CONTENTION – Judicial CONtrol of Immigration DeTENTION

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I. SETTING THE SCENE

1. FIRST STAGE of judicial control,
i.e. judicial *control of Initial Detention acc. to Art. 15(2) RD*

Q1. The ***initial*** detention is ordered by:

- An administrative authority. The TCN concerned has the right to take proceedings by means of which the lawfulness of detention is subject to a judicial review (AT, BE, BG, CZ, SI, SK)

  The initial decision (administrative order, usually administrative order without further investigations, Mandatsbescheid) is made by the BFA (Federal Office for Immigration and Asylum). A complaint against such a decision is possible. The complaint is decided by the Federal Administrative Court.[1] *The complaint has to be filed with the BFA; the Office has to decide in a preliminary decision. The BFA has to submit the complaint, the preliminary decision and the files to the Federal Administrative Court.*
  The Federal Administrative Court and Administrative Courts in the Federal States have been established in 2013 and judges were inaugurated in 2013, the work started on 1 January 2014. Before 2014 the competence to decide about detention orders was allocated to the Aliens Police. Independent Administrative Boards (or Senates, UVS - Unabhängige Verwaltungssenate) were responsible to decide about complaints filed against detention orders. As the reference to jurisprudence is mainly based on decisions taken before the establishment of the new administrative and judicial framework, it is necessary to mention the organizational development here.

- An administrative authority. The order must be endorsed by a judicial authority within a specific time-limit (NL)

  Not relevant.

- Administrative authority. However, it can order detention of a certain length, and detention which goes beyond that length is ordered by a judicial authority (IT, HU, FR)

  Not relevant.

[1] Bundesgesetz, mit dem die allgemeinen Bestimmungen über das Verfahren vor dem Bundesamt für Fremdenwesen und Asyl zur Gewährung von internationalem Schutz, Erteilung von Aufenthaltstiteln aus berücksichtigungswürdigen Gründen, Abschiebung, Duldung und zur Erlassung von aufenthaltsbeendenden Maßnahmen sowie zur Ausstellung von österreichischen Dokumenten für Fremde geregelt werden, Act on Procedures bevore the BFA (BFA-Verfahrensgesetz – BFA-VG), BGBl. I Nr. 87/2012, Amendments: BGBl. I Nr. 68/2013; BGBl. I Nr. 144/2013. In force since 1 January 2014. See also Bundesgesetz über das Verfahren der Verwaltungsgerichte, Act on Procedures before the Administrative Courts (Verwaltungsgerichtsverfahrensgesetz – VwGVG) BGBl. I Nr. 33/2013, as amended by BGBl. I Nr. 122/2013. In force since 1 January 2014.

- A judicial authority on request of an administrative authority (DE)

Not relevant.

Q1.1. For any response you chose in the previous question, please explain whether the judge **controls *ex officio* all the elements of the lawfulness** irrespective of the arguments of the parties or whether the judge **limits the control only to the arguments** raised by the parties:

*According to § 22a Act on Procedures before the BFA the Federal Administrative Court has to decide about **all aspects of legality** of detention, if the TCN is still in detention at the time when the Court decides. Thus the judge controls ex officio all elements of lawfulness irrespective of the arguments in case the TCN is still in detention.*
The decision is a twofold one.
1. The judge has to decide whether detention is lawful (necessary and proportionate) at the time of the decision in order to establish whether or not detention may be continued. This situation corresponds to the situation in force until 31 December 2013; the extent of judicial control is the same. The High Administrative Court held that the control is not limited and the previous Federal Administrative Senates were obliged to a full control of all aspects of legality of detention (see e.g. High Administrative Court, 2010/21/0292, 15.12.2011). The Federal Administrative Court decided that the control is not limited and continued the practice to control all elements irrespective of the arguments raised (see BVwG, G307 2007974-1, 21.5.2014; so far there are no decisions by the High Administrative Court based on the new legal situation).

2. The judge also has to decide whether the initial detention was lawful. The Court decides about the legality of the initial decision only taking the arguments into account, which were raised by the applicant (see e.g. UVS-01/51/7614/2012, 16.1.2013). The Act on Procedures before the Administrative Courts limits the control to be exercised by the Courts to arguments raised in the complaint (see § 27 Act on Procedures before the Administrative Courts). If the person is no longer in detention the judge only takes the arguments raised into account.

New facts and proofs in the complaint may only be submitted by the applicant, if the reasons enumerated in § 20 (1) Act on Procedures before the BFA are fulfilled. New facts and proofs may be submitted, if 1) the facts on which the decision was based changed considerably after the decision was made; 2) the procedure before the BFA was deficient; 3) the TNC did not have access to these proofs and did not have knowledge about the facts at the time when the procedure was pending before the BFA; 4) the person was not capable of submitting the facts. In practice new facts and proofs are rarely submitted by the applicants.

The Court has to control the legality of detention after four months of detention ex officio and exercise full control and the BFA has to control the legality within the first four months. The Court and the BFA are obliged to decide about all aspects of legality.

Q1.2. What are in your opinion the **advantages and disadvantages** of the options you chose in **Q1** and **Q1.1**?

In general one could qualify the full judicial control about prolongation of detention, which has to take place upon a complaint by the TCN in detention as an advantage. Also the regular control of legality by the Federal Administrative Court is an advantage.
As the jurisprudence shows the decisions often merely refer to the fact that there is a necessity to secure a person's removal or to secure the return procedure without fully investigating all the facts of the case. General changes in the line of arguments used by the Federal Administrative Court and previously by the Independent Administrative Senates were often based on the jurisprudence of the High Administrative Court.

(The system is only applicable since 1 January 2014. A thorough analysis is only possible after a certain period. The system however is not fundamentally different in comparison to the previous system with regard to judicial control and with regard to the extent of judicial control. The main difference is that the Federal Administrative Court is responsible for judicial control, whereas until 2014 the competence was allocated to the Independent Administrative Senates (or Tribunals) in the Federal States.)

Q2. Please provide below a short description of **the system of legal aid** for pre-removal detainees in your Member State

Free legal aid is available for persons who are in pre-removal detention and also for persons who are apprehended according to the Aliens Police Act. The persons have to be informed about the availability of free legal aid by procedural order (Verfahrensanordnung). Legal counsellors do have to support applicants when they file a complaint. They also have to inform them about the prospects of success of a complaint.

Q3. Do the competent judicial authorities, i.e. the courts ordering, endorsing or reviewing (administrative decision regarding) the initial detention belong to:

- □ Civil jurisdiction
- X Administrative jurisdiction
- □ Criminal jurisdiction
- □ Special jurisdiction
- □ Else

Not relevant.

Q4. Is the judge ordering, endorsing or reviewing the ***initial*** detention,

- Hearing only detention cases in general (special competence)?

No.

- Hearing only immigration law cases?

No.

- Hearing a wide range of cases not limited to immigration/detention (general competence)?

The Federal Administrative Court as such has a general competence. The Court is organised in Chambers and Senates. The regional branch offices in three other towns outside Vienna (Linz, Graz and Innsbruck) build a Chamber as well. Chambers 1 and 2 (located in Vienna) are responsible for asylum and immigration law cases including detention, the branches are also dealing with asylum and aliens law cases. Fields of competence are allocated to the judges in advance by the committee on the allocation of duties consisting of the judges of the Court. ***Based on this allocation system certain judges are usually (but not necessarily) only competent to deal with asylum and TCN law cases.***

Q5. If the detention is ordered **by an administrative authority** and **reviewed on the initiative of the detainee by a judicial authority**, does your Member State's legislation provide for a second level of jurisdiction for the examination of the lawfulness of detention?
X YES NO

Q5.1. If the answer to the previous question is YES, please elaborate on **any differences** in the control of lawfulness of detention **between the first and the second levels of jurisdiction**:

The Federal Administrative Court has to decide about facts and law, the High Administrative Court only decides about the law.

