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 Immigration Office delivers orders to leave the territory and detention orders. It is working under the authority of the executive power (Minister of Immigration). It is not an independent administrative authority. *Orders to leave the territory are controlled by an administrative jurisdiction: the Council of Immigration Disputes.* *Detention orders are controlled by the judiciary. The Council Chambers (1st instance), the Indictment Chambers of the Court of Appeal (3 judges – 2nd instance) and the Court of Cassation (limited control). At each stage, the Public Prosecutor gives his opinion. The TCN, the Public Prosecutor and the Minister or his representative can appeal against the decisions.* *The Court of Cassation has only a limited control power of legality.*

- 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.

- 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:

In practice, the judge limits the control to the arguments raised by the parties. The lawfulness of both the detention decision AND the removal decision can be controlled by the judge (art. 72 Law 15 December 1980). However, it must be noted that some judges are reluctant to control the lawfulness of the removal because an administrative judge (Alien Litigation Council) is normally in charge of this subject. Often the judge reproduces the

motivation of the administrative decision without any further investigation.

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

The main disadvantage is that judicial reviews are performed by criminal jurisdictions. There are three consequences to this. Firstly, the TCN is treated like a criminal (handcuffs, police, etc.). Second, criminal jurisdictions are already overwhelmed by their main business (i.e. criminal cases) and the detention of TCN is de facto considered as "secondary". Third, with the Alien Litigation Council (administrative judge) there are two different judges for the control of the removal. It can lead to contradictory decisions. Furthermore, the criminal judge tends to rely on the administrative judge who is more specialized.

Advantage: the ex officio control should compensate for a possible gap in the argumentation of the lawyer.

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

Each pre-removal detainee has a right to free legal aid.[1] *They have a right to primary legal aid – i.e. advice given by a lawyer – and secondary legal aid– i.e. representation before Courts. They have to apply for it, but it is an obligation for every lawyer to verify whether his client meets the conditions of legal aid (art. 5.10 code of ethics of Lawyers).*[2]

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

- □ Civil jurisdiction
- □ Administrative jurisdiction
- X 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)?

Not relevant.

- Hearing only immigration law cases?

Not relevant.

[1] Art. 54, § 1, al. 3 and 4 Law 15 December 1980.
[2] http://www.avocats.be/files/docs/code_de_deonto/01.10.2013_Code_deontologie_version_francaise_en_vigueur_au_01.10.2013.pdf

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

The Council Chambers and Indictment Chambers intervene only in criminal matters. They are responsible for questions related to pre-trial detention and decisions related to the referral of the case to the criminal court at the end of the investigation if there is sufficient evidence.

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
The first instance is the Council Chamber and the 2nd instance is the Indictment Chamber of the Appeal Court. The appeal has to be introduced within 24 hours.[3]

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**:

No difference except that there are three judges in the Chamber of Indictment.

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

N/A X

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:

Not relevant.

[3] Article 72, al. 3 and 4 Law of 15 December 1980 and art. 30 Law of 20 July 1990, *M.B.*, 14 August 1990.

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?

The Immigration Office has to seize the Council Chamber within five days of his renewal order. Every month, the detainee can again submit his case. The advantage is that the lawfulness of the detention is reviewed more often.[4]

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

  The first instance is the Council Chamber and the 2nd instance is the Indictment Chamber of the Appeal Court. The appeal has to be introduced within 24 hours.[5] *There is no difference with the review of the initial detention period.*

- Possible only on application of the detainee

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:

The judge limits the control only to the arguments raised by the parties. I do not have any knowledge of a decision where the unlawfulness has been raised ex officio.
The lawfulness of both the detention decision AND the removing decision can be controlled by the judge (art. 72 Law 15 December 1980).

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

The advantage is that in theory the review takes place more often and that the spectrum of the control is larger.
The disadvantage is that in practice the restrictive approach of legal examination taken by

[4] Article 71 and 72 Law of 15 December 1980 and art. 30 Law of 20 July 1990, *M.B.*, 14 August 1990.
[5] Article 72, al. 3 and 4 Law of 15 December 1980 and art. 30 Law of 20 July 1990, *M.B.*, 14 August 1990.

the courts does not allow a real examination of the fundamental rights.

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 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**:

Not relevant.

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

  Not relevant.

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

  Not relevant.

- 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

The detainee can ask the Council Chamber to review the lawfulness of his detention one month after the ex officio seizing of the Council Chamber by the Immigration Office, which has decided to extend the detention period. If the detainee is not satisfied with the decision, he can appeal it within 24 hours to the Indictment Chamber. *The control is the same in the Council Chamber and in the Indictment Chamber, except for the three judges in the Indictment Chamber.*

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

Theoretically, the two instances allow a better coherence between the various Chambers in reviewing the detention of TCN. *No disadvantage.*

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?

X YES NO

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

Not relevant.

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:

Not relevant.

