal and other circumstances, there are reasonable grounds to believe that he or she is a danger to the national security.</td>
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5. the third-country national has not complied with the surveillance measures applied with regard to him or her to ensure compliance with the precept to leave;

6) the third-country national has notified the Police and Border Guard Board or the Estonian Internal Security Service of his or her non-compliance with the obligation to leave;

7) the third-country national has entered into Estonia during the period of validity of the prohibition on entry applied with regard to him or her;

8) the third-country national has been detained due to the crossing of the external border of Estonia illegally and he or she has not obtained the permit or right to stay in Estonia.

If there is no possibility to return the third-country national in 48 hours, a court order must be applied for further detention. Meaning that without a court order a person cannot be detained for more than 48 hours in Estonia.

2. Please report on the actual national practice and specify in how many cases deprivation of liberty of third-country nationals suspected of staying irregularly is applied.

Police and Border Guard Board does not keep statistics on short term detentions (up to 48h). However this number is slightly higher than the number of foreigners detained in the detention center based on a court order (in 2014 approx. 100 persons).
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<tbody>
<tr>
<td>France</td>
<td>Yes</td>
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1. In France, irregular stay is no longer considered as a criminal offence (law of December 31, 2012). Consequently, the fight against irregular stay depends on the administrative police process but can also be processed during judicial inquiry on offences. There are 2 steps in the control of stay:

   First, control of residence permits: article L. 611-1 of the Code of Entry and Residence of Foreigners and the Right for Asylum (CESEDA) prevails that any foreign national has to be able to present his/her visa and residence permit authorizing him/her to stay and reside in France if requested by Police or Gendarmerie officers. This request cannot be made because of the physical appearance or accent of the person. In order to verify the validity of his/her documents, this person can be retained temporarily. This control can be requested for identity checks by police or by custom agents, with no direct link with the fight against irregular stay. In all cases, such controls cannot exceed 6 hours consecutively in the same place. They cannot apply to all persons present in the same place. Moreover, during identity checks or police custody (because of judicial process with deprivation of liberty) when police suspects that the person is a foreign national, such control can be requested and are limited to respectively 4 hours and 24 hours.

   Second, control of right of residence (16 hours maximum): if a person cannot provide any document proving his/her right of residence or entry to France during an administrative, judicial or custom control, he/she can be retained in order to verify this point, during a maximum period of 16 hours (article L. 611-1-1 of the CESEDA). If this person has been first retained for identity check or police custody (see step 1 above) during which his/her irregular stay has been proved, the maximum duration of deprivation of liberty is reduced from the period already spent in custody.

   During this control process, the foreign national benefits from all guarantees and access to rights: control of the process by a public prosecutor, access to a translator, lawyer and doctor, possibility to inform his/her family at any moment as well as the competent consulate, access to legal aid. This person can also contact any person who can take care of his/her minor children if necessary. The police officer appreciates the duration of this control based on the information provided by the person, it is limited to 16 hours and cannot be extended. This control has to take place in a police office.
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<table>
<thead>
<tr>
<th>Germany</th>
<th>Yes</th>
</tr>
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1. The following types of detention are important for the Federal German Police authorities:
   - detention awaiting removal from the federal German territory (Zurückschiebungshaft) pursuant to section 57 (3) read in conjunction with section 62 of the Aufenthaltsgesetz (AufenthG) [German Act on Residence]
   - custody awaiting deportation (Abschiebungshaft) pursuant to section 62 (3) of the AufenthG
   - detention pending exit from the federal territory (Zurückweisungshaft) pursuant to section 15 (5) of the AufenthG
   - stay in the transit area of an airport or a place of accommodation (Transitaufenthalt) pursuant to section 15 (6) of the AufenthG

The proceedings in cases of deprivation of liberty are made on the basis of the Gesetz über das Verfahren in Familiensachen und in Angelegenheiten der freiwilligen Gerichtsbarkeit (FamFG) [German Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction].

The deprivation of liberty is a violation of the basic right of the person pursuant to art. 2 (2) of the Grundgesetz [Basic Law for the Federal Republic of Germany]. This is the reason why only a judge is allowed to decide upon the lawfulness and duration of the deprivation of liberty!

2. Stay in the transit area of an airport or a place of accommodation (Transitaufenthalt):
   Third-country nationals who do not fulfil the entry conditions pursuant to art. 5 of the Schengen Borders Code, will in principle be refused entry.