The Federal Administrative Court has to decide on the merits if the facts are established. The Court may (but not necessarily must) refer the case back to the administrative authority, the BFA. The BFA then has to conduct further inquiries and has to establish all the facts and decide again on the basis of the reasoning in the decision and has to follow the opinion of the Court.

The person may file a remedy, called ***revision, to the High Administrative Court*** *(Art. 133 (4) Austrian Constitution, B-VG, § 25a Act on the High Administrative Court). The High Administrative Court has to decide about the legality of the order, thus the Court has to decide about the law. The revision has to be submitted to the Federal Administrative Court, this Court has to decide whether such a revision is admissible. A revision has to be permitted if one of the reasons enumerated in § 25a Act on the High Administrative Court is fulfilled. The Federal Administrative Court has to allow a revision if a legal question has to be solved which has fundamental importance, especially because the decision deviates from previous jurisprudence of the High Administrative Court, if there is no such jurisprudence or because there is no consistent jurisprudence with regard to the legal question (Art. 133 (4) B-VG). It is also possible that the Court renders a final decision if all facts are established.*

If the Federal Administrative Court ***does not allow a revision the person may file an extraordinary revision to the High Administrative Court****.*

A procedure about an ordinary revision is conducted by the Federal Administrative Court and then submitted to the High Administrative Court (together with the files and the

preliminary decision), a procedure about an extraordinary revision is conducted by the High Administrative Court. In the latter case the person has to submit reasons why the question is a question of fundamental importance.

According to § 8 Act on Procedures before the BFA the Ministry of the Interior may file a revision to the High Administrative Court as well.

Q6. If the detention is **ordered/endorsed by a judicial authority**, does your Member State's legislation provide for **a second level of jurisdiction** for the examination of the lawfulness of detention?
YES NO

Q6.1. If the answer to the previous question is YES, please elaborate on any differences in the control of lawfulness of detention between the first and the second levels of jurisdiction:

Not relevant.

Q7. If relevant, please elaborate in the following on **any on-going legislative changes** relating to the **QQ. 1-6**, which will affect in the future the judicial control of detention:

As the system is only working as described above since January 2014 there are no on-going legislative changes. There is however a "certain consolidation" of practice.

2. SECOND and SUBSEQUENT STAGES of judicial control,

i.e. *judicial control of continuing detention according to Art. 15(3)*

Q8. The lawfulness of continuing detention is controlled by a judicial authority:

- □ Only **when** the detention order is **renewed**
- □ **Independently** from the renewal order (i.e. irrespective of the time when the detention order is renewed)
- X Both options are possible

Q8.1. What are in your opinion the **advantages and disadvantages** of the option you chose in the previous question?

An advantage is that the lawfulness of detention has to be controlled ex-officio and upon a complaint. The system works as follows: The administrative authority (BFA) has to review the proportionality of detention every four weeks. The Federal Administrative Court has to review the lawfulness if detention lasts longer than four months and then every four weeks. A complaint to the Court is possible from the beginning. As long as a complaint is pending there is no ex-officio review.

2.1 Judicial control of detention exercised on the occasion of the renewal of detention

Q9. When judicial control is exercised **on the occasion of the renewal of detention** and the renewal decision was taken by the administration, is the judicial review of the lawfulness of the renewal order:

- Automatic

As mentioned above the judicial control is automatic after four months of detention.

- Possible only on application of the detainee
  Judicial control is possible upon a complaint by the detainee at any time after a decision has been rendered.

Q9.1. For each of the response you chose in the previous question, please explain whether the judge controls *ex officio* all the elements of the lawfulness irrespective of the arguments of the parties or whether the judge limits the control only to the arguments raised by the parties:

See the answer to question Q 1.1. *The judge has to decide whether detention is lawful (necessary and proportionate) at the time of the decision in order to establish whether or not detention may be continued.* *The judge also has to decide whether the initial detention was lawful. The Court decides about the legality of the initial decision only taking the arguments into account, which were raised by the applicant (see e.g. UVS-01/51/7614/2012, 16.1.2013).*

Q10. What are in your opinion the **advantages and disadvantages** of the options you chose in **Q9** and **Q9.1:**

There are no advantages or disadvantages, the system works quite well.

Q11. If the response to the **Q9** is **"possible only on application of the detainee"**, does your Member State's legislation provide for **a second level of jurisdiction** for the examination of the lawfulness of renewal order
YES NO

Q11.1. If the answer to the previous question is YES, please elaborate on any **differences** in the control of lawfulness of detention **between the first and the second levels** of jurisdiction:

Not relevant.

Q12. If the renewal decision is taken by a judicial authority, is there any **second level of jurisdiction** for the examination of the lawfulness of renewal of detention?
YES X NO

Q12.1. If the answer to the previous question is YES, please elaborate on **any differences** in the control of lawfulness of detention **between the first and the second levels of jurisdiction**:

See the answer to Q 5.1.

2.2 Judicial control of detention exercised independently (in time) from the renewal of detention

Q13. If the lawfulness of continuing detention is controlled **independently from the renewal order**, the lawfulness of detention is reviewed by:

- An administrative authority *ex officio* with an automatic judicial review

The administrative authority (BFA) has to review the proportionality of detention every four weeks. The Federal Administrative Court has to review the lawfulness if detention lasts longer than four months and then every four weeks.

- An administrative authority *ex officio* with the possibility of judicial review on the application of the TCN concerned

As mentioned above the proportionality is controlled ex-officio by the BFA every four weeks. After four months of detention the Federal Administrative Court has to review the lawfulness. A complaint to the Court is possible from the time when the detention order is issued.

- An administrative authority on application by the TCN concerned with an automatic judicial review

Not relevant.

- An administrative authority on application by the TCN concerned with the possibility of judicial review on the application of the TCN concerned

Not relevant.

- A competent court *ex officio* with no possibility of second level review of lawfulness of detention

Not relevant.

- A competent court *ex officio* with the possibility of second level review of lawfulness of detention on application of the TCN concerned

Not relevant.

- A competent court on application by the TCN concerned with no possibility of second level review of lawfulness of detention

Not relevant.

- A competent court on application by the TCN concerned with the possibility of second level review of lawfulness of detention

After four months of detention the Federal Administrative Court has to review the lawfulness on a regular basis. A complaint to the Court is possible from the time when the detention order is issued. A revision to the High Administrative Court is possible against a decision by the Federal Administrative Court.

Q14. What are in your opinion the **advantages and disadvantages of the option you chose** in the previous question?

An advantage is the combination of both review methods. The dense ex-officio control might be a disadvantage as well, as the authorities and the Court could just enact an automatic review mechanism without checking the lawfulness carefully.

Q15. Is the **judge** controlling the lawfulness of continuing detention **the same** as the one ordering/endorsing/reviewing (administrative decision regarding) **the initial order** of detention?

YES NO

This depends on the allocation of competences decided in advance. It might be the same judge but there is no automatism.

(The judge deciding in the asylum procedure is not the same judge who decides the aliens' law procedure.)

Q15.1. If the answer to the previous question is NO, please explain briefly the difference:

See the answer to Q 15.

Q16. If relevant, please elaborate in the following on any on-going legislative changes relating to the **QQ. 8-15**, which will affect in the future the system judicial control of detention:

No on-going legislative changes.

3. Control of facts and law

Q17. The control exercised by the judge in your Member State on the materiality of the **facts** of a case of detention is:

- a control limited to a manifest error of assessment

Not relevant.

