



EMN Ad-Hoc Query on NO EMN AHQ limited follow-up on sanctions and punishments for violation of entry ban related to limitations of the return directive/ practices of the EU court of law

Requested by Kathleen CHAPMAN on 2nd March 2018

Border

Responses from Belgium, Czech Republic, Finland, France, Germany, Greece, Luxembourg, Malta, Netherlands, Slovak Republic, Slovenia, Sweden, Norway (13 in total)

Disclaimer:

The following responses have been provided primarily for the purpose of information exchange among EMN NCPs in the framework of the EMN. The contributing EMN NCPs have provided, to the best of their knowledge, information that is up-to-date, objective and reliable. Note, however, that the information provided does not necessarily represent the official policy of an EMN NCPs' Member State.

Background information:

In your response to Finland's EMN AHQ of 20. June 2017, your MS (BE, CZ, FI, FR, DE, IT, LU, MT, NL, PT, SI, SK, SE) indicated that your national legislation allows sanctions/punishments for the violation of an entry ban. Our question concerns a particular scenario in which a foreign national who has been issued an entry ban, returns to the issuing state without having left the Schengen area. The Norwegian Ministry of Justice and Public Security is considering a legal amendment to clarify whether or not a prison sentence may be imposed in the scenario outlined in question 1. We would like to know how other countries have addressed this question, if at all - the situation is probably quite rare.

The Ministry notes that the European Court of Justice has not addressed the question of imprisonment in this scenario specifically. Certain judgments concerning Directive 2008/115/EC, in particular *Ouhrami* and *Celaj*, may nevertheless be relevant as to the permissibility of imposing a prison sentence for the violation of an entry ban.

Based on this background, the Norwegian Ministry of Justice and Public Security would like you to respond to the following questions:

Questions

1. According to your legislation, may a foreign national be sentenced to imprisonment for violating an entry ban in the following scenario? i) The foreign national is issued a return decision and an entry ban on the grounds of immigration-related violations (not due to a sentence for a "regular" crime), ii) the foreign national subsequently leaves the country but not the Schengen area, and iii) the foreign national then reenters the country Yes/No
2. If yes, please specify: Can a prison sentence only be imposed if it (i) does not impede return procedures and/or (ii) return efforts have been exhausted without result?
3. Please specify whether or not a foreign national may be sentenced to imprisonment for the violation of an entry ban if he/she (i) has left the Schengen area (voluntarily or forcibly) and (ii) subsequently reenters the country.

Responses

	Country	Wider Dissemination	Response
--	---------	---------------------	----------

	Belgium	Yes	<p>1. No. Illegal entry into and illegal residence in Belgium is a penal offence, however not specifically if this is in violation of an entry ban (or a return decision). Article 75 of the Belgian Immigration Act states that the foreigner who enters or stays illegally in the realm, will be punished with imprisonment from 8 days until 3 months and/or a fine between Euro 26,- and Euro 200,-. This article doesn't specifically regard foreigners who violated an entry ban in particular, but focuses on all foreigners who enter or stay illegally. According to our legislation it is possible that the foreign national in the above mentioned scenario will be sentenced to imprisonment. Not for violating an entry ban though, but for illegal residence. Please note that the above-mentioned Article 75 of the Immigration Act is currently being revised. A draft law, including amendments to the said Article, has been adopted by the Council of Ministers on 30 June 2017. The amendments aim to clarify (i) the scope of Article 75 and (ii) the notions of "illegal entry" and "illegal residence". They also aim to ensure compliance with the case law of the Court of Justice, which require that criminal penalties against illegal entry or illegal residence do not jeopardize the implementation of standards and procedures established by the Return Directive (see inter alia Achughbabian C-329/11 from 6 December 2011, Affum C-47/15 from 7 June 2016). The amended Article 75 would (once approved) take into consideration the conditions set by the Court to impose an imprisonment sentence for illegal entry or illegal residence. This draft law has not yet been adopted by the Parliament.</p> <p>2. Our legislation does not have a provision stating that a prison sentence for illegal residence may only be imposed if it does not impede return procedures and/or return efforts have been exhausted without result.</p> <p>3. According to our legislation it is possible that the foreign national in the above mentioned scenario will be sentenced to imprisonment. Not for violating an entry ban though, but for illegal residence.</p>
	Czech Republic	Yes	<p>1. Yes, in all cases if the court finds well-founded reasons.</p> <p>2. Within the scope of criminal trial proceedings the court does not take in consideration the Return Directive.</p>