   Third-country nationals who travelled to Germany by air, can stay in the transit area of an airport in order to safeguard the refusal of entry. This is only then applicable if it is in fact possible for them to leave the airport’s transit area by air (section 15 (6) sentence 1 of the AufenthG). If this is not guaranteed, custody to secure deportation (Sicherungshaft) must immediately be applied for or entry must be authorised.

   A foreigner’s stay of more than 30 days from arrival at the airport shall require a judicial order (section 15 (6) sentence 2 of the AufenthG). Should it become clear at an earlier point of time that the refusal of entry cannot be enforced within a period of 30 days, the judicial order shall be obtained immediately.
Detention pending exit from the federal territory (Zurückweisungshaft):

If there is the concrete risk that the person concerned will try to cross the border and enter, something which is contrary to the refusal of entry, the foreigner concerned is to be taken into custody by virtue of a judicial order in order to secure the refusal of entry (section 15 (5) of the AufenthG). Until the time of obtaining the court order for detention, an application shall be filed for temporary deprivation of liberty by way of an interlocutory order (section 427 of the FamFG), in so far as there is no direct hearing at court carried out.

If the court dismisses the application for detention for safeguarding the refusal of entry, the respective person must be released from custody. The third-country nationals must be transferred to the Alien’s office which is then responsible for the removal. This provision applies with the necessary modifications when detention is released.

Detention awaiting Removal from the federal German territory / custody awaiting deportation (Zurückziehungs- / Abschiebungshaft):

The Federal German Police is in particular responsible for the application for custody to secure deportation (removal from the federal German territory / deportation) in connection with removal measures in order to guarantee these measures. If the removal cannot immediately be carried out, then the enforcement must be secured.

Prior to the application for custody to secure deportation, it has to be examined whether the purpose of the detention can be achieved by other less severe means (section 62 (1) of the AufenthG). The application for custody to secure deportation is not permissible if the removal or deportation cannot be carried out within the next three months for reasons beyond the third-country national’s control, e.g. because he or she is an in-patient in hospital.

The need of speed obliges the border authority to actively prepare and carry out the removal or deportation of detained third-country nationals as quickly as possible. This includes in particular the immediate initiation of measures for obtaining travel documents, the clarification of transfer conditions or the early booking of flights.

Custody shall only be applied for the period of time required for the execution of the removal. It must be explained that the return can presumably in fact be carried out within this period of time.

Custody for the purpose of safeguarding removal or deportation (custody to secure deportation) shall then be applied for on the basis of the legal conditions, if there is a well-founded suspicion that the respective person intends to evade removal or deportation (section 62 (3) sentence 1 no. 5 of the AufenthG) and if other less severe means are not suited for the safeguarding of the removal.

Custody to secure deportation can principally be applied for a period of time of up to three months. If it is clear right at the beginning that the return cannot be carried out within the next three months for reasons beyond the third-country national’s control, even the application for custody is not permissible (section 62 (3) sentence 4 of the AufenthG). An extension of the custody to secure deportation by a maximum of twelve months is permissible, if the reasons which lead to this required extension are under the third-country national’s control (section 62 (4) sentence 2 of the AufenthG).
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During the deprivation of liberty, the border authority agrees to regularly check whether the continued execution of deprivation of liberty is still legal. The border authority must immediately apply for the revocation of the deprivation of liberty (section 426 of the FamFG), if for reasons beyond the person’s control the removal cannot be carried out within the ordered period of three months. This is in particular applicable if the authority finds any bans on deportation, if deportation stops are ordered or if there are in addition permanent impediments to deportation.

Statistical entries on deprivation of liberty are not made at a central institution.

<table>
<thead>
<tr>
<th>Country</th>
<th>Response</th>
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<tbody>
<tr>
<td>Greece</td>
<td>Yes</td>
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</tbody>
</table>

1. According to our national legislation the procedure, of checking identity as well as documents of legally residing in our country, is the same for nationals and third country nationals as well. This, which comes of national legislation is that, the exact period of prosecution must be as necessary as the reason of it.