- a full control not limited to a manifest error of assessment

Yes, there is a full control if detention is still in place.
If the judge decides that the BFA did not investigate all the facts of the case referred to at the first instance, the BFA, for further establishment of facts. The judge may decide the case based on the established facts or also hold a hearing if necessary.
As the BFA decides without an intense investigation and issues an administrative order (Mandatsbescheid) this would be a possibility to influence the BFA to conduct further inquiries. In practice the Independent Administrative Senates and the Federal Administrative Court usually confirm the decision of the BFA. As the case law examples show the judges usually confirm the reasoning.
As mentioned above new facts and proofs may only be submitted by the complainant, if the reasons enumerated in § 20 (1) Act on Procedures before the BFA are fulfilled. New facts and proofs may be submitted, if 1) the facts on which the decision was based changed considerably after the decision was made; 2) if the procedure before the BFA was deficient; 3) if the TNC did not have access at the time when the procedure was pending before the BFA: 4) if the person was not capable of submitting the facts.

Q18. The control exercised by the judge in your Member State on **legal elements** of a case of detention is:

- a control limited to a manifest error of assessment

Not relevant.

- a full control not limited to a manifest error of assessment

The Federal Administrative Court exercises full control.
A revision to the High Administrative Court (second level of judicial control) is only admissible if one of the reasons enumerated in § 25a Act on the High Administrative Court is fulfilled. The Federal Administrative Court has to allow a revision if a legal question has to be solved which has fundamental importance, especially because the decision deviates from previous jurisprudence of the High Administrative Court, if there is no such jurisprudence or because there is no consistent jurisprudence with regard to the legal question (Art. 133 (4) B-VG).

Q19. If relevant, please elaborate in the following on any on-going legislative changes relating to the **QQ. 17-18**, which will affect in the future the control of facts and law:

No on-going legislative changes.

4. Proportionality in general

Q20. Describe briefly how the judge will in your Member State assess the proportionality of a detention (quote the **main elements to be controlled** on that basis):

Proportionality includes all elements which are taken into account when deciding whether detention is balanced to reach the aim or if less coercive measures or no measures would be sufficient (see VwGH 2013/21/0090) or if detention is necessary and proportionate to secure the return procedure or the removal.
See for many about the necessity to take all elements into account and establish the true factual situation: VwGH 2011/21/0009.
The aims are securing the return procedure or the removal. Detention has to be necessary to reach the aim.
A general statement in the decisions refers to the fact, that the person's intention not to leave Austria is not sufficient to justify that the security interest requires detention (see for many UVS-01/55/13313/2013, 27.11.2013, UVS-01/45/13447/2013, 25.11.2013).

All elements related to the risk of absconding are taken into account to assess proportionality of detention. These are: Previous behaviour of the person, attempts to abscond, violation of registration obligations (see UVS-01/55/13313/2013, 27.11.2013), no activities to obtain a passport, false statements in the asylum procedure, no interest in the asylum proceedings (see UVS-01/55/13313/2013, 27.11.2013), violations of cooperation duties with the authorities, intensity of the violation of cooperation duties (UVS-01/51/13223/2013, 20.11.2013), violation of cooperation duties regarding the establishment of the identity. Hunger strikes are seen as a lack of cooperation with the authorities (UVS-01/20/4392/2013, 22.5.2013, UVS-01/46/158/2013, 21.2.2013).
Criminal actions or convictions (see e.g. UVS-01/46/12212/2009, 7.1.2010, UVS-01/46/4503/2011, 13.5.2011, UVS-01/40/12094/2011, 28.12.2011, UVS-01/40/14999/2012, UVS-01/45/4456/2011, 22.4.2011, UVS-01/46/10271/2011, 13.9.2011). See also: Violations of obligations to stay in a certain district during the asylum procedure, which occurred months ago, do not justify detention (VwGH[2] 2012/21/0110, 12.9.2013).
A general lack of cooperation with the authorities justifies detention (UVS-01/20/4392/2013, 22.5.2013).
The decisions usually also mention that the person is not integrated in Austria, does not work in Austria and does not have family ties in Austria (see for many and with more details: UVS-01/55/13313/2013-20). This lack of integration is seen as an element of a higher risk of absconding.
This is a general reasoning in quite a number of decisions contained in the database. See for many and with more details: UVS-01/55/13313/2013-20: income comes from a boyfriend, whose name and identity has not been stated. Family ties are not created when a person lives with a "friend" only for a couple of days.
Illegal employment is relevant for the decision that the TCN has to leave the country but does not justify detention in order to secure the return procedure (see UVS-01/45/10588/2013).
Reasonable prospects to remove the person are taken into account as well. These are: Likeliness that a return certificate will be issued by the authorities of the country of nationality (Ghana, UVS-01/46/10295/2013), likeliness of getting a travel document, contact of Austrian authorities to the authorities of the home country. As long there is no

[2] Verwaltungsgerichtshof, VwGH, High Administrative Court.

clear indication that the state of origin (here Algeria) will not issue a travel document, detention is justified (UVS-01/45/13447/2013, 25.11.2013).

A subsequent application for asylum might be an indication for the intention not to leave the country voluntarily (UVS-01/46/14830), 25.4.2012).
Detention is justified as the subsequent asylum application was only filed to avoid detention (UVS-01/45741/2011, 7.1.2011) or removal (UVS-01/46/6159/2009, 2.7.2009).
The applicant never intended to apply for asylum, the asylum procedure however was declared admissible. From that time onwards detention is unlawful (UVS-01/55/9244/2013).
Detention is unlawful when an application for asylum is declared admissible (UVS-01/5673929/2013, 16.4.2013).
See however: High potential of criminal energy, though an application for asylum was filed, detention may be upheld (UVS-01/46/10295/2013).

5. Expediency (or deference in English & opportunité in French) in general

Q21. The control exercised by the judge in your Member State on a case of detention can touch upon expediency?
YES

Not relevant.

NO

Expediency as such is not mentioned in the legal basis for control of detention and thus judges are not referring to expediency.

Q21.1. If the response to the previous question is YES, please elaborate on any changes in this respect, brought about by the implementation of the Return Directive:

Not relevant.

Q22. If relevant, please elaborate in the following on any on-going legislative changes relating to the **QQ. 20-21**, which will affect in the future the control of expediency:

There are no on-going legislative changes.

II. ELEMENTS OF LAWFULNESS NOT EXPLICITLY MENTIONED IN ART. 15 RD

1. Quality of law

Q23. Is there any case-law in your Member State concerning the assessment of the quality of the legal provisions applying to pre-removal detention in terms of their **preciseness**, **foreseeability** or **accessibility**?

YES NO X

No case law on preciseness, foreseeability or accessibility. The Constitutional Court decided that the provisions on detention are in conformity with the Constitution. The Court also confirmed that the authorities and the Independent Administrative Senates and now the Federal Administrative Court have to decide taking all the facts into account. Less coercive measures have to be applied in case they are sufficient to reach the aim (Constitutional Court, G140/11 ua, 3.10.2012). If less coercive measures are applied and the order could not be delivered detention is justified (UVS-01/61/5522/2012, 2.5.2012).

Q23.1. If the response to the previous question is YES, please elaborate on the relevant case-law:

Not relevant.

2. Compliance with procedural rules

Q24. What is the impact of (non-)compliance with domestic procedures relating to detention on the lawfulness of detention? *Please also elaborate on possible **procedural flaws** which according to your Member State's case-law **do not affect the lawfulness of detention** (e.g. the right to be heard as suggested by the CJEU in G.R.)*

*Procedural **flaws** might **affect the lawfulness of detention**. This depends on the question whether the procedural flaw would have led to a different decision or it would have been possible that the procedural flaw led to a different decision (see e.g. High Administrative Court, VwGH 2010/21/0503, 20.10.2011: The person had a certificate about the fact that detention was not allowed for medical reasons. The authority – the BFA – decided on the basis of the files without conducting a hearing. The High Administrative Court decided that the violation of procedural rules led to the unlawfulness of the detention order as it would have been necessary to hear the person.* *See also VwGH, 2010/21/0410, 20.10.2011: The authorities have to make inquiries about allegations that the person may not be detained for medical reasons.*

Q25. If relevant, please elaborate in the following on any on-going legislative changes relating to the **QQ. 23-24**, which will affect in the future the judicial control of detention:

There are no on-going legislative changes.

