

Ad-Hoc-Query N° 2018.1299 (launched by AT)

on

Confiscation of Cash, Detention pending Removal and Exception of the Application of the Return Directive

Summary

(based on responses for wider dissemination)

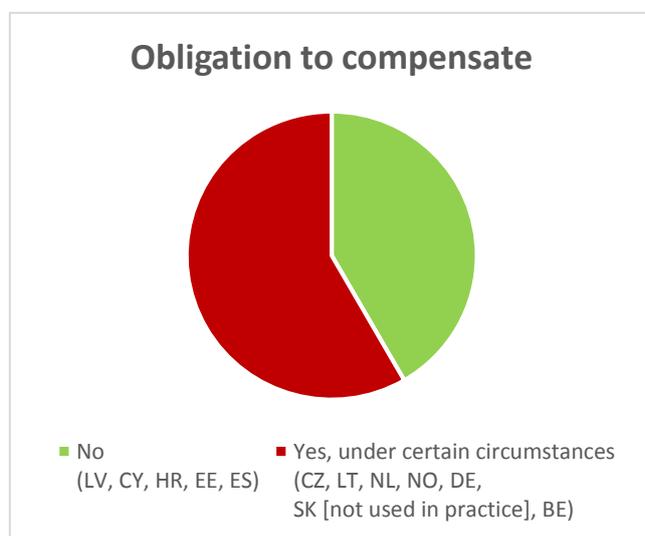
Background: The Austrian Federal Government aims at developing a more enforceable and consequent Asylum and Aliens Law and at making return procedures more efficient. Currently the possibility whether to (if required) arrest criminal asylum seekers after they served their penal sentence on grounds of public order and security in order to prevent absconding is discussed and elaborated. Therefore, we would like to know from other Member States what regulations they have implemented concerning criminal asylum seekers after their release from penal custody. Furthermore, we are interested in Member States' regulations concerning the Confiscation of Cash of asylum seekers.

Total number of participating NCPs: 17

Responses for wider dissemination: LV, LU, SE, CZ, LT, NL, CY, NO, DE, SK, HR, BE, EE, ES, EL

Responses not for wider dissemination: IE, UK

Question 1: According to the national law of your Member State, is there an obligation for applicants for asylum to compensate for the expenses related to their care completely or partially (Art. 17 para 3 and 4 Reception Directive)?



LU pointed to their national law, establishing the rule, that the international protection applicant must not be deprived of sufficient resources to ensure his/her livelihood for benefiting from the material reception conditions. In the case that the applicant has the necessary resources she/he is excluded from benefiting from the material reception conditions.

SE mentioned an obligation for adult applicants to pay a patient fee (approx. 5 euros) when visiting a medical practitioner

within the primary care system. If the applicant is hospitalized, she/he does not have to pay a patient fee.

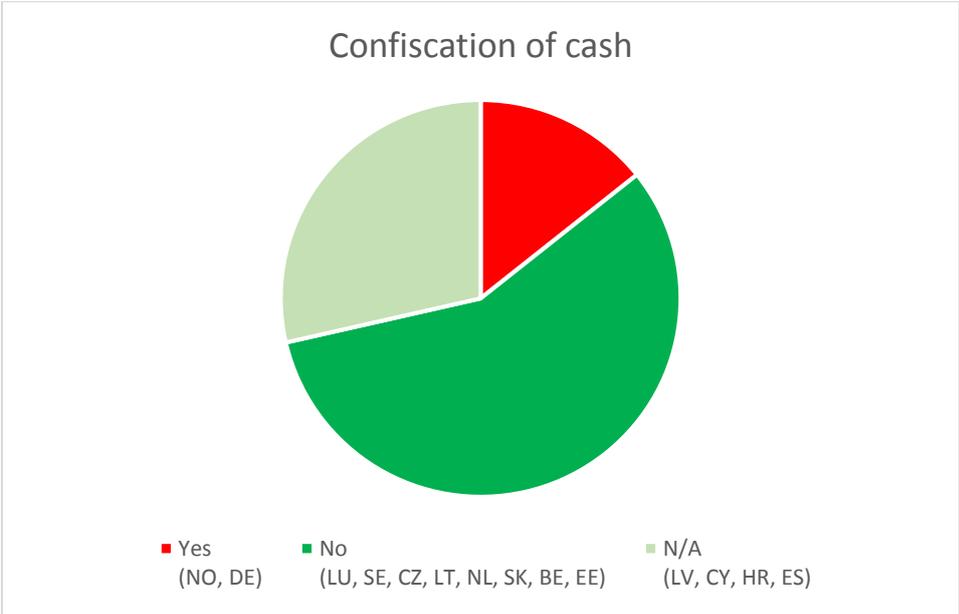
BE elaborated that termination of residence at the mandatory place of registration (reception structure) is possible under specific circumstances. In such cases the applicant for international protection has to find housing on the regular housing market.