**Relevant Legal Frame:**

According to national legislation,

a. Art 5 par. 3 of Constitution: “No one is being prosecuted, either is arrested or being jailed only if law sets.

b. Art 48 par 1 of Constitution: “Only under a judicial warrant someone is being arrested or jailed.

c. **Our national legislation briefly foreseen the following:** If a third country national is being prosecuted, the competent authority which has ordered the prosecution, after conducting the necessaries, will order the transfer of the third country national to the Aliens Division. The police officer leads to the police station third country nationals who are lack of legal documents or because of their attitude, which might create suspicion of acting as criminals. If there is an escape suspicion, of the third country national who is prosecuted, he is being bound with handcuffs. The time of prosecution which is imposed each time, is based on the scope of the prosecution. The excess of the time, above mentioned, means criminal offence. The personality respect of every citizen, imposes the that the third country national who has been prosecuted must be informed about the exact time of prosecution duration.

1. Third Country Nationals are being prosecuted, if after a control conduction from the Police Headquarters is noted that are unable to show of their legal documents of legally residing to our Greece, either because they lack of legal documents or because they do not bring them with.

   They do bring with them legal documents of legally residing in Greece, but the person who conducts the control decides that his/her documents need to be more investigated as far as the legitimacy and validity of the documents is concerned.

   After the control, which is being conducting by the Policy Headquarters, and based on the data that have been selected, the relevant authority decides whether the Third Country National can be released or arrested with the order to leave the country.

As fas as the number of cases deprivation of liberty of third-country nationals suspected of staying is applied, there is no data available.
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<table>
<thead>
<tr>
<th>Hungary</th>
<th>Yes</th>
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| 1. In order to secure the deportation of a third-country national the immigration authority shall have powers to detain the person in question if:  
  a) he/she is hiding from the authorities or is obstructing the enforcement of the deportation or transfer in some other way;  
  b) he/she has refused to leave the country, or, based on other substantiated reasons, is allegedly delaying or preventing the enforcement of expulsion (risk of absconding);  
  c) he/she has seriously or repeatedly violated the code of conduct of the place of compulsory confinement;  
  d) he/she has failed to report as ordered, by means of which to forestall conclusion of the pending immigration procedure;  
  e) he/she is released from imprisonment as sentenced for a deliberate crime.  
  Detention under immigration laws may be ordered for a maximum duration of seventy-two hours, and it may be extended by the court of jurisdiction by reference to the place of detention until the third-country national’s deportation or transfer, or for maximum sixty days at a time.  
  Detention under immigration laws may be extended by up to six additional months on the expiry of a period of six months, if the carrying out the expulsion order takes more than six months, in spite of having taken all necessary measures, due to  
  a) the failure of the third-country national affected to cooperate with the competent authority, or  
  b) delays in obtaining the documents required for deportation attributable to the authorities of the third-country national’s country of origin, or another state liable for readmission under readmission agreement or which is otherwise liable to accept him/her.  
  The immigration authority may order the detention of the third-country national prior to expulsion in order to secure the conclusion of the immigration proceedings pending, if his/her identity or the legal grounds of his/her residence is not conclusively established, or if the return of the third-country national under the bilateral readmission agreement to another Member State of the European Union is pending.  
  Detention prior to expulsion may be ordered for a maximum duration of seventy-two hours, and it may be extended by the court of jurisdiction by reference to the place of detention until the third-country national’s identity or the legal grounds of his/her residence is conclusively established, or for maximum thirty days.  

  2. executed detention ( ordered by Police and Office of Immigration and Nationality)  
  2015. 1-6. months:  
  Alien policing detention: 3746  
  Detention prior to expulsion: 203  
  2014:  
  Alien policing detention: 4544  
  Detention prior to expulsion: 297  
  2013:  
  Alien policing detention: 3973 |
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<table>
<thead>
<tr>
<th>Country</th>
<th>Detention prior to expulsion: 273</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hungary</td>
<td>Hungarian law: Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals</td>
</tr>
</tbody>
</table>

In Italy, there is no specific form of detention of TCNs who are suspected of staying irregularly. Detention is the measure of last resort in the regulation on entry and stay within national territory; it is regulated only as a possible outcome of regular administrative and judicial procedures aimed at checking the position of TCNs with respect to the Italian State under the Consolidated Act on Immigration.

If TCNs are suspected of staying irregularly (e.g., they are caught without their residence permits, which they are required to exhibit any time Police Authorities request them to do so), they are escorted to the Questura (provincial police headquarters) for fingerprinting. If fingerprinting reveals that the TCNs have no residence documents, the Questura notifies the Prefect of the town in which the check was carried out. The Prefect issues a deportation order, which should be assessed and confirmed by the competent Judge within 48 hours. Only if the deportation order cannot be enforced immediately, the Questore orders the detention of the TCNs in the Centre for Identification and Deportation (CIE).