III. PARTICULAR ELEMENTS OF ART. 15 RD

1. Purposes of detention

Q26. Does the **judge** controlling the lawfulness of pre-removal detention **also control the lawfulness of a return decision**?
YES NO X

The same Court but not necessarily the same judge.

Q26.1. Please elaborate in the following on consequences of the response you chose in the previous question:

As the system works on since January 2014 it is too early to seriously talk about consequences.
As mentioned, the lawfulness of detention is examined by the same Court but not by the same judge. The Court published the allocation of competences in early 2014, this allocation system might be changed according to practical experience and evaluation. The judge controlling the lawfulness of detention also controls the facts established in the return proceedings. The system might lead to the consequence that facts are assessed in a different way and that provisions are interpreted in a different way as well.[3]

There might be an informal dialogue between the judges, there is no established practice.

If a complaint against the return decision is successful the TCN has to be released immediately. Detention could then be based on another reason. An annulment of a return decision is possible. (According to the Austrian legal terminology annulment has a different meaning. Annulment is not really relevant for the present questionnaire).

Q27. Does your Member State's legislation differentiate between the two possible purposes of detention according to Art. 15 RD, *i.e.* the preparation of the return or carrying out the removal process?
YES X NO
There is a similar distinction, the distinction however is not exactly the same as mentioned in the question and in Art. 15 RD. The provisions cover both elements contained in Art. 15 RD. Detention is possible in order to secure the return procedure, in order to secure the procedural order to remove the person, to secure the expulsion order or the residence ban until they can effectively be implemented or to secure the removal as such (carrying out the removal process).

[3] I will try to see if I can find examples.

1.1 Preparation of the return

Q28. If the answer to the **Q27** is YES, please elaborate on the **meaning of "the preparation of the return"** with reference to relevant provisions and pertinent case-law:

There is a similar distinction; it is however not exactly the same as mentioned in the question and in Art. 15 RD. The provisions cover both elements contained in Art. 15 RD. Detention is possible in order to secure the return procedure, in order to secure the procedural order to remove the person, to secure the expulsion order or the residence ban until they can effectively be implemented or to secure the removal as such (carrying out the removal process). The law refers to securing the return procedure as several types of procedures and procedural orders are covered (see next paragraph).
Preparation of voluntary return as such is not explicitly mentioned in the law for an initial detention order. § 76 however covers both reasons, safeguarding the procedure and the removal. This legal situation leads to the consequence that when an order is adopted and becomes final and may be effectuated, detention may be upheld to secure the departure (§ 76 (5) Aliens Police Act). Departure means that the person has to leave the country but there is no surveillance and the person is not removed forcibly. One could thus see § 76 (5) as a provision which allows detention in order to secure voluntary departure; the initial detention order had to be based on the necessity to secure the procedure for the adoption of the return decision.
According to § 76 Aliens Police Act securing the return procedure means that the authorities conduct a procedure and decide whether the person has to leave the country. Several legal possibilities exist obliging a person to leave the country. Detention is possible in order to secure the procedural order to remove the TCN, to secure the expulsion order or the residence ban until they can effectively be implemented. All options fall under the category preparation of the return.
Art. 76 Aliens Police Act regulates detention for TCNs and applicants for protection. The provision covers return decisions which fall under the RD and also detention because of an expected inadmissibility decision in the asylum procedure which leads to a Dublin transfer (not covered by the RD).

Q29. Does the judicial control of the cases where the purpose of detention is "the preparation of the return" differ from the cases where the purpose of detention is "carrying out the removal process"?
YES NO X

Q29.1. If the answer to the previous question is YES, please elaborate on those differences (*e.g. no or restricted application of the principle of proportionality during "preparation of return", especially the impossibility to evaluate whether there is a reasonable prospect of removal. Another example of the restricted application of the proportionality principle in such cases might be the impossibility to assess in detail whether the administration acts with due diligence*):

Not relevant.

Q29.2. Please indicate if there is any time-limit fixed in the national legislation for the detention "in order to prepare the return":

Yes, there are time limits, they are the same for the two options mentioned above.
If detention was ordered to secure the return procedure it may be upheld to secure the departure if the surveillance of the departure seems to be necessary (§ 76 (5) Aliens Police Act).

§ 76 Aliens Police Act however covers both reasons, safeguarding the procedure and the removal. This legal situation leads to the consequence that when an order to leave the country (various types are possible, see above the answer to Q.28) is adopted and becomes final and may be effectuated, detention may be upheld to secure the departure (§ 76 (5) Aliens Police Act). Departure means that the person has to leave the country but there is no surveillance and the TCN is not removed forcibly. One could thus see § 76 (5) as a provision which allows detention in order to secure voluntary departure; the initial detention order had to be based on the necessity to secure the procedure for the adoption of the return decision. Time limits are the same.
According to § 76 Aliens Police Act securing the return procedure means that the authorities conduct a procedure and decide whether the TCN has to leave the country. Several legal possibilities exist obliging a TCN to leave the country. Detention is possible in order to secure the procedural order to remove the TCN, to secure the expulsion order or the residence ban until they can effectively be implemented. All options fall under the category preparation of the return.
Art. 76 Aliens Police Act regulates detention for aliens and applicants for protection. The provision covers return decision which fall under the RD and also detention because of an expected inadmissibility decision in the asylum procedure which leads to a Dublin transfer (not covered by the RD).

Detention is only justified as long as the reasons for detention are still in place. If minors between 14 and 18 are detained then detention is limited with two months. The limits are specified in the Aliens Police Act. § 80 (3) which states: "If an alien may not be deported because an application under § 51 has not been finally decided, detention pending deportation may be continued until expiry of the fourth week following pronouncement of the final decision, however, for no longer than six months altogether."[4]
§ 80 (4) Aliens Police Act: "If an alien cannot or may not be deported because 1. it is not possible to establish his identity and nationality or 2. he does not possess the permit required by another state for entry or transit or 3. he thwarts deportation by resisting coercive measures (§ 13), detention pending deportation ***cannot be continued by reason of the same facts for a period exceeding six months within a period of 12 months unless failure to deport the alien is attributable to his conduct.*** *In such cases, the alien shall not be kept in detention pending deportation* ***for a period exceeding ten months within a period of 18 months by reason of the same facts****. This also goes for situations, where deportation is at risk because the person already evaded deportation previously. Also, detention pending deportation imposed under § 76 (2) may be continued for a period exceeding six months, but not for more than ten months within a period of 18 months."*

[4] Unofficial UNHCR translation, available on Refworld. The text available on Refworld is the version in force until the end of 2013. The text mentioned here is the updated version in force.

Q29.3. Please elaborate on **any changes** in the treatment by judges of the questions raised in **QQ. 28-29.2**, brought about by **the implementation of the Return Directive**:

There are no changes in the treatment by judges. The RD brought an amendment of time limits. The sentence "This also goes for situations, where deportation is at risk because the person already evaded deportation previously" (see above) was included. The Government Proposal to the amendment of the Aliens Police Act refers to the RD and the need to secure the procedure for a return decision and to include all situations of risks of absconding.[5] *The Government Proposal explicitly refers to Art. (1) 15 RD. It says that detention should be possible not only to secure the removal but also to secure the different types of return procedures. Detention should thus be possible to secure the procedure in cases where there are sufficient reasons to decide that detention is necessary for that purpose, especially when there are indications that the person will "evade" (hamper) the procedure .*

Q30. If relevant, please elaborate in the following on any on-going legislative changes relating to the above-mentioned questions on the "preparation of return", which will affect in the future the interpretation of this criterion:

No on-going legislative changes.