EE pointed out, that in Estonia no obligation for applicants to compensate for the expenses exists. However, under certain circumstances, applicants are not entitled to all services potentially provided and may reside outside the accommodation centres.

EL responded, that the answer to that question is still pending.

Question 2: If question 1 is to be answered in the affirmative: Does your national legislation permit the confiscation of cash of an applicant of asylum on the occasion of the application for international protection or at a later point during the asylum procedure in order to guarantee the compliance with the obligation to compensate?

The responses regarding the confiscation of cash is shown in the graph below.



EL responded, that the answer to that question is still pending.

Question 3: If question 2 is to be answered in the affirmative: Up to which maximum amount the applicant’s cash can be confiscated? Does your national legislation allow to confiscate the entire amount of cash (up to a possible limit) or is the confiscation only applicable if the amount of cash exceeds a certain minimum amount or an allowance that must not be confiscated as it remains property of the applicant?

The majority of responding NCPs (LU, SE, CZ, LT, NL, LV, CY, SK, HR, EE, ES) has answered “n/a”.

In **NO** a reasonable amount, that shall be equal to a month's worth of living expenses in the country of origin, is reserved for the foreigner. In **DE** a determined allowance per person exists. In addition, there are certain percentages up to which asylum seekers have to spend their net income to cover their living costs. Finally, asylum seekers are left with a certain amount for securing the subsistence level after arrival in the country of destination. **BE** referred to the answers to questions 1 and 2. **EL** responded, that the answer to that question is still pending.

Question 4: Can asylum seekers be detained following release from penal sentence for reasons of public order and security or other reasons in order to prevent absconding? How have you implemented Art. 8 para 3 (e) of the Reception Directive into national legislation?

The responses regarding the grounds for detention of asylum seekers in different member states are listed in the table below.

	Threat to national security or public order and safety, reasons of public order and security, threat to fundamental national interests	Determination of elements on which the application is based	Risk of absconding	Establishing identity/nationality	Reasons of return procedure/decision	Particular circumstances with regard to the asylum application	Access to the asylum procedure and delaying/frustrating return decision by application for international protection	Decision on the right of an asylum seeker to enter the State	Transfer procedure (Article 28 of Regulation No 604/2013)	Risk of committing a crime	Conviction for a criminal offence	Implementation of Article 8 paragraph 3e Reception Directive
LV	LV (particularly if absconding is possible)		LV	LV			LV	LV				LV
LU	LU (especially if there is a risk of absconding)											LU
		SE		SE					SE			
												CZ (n/a for those released)
LT												
NL	NL	NL	NL	NL	NL	NL						NL
												CY
NO		NO		NO								NO
DE		DE		DE								
SK												SK
HR				HR						HR		HR
BE	BE		BE	BE								
EE		EE										
EL	EL (particularly if absconding is possible)	EL	EL			EL						EL

ES responded that detention of asylum applicants is not foreseen in its national legislation.

