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legislation in detention

Various legislative initiatives concerning detention were reported in 2022.

A royal decree was published in Belgium in September 2022, which explicitly allows the CGRS to organise interviews with applicants through videoconferencing. Accordingly, video interviews resumed in closed centres with the use of Microsoft Teams. Once an end-to-end encryption is possible for third-party participation, lawyers will be able to participate remotely rather than going to the closed centre in person, as is currently the practice. The CGRS nonetheless emphasised the preference for the physical presence of the lawyer.^{[685](#)} Legal proceedings were pending before the Council of State on the implementation of the royal decree. Concerned about the use of a specific software, the Belgian CALL [ruled](#) that more information was needed on the reliability of Microsoft Teams and its compliance with data protection.

Following the Supreme Court decision [No 3-22-56](#) of 10 May 2022, Estonia introduced in August 2022 an amendment to the Act on Granting International Protection to Aliens on the transfer and detention of a third-country national to a responsible EU Member State. According to the amendment, if the PBGB decides to initiate proceedings for the transfer of a third-country national under Regulation (EU) No 604/2013 of the European Parliament and of the Council, then the Act on Granting International Protection to Aliens is applied for the detention of the person.^{[686](#)}

In addition, amendments to Article 15 of the Obligation to Leave and Prohibition on Entry Act (OLPEA) came into force, which stipulate the possibility of detaining a third-country national for identification procedures and establishing whether a person is obliged to leave the country.^{[687](#)} In August 2022, another amendment to the act was made so that upon the detention of a third-country national in an emergency situation, the following information is recorded in the detention report: name or names of the person; legal and factual basis and justification for the detention; the date, time and place; and the name of the administrative body and official who made the report. The difference with detention under normal circumstances is that less personal data are collected initially and a group, rather than individual, protocol is made.^{[688](#)}

With Presidential Decree No 77/17.11.2022, CCACs in Greece were established on Samos, Kos, Leros, Lesbos and Chios as regional services of the Reception and Identification Service.^{[689](#)} These replaced the previous Reception and Identification Centres (RICs) which were abolished.

In Italy, the Department of Civil Liberties and Immigration published a circular directed to the prefects and other relevant stakeholders to ensure the implementation of the new regulation of the CPR which was published in May 2022.[690](#) The circular ensures full and effective respect of the rights of detainees, including access to information and the assessment of health conditions and medical care. It also regulates the services to be provided within the centre, communication, access to centres, visits and monitoring and controls.

In May 2022, Internal Regulation No 23.1-8.2/12 of the State Border Guard on the “Procedure according to which measures are to be performed in the field of asylum under the competence of the State Border Guard” entered into force in Latvia. It defines the actions to take if minor children arrive with an adult asylum seeker who is detained, particularly for accommodation in the State Border Guard premises for asylum seekers.

In Lithuania, amendments to the Law on the Legal Status of Foreigners, which is in force since 1 January 2022, regulates the detention of asylum applicants in the event of martial law, a state of emergency or declaration of an emergency due to a mass influx of foreigners.[691](#) According to Article 140 of the law, an asylum applicant may be detained not only in the cases referred to in Article 113(4) but also when he enters the territory by illegally crossing the state border. The CJEU [ruled](#) that EU law precludes legislation under which an asylum applicant is detained on the ground that they are staying illegally, because in principle, an applicant for international protection cannot constitute a threat to national security or public order solely for staying illegally ([see Section 2.6](#)). In reaction to the verdict, the Ministry of the Interior committed to analyse and evaluate what should be changed in the national law to ensure that there is a balance between the right of individuals to asylum and national and EU-wide security.[692](#)

In January 2022, Luxembourg introduced Bill 7954 to the parliament, which – among other things – amends the amended Law of 29 August 2008 and proposes extending the possibility of administrative detention to any illegally-staying foreigner who needs to be forcibly removed, including EU citizens and their family members who have been issued a removal order, for reasons set out in Articles 27, 30(1) and 30(2) of the Immigration Law.[693](#) In addition, Bill 8014 amending the amended Law of 18 December 2015 on international protection and temporary protection (Asylum Law) provided the modification of Article 22(2d) by introducing the non-negligible risk of absconding as a reason for detention and by specifying in which case this risk is presumed.[694](#)

