



Ad-Hoc Query on the Return Directive (2008/115/EC) Article 2, paragraph 2 a) and 2 b)

Requested by SK EMN NCP on 15 May 2013

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Responses from Austria, Belgium, Bulgaria, Czech Republic, Estonia, Finland, France, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Slovak Republic, Slovenia, Sweden, United Kingdom plus Norway (17 in Total)

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1. Background Information

The Article 2, paragraph 2 of the Return Directive (2008/115/EC) states that Member States may decide not to apply this Directive to third-country nationals who:



(a) are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State;

(b) are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures.

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The Slovak Border and Aliens Police is currently working on the amendment to the Act on Residence of Aliens (404/2011) and is considering to exempt certain categories of persons from under the scope of the Return Directive (this concerns mainly the category of persons to whom the punishment of expulsion from the Slovak Republic was imposed by the court). While we are considering to introduce this change into the national legislation we are interested whether the Member States decided to transpose the Article 2, paragraph 2 a) and b) to their national legislation.

2. Responses¹





			<p>1. Did your Member State transpose the Article 2, paragraph 2 a) and b) of the Return Directive (2008/115/EC) to the national legislation?</p> <p>2. If yes, could you please provide the relevant Article(s) of your national legislation?</p> <p>3. Please state, if applicable, the positive and negative aspects of the transposition of the mentioned Article and paragraph of the Return Directive. Please state separately the positives and negatives for persons falling under subparagraph 2 a) and 2 b).</p>
	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>ANSWER TO QUESTIONS 1 + 2:</p> <p>Article 2(2)(a) of the Directive sets out an option and Belgium has chosen to apply it within its relative national legislation.</p> <p>Article 74/10 of the Aliens Law (Law of 15 December 1980), as inserted by the Law of 19 January 2012, determines the scope of application of the provisions of Title IIIQuater of the Aliens Law, thus those applying to illegally staying third-country nationals. As such, Article 74/10 of the Aliens Law specifies the situations in which certain third-country nationals do not fall within the scope of the above-mentioned Title IIIQuater.</p> <p>In line with Article 2(2)(a) of the Directive, the provisions of the current Title IIIQuater of the Aliens Law do not apply to the third-country national who is subject to a decision of refusal of entry in accordance with Article 13 of the Schengen Borders Code, or who is apprehended or intercepted by the competent authorities at the moment of irregularly crossing via land, sea or air of the external border of a Member State and who has not subsequently obtained an authorisation or a right to stay in the said Member State.</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.






