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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, Lesvos 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.

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