			3. Yes, if the entry ban decision has been already issued and the person obstructs execution of the decision by his acting.
	Finland	Yes	<p>1. i), ii) and iii) No</p> <p>2. N/a</p> <p>3. N/a</p>
	France	Yes	<p>1. Yes. The violation of a national entry ban constitutes a misdemeanor. Article L. 624-1-1 of the Code of Entry and Residence of Foreigners and Right of Asylum (CESEDA) provides that any TCN concerned by a return ban who enters France or who has remained in France despite this decision shall be sentenced to three years' imprisonment (there is an additional fine of Euro 3750 if s/he has remained in France despite the removal order). Moreover, Article L. 624-2 of the CESEDA provides that in the cases listed in article L. 624-1-1 (e.g. attempts to avoid the execution of a removal order/reentering French soil without authorization; a TCN under detention tries to evade supervision), the judicial authority may impose a prohibition of the French territory of up to 10 years (criminal sanction). The French CESEDA does not make a distinction of situations according to the entry/exit of the Schengen area but according to the entry/exit into the French territory.</p> <p>2. If a third country national avoids/obstructs the preparation of return or the removal process, s/he can be sentenced to three years' imprisonment. Priority is given to house arrest.</p> <p>3. Yes. It is the same legal regime (3 years of imprisonment) with or without an exit from the Schengen area. Please note that criminal sanctions may vary depending on the decision of the prosecutor (who may decide not to sue) and on the decision of the Court who may decide not to convict the person.</p>
	Germany	Yes	1. In accordance with section 95 (2) no. 1 of the AufenthG [German Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory] anyone will be punished

(with a fine or imprisonment up to one year) who in contravention of section 11 (1) of the AufenthG enters the federal German territory without permission or resides in said territory without permission. This requires that the foreigner had previously been expelled and that he or she left the country, was deported or was removed and that he or she re-enters the federal German territory during the time when the entry ban is effective (see section 11 (1) of the AufenthG).

2. We cannot give a general answer to question number 2. In so far as there is the option of punishment pursuant to section 95 (2) no.1 of the AufenthG, the judicial authorities will decide in the individual case on the sentence (fine or imprisonment up to one year) and - if required – in this respect on any measures in order to end residence (see section 60 (8) of the AufenthG). Any measures of the German Aliens law do not automatically have priority over a sentencing.

3. The ban on entry pursuant to section 11 (1) of the AufenthG will only be triggered off by an expulsion [order] and/or deportation or removal that has been carried out (section 57 of the AufenthG). (The option of punishment – fine or imprisonment – does not depend on whether the respective person enters the territory from a "Schengen country" or a third country.) Other measures of the German Aliens law such as for example the refusal of entry [refoulement] (section 15 of the AufenthG) do not trigger off such an effect. In addition, other national or international alerts for a refusal of entry or refoulement as such (e.g. in the SIS) do not lead to a similar ban. If the foreigner has a permission to enter the territory (Betretenserlaubnis) pursuant to section 11 (2) of the AufenthG, this is not regarded as an unauthorised entry. The act itself pursuant to section 95 (2) no. 1 b of the AufenthG is then committed if a person resides in Germany after re-entering the federal territory in violation of the entry ban. A mere non-compliance with the (executable) deportation order by remaining in the country does – however - not fulfil the facts of the case. The facts of the case of section 95 (2) no. 1 of the AufenthG are not fulfilled if there were the statutory requirements for the granting of temporary admission (Duldung) in the relevant period of time of the act. The facts of the case do not apply to citizens of the European Union who in violation of an entry ban enter the federal territory. Section 9 of the FreizügG/EU [principle of freedom of movement of the EU] shall apply to them as a special law and this shall have priority over section 95 (2) no. 1 of the AufenthG. In addition, a special check must be carried out whether an entry ban based on a search notice is still valid. Apparent contraventions against unlimited entry bans which as per 26 November 2011 were older than five years or as of 26 November 2011 were five years