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		<p>As such, Article 74/10 of the Aliens Law almost literally transposes Article 2(2)(a) of the Directive and makes the aforementioned title of the Aliens Law not applicable to the categories of persons therein mentioned.</p> <p>However it has been completed by a sentence saying that it does apply “excluding the provisions of section 74/17 §1 of the Aliens Law in order to transpose Article 4(4)(b) of the Directive. In any case, third-country nationals to whom entry to Belgium is refused or who are apprehended or intercepted when irregularly crossing by land, sea or air of the external border and who have not subsequently obtained an authorisation or a right to stay in Belgium, shall not be sent back or removed if the decision of refoulement or removal to the borders of the territory shall expose the third-country national concerned to a violation of the non-refoulement principle.</p> <p>The above-mentioned Article 74/10 of the Aliens Law seems not to refer to the matter dealt with in Article 2(2)(b) of the Directive. However, there are pre-existing provisions within the Aliens Law dealing with the expulsion and the sending back or the refoulement of aliens in case of danger to the public order or national security. As such Article 20, first subparagraph of the Aliens Law foresees the refoulement of aliens who do not have a residence in Belgium and who endangered the public order or the national security of Belgium, or who did not comply with the conditions of residence imposed on them by law. The second subparagraph foresees the expulsion of aliens who enjoy the long-term residence status, when the alien seriously harmed the public order or the national security.</p> <p>In addition, Article 74/8 of the Aliens Law has been amended by the Law of 19 January 2012. The latter provision foresees the imprisonment of aliens who are a suspect or a convict. As such, those aliens can be sent to detention centers with the purpose of organizing their removal from the State, after having fulfilled the sentences imposed by the courts.</p> <p>Also, according to Article 74/8(1), third subparagraph of the Aliens Law, the alien in a prison facility who is the subject of an enforceable decision of removal shall be immediately removed or shall after having fulfilled the sentences imposed by the court, be transferred to a place that falls under the jurisdiction of the Minister with the purpose of its effective removal.</p> <p>From the aforementioned, it can be implied that Belgium has also chosen to transpose the option in point (b) of Article 2(2) as well.</p> <p><u>ANSWER TO QUESTION 3:</u> <u>Subparagraph 2 a)</u></p> <p>Immigration authorities rather negatively consider the fact that the entry ban doesn't apply at the border. Based on this, someone who is denied entry because of using forged documents will be turned back without other consequences while the same person, if apprehended within the territory, will most likely receive an entry ban. Another example may be that of a drug trafficker who is denied entry and gets a refoulement order, he/she may be prosecuted and sent to jail but nothing after that, while the same person, if apprehended within the territory, would receive an entry ban.</p>
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			<p>Subparagraph 2 b) Article 74/8 of the Aliens Law foresees an entry ban for third country nationals who have been condemned to a criminal sentence and who have not (any more) a residence permit in Belgium. This entry ban can have a duration of maximum 8 years (art 74/11 of the Aliens Law). This provision is working very well, since it has been made more flexible to impose entry bans on persons who have been condemned. Before the Return Directive came into force, Belgium could only resort to Ministerial or Royal Decrees (entry ban of 10 years), which involve a lengthy and heavy procedure. Only a few legal challenges have lead to overturning the entry ban, mainly because of problems with article 8 of the European Human Rights' Convention (persons linked to Belgian or EU citizens, persons linked to recognized refugees).</p> <p>As for now, the only disadvantage is that, if the return is not effectively implemented, the entry ban is an “empty shell” since the returnee, although subject to an entry ban, remains on the Belgian territory. Since the Belgian legislation (for now) provides that the entry ban is automatically linked to the initial return decision, this means that quite a few ineffective entry bans have been imposed. A draft bill will be submitted which will make it possible to impose the entry ban separately. This way, the entry ban would be imposed on the returnee once an effective return would have been initiated.</p>
	Bulgaria	Yes	Article 2(2)(a) and Article 2(2)(b) of the Directive set out an option. Concerning this option, Bulgaria did not choose to apply the Directive provision within its relative national legislation.
	Czech Republic	No	This EMN NCP has provided a response to the requesting EMN NCP. However, they have requested that it is not disseminated further.
	Estonia	Yes	Estonia did not transposed the Article 2 paragraph 2 a) and b) into national legislation.
	Finland	Yes	<p>1. No. national legislation was found to be in compliance with the directive hence guidelines for application were given with Government Bill 208/2010.</p> <p>Government Bill on transposing the Return Directive states the following: Section 148 of the Aliens Act regulates that an alien may be refused entry into the country if he or she does not meet the requirements for entry laid down in section 11. This includes the requirements for entry in accordance with Schengen Code, Articles 5 and 13. Prohibition of entry would then hinder entry into country. Section 148 of the Aliens Act stipulates further that an alien who has entered the country without a residence permit and who is required to hold a visa or residence permit to stay in Finland but who has not applied for one or has not been issued with one may also</p>