1.2 Successful removal and its reasonable prospect

Q31. Do courts apply the criterion of **a reasonable prospect of removal** when reviewing the lawfulness of an ***initial*** **detention order**?

X YES NO

Q31.1. If the answer to the previous question is NO, please elaborate on any known reasons **why** the courts do not apply this test at that stage of review:

Not relevant.

Q32. What are the **defining factors** for assuming that there is **no reasonable prospect** of removal? Please choose from the following list:

- Lack of **due diligence** of national authorities

Yes. The authorities have to conduct the return procedure with due diligence (see VwGH 2009/21/0047, 19.4.2012), they have to conduct the authorities of the country of origin, have to make inquiries and the Independent Administrative Senates have to decide about these questions and have to investigate whether the authorities acted with due diligence). They have to contact the authorities of the home country (see UVS-01/46/10295/2013, 4.9.2013), have to obtain return certificates or documents (see UVS-01/45/7306/2012, 20.6.2012: detention is justified as there are no indications that the Chinese embassy would not issue a return certificate). The authority requested a return certificate and already contacted the authorities of the

[5] Government Proposal § 76(1) Aliens Police Act, RV 1078 BlgNr XXIV GP, BGBl. 38/2011.

country of origin again (UVS-01/46/5647/2013, 19.7.2013). Detention is justified as long as it is not yet confirmed that no travel document will be issued to substitute the original one (UVS-045/13463/2012). See however VwGH 2010/21/0517, 28.8.2012: There is a need for a sufficient reasoning that the authorities do issue a travel document (China), detention was not justified on the mere statement that a travel document is generally issued by Chinese authorities. In general the High Administrative Court requires clear indications and sufficient inquiries and a sufficient reasoning.

- The **resources** (human and material) at the disposal of the authorities

No.

Transport infrastructure (e.g. when there is no functioning airport in the State of return or there is no route of return)

There are no provisions in the law. If it is clear that removal is not possible based on the lack of infrastructure detention would not be justified. There is no case law.

- **Conduct of the TCN concerned**, especially if the latter refuses the cooperation which is indispensable for the issuance of relevant documentation by the Member State of return (cf. ECtHR, *Mikolenko)*

Yes. Arguments for the necessity to secure the removal based on the conduct of the TCN or the situation of that TCN. No family ties in Austria, no vocational connections, false statements during the asylum procedure, homelessness, no social ties in Austria, no financial means, applicant did not appear before the aliens police authority, the person does not sign the application for a return certificate (UVS-01/51/11045/2010, 20.12.2010). The applicant violated the registration duty (see for many UVS-01/5174984/2013, 3.6.2013, UVS -01/51/761472012, 14.1.2013). These arguments justify the presumption that the applicant would abscond and thus would impede the removal. See also VwGH 2006/21/0081, 22.6.2006; 2005/21/0379, 27.3.2007; 2004/21/0028, 28.6.2007; UVS-01/45/476/2010, 26.01.2010.
Illegal employment for two days does not create a necessity to secure (UVS-01/55/16956/2012, 27.12.2012). Illegal employment in general might create the necessity to secure the removal or to secure the procedure (UVS-01/56/6689/2012, 4.6.2012).
As long as there is no decision on the obligation to leave the country (expulsion order or else), detention based on the aim to secure the removal is impossible (see UVS-01/45/5572/2013, 19.6.2013).

- **Conduct of the Member State of potential return** (*e.g. an embassy in a given MS refuses generally the cooperation in cases of forced return and accepts only voluntary returns or it does not confirm the nationality of the person concerned (Cf. ECtHR, Tabesh))*

Yes. Examples see above, first part of this question. Detention is seen as justified as long as it is not confirmed that no travel document will be issued to substitute the original one or as long as it is not confirmed that no return certificate will be issued.

- The **lack of a readmission agreement** or no immediate prospect of its conclusion;

Yes.

- **Strasbourg proceedings** (especially when the Rule 39 is applied)

Strasbourg proceedings do not have an influence on detention. Deportation or any other removal to a target state is impermissible as long as an Art. 39 provisional measure applies. If the Strasbourg proceedings are still going on when the time elapses, the person would have to be released.

- Parallel **national judicial proceedings of suspensory character**, making the return impossible within the fixed time-limits

No.

- Return will be impossible because of the **considerations in accordance with Art. 5 RD** (*non-refoulement* in broader sense, i.e. also covering all cases mentioned in Art. 15 Qualification Directive; best interest of the child; family life; the state of health of the third Member State national concerned)

There are various possibilities that the non refoulement obligation is not violated in the asylum procedure. In the aliens law procedure an application based on § 51 Aliens Police Act is possible. If a TCN may not be deported because there is no decision about an application based on § 51 Aliens Police Act (application that the non-refoulement obligation applies and that the TCN may therefore not be removed to a specific country) is only allowed until four weeks from the final removal decision and in total no longer than six months (§ 80 (3) Aliens Police Act: "If an alien may not be deported because an application under § 51 has not been finally decided, detention pending deportation may be continued until expiry of the fourth week following pronouncement of the final decision, however, for no longer than six months altogether.") The detention judge takes all the facts and elements into account: situation in the country, prospect of removal, cooperation. If there is a necessity to secure the procedure detention is possible even if an application based on § 51 Aliens Police Act has been filed and has not yet been decided.

- Else

If relevant, please elaborate here on pertinent provisions and related case-law.

Q33. Assuming that the national courts apply the test of a reasonable prospect of removal already at the FIRST STAGE of judicial control of detention, does the relevant case-law indicate **any differential treatment** of the above-listed factors **during that FIRST vs. SECOND and any subsequent STAGES** of judicial control?

YES NO X N/A

Q33.1. If the answer to the previous question is YES, please elaborate on any such differences, also indicating any difference in the intensity of review:

Not relevant.

Q34. Please elaborate on the issue of the **time-frames** within which a reasonable prospect of removal must exist according to the national case-law. Consider if necessary different scenarios applicable to the above-listed factors (cf. Concept Note, III. 2.2.2):

The case law is based on the provisions of the Aliens Act. The time frame depends on the reasonable prospect of removal. There is however no case law on the exact interpretation of the time frames.
As already mentioned detention pending deportation cannot be continued by reason of the same facts for a period exceeding six months within a period of twelve months unless failure to deport the TCN is attributable to the person's conduct, if it is not possible to establish the identity and nationality or if the person does not possess the permit required by another state for entry or transit or if the person thwarts deportation by resisting coercive measures (§ 13).

Q35. When deciding on the existence of a reasonable prospect of removal, the courts:

- Limit their assessment to **an abstract or theoretical possibility of removal**
  Require **clear information on its timetabling or probability** to be corroborated with relevant **statistics** and/or **previous experience in handling similar cases**
- X Else
  Practice shows that the authorities usually limit the assessment and refer to previous experiences and state that usually the necessary documents including the return certificates are issued by the country of nationality.

Q35.1. Please elaborate in detail (with reference to pertinent national case-law) on the selected responses in the previous question:

The judges usually refer to previous experiences and do not quote statistics when they refer to the practice of states regarding the questions whether these states issue travel documents, identity documents or return certificates. The Courts quote previous decisions where a similar reasoning was made.

Q36. The control exercised by the judge in your Member State on the requirement "that prospects of removal be reasonable" is:

- a control limited to a manifest error of assessment

  No.

- a full control not limited to a manifest error of assessment, also substituting **judge's own discretion to that of decision-making authority**

  There is a full control.

This is based on the legal situation. Many decisions refer to the fact that the judge comes to a different decision and that facts are assessed in a different way. See e.g.: The judge decided that illegal employment for two days does not create a necessity to secure (UVS-01/55/16956/2012, 27.12.2012), whereas the authority had seen a necessity to secure the procedure.

Q37. Please elaborate on any changes in adjudicating the issue of a reasonable prospect of removal, brought about by the implementation of the Return Directive:

No changes.