Under Article 14 of the Consolidated Act on Immigration, therefore, the Questore (head of the provincial police headquarters) may detain TCNs only following a deportation order issued by the Prefect. In this case, however, the TCNs are not suspected of staying irregularly, since their irregular position, which cannot be corrected, has already been established. They have therefore received a deportation order.

2. The actual national practice follows the regulation outlined above. During the time needed to check the positions of the TCNs who are suspected of staying irregularly (and identities, if that is the case), they are detained at the Questura. Depending on the outcome of the checks (identity non-confirmed, check on regularity of stay, check on the existence of previous deportation orders, applications for international protection, etc.), the relevant measures are then taken.

In Latvia, please provide a brief summary of your national legislation related to initial deprivation of liberty of third-country nationals suspected of staying irregularly.

In accordance with Latvian Administrative Violations Code (LVC) Article 255 a person, who is suspected of having committed an administrative violation, may be detained for time period no longer than 4 hours. Within the administrative procedure the necessary procedural actions with the detained person shall be carried out immediately and for the purposes mentioned in Article 252 of LVC. Article 252 of LVC defines that the administrative detention of a person, the inspection of a person and property, as well as the removal of property and documents is allowed in cases mentioned in the LVC (e.g. Article 190 of LVC-staying or residing on the territory of the Republic of Latvia without valid visa, residence permit or valid travel document) and in order to stop administrative violations, when other coercion measures have been used, to specify the identity of the violator, in order to draw up a report regarding an administrative violation, if it cannot be done on site and if the drawing up of the report is mandatory, to implement the decisions taken in the administrative violation matter.

The above-mentioned deprivation of liberty is called administrative detention.
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<table>
<thead>
<tr>
<th>Lithuania</th>
<th>Yes</th>
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</table>
| 1. According to Article 112 of the Law of the Republic of Lithuania on the Legal Status of Aliens, an alien’s freedom of movement in the Republic of Lithuania may be restricted where it is necessary to ensure national security and public policy, to protect public health or morals, to prevent crime or to safeguard the rights and freedoms of other persons. The grounds for detaining an alien are stipulated in Article 113 of the Law. The grounds for detention are as follows:
| | |
| 1) in order to prevent the alien from entering the Republic of Lithuania without a permit; |
| 2) the alien has unlawfully entered the Republic of Lithuania or illegally stays in it; |
| 3) when it is attempted to return the alien who has been refused admission into the Republic of Lithuania to the country from which he arrived; |
| 4) when the alien is suspected of using counterfeit documents; |
| 5) when a decision is taken to expel the alien from the Republic of Lithuania or another state to which the Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals applies; |
| 6) in order to prevent the spread of dangerous or especially dangerous contagious diseases; |
| 7) when the alien’s stay in the Republic of Lithuania represents a threat to national security, public policy or public health; |
| 8) when deciding on the return of an alien to a foreign state, his expulsion from the Republic of Lithuania, the obligation of the alien to leave from the Republic of Lithuania or the transfer of an asylum applicant to another EU Member State responsible for examining an application for asylum, the alien may be detained only if the detention is necessary for the taking and/or enforcement of the relevant decision (if the alien hampers the taking and/or enforcement of the decision and may abscond to avoid return, expulsion or transfer, etc.): |
| 9) an asylum applicant may be detained only in order to establish and/or verify his identity/citizenship and/or to identify the grounds underlying his application for asylum, also when his application for asylum is based on grounds manifestly unrelated to the risk of persecution in the country of origin or based on fraud or where the asylum applicant has been refused temporary territorial asylum and there are grounds for believing that he may abscond to avoid return to a foreign state or expulsion from the Republic of Lithuania. |

2. Please report on the actual **national practice** and specify in how many cases deprivation of liberty of third-country nationals suspected of staying irregularly is applied.

The above-mentioned administrative detention for the time period of 4 hours is usually applied with regard to person apprehended within the territory of the country, who do not have any identification document with the aim to clarify the circumstances of the case and identify the person.