EL stated that migrants, who are released from a penal sentence and who have applied for asylum, cannot be detained. In **EL** aliens or stateless persons who, while in detention in accordance with the relevant provisions of its national legislation, submitted an application for international protection shall remain in detention only for specific reasons and if it is considered necessary after an individual assessment.

Question 5: Have you made changes in the field of Asylum and Aliens Law, in particular in the area of detention of asylum seekers, in the last three years or are you planning changes? If so, what are the specific measures?

In **LV** a new Asylum Law was accepted in 2016, implementing Directives 2013/33/EU (Reception Directive) and 2013/32/EU (common procedures for granting and withdrawing international protection). Regarding possible restrictive measures set forth in the law, detention is the last resort in specifically stipulated situations.

In **LU** the Directives 2013/32/EU and 2013/33/EU were transposed into national law. In 2017, different laws were amended in order to also detain families with children for up to seven days in order to organize their return.

In **SE** there have not been any major changes regarding the grounds of detention for the last three years. However, there are some changes suggested by the government, such as the detention order shall be subject to supervision of a judicial authority in cases of prolonged detention periods. Furthermore, the initial detention order shall also be subject to the supervision of the judicial authority if the detention period exceeds two weeks.

In **CZ** the biggest issue was the transposition of the Reception Conditions Directive (2013/33/EU) by amending the Asylum Act, entering into force in December 2015. The last amendment also introduced the possibility for courts to stop the review of actions lodged against detention decisions in cases where the applicants have been released in the meantime. This change is, however, subject to preliminary ruling at the Court of Justice of the European Union and a constitutional complaint was lodged against it.

In **LT** a law of January 2015 sets out the grounds for detention applicable to asylum seekers. The law also provides for circumstances that are assessed in determining whether there is a risk of absconding, such as an asylum applicant who, during the examination of the asylum application, does not cooperate with the competent authorities. No new changes are currently planned regarding detention of asylum seekers.

In **NL** the Reception Conditions Directive was implemented into Dutch law in 2015. Since 2015, there have not been any relevant changes concerning asylum seekers. Additionally, in the near future there are no foreseeable changes.

In **CY** persons who are detained for violating the penal code and then apply for asylum are now detained under the Cyprus Refugee Law and not under the Aliens and Immigration Law. Furthermore,

there is an amendment bill pending before the House of Parliament, which sets out the criteria for detention for persons under the Dublin Procedure.

In **NO** a new basis for arresting foreigners has been established, such as the possibility of arresting and incarcerating persons whose case will probably be refused (i.e. denied the right to stay) in Norway for specific reasons. Also, the arrest and incarceration of foreigners whose asylum application is considered manifestly unfounded is now possible. In May 2018 new grounds for arrest and incarceration of minors and families (families with children) will enter into force.

In **DE** regulations have been issued for a geographical restriction of asylum seekers' place of residence but not in the area of detention. No such regulations are planned.

In **SK** the Act on Asylum was changed in connection with the transposition of Directives 2013/32/EU and 2013/33/EU and the adoption of a new Code of Administrative Procedure. Currently an amendment is in the legislative process to (among other things) widen the reasons for termination of asylum and subsidiary protection.

HR has amended its Act on Foreigners which now regulates, that third-country nationals may have their freedom of movement restricted by accommodation in the Reception Centre for Foreigners for up to six months under certain circumstances.

In **BE** a lot of legal changes came into force in March 2018, transposing these stipulations of the Return Directive which challenged the detention policy. Furthermore, conditions were specified under which the appeal against a negative decision regarding a second asylum application of a third-country national is no longer suspensive.

In **EE** a few legislative changes took place in the field of detention of asylum seekers in the last three years. Among them was the coming into force of a new provision in 2016, entitling the administrative court to extend the term of detention up to four months under certain conditions.

ES reported, that there were no recent changes.

