

**Offense of solidarity**  
**- Understanding the legal context -**

**I- The offence and its exemptions**

A person accused of an offense called « offense of solidarity » is usually to be prosecuted under **Article L-6221 from the Code of Entry and Residence of Foreigner and the Right of Asylum: CESEDA.**

According to this article, **a person who has «assisted or attempted to assist in any direct or indirect manner the illegal/unauthorised entry, circulation or residence of a migrant in France» shall be charged with a maximum of five years of imprisonment and a 30 000 euro fine.** Both can be cumulative. This represents the maximum sentence; the court can impose any lesser sentence, including a suspended sentence. The court can also find the person guilty, without giving them any penalty.

The court can also release the accused, if the judge feels that they have not committed the offence or if they can be immune under the law according to exemptions. The article explains that **these acts are subject to criminal sanctions « subject to the exemptions provided by Article L- 6224. »**

These « **exemptions** » exist to prevent someone from being prosecuted in court for having helped undocumented migrants selflessly. However, **this article does not provide enough protection against the prosecution of « humanitarian and selfless » acts (selfless understood as “without reward or compensation”)**. In many cases these definitions can be used to intimidate or discourage a person with an entirely altruistic goal.

First of all, **the exemptions provided in the article only apply for the offence regarding assisting the «unauthorised residence»** of an undocumented migrant, and therefore do not apply if a person has helped migrants to “illegally enter” into the country or travel from a point A to a point B within France. Even if that person does it in a selfless manner and without receiving any compensation, said person can be prosecuted and charged if they helped a foreigner cross the border or even helped them go from point A to point B on the French territory (for instance, driving them in their own car).

Secondly, even for helping an undocumented migrant illegally «reside», the only part of the offence to which exemptions can apply, exemptions are limited.

The following **persons, belonging to the family of the assisted migrant benefit from immunity** (and therefore will not, in theory, be prosecuted) :

- Their parents (or grandparents), children, spouse, brothers and sisters and their spouses.
- Their spouse or any person with whom the foreigner lives as a « marital situation », as well as the parents, children, brothers or sisters of the spouse or the person with whom the migrant lives.

These exemptions are fairly simple. However, it is more complicated for a person who is not a relative of the assisted foreigner and thus is not part of his or her family.

Indeed, ***any person (who is not a relative) whose act was « not met with any direct or indirect compensation and which consisted of giving legal advice, providing food, lodging or medical care which can improve foreigners’ life conditions, or any assistance which help them preserve their dignity and physical integrity. » benefits from exemption.***

To avoid prosecution, **BOTH** of the two following conditions **HAVE** to be met (If one of them is not met, the offender may be prosecuted):

**1° The helper must not receive any « direct or indirect » compensation.** As the article does not give any specification on the nature of said compensation, some situations can lead to uncertainties on the subject, but the existence of such compensations has to be proven for the court to charge any sentence.

**2° Even if the assistance was given without any compensation, it still has to meet certain Conditions in concerning:**

- Either legal advice, with no further condition to be satisfied.
- Either food provision, lodging services, or medical care. These services must then be provided intending to «ensure decent and dignified living condition for the migrant».
- Or any other form of assistance intended to «uphold the dignity and physical integrity» of the assisted person.

Any form of assistance that does not match the criteria mentioned above is punishable if its aim is **not** to uphold the assisted person's dignity or physical integrity. However, this condition is difficult to meet: teaching someone how to read or charging their phone are not considered as acts to uphold this person's dignity or physical integrity and therefore can be punished by the law, even if those acts are selfless and there is no compensation or reward.

All these restrictions restrict the immunity helpers should benefit from, and therefore mean there is the possibility of prosecution. That said, the court has the final authority over analysing and deliberating on the facts before the court, deciding if the person charged is guilty or not. The charges can be different from the ones requested by the prosecutor, who may decide to charge someone subject to a police investigation. In that case, the court can decide to acquit, against the prosecutor's recommendation. If it does happen or if the charges are dropped, the people concerned may still face direct and indirect consequences of a criminal investigation and in some cases may have to appear in front of a court.

## **II- Is this legislation compatible with European texts?**

The Constitutional Court has previously upheld criminalising the facilitation of unauthorised entry and residence, meaning the legislation further restricted the exemptions that could be granted to people who acted for humanitarian purposes.

A **European Directive (2002/90 CE of 28 Nov 2002)** defining the « facilitation of unauthorised entry, transit and residence» requires all EU Member States to adopt appropriate sanctions against any person who :

- a) Knowingly helps a foreigner to enter or travel within the territory of the Member State, in breach of the domestic laws of the Member State concerned;
- b) Knowingly helps a foreigner, for lucrative/profitable purposes, to remain on the territory of the Member State, in breach of the domestic laws of the Member State concerned.

This directive therefore distinguishes between the facilitation of illegal entry and transit (which can both be punished in any case, even if the helper does it with a non-lucrative purpose) and assistance to unlawfully reside - the latter offence is indictable by Member States only if it is carried out for a profit-making purpose. Under French legislation, people can be prosecuted for other forms of assistance than the ones with a profit-making purpose (see examples above).

When ignoring the “profitability” requirement, which is a key element of this directive, the French government adopted a much broader definition on the facilitation of unauthorised residence than the one adopted by the EU. However, the goal of this directive is to impose an obligation that EU member states put in place a system of penalties for facilitating unauthorised entry and residence without the EU themselves imposing a precise set of rules.

However some elements could make one think that the regime adopted into French legislation goes against EU legislation, because:

- First and foremost, the directive requires EU member states to establish «appropriate» penalties: the directive itself deems it unnecessary to criminalise the facilitation of unlawful residence for a non-lucrative purposes. Such prosecution can seem inappropriate and therefore contrary to the goal of the directive itself.
- Secondly, as it is explained in articles 1 and 2 that a state can decide whether or not to penalize the act of facilitating illegal entry into a Member State if it is «in order to give someone humanitarian help». This provision emphasises the fact under EU legislation, it should be impossible to penalise and prosecute the act of facilitating “unlawful residence” with no lucrative goal.
- Finally, article 27 of the Schengen Accord, which refers to illegal immigration networks, does not distinguish between facilitating unlawful entry and residence, and requires lucrative purposes in both cases for penalisation: 'The Contracting Parties undertake to impose appropriate penalties on any person who, for financial gain, assists or tries to assist an undocumented migrant to unlawfully enter or reside within the territory of one of the Contracting Parties in breach of the domestic laws of the Contracting Party in respect to entry and residence of illegal migrants.' French domestic law seems to go, once more, against the logic of European legislation.

### **III-What is the impact of decriminalization of unauthorized residence on the penalization of facilitating unlawful residence?**

The law passed on December 31st of 2012 repealed the offense of “unauthorized residence”. It is therefore important to know to what extent a person can be prosecuted if they do help a foreigner reside on the territory, while this foreigner is not committing any violation of the law when staying illegally in the country. If the original offence no longer exists, how come there are still penalties in effect for facilitating unlawful residence?

In reality, the impact of decriminalization of unauthorized residence would be obvious if the helper/facilitator couldn't be prosecuted as the foreigner's accomplice. An accomplice can be prosecuted only if their association with the foreigner led to committing an act that is itself punishable. It is however different for facilitating unauthorized residence, because the helper will not be prosecuted as an accomplice but as having committed an autonomous offense. This offense - facilitating unauthorized residence is established once the main elements are present. If the person that is helped is, according to the legislation, in an irregular situation regarding their residence – even if that person cannot be prosecuted – then the helper can, themselves, be prosecuted for helping the foreigner.