There is no statistical data available on the number of third-country nationals with regard to whom the administrative detention was applied because of their irregular stay in Latvia. The administrative detention is applied very rarely.
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<tr>
<th>Luxembourg</th>
<th>Yes</th>
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1. According to article 133 (1) of the amended law of 29 August 2008 on free movement of persons and immigration the Minister in charge of immigration may carry out checks and controls, or cause them to be carried out, in order to verify whether the conditions laid down for the entry and stay of foreigners are fulfilled. Normally these controls are carried out by the Grand-Ducal Police (article 134). Also article 136 (1) establishes that "without prejudice to Article 45 of the Code of Criminal Investigation, foreigners must be in a position to produce, whenever requested so to do by the Grand-Ducal Police, the documents by virtue of which they are authorised to enter or stay on the territory. Officers of the Grand-Ducal Police shall be empowered, to retain the travel documents of persons in an irregular situation. They shall, in return, provide such persons with a receipt counting as proof of their identity." The police is entitled to detain the third-country national during the time of the verification of his/her identity and his/her residence status in the country. The Foreigners’ Service of the Judicial Police will inform the Directorate of Immigration of the detention. The presence on the territory of a third-country national that does not fulfil the conditions of entering and stay, entails that s/he will be considered an irregular migrant (article 100 (1)). In this case a return decision will be issued and notified to the third-country national (article 109 (1) and 110 (1) and article 111 (1)).

2. In practice, the Grand-ducal Police does not detain people based on a profile. They will only require the production of documents of a third-country national when the person acts suspiciously, nervous or if s/he has violated the law or when there is the suspicion that the third-country national is residing illegally in the territory. If the individual does not bring forward any identification documents or s/he shows false documents the police will bring the third-country national to the police station and s/he will be placed in detention during the time they verify his/her identity. In this case, the maximum duration of detention is 4 hours.

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1 See First instance Administrative Court, 3rd Chamber, n° 35880 of 26 February 2015, 2nd Chamber n° 35705 of 22 January 2015.
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<table>
<thead>
<tr>
<th>Netherlands</th>
<th>Yes</th>
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<tbody>
<tr>
<td><strong>Please provide a brief summary of your national legislation related to initial deprivation of liberty of third-country nationals suspected of staying irregularly.</strong></td>
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</table>

National legislation related to initial deprivation of liberty of third-country nationals suspected of staying irregularly can be found in article 50 of the Aliens Act (2000). In this article the authorization for border control officers and aliens supervision officers to stop persons in order to check their identity, nationality and residence status is enshrined. These officers are authorised to stop persons if on the basis of objective criteria, a reasonable suspicion that such persons are illegally resident or in order to prevent illegal residence of persons after they have crossed the border.

If the identity of a person who has been stopped cannot be immediately established, he may be transferred to a place of interview. He shall not be detained there for longer than six hours, for which purpose, however, the period between midnight and nine o’clock in the morning is not counted.

If the identity of a person who has been stopped cannot be immediately established and if it transpires that this person is not lawfully resident in the Netherlands or if it is not immediately established that he is lawfully resident, he may be transferred to a place of interview. He shall not be detained there for longer than six hours, for which purpose, however, the period between midnight and nine o’clock in the morning is not counted.

If there is still a basis for the suspicion that the detained person is not lawfully resident, the period referred to in subsections 2 and 3 may be extended for a maximum of forty-eight hours in the interests of the investigation by the commander of the Royal Netherlands Military Constabulary or, as the case may be, the chief of police in the place where the person is present. There are plans to extend the six hours time span to nine hours and forty-eight hours time span to twenty-four hours.

**Mobile Security Monitoring**

Although the controls between the Schengen countries are no longer performed, people must still be able to provide proof of their legal residence.

Several countries have implemented measures to tackle undesired illegal immigration and crime. In the Netherlands, the Royal Netherlands Marechaussee has been charged with Mobile Security Monitoring at the internal borders with Belgium and Germany since May 1994. The purpose of these controls is to tackle illegal immigration and all forms of crime.

Controls are carried in the area behind the border and random checks are carried out throughout the Netherlands, on the roads, in the trains, on water, and at air traffic. Under certain conditions deprivation of liberty in these situations is possible.