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

The review of the lawfulness of the administrative decision includes monitoring the accuracy of the factual grounds on which it rests.[6] *More exactly, the lawfulness review involves the verification that the facts alleged by the administration actually took place and reflect reality. The judge examines whether the decision is based on reasoning without a manifest error of assessment or a factual error.*[7] *Naturally, this will largely depend on the file and the arguments of the defence.*

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 control of the lawfulness of the detention includes the examination of the removal from the point of view of fundamental rights. If the removal is contrary to art. 3 or 8 ECHR, the detention – as an accessory of the removal – is considered illegal.[8] *Hence, I would say that the examination is not limited to a manifest error of assessment. Even so, as it is stated above, the Court of Cassation has considered that: "The judge examines whether the decision is based on reasoning* ***without manifest error of assessment*** *or factual error."*[9]

[6] Brussels (Indict. Ch.), Judgment No 3219, 25 September 2012; Brussels (Indict. Ch.), Judgment No 2851, 30 August 2013.
[7] Cass. (2nd Ch.), Judgment No P.12.2050.N/A, 2 January 2013.
[8] Cass. (2nd Ch.), Judgment No P.11.2130.F, 18 January 2012; Brussels (Indict. Ch.), Judgment No 3046, 13 September 2013; Brussels (Indict. Ch.), Judgment No 3405, 4 October 2013. Cass. (2nd ch.), Judgment No P.12.0291.F, 21 March 2012.
[9] Cass. (2nd Ch.), Judgment No P.12.2050.N/A, 2 January 2013.

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:

Not relevant.

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):

Most of the time, no assessment is made of proportionality in the examination by the judge. The Indictment Chamber constantly considered that: "no illegality can be inferred from the mere fact that the administrative authority imposes a detention measure to the TCN, despite the fact that other less coercive measures could be applied."[10] *A judgment of the Court of Cassation has considered that detention must be necessary in order to prepare the return and/or carry out the removal and it must be* ***proportionate*** *to intervene as a last resort if there are no other sufficient but less coercive measures.*[11] *But this judgment is not followed by the Indictment Chambers.* *Detention is often considered as proportionate because the TCN has refused to obey various orders to leave the territory.*

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

The Council Chamber and the Chamber of Indictments verify "if the detention measures and removal are in accordance with the law without being able to decide on their opportunity."[12]

[10] Brussels (Indict. Ch), Judgment No 2772, 14 August 2012; Brussels (Indict. Ch), Judgment No 2773, 14 August 2012; Brussels (Indict. Ch), Judgment No 3717, 30 October 2012; Brussels (Indict. Ch), Judgment No 3539, 17 October 2012; Mons (Indict. Ch.), Judgment No 664/12, 21 August 2012; Brussels (Indict. Ch), Judgment No 2760, 14 August 2013; Mons (Indict. Ch.), Judgment No 453/13, 28 June 2013.

[11] Cass. (vac.), Judgment No P.12.1028.F, 27 June 2012.

[12] Article 72, al. 2, Law of 15 December 1980; Cass. (vac.), Judgment No P.01.1011.F, 31 July 2001; Cass. (2nd Ch.), Judgment No P.12.2019.F, 2 January 2013.

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:

Not relevant.

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

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.)*

If the time limits regarding the reviewing of the detention are not met, the TCN will probably have to be released. I have not found any jurisprudence concerning this hypothesis. Probably because in practice the Immigration Office delivers a new detention order when it appears that the old one is no longer correct. *If the motivation for the detention decision has not been correctly applied then the TCN must be released.*[13] *Once, the Council Chamber decided to put an end to the detention because the TCN had not been heard before the detention decision was taken.*[14] *The Immigration Office appealed the decision and the Indictment Chamber considered that the possibility to express his view in writing during the asylum procedure was sufficient. Detention was then maintained.*[15]

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:

Not relevant.

[13] Brussels (Indict. Ch.), Judgment No 2771, 19 August 2013.
[14] Arlon (Counc. Ch.), Judgment XXX, 4 April 2014.
[15] Liege (Indict. Ch.), Judgment No C-542, 22 April 2014.

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**?
X YES NO

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

YES:
The control of the lawfulness of the detention includes the control of the removal from the point of view of fundamental rights. If the removal is contrary to art. 3 or 8 ECHR, the detention – as an accessory of the removal – is considered illegal and ended.[16] *Removal itself can only be annulled by the Alien Litigation Council and not by the Indictment Chambers. As a consequence, the Indictment Chamber may annul a detention decision because it considers that the removal breaches the detainee's fundamental rights, whereas the Alien Litigation Council may consider that the removal decision is legal. Therefore the same facts are sometimes assessed differently by different courts. In theory, there is no dialogue between the two jurisdictions to avoid this problem.*

With regard to the timetable, the TCN is released as soon as the decision annulling the detention is final, i.e. after 24 hours[17].

There has been one exception, the Indictment Chamber ended the detention of a woman who was detained in order to be implement her removal to Kinshasa because she had proof that she was legally staying in France.[18]

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 NO X

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:

NO:
The preparation of voluntary departure is never used as a purpose for detention.