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			be refused entry. The Government Bill then states that Article 2, para 2a should not be applied when entry is refused while crossing the border or during the inspection at the border check. Regarding Article 2, para 2b the Government Bill states it should not be applied if the decision on removal was a result of a criminal sanction.
	France	Yes	1. France chose not to transpose the article 2 paragraphs 2.a) and b) of the return directive (2008/115/EC) to the national legislation. Since French legislation already dealt with these questions before the introduction of the directive 2008/115/EC, France is considered to be consistent with its provisions, according to the Commission.
	Germany	Yes	1. No. 2. and 3. NA.
	Hungary	Yes	Hungary did not make use of the option to exclude third country nationals falling under either of the provisions concerned (Article 2, paragraph 2 a) and b) of the Return Directive). The personal scope of Act No. II of 2007 on the entry and stay of third country nationals (Article 1) as well as its provisions on issuing the return decision (Article 43(2)) both encompass these persons, too. In other words, it implicitly but clearly flows from our national implementing legislation that it is fully applicable to those persons. Given that we did not opt for restricting the scope <i>ratione personae</i> of the Directive in our national legislation, we did not encounter any negative experience in implementing it. Nor does it make any difficulties in practice that the standards of the Directive are applicable to all illegally staying third country nationals.
	Italy	Yes	Italy did not transpose the Article 2, paragraph 2 a) and b) of the Return Directive (2008/115/EC) to the national legislation.
	Latvia	Yes	1. and 2. Latvia applies exceptions foreseen in Article 2(2)(a) and 2(2)(b). So Latvia does not apply the provisions of the Return Directive in cases mentioned in Article 42 of Immigration law. The provisions of Article 42 of Immigration law foresees the following: <i>A decision on voluntary return or a decision on forced expulsion shall not be issued if</i> - the decision on refusal for a foreigner to enter the EU Member States is taken; - a foreigner is detained in the border area after illegally crossing the external border coming directly from the

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			<p>neighbouring state and for whom there were no circumstances that allowed this foreigner to stay in the Republic of Latvia and the third country is ready to take the person back in accordance with the treaties with the Republic of Latvia or in accordance with the requirements of the agreement (readmission);</p> <p>- if the Court within the framework of criminal case imposed for a foreigner an additional punishment - expulsion from the Republic of Latvia;</p> <p>- if foreigner is a subject to return or extradition process in accordance with the international cooperation in the field of criminal law.</p> <p>3. No comments on positive or negative aspects of transposition taking into account that Latvia included exceptions provided by Return Directive into the national legislation.</p>
	Lithuania	Yes	<ol style="list-style-type: none"> 1. Lithuania does not apply the provisions set in the Article 2 (a) of the Return Directive. Third country nationals as defined in 2(a) are refused admission into the Republic of Lithuania in accordance with the Law on the Legal Status of Aliens (Article 8). 2. N/A 3. N/A
	Luxembourg	Yes	<ol style="list-style-type: none"> 1. Yes. Luxembourg transposed article 2 paragraph 2 a) and b) of the Return Directive into national legislation. 2. Article 2 paragraph 2 a) and b) was transposed in articles 99, 104, 105 and 128 of the Law of 29 August 2008 on free movement of persons and immigration. Regarding the refusal of entry at the border, article 105(1) provides that a refusal decision issued by the agents of the airport control service can be enforced ex officio. Therefore, the Minister is not required to issue a refusal decision, accompanied with a return decision. Article 128 establishes that during the extradition procedure the foreigner cannot be expelled. 3. There has not been an evaluation on the positive and negative aspects of transposing article 2 (2) a) and b) of the directive until now.
	Netherlands	Yes	<ol style="list-style-type: none"> 1. The Netherlands have transposed both paragraph 2(a) and 2 (b). From paragraph 2 (b) only the part about 'who are the subject of extradition procedures'.

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			<ol style="list-style-type: none"> 2. Currently, the transposition has been done via temporary decree and will be imbedded in the Dutch Aliens Act (Vreemdelingenwet) as soon as possible. 3. No positive and negative aspects are known.
	Slovak Republic	Yes	The Slovak Republic did not transpose the Article 2, paragraph 2 a) and b) to its national legislation so far.
	Slovenia	Yes	We fully transposed the Article 2, paragraph 2 a) and b) into national legislation. National legal provisions fully follow the text of Directive.
	Sweden	Yes	Sweden has transposed the Article 2 b, that is for those who are to return as a criminal law sanction. According to chapter 8, paragraph 18a “a decision of refusal of entry or expulsion should define a period for voluntary return except when the alien is expelled by a court due to a crime “ There have been no evaluations yet to map positive or negative aspects of the transposition.
	United Kingdom	Yes	The UK did not opt into the Returns Directive and therefore did not transpose the Article 2, paragraph 2 a) and b) to its national legislation.
	Norway	Yes	<ol style="list-style-type: none"> 1. No 2. NA 3. The wording in the relevant parts of the Norwegian regulations and decisions makes it unnecessary to specify deadlines for returns.