The rules governing these operations are laid down in Article 4.17a Aliens decree 2000 (Vreemdelingenbesluit 2000). In an unofficial translation this provision reads:
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|       | I. The competence meant in Article 50, first section, of the Act, to stop persons for the purpose of combating illegal stay after crossing the borders in order to establish their identity, nationality and residence position, is exclusively exercised in the framework of aliens control:  
|       | a. at airports in relation to arrivals of flights from the Schengen area;  
|       | b. in trains during at most thirty minutes after passing the common border with Belgium or Germany or, if the second train station is not yet reached within this period since the border was passed, not further than the second train station after the border;  
|       | c. on roads and waterways in an area till twenty kilometres from the common border with Belgium or Germany.  
|       | II. The controls, meant in the first section are exercised on the basis of information or experiences about illegal stay after crossing borders. The controls may in addition to a limited extend be exerted with the purpose of obtaining information concerning such illegal stay.  
|       | III. The controls, meant in the first section, under a, are exercised at most seven times a week with respect to flights on the same flight route, with a maximum of one third of the total number of scheduled flights on that flight route. Within the scope of these controls only part of the passengers of one flight is addressed.  
|       | IV. The controls, meant in the first section, under b, are exercised in at most three trains per day per route and at most twenty trains in total, and per train at most four compartments.  
|       | V. The controls, meant in the first section, under c, are exercised on the same road or waterway at most ninety hours per month and at most six hours per day. Within the scope of these controls only part of the passing vehicles is stopped.  
|       |  
|       | 2. Please report on the actual **national practice** and specify in how many cases deprivation of liberty of third-country nationals **suspected** of staying irregularly is applied.  

For national practice see above.  
Unfortunately at the moment we have no complete data set available. Maybe we can send this information on a later stage.

<table>
<thead>
<tr>
<th>Country</th>
<th>Yes</th>
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| Portugal | In Portugal, irregularly staying citizens are notified to voluntarily leave national territory within twenty days. If the citizen is detected irregularly-staying a second time, and in breach of the previous decision, he/she may be applied another coercive measure. The most severe coercive measure is detention in a centre equated to a detention facility [CIT – Centro de Instalação Temporária], which is a closed facility, until his/her return. The citizen’s stay in a centre may not exceed 60 days.  
| Romania | Please provide a brief summary of your **national legislation** related to initial deprivation of liberty of third-country nationals **suspected** of staying irregularly.  
|         | In Romania deprivation of liberty of TCNs suspected of illegally staying is not possible.  

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<tbody>
<tr>
<td>Thus, according to the provisions of the Government Emergency Ordinance 194/2002 on aliens’ regime, restricting the right to free movement is done by taking into public custody of TCNs whose illegal stay is established and against whose has removal under escort been decided. Public custody is a temporary measure restricting the freedom of movement on Romanian territory taken against TCNs in order to fulfill all the necessary steps for escorted removal. Escorted removal represents enforcement of removal measures, return or expulsion respectively, by escorting TCNs outside (Art. 2 v1) of Government Emergency Ordinance 194/2002 on aliens’ regime). General Inspectorate for Immigration orders return against TCNs whose illegal stay is established by issuing a return decision (Art. 81 (1) of Government Emergency Ordinance 194/2002 on aliens’ regime). Return is the process of voluntary or escorted return of a TCN to a third country (country of origin), transit country, or another third country in which the TCN decides to return and where he/she is accepted (Art. 2 v) of Government Emergency Ordinance 194/2002 on aliens’ regime). Return decision represents the administrative act issued by the General Inspectorate for Immigration stating that the TCN’s stay is illegal and set the obligation to return (Art. 2 u1) of Government Emergency Ordinance 194/2002 on aliens’ regime). If TCN was declared undesirable or he/she presents the risk of absconding from voluntary return, the return decision establishes the illegal stay and set the obligation to return and escorted removal (Art. 83 (2) of Government Emergency Ordinance 194/2002 on aliens’ regime). Illegal stay represents the presence in Romania of a TCN who does not fulfill or no longer fulfill the entry conditions set by art. 5 of Regulation (EC) 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders or the entry and residence conditions provided for by Government Emergency Ordinance 194/2002 on aliens’ regime (Art. 2 u) of Government Emergency Ordinance 194/2002 on aliens’ regime). General Inspectorate for Immigration establishes the illegal stay of TCNs in any of the following situations (Art. 81 (2) of Government Emergency Ordinance 194/2002 on aliens’ regime): - the TCN has crossed or attempted to cross illegally the state border of Romania - the TCN has entered Romania in the period of entry ban previously ordered - the TCN no longer fulfills the conditions on entry and/or stay set by Government Emergency Ordinance 194/2002 on aliens’ regime - the stay right set by the visa or based on agreements abolishing visas, or, as appropriate, by the residence permit or border traffic permit ceased - the TCN who ended the asylum procedure or who withdraw his/her asylum application and did not respect the obligation to leave the territory under the law on asylum - the TCN has been declared undesirable</td>
<td></td>
</tr>
<tr>
<td>2. Please report on the actual national practice and specify in how many cases deprivation of liberty of third-country nationals suspected of staying irregularly is applied. No cases.</td>
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</tbody>
</table>
### Slovak Republic