In Belgium, the order to leave the territory (i.e. removal decision) and the detention

[16] Cass. (2nd Ch.), Judgment No P.11.2130.F, 18 January 2012; Brussels (Indict. Ch.), Judgment No 3046, 13 September 2013; Brussels (Indict. Ch.), Judgment No 3405, 4 October 2013. Cass. (2nd ch.), Judgment No P.12.0291.F, 21 March 2012.
[17] Article 73, alinéa 1, de la loi du 15 décembre 1980.
[18] Brussels (Indict. Ch.), Judgment No 402, 30 January 2014.

decisions are simultaneously taken. It is a single administrative act. If a TCN is detained before the taking of an order to leave the territory, it is not within the scope of the return procedure (for example: asylum claimants at the border).

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

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":

Not relevant.

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**:

Not relevant.

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:

Not relevant.

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

Not relevant.

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

Not relevant.

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

Not relevant.

- **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)*

Not relevant.

- **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))*

No:
Case law considers that even in cases of non-cooperation of the country of return, the courts do not assume the lack of a reasonable prospect of removal. The burden of proof relies on the detainee. In on case, the Afghan embassy refused to deliver the necessary travel documents. The Immigration Office therefore delivered a European Pass to proceed with the removal. The Court considered that the detainee did not prove that this kind of removal was not technically possible (Brussels (Indict. Ch.), Judgment NoXXX, 30 October 2013).

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

Not relevant.

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

BE:
ECHR case law Yoh-Ekale Mwanje v. Belgium (Appl. No. 10486/10, 20 December

2011, §123) considered that even if Rule 39 did not affect the lawfulness of the detention, there was no reasonable prospect that the ECHR could rule within the maximum detention period foreseen by the Belgian law. Following that judgment, Belgian authorities seem now to consider that if the removal procedure is suspended because of ongoing proceedings Strabourg, detention must be temporarily ended (ECHR, Singh vs Belgium, no 33210/11, 2 October 2012, §§ 18-19).

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

Not relevant.

- 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)

Not relevant.

- Else

Theoretically, the application of the criterion is controlled.
In practice, I have never seen any detention ended because of a lack of reasonable prospect of removal. It seems that the Courts tend to consider more the steps taken by the Immigration Office to proceed with the removal (i.e. due diligence) than the prospects of succeeding with it (i.e. reasonable prospect of removal)[19].

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):

No jurisprudence.

[19] Brussels (Indict. Ch.), Judgment NoXXX, 30 October 2013.

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

X 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**
- Else

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

In the absence of elements that prove that the removal is impossible, the Courts consider that there is still a reasonable prospect to proceed with the removal. The burden of the proof relating to the existence of a reasonable prospect of removal seems to rest with the detainee[20].

The control of the existence of a reasonable prospect of removal must be distinguished from the control of a risk of violation of fundamental rights. The former is often less rigorous than the latter.

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

*Besides, the burden of proof relies on the detainee. In one case, even in the absence of cooperation of the country of return, the court did not assume the lack of a reasonable prospect of removal given that the detainee did not prove that the removal was impossible. (Brussels (Indict. Ch.), **Judgment** NoXXX, 30 October 2013)*

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:

Not relevant.

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:

Not relevant.

[20] Brussels (Indict. Ch.), Judgment NoXXX, 30 October 2013.

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:

Avoiding and hampering are not differentiated by the Belgian Courts. Usually, the initial detention period is motivated by a risk of absconding (cfr infra). It is only when the detained TCN refuses to board the plane prepared for his removal that a new detention order is issued based on the resistance of the TCN to his removal.[21] *That sort of resistance is the main application of the criterion of "avoiding or hampering" the removal process.* *The disadvantage is that for each refusal, a new detention order must be issued. Consequently, there is no maximum detention period.*

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:

Idem question 39.2

[21] Brussels (Indict. Ch.), Judgment No 2771, 19 August 2013 Mons (Indict. Ch.), Judgment No C-677/12, 28 August 2012.

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?
X YES NO 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***):

The risk of absconding is defined in article 1, 1°, L. 15.12.1980:

"the fact that a third-country national who is the subject of a removal procedure forms an actual and real risk to evade the authorities. To this end the Minister or his/her representative shall base himself/herself on objective and serious elements."

The objective and serious elements are not defined within the law which is contradictory to Art. 3(7) RD. They are only defined in the explanatory memorandum on the Law of 19 January 2012 (Doc. parl., Chambre, Doc. 53, No 1825/001) [22] *which lists several cases by way of example, considering that the risk of absconding can result from one or more factors such as:*

1. Remaining on the territory beyond the period stipulated in the removal decision;

2. Making a false statement or providing false information regarding factors enabling identification or refusing to disclose true identity;

3. Using false or misleading information or false or falsified documents when applying for a residence permit (apart from the asylum procedure), or recourse to fraud or other illegal means to gain permission to reside in Belgium;

4. Failing repeatedly to respond to an invitation from the municipal administration to go in person and receive notice of the residence application decision