Q38. If relevant, please elaborate in the following on any on-going legislative changes relating to the above-mentioned questions on "a reasonable prospect of removal", which will affect in the future the interpretation of this criterion:

There are no on-going legislative changes.

2. Necessity grounds of detention

2.1 Avoiding or hampering the preparation of return or the removal process

Q39. Does your Member State's legislation further specify the meaning of ***avoiding*** the preparation of return or the removal process?

YES NO X N/A, *i.e. in your MS avoiding return is not a detention ground*

Q39.1. If the answer to the previous question is YES, please elaborate *with reference to pertinent case-law* on the specific cases falling under this concept:

Not relevant.

Q39.2. If the answer to the previous question is NO, please elaborate on how this concept is interpreted by the courts:

The Court takes the behaviour of the TCN into account. Avoiding the preparation of return may be connected to risk of absconding. Examples are: false statements in the asylum or aliens law procedure, previous attempts to avoid the preparation of return, previous attempts to abscond and thus hamper the return, violation of reporting obligations, no interest in the procedure documented by not attending a hearing, not appearing before the competent authority, use of various names and identity documents (UVS-01/45/4456/2011, 22.4.2011). Usually various reasons are mentioned in the decisions and the distinction is not always obvious.

Q40. Does your Member State's legislation further specify the meaning of ***hampering*** the preparation of return or the removal process?
YES NO X N/A, *i.e. in your MS hampering return is not a detention ground*

Q40.1. If the answer to the previous question is YES, please elaborate *with reference to pertinent case-law* on the specific sub-categories falling under this concept:

Not relevant.

Q40.2. If the answer to the previous question is NO, please elaborate on how this concept is interpreted by the courts:

Hampering the return procedure or the removal process includes: Violation of cooperation duties during the procedure or the removal process (see UVS-01/51/13223/2013). This also goes for obstructing a police officer in the course of his duty (see UVS-01/51/13223/2013). Also hunger strikes are qualified as a violation of cooperation duties, see UVS-01/46/158/2013, 21.2.2013). Any action by the TNC not to be removed, such as violent acts against the police or the authorities in general.

2.2 Risk of absconding

Q41. Does your Member State's legislation define ***objective criteria*** based on which the existence of a risk of absconding can be assumed?
YES NO X N/A *i.e. in your MS a risk of absconding is not a detention ground*

Q41.1. If the answer to the previous question is YES, please elaborate *with reference to pertinent case-law* on those objective criteria (*please also mention if the consideration whether there is a risk of absconding* ***goes beyond the mere fact of an illegal stay or entry***):

Not relevant.

Q42. If your Member State's legislation does not define aforementioned objective criteria, can the criterion of a risk of absconding still be invoked as a ground of detention?
X YES NO

Q42.1. If the answer to the previous question is YES, please elaborate on how this concept is interpreted by the courts:

All elements related to the risk of absconding are taken into account. These are: Previous behaviour of the person, attempts to abscond, violation of registration obligations (see UVS-01/13313/2013, 27.11.2013), previous criminal actions or convictions (see e.g. UVS-01/46/12212/2009, 7.1.2010, UVS-01/46/4503/2011, 13.5.2011, UVS-01/40/12094/2011, 28.12.2011, UV-01/40/14999/2012, UVS-01/14999/2012, 30.1.2013). The reasoning is not based on public security grounds but on a risk of absconding because of criminal activities

and criminal energy in general.
Previous criminal convictions might rise the necessity to secure the removal or the procedure (UVS-01/457244/2013, 10.1.2013). Criminal acts justify the necessity to secure (UVS-01/40/12094/2011, 28.12.2011).
Violations of obligations to stay in a certain district during the asylum procedure, which occurred months ago, do not justify detention (VwGH 2012/21/0110, 12.9.2013). The decisions usually also mention that the person is not integrated in Austria, does not work in Austria and does not have family ties in Austria. This lack of integration is seen as an element of a higher risk of absconding. This is a general reasoning in quite a number of decisions contained in the database. See for many and with more details: UVS-01/55/13313/2013-20: income comes from a boyfriend, whose name and identity has not been stated. Family ties are not created when a person lives with a "friend" only for a couple of days.

Q43. Assuming that your Member State' legislation sets objective criteria defining a risk of absconding, please elaborate on the question **how individual situation and individual circumstances are taken into consideration by courts** when establishing whether there is a risk of absconding?

This answer could be deleted as the question was answered above Q 42 and 42.1.All elements of the individual behaviour are taken into account. Examples are given in the answer to question 42 and 42.1.

Q44. Please elaborate on any **overlaps between** the concepts **"risk of absconding"** and **"avoiding/hampering return",** which can be observed in the national legislation and/or case-law:

There are frequent overlaps already mentioned in the answers to previous questions. These are: If TCNs do not obey reporting obligations or do not fulfil their cooperation duties there is a risk of absconding as well as a sign that the TCN avoids return. If a TCN does not cooperate with the authorities there is a higher risk of absconding and also an indication that the TCN would hamper the return. Usually the individual behaviour is qualified as a risk of absconding combined with the prospect of hampering the return,

Q45. Having regard to the phrase "in particular" in Art. 15(1) RD, does either your Member State's legislation or the relevant case-law **allow any other ground of detention** apart from "avoiding/hampering return" and "a risk of absconding" (*please note that **we do not refer here to public order grounds** which are excluded from Art. 15(1) RD*)?
YES NO X
There are no other grounds, there is however a more specific distinction. Detention is possible in order to secure the return procedure, in order to secure the procedural order to remove the person, to secure the expulsion order or the residence ban until they can effectively be implemented or to secure the removal as such (carrying out the removal process).

Q45.1. If the response to the previous question is YES, please elaborate in the following on those grounds *with reference to pertinent case-law:*

Not relevant.

Q46. Please elaborate on **any changes in adjudicating** the issues relating to "a risk of absconding" and "avoiding/hampering return", brought about by the **implementation of the Return Directive**:

No changes.

Q47. If relevant, please elaborate in the following on any on-going legislative changes relating to the above-mentioned questions on the "avoiding/hampering return" and "a risk of absconding", which will affect in the future the interpretation of these criteria:

There are no on-going legislative changes.

3. Alternatives to detention

Q48. Does your Member State's legislation oblige administrative or judicial authorities taking detention decisions to consider alternatives to detention?
YES X NO

Q49. Which of the following alternatives to detention exist in your Member State (in law as well as in practice)?

- Registration obligation

No.

- Deposit of (travel) documents

No.

- Bond/bail, i.e. deposit of an adequate financial guarantee

This possibility is contained in the legal basis in § 77 (3) 3. Aliens Police Act. It is however not applied in practice.

- Regular reporting to the authorities

Yes, § 77 (3) 2. Aliens Police Act. Reporting obligations are applied in practice. If the reporting obligations are violated detention is applied. Reporting means that the person has to report to the police, in practice in most cases daily reporting obligations apply.

- Community release/supervision

No.

- Designated residence

Yes, § 77 (3) 1. Aliens Police Act. It is applied in practice.

- Electronic tagging

No.

- Home curfew

No.

- Else

Other alternatives would be possible, as the list is not exhaustive. So far only the designated residence and reporting obligations are applied in practice.

Q50. When there is a **certain <u>risk of absconding</u>**, what are the main considerations (embodied in the national legislation and/or in the relevant case-law) for opting for **alternatives to detention instead of detention**?