| Yes |

1. The national legislation (Act No 404/2011 on Residence of Aliens) permits the police officer to bring in a third-country national to the police department according to Art. 79 of the respective Act in connection with administrative expulsion proceedings, entry ban proceedings, refusal of entry proceedings, execution of administrative expulsion and execution of removal. The police authority uses this legal provision mainly with the aim to examine the irregular stay of a third-country national on the territory of the Slovak Republic. To bring in a third-country national in accordance with the above mentioned legal provision is understood as the initial deprivation of liberty of the third-country national with the aim to verify the facts whether the conditions set in the legislation are met in order to start the above mentioned proceedings and executions. A part of this process is the identification of the third-country national, elaboration of the record and alert in the respective national information systems. According to the Art. 79 par. 3 if the police department will not further act in the administrative expulsion proceeding, refusal of entry proceedings, entry ban proceedings or if it finds out that there are no reasons to surrender the third-country national to the law enforcement authorities, other respective authority or establishment, the third-country national is released immediately.

2. The initial deprivation of liberty of the third-country national in connection with the suspecting of irregular stay is applied with regard to the individual assessment of the case. The irregular stay of the third-country national can be examined also without the use of the respecting legal provision regarding the deprivation of liberty.

### Slovenia

| Yes |

Relevant provisions of our State Border Control Act are the following as set in Article 32 (1):
A police officer may detain a person for a necessary time but for no more than 48 hours, intending to cross or having already crossed the border line if there is reason to suspect that this person has illegally crossed the state border and detention is required in order to establish all necessary facts and circumstances of the crossing of the state border concerned, or in order not to admit a foreign person not meeting the conditions for admission to the state, and who cannot for justified grounds be immediately directed from the state.

In 2013 we had 554 such detentions and in 2014 we had 733 such detentions.

### Spain

| Yes |

1. Please provide a brief summary of your national legislation related to initial deprivation of liberty of third-country nationals suspected of staying irregularly.

Initial deprivation of liberty takes place in police premises and is foreseen in the Spanish Alien Law (Ley Orgánica 4/2000) as a precautionary measure that can be taken in connection with a return procedure. It can last up to 72 hours. Beyond that, deprivation of liberty can only take place in detention centres and must be ordered by a judge.

In fact, for identification purposes, someone can be held in police custody for up to 6 hours according to the Public Security Law (Ley Orgánica 4/2015). However, in case a return procedure is started for a third country national, these 6 hours are not added to the 72, but considered to be part of them.
Ad-Hoc Query: Existing rules on deprivation of liberty of third-country nationals suspected of staying irregularly in a Member State

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<table>
<thead>
<tr>
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<th>2. Please report on the actual national practice and specify in how many cases deprivation of liberty of third-country nationals suspected of staying irregularly is applied.</th>
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<td></td>
<td>There are cases where no deprivation of liberty is needed to start a return procedure. E.g. overstayers in possession of their documents and whose address can be verified. They are summoned to the police office, in a certain period of time, in order to receive the notification corresponding to the opening of the (ordinary) return procedure. Instructions have been given to minimize the number of cases where deprivation of liberty takes place, although this is still the general case due to the circumstances in which illegally staying third country nationals are normally found.</td>
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<td></td>
<td>The 72 hour police custody as precautionary measure can be applied in the ordinary and in the accelerated return procedure. Detention is only possible in the accelerated procedure.</td>
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<tr>
<td><strong>Sweden</strong></td>
<td><strong>Yes</strong></td>
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<td></td>
<td>1. The Swedish rules on administrative detention can be found in Chapter 10 of the Swedish Aliens Act (2005:716). The Police, the Swedish Migration Agency, and the Migration Courts can issue detention orders. Detention can be used when it is deemed necessary to establish the identity of the alien, to investigate whether the person is entitled to remain in Sweden, when it is likely that the person will be refused entry or expelled, or when a person is awaiting the enforcement of an expulsion or refusal of entry order. Detention for the purpose of enforcing an expulsion or refusal of entry order is only permissible when there is risk that the person will abscond to avoid expulsion. When it comes to detention to the first two grounds (to establish identity and investigate the right to remain), most detention orders are made by the Police upon entry or when a person is apprehended without documents within the territory. If the person then applies for asylum, then the whole case (including detention) is handed over to the Swedish Migration Agency for further investigation. Very few detention orders are however made on these grounds. In 2014, a total of 56 such cases have been recorded. When it comes to the third ground, i.e. probable that the person will be expelled (which is a ground for detention before an actual removal decision is made), there a lot more cases. However, the Swedish Migration Agency is not able to provide you with any reliable statistics regarding these numbers.</td>
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<tr>
<td><strong>United Kingdom</strong></td>
<td><strong>Yes</strong></td>
</tr>
<tr>
<td></td>
<td>1. The UK does not participate in the Returns Directive. The power to detain third country nationals suspected of entering or seeking to enter the UK illegally is in paragraph 16 of schedule 2 to the Immigration Act 1971 (as amended). Paragraph 16 (1) provides that a person who may be required to submit to examination on arrival in the UK may be detained under the authority of an immigration officer pending examination and pending a decision to give or refuse leave to enter. Paragraph 16 (2) provides that if there are reasonable grounds for suspecting that a person is someone in respect of whom directions may be given under the paragraphs specified, that person may be detained under the authority of an immigration officer pending—</td>
</tr>
</tbody>
</table>
Ad-Hoc Query: Existing rules on deprivation of liberty of third-country nationals suspected of staying irregularly in a Member State