5. If the person concerned has not respected the obligations, as imposed by Article 74/14, §2 of the law, with the purpose of reducing the risk of absconding;

6. If the person concerned has not respected an entry ban;

7. If the person concerned has changed his/her place of residence during the period that is granted to leave the territory, in application of Article 74/14, §1, without informing the Immigration Service thereof;

8. If the person concerned has given false declarations or false information with regard to elements permitting its identification or has refused to give its true identity;

9. If the person concerned, in the framework of an application for an authorisation to stay (other than an asylum procedure), has used false or misleading information or false or misleading documents, or has committed fraud or has used illegal means in order to be able to stay in the Kingdom;

10. If the person concerned has not replied several times to notification from the local

[22] Projet de loi modifiant la loi du 15 December 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers, exposé des motifs, *Doc. parl.*, Chambre, 2011-2012 , No 53-1825/1, 19 October 2011, pp. 16-17.

administration, in the framework of the notification of the decision concerning its application to stay.

Attention should be brought to the fact that the risk of absconding was defined on the basis of Guideline No 6 "Conditions under which detention may be ordered" of the "Twenty guidelines on forced return" adopted by the Committee of Ministers of the Council of Europe of 4 May 2005.[23]

Jurisprudence has relied on several of these elements to appreciate the risk of absconding. Among others, it was considered that the lack of an address in Belgium,[24] *the declaration of fake identities or nationalities*[25] *or the introduction of a marriage file to the municipality the license for which was refused,*[26] *confirmed the existence of a risk of absconding.*

The Court of Cassation considered that release of the detainee can be ordered if the file of the Foreign Office does not contain any objective and serious evidence regarding the risk of absconding. This is due to the fact that if the detention order is based on the assertion that there is a risk of absconding, the jurisdictions must be able to verify that this risk was assessed by the administration in accordance with the criteria that the law provides[27].

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?
YES NO

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

Not relevant.

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?

Usually, the assessment of the risk of absconding is based on the administrative path followed by the detainee.

The structure of judgments is based on reasoning which considers the facts, the law and the consequences.

[23] Projet de loi modifiant la loi du 15 December 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers, avis de la section de législation du Conseil d'État No 49.947/2/V, *Doc. parl.*, Chambre, 2011-2012 , No 53-1825/1, 19 October 2011, p. 17.
[24] Brussels (Indict. Ch.), Judgment No 2451, 3 July 2013.
[25] Brussels (Indict. Ch.), Judgment No 55 du 4 January 2013.
[26] Brussels (Indict. Ch.), Judgment No 4538, 21 December 2012.
[27] Cass. (2e ch.), Judgment noP.12.1028.F, 27 juin 2012.

It is considered by the courts that if the file delivered by the Immigration Office does not contain objective and serious elements certifying the risk of absconding, release may be ordered. This is justified by the fact that the Court has to be able to verify that the risk of absconding has been evaluated by the administration according to the legal criteria.[28]

However, it should be noted that the assessment of an individual's situation and circumstances is most of the time "formal". For example, it is often considered that detention is justified because it is unlikely for an immigrant to comply with an order to leave the country when he has not obeyed previous identical injunctions[29] *or that he has no official address in Belgium*[30] *.*

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:

Despite the very large definition of the risk of absconding there is no overlap because of the particular application of the "avoiding/hampering" hypothesis (cfr supra).

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*)?
X YES NO

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:*

Some Courts consider that detention is not limited to the two hypotheses of "avoiding/hampering return" and "a risk of absconding"[31]*. However, the Court of Cassation (Judgment n°P.14.0005.N, 21 January 2014) has recently considered that detention for removal was indeed limited to these two hypotheses. The reasoning was based on the fact that, as a legal restriction to the personal freedom, a strict interpretation of article 15 RD is required.*

In practice, detention is often motivated by the fact that having no identity document during his arrest, the TCN has to be detained until his national authorities issue him with travel documents[32]*.*

[28] Cass. (2nd ch.), Judgment No P.12.1028.F, 27 June 2012.
[29] Mons (Indict. Ch.), Judgment n°664/12, 21 August 2012 ; Bruxelles (Indict. Ch.), Judgment n°781, 27 February 2013 ; Bruxelles (Indict. Ch.), Judgment n°684, 20 February 2013 ; Bruxelles (Indict. Ch.), Judgment n°2772, 14 August 2012 ; Bruxelles (Indict. Ch.), Judgment n°3717, 30 October 2012.
[30] Bruxelles (Indict. Ch.), Judgment n°2451, 3 July 2013.
[31] Bruxelles (Indict. Ch.), Judgment noXXX, 20 December 2013 ; Bruxelles (Indict. Ch.), Judgment no1146, 28 March 2014.
[32] Bruxelles (Indict. Ch.), Judgment n°2783, 17 August 2012 ; Bruxelles (Indict. Ch.), Judgment n°2680, 1er August 2012 ; Mons (Indict. Ch.), Judgment n°701/12, 11 September 2012 ; Bruxelles (Indict. Ch.), Judgment n°360, 29 January 2013 ; Bruxelles (Indict. Ch.), Judgment n°3717, 30 October 2012 ; Bruxelles (Indict. Ch.), Judgment n°3539, 17 October 2012 ; Bruxelles (Indict. Ch.), Judgment n°1086, 22 March 2013 ; Mons (Indict. Ch.), Judgment n°453/13, 28 June 2013.