*§ 77 Aliens Police Act provides for the application of alternatives, called more lenient or less coercive measures. These measures have to be applied in **all cases** (not only if a particular ground for detention exists) if the authorities have good reasons to believe that the object and purpose of detention could be reached by the application of such measures. There is no distinction between cases, where there is a risk of absconding and cases where the TNC concerned avoids or hampers the return procedures. If less coercive measures are violated detention is justified (see for many UVS-01/40/1724/2010, 16.3.2010). There is no case law that a judge ordered a less coercive measure in case there is a risk of absconding. The law would require that in cases where there is a minor risk of absconding, a less coercive measure has to be applied. If such measures apply it is usually a first instance decision and often families and mainly families with children are concerned. The authorities see a lower risk of absconding.*

If there are indications that the TNC already tried to abscond or already tried to hamper the return procedure, he or she is detained. According to the law violations of duties (such as reporting obligations) are a reason for detention. § 77 (3) Aliens Police Act contains the obligation to detain persons who do not fulfill the requirements stipulated by alternatives to detention.
Minors between 14 and 18 may only be detained as a last resort, if alternatives are not sufficient to reach the aim.

Q51. When the TCN concerned **avoids or hampers the return procedures**, but there is still no risk of absconding, what are the main considerations (embodied in the national legislation and/or in the relevant case-law) for opting for **alternatives to detention instead of detention**?

There is no distinction, neither in the legislation nor in case law.

Q52. When deciding on the use of pre-removal detention, are competent authorities required to **assess every available or possible alternative to detention** to justify their effectiveness or the lack thereof in a given case?
YES X NO

Q52.1. If the response to the previous question is NO, please elaborate on the reasons why it is not the case *(please also explain here whether in cases where administration does not indicate the appropriateness of any alternative to detention, **the courts can take initiative and assess if there is any alternative to detention** which can be applied effectively in a given case*):

Not relevant.

Q52.2. The control exercised by the judge in your Member State on the consideration of alternatives to detention by the administration is:

- a control limited to a manifest error of assessment

Not relevant.

X a full control not limited to a manifest error of assessment, also substituting **judge's own discretion to that of decision-making authority**

Not relevant.

Q53. Please elaborate on the question whether and how **an individual, case-by-case evaluation** is conducted when deciding on whether detention or any alternative to it should be applied (*especially in those cases where **statistics or previous experience with the same group** of people speak clearly in favour of detention*):

Statistics and previous experience are not used for a decision whether or not an alternative to detention is applied. This depends on the individual circumstances. In general when families are concerned alternatives apply.

Q54. Please elaborate on **any changes in adjudicating** the issues relating to alternatives to detention, brought about by **the implementation of the Return Directive**:

No changes.

Q55. If relevant, please elaborate in the following on any on-going legislative changes relating to the above-mentioned questions on "alternatives to detention", which will affect in the future the interpretation of this criterion:

No on-going legislative changes.

4. Proportionality of the length of detention

4.1 Defining the length of detention

Q56. Taking into consideration the requirement that any detention shall be for "as short a period as possible", **how is the length of *initial* detention determined in your Member State**?

X By wholesale application of the time-periods fixed by national law

§ 80 (3) Aliens Police Act limits detention pending deportation by reason of the same facts for a period with six months within a period of twelve months. This limit only applies if the failure to deport the TCN is not attributable to the conduct of that TCN. In such cases, the TCN shall not be kept in detention pending deportation for a period exceeding ten months within a period of eighteen months by reason of the same facts. This also goes for situations, where deportation is at risk because the TCN already evaded deportation previously. The time limits are upper time limits. The BFA does not specify a certain period for detention in the detention order. There is no relevant case law on the length of detention.

- By exact determination of the length of detention, which is strictly necessary for successful removal in each particular case:

Not relevant.

Q56.1 Please also elaborate on the question when the time of Art. 15 RD-detention starts running according to your national legislation (e.g. from the date of removal/detention order, from the date of apprehension, from the date of actual placement under detention, etc.)?

The time limits start when the detention order is issued. The TCN is apprehended by the police and brought to the detention facilities. A detention order is issued.
(It is also possible to file a complaint challenging the legality of the apprehension as such.)

Q57. Taking into consideration the requirement that any detention shall be for "as short a period as possible", how is the length of ***subsequent*** detention determined in your Member State?

- By wholesale application of the time-periods fixed by national law

Yes. The time limits are the same as for the initial decision.The BFA does not specify a certain period for detention in the detention order. There is no case law on the issue.

- By exact determination of the length of detention, which is strictly necessary for successful removal in each particular case:

Not relevant.

Q58. The control exercised by the judge in your Member State on the requirement that detention should be "as short as possible" is:

- a control limited to a manifest error of assessment

Not relevant.

X a full control not limited to a manifest error of assessment

The full control concerns all aspects of detention; see the answers to Q.1.1., Q.17, Q.18, Q.36. There is no case law on the control of the length of detention.

Q59. Please elaborate on any **changes in adjudicating the issues relating to the length of detention**, brought about by the implementation of the Return Directive:

The RD brought an amendment concerning time limits as such, but no changes in adjudicating the issues relating to the length of detention.

Q60. If relevant, please elaborate in the following on any on-going legislative changes relating to the above-mentioned questions on the "defining the length of detention", which will affect in the future the interpretation of this criterion:

No on-going legislative changes.

4.2 Due diligence

Q61. Please elaborate **on how national courts interpret the "due diligence"** criterion:

As the first instance decision by the BFA is an administrative order conducted without further inquiries the due diligence criterion does not play a crucial role.
The Courts however inquire whether the authorities of the country of origin have already been contacted, if there have been further contacts after a certain time, if return certificates (UVS-01/20/1071072010, 25.11.2010) or travel documents have been asked for or something else.
If the authorities contacted the representatives of the country of origin and asked for return certificates this is sufficient for a diligent performance. Only in the case that concrete indications exist that no such certificate will be issued will detention fail to be upheld (see (see UVS-01/45/10588/2013).
As mentioned in the answer to Q.20, also the likeliness that a return certificate will be issued by the authorities of the country of nationality (Ghana, UVS-01/46/10295/2013), likeliness of getting a travel document, contact of Austrian authorities to the authorities of the home country are taken into account. The contacts have to be conducted with due diligence. As long there is no clear indication that the state of origin (here Algeria) will not issue a travel document, detention is justified (UVS-01/45/13447/2013, 25.11.2013).

Q62. The control exercised by the judge in your Member State on the requirement that removal arrangements to be executed with "due diligence" is:

- a control limited to a manifest error of assessment

Not relevant.

X a full control not limited to a manifest error assessment

See e.g. VwGH 2010/21/0517, 28.8.2012: There is a need for a sufficient reasoning that the authorities do issue a travel document (China), a mere statement is not sufficient.

Q63. Please elaborate on **any changes in adjudicating** the issues relating to the due diligence criterion, brought about by the **implementation of the Return Directive**:

No changes.

Q64. If relevant, please elaborate in the following on any on-going legislative changes relating to the above-mentioned questions on the "due diligence", which will affect in the future the interpretation of this criterion:

No on-going legislative changes.

4.3 Removal arrangements in progress

Q65. Please elaborate on how national courts check whether removal arrangements are in progress:

They check whether the authorities already asked for travel documents or return certificates. They also check if the identity has been established and if contacts to the authorities of the country of return exist.

This might be clear, but just to make sure: Detention is unlawful as long as there is no aliens' law procedure on an expulsion order or another order to remove the person (see UVS-01/45/5572/2013, 19.6.2013).

Q65.1. The control exercised by the judge in your Member State on the requirement "that removal arrangements are in progress" is:

- a control limited to a manifest error of assessment

Not relevant.

- X a full control not limited to a manifest error of assessment, also substituting **judge's own discretion to that of decision-making authority**

Not relevant.

Q66. How do **Strasbourg proceedings**, namely when an interim measure based on the Rule 39 has been ordered, **impact on (the lawfulness of) the length of detention** (*please also consider three requirements developed by the Strasbourg court in this respect – see Concept Note III. 4.2*):

See the answer to one of the questions in Q 32. *Strasbourg proceedings do not have an influence on detention. Deportation or any other removal to a target state is impermissible as long as an Art. 39 provisional measure applies.*

Q67. How **do internal judicial proceedings suspending the return**, impact on (the lawfulness of) the length of detention:

No influence.