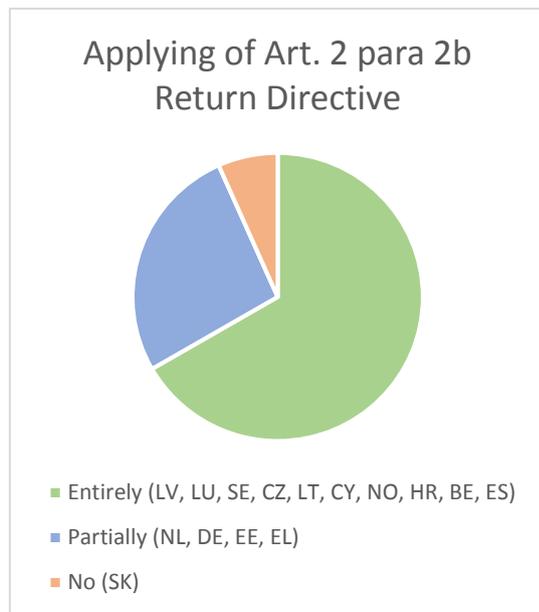
EL responded that a former presidential decree regarding asylum cases was abolished by a new national law in 2016 that which includes the directives 2013/32/EU (article 26) and 2013/33/EU (articles 8 to 11).

Question 6: Do you apply Art. 2 para 2b of the Return Directive, under which Member States may decide not to apply this Directive to third-country nationals who 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? How was this exception implemented in national legislation?

As the graph below shows, the majority of responding NCPs is applying Article 2 para 2b of the Return Directive. **SK** is not applying the mentioned article, **NL**, **DE** and **EE** are applying only a part of the provision.

LV implemented the mentioned provision by determining under which circumstances a removal order shall not be issued or a voluntary return decision shall not be taken.

In **LU** it was established that a third country national who is subject to extradition procedures cannot be returned. That also applies to third-country nationals who have been condemned to a criminal sanction until that sanction has been served or parole has been obtained. Furthermore, a third-country national cannot be returned during being investigated for a criminal offense or during standing trial.



In **SE** the exception is not explicitly mentioned in the Aliens Act. However, the fact that third-country nationals subject to return as a consequence of a criminal law sanction are excepted emerges from the relevant sections.

CZ uses both exceptions allowed and implemented them implicitly in national legislation.

LT applies the exceptions, the Criminal Code, however, does not contain return as a sanction or part of a sanction. The extradition in LT is carried out in accordance with international agreements that, according to LT law, take precedence over national LT law.

In **NL** this article is implemented in Dutch legislation via a decree exemptions of the Return Directive, applying for foreign nationals subject to an ongoing extradition procedure. The mentioned decree does not include an exemption from the Return Directive for foreign nationals who are forced to return as a consequence of a criminal law sanction.

In **CY** third-country nationals who have become irregular migrants as a result of a criminal conviction are not subject to the provisions in the Return Directive regarding detention and return. These persons are subject to return under provisions of national legislation.

NO applies the mentioned exemption and referred to its national legislation.

DE stated, that the application is generally not ruled out but the applicability in connection with the individual regulations is limited.

HR is applying the mentioned exceptions.

BE responded that they are making use of the derogation provided under the mentioned article.

EE applies the Return Directive also to third-country nationals who are subject to return as a criminal law sanction or as a consequence of a criminal law sanction. However, the provisions on issuing return decisions are not applied.

In **EL** the state has the prerogative to not issue a return decisions to third-country nationals who are subject to return as a consequence of a criminal law sanction.

Co-financed
by the
European Union



BM.I



REPUBLIC OF AUSTRIA
FEDERAL MINISTRY OF THE INTERIOR



The European Migration Network (EMN) is coordinated by the European Commission with National Contact Points (EMN NCPs) established in each EU Member State plus Norway. The National Contact Point Austria in the EMN is financially supported by the European Commission and the Austrian Federal Ministry of the Interior.