For the rest, given the extended definition of the risk of absconding, almost any irregular migrant can be considered as "risking to abscond". That is important because it means that detention can always be considered as legal by the Courts. As long as the definition of the risk of absconding is not modified, judgments which justify detention will continue to be regularly made when they should in fact be the exception.

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**:

Not relevant.

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:

Not relevant.

3. Alternatives to detention

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

The principle of less coercive measures is implemented within the Law (article 7 Law 15.12.1980) but not applied in practice and not controlled by case law.
The only alternatives to detention are return houses for families with children. For the rest, according to well established case law: "No illegality can be inferred from the mere fact that the administrative authority imposes a detention measure, while other less coercive measures could be taken."[33] This point of view is largely shared by the Council and Indictment Chambers.

However, it should be noted that the Court of Cassation has taken a different position.
"Article 7, al. 3, L. 15.12.1980 prescribes not to take detention measure unless failing to effectively implement other measures, less coercive but sufficient to remove the foreigner at the border".[34]
Surprisingly, the Council and Indictment Chambers continue to prefer an older judgment from the Court of Cassation (2009) which rejects the necessity to consider alternatives to detention.[35]

[33] Brussels (Indict. Ch.), Judgment No 2772, 14 August 2012; Brussels (Indict. Ch.), Judgment No 2773, 14 August 2012; Brussels (Indict. Ch.), Judgment No 3717, 30 October 2012; Brussels (Indict. Ch.), Judgment No 3539, 17 October 2012; Mons (Indict. Ch.), Judgment No 664/12, 21 August 2012; Brussels (Indict. Ch.), Judgment No 2760, 14 August 2013; Mons (Indict. Ch.), Judgment No 453/13, 28 June 2013; Cass. (2nd ch.), Judgment No P.12.0749.F/4, 16 May 2012.
[34] Cass. (vac.), Judgment No P.12.1028.F, 27 June 2012.

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

- Registration obligation

Not relevant.

- Deposit of (travel) documents

These are provided by the law, not as an alternative to detention but as a restraint during the voluntary departure period (art. 74/14, § 2, al. 2 et 3, Law 15 December 1980)

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

These are provided by the law, not as an alternative to detention but as a restraint during the voluntary departure (art. 74/14, § 2, al. 2 et 3, Law 15 December 1980)

The Indictment court once considered this issue: "The circumstances that the foreigner or his family intend to pay a deposit have nothing to do with the law of 15 December 1980 and are, in all cases, not likely to conclude to the unlawfulness of the detention."[36]

- Regular reporting to the authorities

These are provided by the law, but not as an alternative to detention but as a restraint during the voluntary departure period (art. 74/14, § 2, al. 2 et 3, Law 15 December 1980)

- Community release/supervision

Not relevant.

- Designated residence

Returnees can normally receive a house arrest in place of being detained (art. 7 Law 15 December 1980). In practice, it is never applied.

- Electronic tagging

Not relevant.

- Home curfew

Not relevant.

- Else

The only alternative that is applied is the use of 'return houses' for families with minors. It is regulated by law (art. 74/9), Royal Decree (14 May 2009)[37] *and internal rules.*

[35] Cass. (2nd ch.), Judgment No P.08.1787.F/1, 14 January 2009.
[36] Brussels (Indict. Ch.), Judgment No 2689, 7 August 2013.
[37] http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2009051406&table_name=loi

Return houses have existed since May 2009. Since October 2009, families with children who were not removable within 48 hours after arriving at the border were brought to return houses. Since 20 July 2011, families with children should also be allowed to stay in their own house. But it is not yet applied in practice.

Each house is furnished with a bathroom, a toilet, a living room, a kitchen and a bedroom (art. 3 RD 14 May 2009).

From a strict legal point of view, families are "detained". In practice, they are free to go, with minors restrictions (art. 1, 3°, al. 2, RD 14 May 2009). Since these return houses are open, the families can leave the house under specific rules (art. 19, RD 14 May 2009).

Visits in the family units are allowed (art. 26, RD 14 May 2009).

Supporting officers ('coaches') are appointed by the Immigration Office to accompany the families during their stay (art. 1, 4°, RD 14 May 2009). These officers inform the families about legal procedures (asylum, appeals ...) and assist them in preparing their return to their country in case their asylum request is rejected (art. 7 RD 14 May 2009).

The family has a weekly budget for logistical and nutritional costs, and medical costs which are only reimbursed if the physician has been contacted by the officials (art. 33 and 38 RD 14 May 2009). Every family can apply for a pro bono lawyer (art. 42 RD 14 May 2009).