In an effort to align practices with jurisprudence, the Netherlands altered some sections of the Aliens Act Implementation Guidelines to specify that a foreigner can be detained for a short period to investigate the person’s identity and the lawful status in the country. Accordingly, detention may be implemented for a maximum of 6 hours (nightly hours not included) and can be prolonged by a maximum of 48 hours, when additional research is needed on the lawful status. Before this change, the Implementation Guidelines allowed detention to be prolonged for the sole reason that a large group of presumably illegal third-country national had been arrested, and the Council of State declared the policy guidelines to not be in line with the wording in the Aliens Act.[695](#)

In November 2022, the CJEU [ruled](#) that a national court must review *ex officio* the lawfulness of a detention decision in a return procedure or the international protection procedure ([see Section](#)

[2.6](#)). Prior to this decision, a third-country national in the Netherlands had to put forward on their own initiative the grounds on which the detention decision was not in compliance with applicable legal regulations and the judge could not examine the conditions for detention on its own initiative.

The SMA in Sweden published a legal comment in February 2022 on detainees who are or will be subject to another form of deprivation of liberty (RK/001/2022). As a general rule, a decision on detention should not be made if the foreigner is simultaneously deprived of liberty on other grounds. Under certain conditions, for example when it concerns a deprivation of liberty that can end at short notice, a 'conditional custody decision' is made if there are grounds for detention at the time of the decision. This includes decisions based on both the Aliens Act and the Dublin Regulation.[696](#)

Asylex raised concern over a new national law passed by parliament in Switzerland, where short-term detention is allowed without a judicial review.[697](#) According to the new Article 73(1 lit. c AIG), people may be detained at the border for up to 3 days without a judicial review and without a written order.[698](#) The law targets people who have not applied for asylum, but as Asylex noted, it may mean that people in need of protection would still end up in detention. The Swiss Refugee Council commented on the draft law in 2020 and emphasised the importance of ensuring unimpeded access to the asylum procedure, even under the new legislation.[699](#)

Germany is working on changing legislation to exclude children and juveniles from detention during a deportation procedure. The law is expected to become effective in 2023.

- [685](#) Arrêté royal du 26 Novembre 2021 modifiant l'arrêté royal du 11 juillet 2003 fixant certains éléments de la procédure à suivre par le service de l'Office des étrangers chargé de l'examen des demandes d'asile sur la base de la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers [Royal Decree of 26 November 2021 amending the Royal Decree of 11 July 2003 determining certain elements of the procedure to be followed by the service of the Immigration Office tasked with the examination of asylum applications based on the Law of 15 December 1980 on access to the territory, residence, settlement and removal of foreign nationals], November 26, 2021. <https://www.ejustice.just.fgov.be/eli/arrete/2021/11/26/2021034165/justel>; Office of the Commissioner General for Refugees and Stateless Persons | Commissariaatgeneraal voor de vluchtelingen en de staatlozen | Commissariat Général aux Réfugiés et aux Apatrides. (2022, September 19). Video interviews in closed centres. <https://www.cgrs.be/en/news/video-interviews-closed-centres>
- [686](#) Riigipiiri seaduse muutmise ja sellega seonduvalt teiste seaduste muutmise seadus [Act on amending the State Border Act and other related laws], July 19, 2022. <https://www.riigiteataja.ee/akt/106082022001>
- [687](#) Väljasõidukohustuse ja sissesõidukeelu seaduse, politsei ja piirivalve seaduse ning riigipiiri seaduse muutmise seadus (Schengeni acquis' sätete rakendamise tagasisaatmise valdkonnas) [Law on Amendments to the the Obligation to Leave and Prohibition on Entry Act, the Police and Border Guard Act and the State Border Act (implementation of the provisions of the Schengen acquis in the field of return)], May 18, 2022. <https://www.riigiteataja.ee/akt/108062022003>