			<p>old, must not be punished. Violations of unlimited entry bans which are less than five years old, may only be punished if the fact that the foreigner entered the country must still be regarded as unauthorised, after a subsequent time limit was to be made, and a certain period of time has expired which enables the person concerned to find legal remedy in the federal territory. An unauthorised entry must not be approved without such subsequent time limit. Only contraventions against correctly limited entry bans - pursuant to Art.11 (2) of the Return Directive (RüFü-RL) - without a subsequent decision on a time limit, are subject to punishment.</p>
	Greece	Yes	<p>1. i) According to para 3 Article 82, Law 3386/2005 on " the Entry, Residence and Social Integretion of Third Country Nationals on Greek Territory" (Government Gazette issue 212/ 23-8-2005), "Aliens whose entry into the country has not been allowed because they are entered in the list of unwanted aliens shall depart immediately; otherwise, they shall be returned to the country of origin or to a third country, where entry may be allowed under the responsibility and costs of the aliens or those who transported them, who shall also be obliged to pay any other necessary costs required for departure." Also, pursuant to para 4 therein, "Aliens illegally returning to the country having been entered in the list of unwanted persons shall be punished by imprisonment of at least one year and a fine of EUR three thousand (€3,000) to EUR ten thousand (€10,000). The lodging of remedies shall not have any suspending effects."</p> <p>2. In case the third country national serves the sentence imposed or has been given a suspended sentence (which is most often the case), on reasons related to irregular migration, he/she should be deported. This is the responsibility of police authorities pursuant to paragraphs 2 to 5 of article 76, Law 3386/2005: In case the third country national serves the sentence imposed or has been given a suspended sentence (which is most often the case), on reasons related to irregular migration, he/she should be deported. This is the responsibility of police authorities pursuant to paragraphs 2 to 5 of article 76, Law 3386/2005: "2. Expulsion shall be ordered by decision of the competent Police Director and, in case of the General Police Directorates of Athens and Thessaloniki, by the Police Director in charge of aliens or a higher officer, appointed by the competent General Police Director, having given the alien a period of at least forty-eight hours to express his/her objections. 3. If the alien is considered, on the basis of the general circumstances, suspect for escape or dangerous for the public order or avoids or obstructs the preparation of his departure or the procedure of his</p>

expulsion, his temporary detention is ordered, upon decision of the bodies referred to in the previous paragraph, until the issue, within three (3) days, of the decision regarding his deportation. Once the above decision is issued, detention still continues until deportation, but cannot last more than six (6) months in any case. If deportation is delayed because the alien refuses to cooperate or the documents necessary for his deportation are not sent timely from the home country or the country of origin of the alien, his detention may be extended for a limited time which cannot exceed twelve (12) months. The alien should be informed in a language he understands about the reasons for his detention and his communication with his attorney-at-law should be facilitated. The alien in detention, along with his rights according to the Code of Administrative Procedure, may also express objections against the decision for his detention before the president or the judge of the first instance court defined by the latter, in the region of his detention. 4. Objections shall contain specific reasons; oral objections may also be submitted. In this regard a relevant report is drawn up by the registrar. In relation to the proceedings, provisions of case c, par 2, art. 27 and par.1, art. 204 of the Code of Administrative Procedure shall apply accordingly. If so requested, the judge must hear the opponent or his representative or even order the hearing. The allegations put forth during the process must be substantiated immediately. The authorised judge as referred to in par. 3 shall decide on the lawfulness of the detention or the extension of it and issue immediately a judgement on the objection which must be stated briefly in the minutes. A copy of the minutes must be handed over immediately to the police authorities. In case of a public holiday, the presence of a registrar is not required, the minutes and the report provided for in par.1 are drawn up by the judge himself. This decision is not subject to appeal . 5. In case the alien to be expelled is not regarded as suspect of an eventual escape or is not deemed dangerous to public order or the president of the Administrative court of first instance disagrees with the detention, the same decision allows the alien a period of time not exceeding thirty days in which to leave the country, unless there are grounds for non –expulsion"

3. In case the third country national has been deported and then re-enters the country illegally, the above measures should be taken. In case the third country national leaves the country voluntarily, an entry ban is not registered upon their departure (see article 26, para 1, Law 3907/2011), and hence in case the foreign national returns illegally to the country and is arrested, the pertinent legislation is Article 76, para 1 and 2 of Law 3907/2011