The fact that they are, legally speaking, "detained" has various consequences. They can appeal their detention decision, as for the detainee, they are in an "accelerated procedure" for their asylum claim (15 days instead of 30 to appeal the CGRS decisions, quick decision of the alien litigation council, etc.) and they do not benefit from the reception law.

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**?

The only consideration for an alternative to detention, .i.e. return houses, is that there is no detention for minors.

For the rest, according to well established jurisprudence: "No illegality can be inferred from the mere fact that the administrative authority imposes a detention measure, while other less coercive measures could be taken."[38] *This point of view is largely shared by Council and Indictment Chambers.*

[38] Brussels (Indict. Ch.), Judgment No 2772, 14 August 2012; Brussels (Indict. Ch.), Judgment No 2773, 14 August 2012; Brussels (Indict. Ch.), Judgment No 3717, 30 October 2012; Brussels (Indict. Ch.), Judgment No 3539, 17 October 2012; Mons (Indict. Ch.), Judgment No 664/12, 21 August 2012; Brussels (Indict. Ch.),

However, it should be noted that the Court of Cassation has taken a different position:

> *"Article 7, al. 3, L. 15.12.1980 prescribes not to take detention measure unless failing to effectively implement other measures, less coercive but sufficient to remove the foreigner at the border".*[39]

Surprisingly, the Council and Indictment Chambers continue to prefer an older Judgment from the Court of Cassation (2009) which rejects the necessity to consider alternatives to detention.[40]

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**?

Idem. No detention for minor children.

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 NO X

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*):

Because the case law of the Council and Indictment Chambers considers that Courts do not have to assess any alternative to detention. Anyway, there is no alternative to detention available apart from return houses for families with children.
Besides that, the control of the Courts is limited to the legality of the decision. It cannot assess the opportunity of an alternative in comparison with another.

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

  It is a legal control. It only verifies if the choices made are legal and correctly motivated.

- 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.

Judgment No 2760, 14 August 2013; Mons (Indict. Ch.), Judgment No 453/13, 28 June 2013; Cass. (2nd ch.), Judgment No P.12.0749.F/4, 16 May 2012.
[39] Cass. (vac.), Judgment No P.12.1028.F, 27 June 2012.
[40] Cass. (2nd ch.), Judgment No P.08.1787.F/1, 14 January 2009.

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*):

Not relevant.

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

Return houses are a consequence of ECtHR jurisprudence. Belgium has been condemned by the ECtHR for violating Article 3 on account of having detained TCN minors, whether or not they are accompanied, in a closed centre designed for adult TCNs, in conditions which were ill-suited to their extreme vulnerability as minors.[41]

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:

Not relevant.

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**?

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

According to Article 7, third subparagraph of Law 1980, detention shall be possible only for the time strictly necessary to carry out the return of the TCN or to implement the decision of removal and shall not exceed a period of two months. *The initial detention orders do not indicate any precise period of detention. The control by courts during that period is mostly formal. I do not have any knowledge of a decision which has a real analysis and precisely details the parameters that are to be taken into consideration.*

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

Not relevant.

[41] ECHR, *Kanagaratnam and Others v. Belgium*, 13 December 2011, No 15297/09.

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.)?

Courts are usually referring to the date of removal/detention order issued by the Immigration Office.[42]

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

Article 7 Law 15.12.1980: When the necessary steps to remove the TCN are taken within 7 working days following the detention of the TCN and these steps are pursued with due diligence and it is still possible to carry out the removal of the TCN in an effective way within reasonable time, the Minister or his/her representative can decide to prolong the detention by an additional two months. Once the Minister decides to prolong the detention, it can only be extended by an additional two months maximum. In any case, the TCN has to be released after being detained for a period of five months.

In practice, detention periods are not often extended. But, a new detention order on the basis of article 27 L. 15/12/1980 is issued each time the detainee refuses or resist his removal, i.e. when he refuses to get on the plane. And with new detention orders comes a new five-month detention period similar to the one provided in article 7. The legal basis for this practice – supposedly article 27 L. 15/12/1980 – is unclear but unanimously accepted by case law.[43] *With many new detention orders, the detention period can sometimes last longer than the five months mentioned in article 7, for example at least one detention had lasted up to 9 months.*[44]

- 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

The Courts examine whether the decisions are correctly motivated. For detention periods extended beyond a month, they are supposed to verify whether the necessary steps to remove the TCN were taken within seven working days following the

[42] Brussels (Indict. Ch.), Judgment No 3698, 25 October 2012; Brussels (Indict. Ch.), Judgment No 3484, 11 October 2012.

[43] Cass. (vac.), Judgment No P.11.1456.F/1, 23 August 2011; Brussels (Indict. Ch.), Judgment No 3698, 25 October 2012; Brussels (Indict. Ch.), Judgment No 3484, 11 October 2012; Brussels (Indict. Ch.), Judgment No 3696, 25 October 2012; Brussels (Indict. Ch.), Judgment No 3697, 25 October 2012; Brussels (Indict. Ch.), Judgment No 3346, 3. October 2012; Mons (Indict. Ch.), Judgment No C-677/12, 28 August 2012; Brussels (Indict. Ch.), Judgment No 2942, 6 September 2012; Brussels (Indict. Ch.), Judgment No 3554, 17 October 2012.