Q68. Is there any obligation on the side of the administration or the reviewing court to **inquire with the court where the parallel proceedings about return are pending** about the possible length and/or outcome of those proceedings?
X YES NO

Q68.1. If the response to the previous question is YES, please elaborate on the relevant modalities of the mentioned inquiry:

There is a request to the authorities or the competent judge.

Q69. Does the period when **asylum proceedings** are pending have any impact on calculating the length of detention?
X YES NO

Q69.1. If the response to the previous question is YES, please elaborate on the relevant national case-law in this respect (please also consider CJEU, *Kadzoev and Arslan*):

Detention may be upheld for four weeks after the final decision in the asylum procedure. § 80 (5) Aliens Police Act contains these rules and refers to cases where detention is based on § 76 (2) or (2a) Aliens Police Act. If a complaint against a decision on the inadmissibility of the asylum claim (usually in Dublin cases, safe third country cases would be possible as well) is granted suspensive effect concerning the order to leave the country, detention may be upheld until the final decision by the Federal Administrative Court is rendered. The time limit for detention is ten months within a period of eighteen months.

Q70. Please elaborate on **any changes in adjudicating** the issues relating to the removal arrangements in progress criterion, brought about by the **implementation of the Return Directive**:

No changes.

Q71. If relevant, please elaborate in the following on any on-going legislative changes relating to the above-mentioned questions on the "removal arrangements in progress", which will affect in the future the interpretation of this criterion:

No on-going legislative changes.

5. Necessity of the extension of the length of detention beyond 6 months

Q72. Does your Member State's legislation provide for the **possibility of extension of detention beyond 6 months** because of:

- A **lack of cooperation by the third-Member State national concerned**

Yes. See the jurisprudence above.

- **Delays in obtaining the necessary documentation** from the third countries

No.

- Else

Not relevant.

Q72.1. The control exercised by the judge in your Member State on the "lack of cooperation" or "delays in obtaining the necessary documentation" is:

- a control limited to a manifest error of assessment

Not relevant.

X a full control not limited to a manifest error of assessment, also substituting **judge's own discretion to that of decision-making authority**

Not relevant.

Q73. When deciding on the extension of detention, is a new assessment of a risk of absconding conducted?
X YES NO

Q73.1. Please elaborate on any selected response to the provisions question *with reference to pertinent national case-law*:

There is no case law mentioning the change of the risk of absconding. In general the review has to assess whether there is a current risk of absconding.

Q74. When deciding on the extension of detention, is **a new assessment of alternatives to detention** conducted?
X YES NO

Q74.1. Please elaborate on any selected response to the provisions question *with reference to pertinent national case-law*:

There is however no case-law on this specific point. There are no decisions mentioning that there were changes in the assessment. There is no case-law on this specific point.

Q75. Please elaborate on **any changes in adjudicating** the issues relating to the extension of detention criteria, brought about by the **implementation of the Return Directive**:

No changes.

Q76. If relevant, please elaborate in the following on any on-going legislative changes relating to the above-mentioned questions on the **possibility of extension of detention beyond 6 months**, which will affect in the future the interpretation of this criterion:

No on-going legislative changes.

6. Different intensity of review with the lapse of time

Q77. Does your Member State's legislation, case-law or any other written or unwritten judicial practice indicate **any difference of the intensity** of the lawfulness review of detention **depending on the time spent in detention** (i.e. does the intensity of review increase with the lapse of time spent in detention)?
X YES NO

Q77.1. If the response to the previous question is YES, please elaborate on relevant national provisions and/or pertinent case-law and explain if relevant how the intensity of review increases:

After four months of detention the obligation to review detention ex officio moves from the BFA to the Federal Administrative Court. This might be seen a difference in intensity, the time intervals remain the same (four weeks).

7. Consequences of unlawful detention and re-detention

Q78. In your Member State, the declaration of detention as unlawful by judges leads to:

- Immediate release of the TCN concerned **irrespective** of whether the reasons of unlawfulness were **procedural flaws** or the breach of one of the **necessity and proportionality criteria** foreseen under Art. 15 RD

Yes. In general the TCN is released. As mentioned above (Q 1.1.) the decision is a twofold one. The judge has to decide whether detention is lawful (necessary and proportionate) at the time of the decision and thus may be continued. The judge also has to decide whether the initial detention was lawful. *Thus it may happen that the initial decision was unlawful but detention then became lawful and may be continued.* ***The consequence does not depend on** whether the reasons of unlawfulness were **procedural flaws** or the breach of one of the **necessity and proportionality criteria** foreseen under Art. 15 RD.*

- Immediate release of the TCN concerned **only when** the reason of unlawfulness was the **breach of one of the necessity and proportionality criteria** foreseen under Art. 15 RD

Not relevant.

- No release of the TCN concerned when it is possible to regularise the breach with a new detention order

Not relevant.

- No release of the TCN concerned until the decision of the second level of jurisdiction

Not relevant.

Q79. After release of the TCN concerned as a result of **declaring detention unlawful**, is it possible in your Member State to **re-detain** the TCN concerned?

X Yes No

Q79.1. If the response to the previous question is YES, please elaborate with reference to relevant provisions and pertinent national case-law on the reasons which can be invoked for the re-detention:

Any other reason mentioned in the legislation may be invoked for re-detention or any changes in the facts or elements. This is an on-going practice in Austria. There is no case-law. A fresh first instance administrative order is issued. The time limits as mentioned in the answer to Q.56 apply.

Q80. After the release from detention because of the **expiry of the maximum time-limits**, is it possible in your Member State to **re-detain** the TCN concerned?

X YES NO

Q80.1. If the response to the previous question is YES, please elaborate with reference to relevant provisions and pertinent national case-law on the reasons which can be invoked for the re-detention like for instance a new element:

Any other reason mentioned in the legislation may be invoked for re-detention or any changes in the facts or elements.

Q81. Do the victims of unlawful pre-removal detention have **an enforceable right to compensation** in your Member State?

X YES NO

Q81.1. If the response to the previous question is YES, please elaborate on the relevant provisions and pertinent case-law, including some elements on the amounts of compensation:

In general TCNs claim compensation. Compensation includes material and immaterial damages. The amount is a lump sum of € 100 per day. The claims are based on Art. 5 (5) ECHR, the ECHR has the rank of Constitutional Law in Austria and the Convention is directly applicable as well. See High Court (1 Ob 114/10m).

Q82. If possible, please explain how widespread is the practice of asking for compensation by unlawfully detained third-country nationals:

In case detention was unlawful compensation has to be paid. As the TCNs do have legal aid, they are also informed that compensation has to be paid. NGOs granting legal aid assist them in claiming compensation. Usually they claim compensation (exercised by the NGOs), even if they are already deported. Only if they express that they do not want to claim compensation or if any obstacles exist (e.g. no account) do they fail to claim compensation.

IV. STATISTICS

Q83. If possible, please elaborate on any available **statistics on judicial control of lawfulness of detentio**n, especially concerning the **release from detention as a consequence of the judicial control**:

Statistics are published on the numbers of persons in detention but not on the numbers of successful or unsuccessful complaints.
Only few decisions on the complaints led to a release of the persons concerned. In many cases there are standard explanatory statements referring to the risk of absconding or the intention to hamper the return procedure or removal.

V. BEST PRACTICES

Q84. Please list here any **best practices relating to the judicial control of detention**, which you think can be deduced from your previous responses and explain briefly why you think that any particular practice is a best practice:

One can qualify the question of detention of minors between 14 and 18 as best practice. Detention has to be the last resort to secure a return or a removal.
TCNs under 14 cannot be detained.

Q85. Please add here any other element not related to previous questions and that you would like to cover:

Not relevant.