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|                | Norway | Yes |
|----------------|--------|-----|  |
| (a) decision whether or not to give such directions; |        |     |  |
| (b) removal in pursuance of such directions. |        |     |  |
| 2. Please report on the actual national practice and specify in how many cases deprivation of liberty of third-country nationals suspected of staying irregularly is applied. |        |     |  |
| Information on the use of detention for immigration purposes in the UK is set out in section 55.1 of the Enforcement Instructions and Guidance, accessible via the link below: https://www.gov.uk/government/publications/chapters-46-to-62-detention-and-removals |        |     |  |
| 1. The use of coercive measures, including the deprivation of liberty, is regulated in the Norwegian Immigration Act Section 99. |        |     |  |
| "A coercive measure may only be applied where there is sufficient reason to do so. A coercive measure may not be applied where doing so would constitute a disproportionate intervention in light of the nature of the case and other factors. Coercive measures to ensure the implementation of an administrative decision may be applied where an administrative decision has been made entailing that a foreign national must leave the realm, and during the processing of a case which may lead to such an administrative decision."

The latter part of this provision, allowing for the use of coercive measures during the processing of a case, is interpreted to include steps taken to clarify the legal status of the individual. The term "coercive measures" is broadly construed.

Furthermore Section 106 paragraph one sub-section a, holds that "a foreign national may be arrested and remanded in custody if (a) the foreign national is not cooperating on clarifying his or her identity in accordance with section 21 or section 83 of the Norwegian Immigration Act, or there are specific grounds for suspecting that the foreign national has given a false identity".

Section 106 paragraph three holds that "Arrest shall be decided by the Chief of Police or the person authorised by the Chief of Police."
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Where there is danger associated with any stay, a police officer may make the arrest. If the police wish to detain the arrested person, they must, at the earliest opportunity, and at the latest on the third day following the arrest, bring him or her before the district court with an application that he or she be remanded in custody

Detention in accordance with Section 106 must only be used where it is not a disproportionate intervention, viz. Section 99.

2. In practice, police officers who encounter an individual who is not immediately able to provide evidence of his or her legal stay in Norway will usually be able to quickly determine this through consultation of relevant electronic registers. They may also accompany the individual to the location where the individual claims his or her documents are stored, or they may compel the individual to come to a police station for fingerprinting. If the situation is still not resolved, they may arrest the individual in accordance with Section 106 described above. In practice, by the time someone is detained it will generally be known whether or not they are staying irregularly in Norway.

Statistics on deprivations of liberty prior to any administrative decision are not available.

When individuals are detained due to lack of cooperation about their identity, it is usually also because there is a risk of evasion (Section 106 paragraph ne sub-section b). It is rare to have detention purely under Section 106 paragraph one sub-section a, and there may also be some under-reporting.

2013: 77 individuals have been registered as detained in immigration detention purely on the grounds of failure to cooperate in order to clarify their identity (out of 3.197 persons detained).

2014: 82 individuals have been registered as detained in immigration detention purely on the grounds of failure to cooperate about their identity (out of 3.066 persons detained).

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