[44] Brussels (Indict. Ch.), Judgment No 2771, 19 August 2013.

detention of the TCN and these steps must have been pursued with due diligence and it must still be possible to carry out the removal of the TCN in an effective way within reasonable time.

The control operated by the Courts regarding the extension of detention is usually not limited to the matters adduced by the administrative authority or even the TCN. Courts are able to consider any other element that is relevant for its decision. According to article 72 L.15/12/1980, Courts must proceed with the control of detention of TCNs according to the rules related to pre-trial detention. It means that it is an inquisitorial procedure where Courts are not neutral and passive but have a real power of initiative. However, I am not aware of any decision where the Court based its ruling on elements which were not raised by the TCN, the Administration or the Prosecutor.

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

Not relevant.

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:

Not relevant.

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:

Not relevant.

4.2 Due diligence

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

According to art. 7(5) L.15.12.1980: When the necessary steps to remove the TCN are taken within seven working days following the detention of the TCN and these steps are pursued with due diligence and it is still possible to carry out the removal of the TCN in an effective way within a reasonable time, the Minister or his/her representative can decide to prolong the detention by an additional two months.
Due diligence is controlled by courts but is not defined as such. It seems to be limited to the taking of the necessary steps to proceed with the removal.[45] *For example:*

- *Contact with the national authorities of the TCN*[46]*;*
- *An attempt to proceed with the removal, even if it has failed due to the resistance or*

[45] Mons (Indict. Ch.), Judgment No 407/13, 14 June 2013.
[46] Bruxelles (mis. acc.), arrêt n°150, 15 janvier 2014

the refusal of the detainee. In that case the TCN is responsible for the extension of the detention period and it is considered that the removal is pursued with due diligence.[47]

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

The control is limited to the taking by the Immigration Office of the necessary steps to proceed with the removal.[48]
I do not have any knowledge of a decision considering that the removal is not pursued with due diligence.
A failed attempt to proceed with the removal due to the resistance or the refusal of the detainee allows consideration as to whether the TCN is responsible for the extension of the detention period and that the removal is pursued with due diligence.

- a full control not limited to a manifest error assessment

Not relevant.

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**:

Not relevant.

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:

Not relevant.

4.3 Removal arrangements in progress

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

According to article 7 L. 15.12.1980, the necessary steps to remove the TCN have to be taken within seven working days following the detention of the TCN.

Removal arrangements, like due diligence, are supposed to be controlled by courts but are not defined as such. It seems to be limited to the taking of the necessary steps within seven days of the detention period to proceed with the removal.[49]

I do not have any knowledge of a decision that considers whether there has been a lack of progress in the removal arrangements.

[47] Bruxelles (mis. acc.), arrêt n°3554, 17 octobre 2012
[48] Mons (Indict. Ch.), Judgment No 407/13, 14 June 2013.
[49] Mons (Indict. Ch.), Judgment No 407/13, 14 June 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

It is a legal control.

- 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*):

Application of Rule 39 alone does not allow consideration of the detention as being illegal. The Indictment Chamber of Anvers has considered: "The fact that the European Court of Human Rights has decided to suspend the expulsion of [the applicant] does not mean that, for this reason, the expulsion cannot take place within the legal detention period taking into account the final decision of this Court."[50]
However, if the ECHR does not statute within the maximum detention period, the detainee has to be released. Since the ECHR case of Yoh-Ekale Mwanje v. Belgium (Appl. No. 10486/10, 20 December 2011, §123) considered that there was no reasonable prospect that the ECHR could rule within the maximum detention period foreseen by Belgian law even if Rule 39 did not affect the lawfulness of the detention, Belgian authorities seem to consider that if the removal procedure is suspended because of a Strasbourg proceeding, detention must be temporarily ended (ECHR, Singh vs Belgium, no 33210/11, 2 October 2012, §§ 18-19).

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

If the return is considered illegal by the Courts, for example because it is contrary to art. 3 ECHR, detention is ended[51].

If the return is only considered as "suspended", there are theoretically two possibilities: the migrant is either detained on another legal basis (for example: as an asylum seeker) and therefore it has no influence on the length of the detention in order to proceed to the removal, or he is not detained on a legal basis and thus he must be released when the maximum detention period has expired or if there is no reasonable perspective to proceed with the removal. No jurisprudence available.

[50] ECHR, Yoh-Ekale Mwanje c. Belgique, req. No 10486/10, 20 December 2011, § 37.
[51] Bruxelles (mis. acc.), arrêt n°3046, 13 septembre 2013 ; Bruxelles (mis. acc.), arrêt n°3405, 4 octobre 2013.

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?
YES NO X

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

Not relevant.

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

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*):

Not relevant.

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**:

Not relevant.

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:

Not relevant.