- [688](#)Riigipiiri seaduse muutmise ja sellega seonduvalt teiste seaduste muutmise seadus [Act on amending the State Border Act and other related laws], July 19, 2022. <https://www.riigiteataja.ee/akt/106082022001>
- [689](#)Προεδρικό Διάταγμα Υπ' Αριθμόν 77, ίδρυση Κλειστών Ελεγχόμενων Δομών (Κ.Ε.Δ.) και κατάργηση Κέντρων Υποδοχής και Ταυτοποίησης (Κ.Υ.Τ.) - Τροποποίηση του π.δ. 106/2020 «Οργανισμός Υπουργείου Μετανάστευσης και Ασύλου» (Α΄ 255), ΦΕΚ Α΄ - 212/17.11.2022 [Presidential Decree No 77 . Establishment of Closed Controlled Access Centers (CCAC) and abolition of Reception and Identification Centers (RICs) -amendment of presidential decree 106/2020 “Organisation of the Ministry of Migration and Asylum” (Α΄ 255), Gov.Gaz Α΄ - 212/17.11.2022]. 17 November 2022. <https://migration.gov.gr/wp-content/uploads/2022/11/%CE%A0%CE%9477-2022.pdf>
- [690](#)Ministry of the Interior | Ministero del Interior. (2022, May 19). Direttiva 19 maggio 2022. Criteri per l'organizzazione e la gestione dei centri di permanenza per i rimpatri [Directive of 19 May 2022. Criteria for the organization and management of centers for stay and repatriation]. https://www.interno.gov.it/sites/default/files/2022-06/direttiva_ministro_lamorgese_19.5.2022.pdf
- [691](#)Lietuvos Respublikos įstatymo „Dėl užsieniečių teisinės padėties“ Nr. IX-2206 2, 3, 5, 26, 32, 40, 50, 67, 71, 76, 77, 79, 113, 125, 126, 130-1, 136, 138, 139, 140 straipsnių pakeitimo, 69 straipsnio ir IX-1 skyriaus pripažinimo netekusiais galios ir įstatymo papildymo X-2 skyriumi įstatymas [Law amending Articles 2, 3, 5, 26, 32, 40, 50, 67, 71, 76, 77, 79, 113, 125, 126, 130-1, 136, 138, 139 and 140 of Law No IX-2206 of the Republic of Lithuania on the Legal Status of Aliens, repealing Article 69 and Chapter IX-1 and adding Chapter X-2 to the Law], December 23, 2021. <https://www.e-tar.lt/portal/legalAct.html?documentId=0eee5e90696c11eca9ac839120d251c4>
- [692](#)Lithuanian National Radio and Television | Lietuvos radijas ir televizija. (2022, June 30). ES Teisingumo Teismo sprendimas: Lietuvos elgesys su migrantais prieštarauja ES teisei [Decision of the EU Court of Justice: Lithuania's treatment of migrants is contrary to EU law]. <https://www.lrt.lt/naujienos/lietuvoje/2/1730474/es-teisingumo-teismo-sprendimas-lietuvos-elgesys-su-migrantais-priestarauja-es-teisei>
- [693](#)Projet de loi 7954 portant modification de la loi modifiée du 29 août 2008 sur la libre circulation des personnes et l'immigration [Bill 7954 amending the amended law of 29 August 2008 on the free movement of persons and immigration], January 19, 2022. <https://www.chd.lu/fr/dossier/7954>
- [694](#)Projet de loi 8014 portant modification de la loi modifiée du 18 décembre 2015 relative à la protection internationale et à la protection temporaire [Bill 8014 amending the amended law of 18 December 2015 on international protection and temporary protection], May 30, 2022. <https://www.chd.lu/fr/dossier/8014>
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- [698](#)Loi fédérale sur les étrangers et l'intégration (LEI) (Soutien financier aux cantons qui gèrent des centres de départ à la frontière) (Projet), FF 2022 1313 [Foreign Nationals and Integration Act (FNIA) (Financial support for the cantons which manage departure centers at the border) (Draft), May 18, 2023. <https://www.fedlex.admin.ch/eli/fga/2022/1313/fr>
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