(

			<p>%20Law%203907%20Greece.pdf) and Article 83 of Law No. 3386/2005 (http://www.refworld.org/docid/4c5270962.html) Article 83 Illegal entry in and exit from the country 1. Third-country nationals who exit or attempt to exit Greece or enter or attempt to enter Greece without legal formalities shall be punished by imprisonment of at least three months and a fine of at least EUR one thousand five hundred (€1,500). If the person attempting to depart illegally is wanted by judicial or police authorities or has tax or other obligations to the State or is a recidivist, this shall be considered as aggravating circumstances and he/she shall be punished by imprisonment of at least three months and a fine of at least EUR three thousand (€3,000). The penalties referred to herein shall also be imposed to EU Member State nationals.54 2. If a third-country national enters on Greek territory or departs therefrom without the legal formalities, the public prosecutor for the magistrate court, with the approval of the public prosecutor for 54 Added by article 45, para.1f, of Law 3731/2008. of 37 / 52 the court of appeal, to whom he shall immediately report, may refrain from initiating criminal proceedings for such act, in which case he shall immediately notify his decision to the commander of the police or port authority who discovered the illegal entry or departure, in order for the latter to forward the third-country national immediately to the country of origin or descent. The approval of the public prosecutor for the court of appeal may be given by any suitable means. If the third-country national cannot be forwarded immediately, the commander of the police or port authority shall prepare a report and shall refer the third-country national to the competent administrative authority for expulsion, pursuant to article 76 hereof. If the expulsion is not effected within three months, the latter authority shall notify the competent public prosecutor for the magistrate court. In such case, the public prosecutor for the magistrate court may revoke his decision on refraining from criminal proceedings, with the approval of the public prosecutor for the court of appeal, provided that no more than a year has lapsed from the date of illegal entry of the third-country national in the country.</p>
	Luxembourg	Yes	<p>1. Yes. Article 142 of the amended law of 29 August 2008 on free movement of persons and immigration (Immigration Law) can be applied to that situation.</p> <p>2. If the return decision and the entry ban have been notified to the individual and s/he leaves the territory of Luxembourg, the TCN can be convicted if s/he is detected again on the territory (Article 142 of the Immigration Law). The criminal offense does not require that the individual leaves the</p>

			<p>Schengen area. However, if the TCN could not leave the country because of external factors or that the Luxembourgish authorities could not execute the return decision, in that case the subjective element of the criminal offense is not fulfilled and there can not be conviction.</p> <p>3. Yes. See answer to question 1.</p>
	Malta	Yes	<p>1. Yes, a prison sentence may be imposed in line with Article 24 of the Immigration Act (Cap. 217 of the Laws of Malta). ii) In the majority of cases of convicted TCNs, in practice, the return decision is accompanied with a removal order and therefore the possibility of the person leaving to another MS is eliminated. iii) Yes, if the foreign national re-enters without requesting and obtaining prior clearance.</p> <p>2. Legislation does not have a provision stating that a prison sentence for violation of an entry ban may only be imposed if it does not impede return procedures and/or return efforts have been exhausted without result.</p> <p>3. Yes if he re-enters without having first obtained prior authorization. The imprisonment is not linked to an illegal stay but limited for the violation of the entry ban</p>
	Netherlands	No	
	Slovak Republic	Yes	<p>1. No.</p> <p>2. N/A</p> <p>3. If a TCN re-enters the territory of the Slovak Republic despite an imposed ban on entry to Schengen area, s/he is committing a crime of “Obstruction to execution of an official decision” in line with the Art. 348 of the Criminal Code. S/he can be imposed a punishment of imprisonment of up to 2 years.</p>

	Slovenia	Yes	<p>1. No</p> <p>2. n.a.</p> <p>3. no</p>
	Sweden	Yes	<p>1. No. A foreign national can be sentenced to imprisonment for violating an entry ban only if the entry ban is connected to a an expulsion due to a sentence for a "regular" crime.</p> <p>2. NA</p> <p>3. See the answer to question no 1.</p>
	Norway	Yes	<p>1. Yes. Norwegian law does not expressly state whether or not a prison sentence may be imposed in the scenario outlined in question 1, but the answer is probably yes. A violation of an entry ban is punishable by imprisonment for up to two years, and according to section 71 of the Immigration Act, an entry ban "shall prevent subsequent entry into the realm" (our emphasis). Some case law suggests that re-entry to the realm may be punishable by prison whether or not the foreign national has left the Schengen area.</p> <p>2. Norwegian law does not have a provision stating that, in the scenario outlined, a prison sentence may only be imposed if it does not impede return procedures and/or return efforts have been exhausted without result.</p> <p>3. A foreign national may be sentenced to imprisonment for violating an entry ban if he re-enters the country after having left the Schengen area.</p>