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**

In theory, the maximum detention period is limited to five months (article 7 and 27 L.15.12.1980). But, as mentioned above, new detention orders with a new detention period can be issued on the basis of article 27 when the migrant refuses or resists his removal (typically, when he refuses to get on the plane). This is unanimously admitted

by the jurisprudence.[52] The wording of articles 7 and 27 is quite obscure, but the case law is very clear. It means that in practice, there is no maximum detention period within the Belgian law for those who refuse or resist their removal. For example, a migrant who had resisted his removal by giving false information about his country of origin and refused to get on the plane had a detention period of up to nine months.[53] Even if the practice of the Immigration Office is "reasonable" – I have not noticed any detention period exceeding 9 months – the practice related to article 27 appears to be questionable because de facto there is no legal maximum detention period.

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

Not relevant.

- Else

Articles 7 in fine, and 29, al. 5 L. 15.12.1980 rules that the detention period can be extended up to eight months when the detainee represents a danger for the public order or the national security.

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

The control is usually limited to noticing that the migrant has refused to get in the plane and that he is therefore responsible for the extension of his detention period. We are still in an inquisitorial procedure where Courts are not neutral and passive but have a real power of initiative. Therefore, Courts are normally able to consider any element that is relevant for their decision.
If it appears that no steps have been taken in weeks to proceed with the removal, the release of the TCN will probably be ordered.

- 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?
YES NO X

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

Usually the motivation is limited to the administrative background of the detainee without

[52] Cass. (vac.), Judgment No P.11.1456.F/1, 23 August 2011; Brussels (Indict. Ch.), Judgment No 3698, 25 October 2012; Brussels (Indict. Ch.), Judgment No 3484, 11 October 2012; Brussels (Indict. Ch.), Judgment No 3696, 25 October 2012; Brussels (Indict. Ch.), Judgment No 3697, 25 October 2012; Brussels (Indict. Ch.), Judgment No 3346, 3. October 2012; Mons (Indict. Ch.), Judgment No C-677/12, 28 August 2012; Brussels (Indict. Ch.), Judgment No 2942, 6 September 2012; Brussels (Indict. Ch.), Judgment No 3554, 17 October 2012.
[53] Brussels (Indict. Ch.), Judgment No 2771, 19 August 2013.

any further analysis of a risk of absconding. Given that detention is often extended because of the refusal of the detainee to cooperate, the risk of absconding is implicitly taken for granted.

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

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

Even for the initial period of detention, such an assessment is not conducted.

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**:

Not relevant.

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:

Not relevant.

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:

Not relevant.

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

Not relevant.

- 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

The detainee stays detained until the judicial decision is definitive. It includes first instance, appeal and cassation. This means that the TCN will not be released until the third level of jurisdiction, as long as there is one. *Potential delays are:* *The appeal of the Council Chambers decisions to the Indictment Chamber has to be introduced within 24 hours.* *The decision of the Indictment Chamber must be rendered within 15 days, otherwise the TCN is release.* *The appeal to the Court of Cassation must be introduced within 48 hours.* *The decision of the Court of Cassation must be rendered within 15 days, otherwise the TCN is release.* *If the Court of Cassation annuls the decision of the Indictment Chamber, the case must be referred back to another Indictment Chamber which must render its decision within 15 days, otherwise the TCN is released. (art. 30 and 31 L. 31 July 1990 related to pre-trial Detention and 72 L. 15/12/1980)* *If the maximum length of detention expires in the meantime, the TCN will be released.*

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:

No jurisprudence available.

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:

Yes. There are no provisions in the law but in jurisprudence, there is at least one example. After a seven month detention period, an illegally staying Senegalese person was released because the maximum period of detention had expired. A few days later, he was arrested again and was ordered to leave the territory with a detention order. The Indictments chamber confirmed the lawfulness of these detention orders[54].

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

YES

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:

There is no specific mechanism of compensation for a TCN illegally deprived of their liberty within a removal procedure. However, according to article 27 L.13/03.1973 relating to compensation for pre-trial detention, a right to compensation is open to <u>any person</u> who has been deprived of his liberty under terms that are inconsistent with the provisions of Article 5 ECHR. Therefore, if detention is considered illegal by the Council or Indictment Chambers, compensation should theoretically be accessible. Yet I have never heard of such a case.

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

Not relevant.

[54] Bruxelles (mis. acc.), arrêt n°XXX, 21 décembre 2011.

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**:

I have not found any statistics and I do not think there are any.
However, there is no doubt that a huge majority of decisions tend to confirm the detention order. Often, the detainee has already been removed when the legality of his detention is controlled. On the basis of the decisions I have come to analyse – not only in the context of the contention project – I would say that at least 90 % of detention orders are confirmed by jurisdictions.

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:

If the removal is considered as being contrary to human rights, detention must be ended because it is considered as an accessory of the removal and Accessorium sequitur principale. It offers a back-up control of the conformity of the removal with human rights which allow a safer procedure.

If the detainee has been released in first instance, unanimity is required among the judges of the appeal Court to reverse the decision and to confirm the detention measure.

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

Not relevant.