REDIAL PROJECT

National Synthesis Report – Netherlands

(Draft)

TEMPLATE FOR THE NATIONAL REPORTS ON THE THIRD PACKAGE OF THE RETURN DIRECTIVE – Articles 15 to 18 RD

by Galina Cornelisse, Assistant Professor, Lecturer in EU Law and International Law
VU University Amsterdam

Please consider that the questions below do not represent an exhaustive list of issues raised by these provisions but mainly offer a starting point for research and greatly facilitate our subsequent comparative analysis. The jurisprudence to be considered should be primarily the one submitted by the national judge collaborating in the REDIAL Project. Any other jurisprudence which does not touch precisely on these issues might be included in your report, as long as it is relevant for the interpretation/implementation of Articles 15-18 of Chapter IV of the Return Directive. (See in this regard the REDIAL Annotated Return Directive covering both the ECtHR and CJEU relevant case law)

When applicable, please also refer to any relevant administrative practice or on-going legislative changes at national level relating to pre-removal detention.

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)

  If relevant, please provide here a brief explanation of how this system operates.

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

  If relevant, please provide here a brief explanation of how this system operates:

  In Dutch law, the system is a combination of the first two answers.

  Detention is an administrative measure, which is formally ordered by the Minister (59 Aliens Act). The competence to order detention has been mandated in law to the mayor, chief constable, commander of the military police, and the assistant district attorney. In practice, it is almost always the latter who orders the detention.

  According to 94 Aliens Act, the Minister shall notify the court within 28 days from the beginning of the detention that this measure has been ordered, *except for those cases in which the detained alien herself installs an appeal against the detention in the court* (corresponding to the first option)

As soon as the court has received the notification by the Minster, it is treated as an appeal against the detention by the TCN concerned, including a request for compensation in the case of unlawful detention.

The court hearing will take place within 14 days after it has received the appeal or notification, and it will notify its judgement within 7 days after the hearing (article 94 para 2 Aliens Act). If the hearing is not held within those 14 days, the detention will be unlawful from the date that this period expired (see Council of State, 12 June 2008, 200803561/1). In some cases, the Court can reopen the investigation after the court hearing, and thus it may take longer before the judgment is notified. It will depend on the circumstances of the case whether this will be lawful. A period of 33 days after receiving the appeal will not be seen as a speedy judicial decision (as required by the ECHR) in the view of the Council of State (see Council of State, 7 July 2009, 200904366/1/V3).

- 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)

If relevant, please provide here a brief explanation of how this system operates.

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

If relevant, please provide here a brief explanation of how this system operates.

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 Dutch administrative law, the courts pronounce their judgement on the basis of the arguments that have been brought forward by the parties in the procedure. Thus, the General Administrative Law Act (GALA article 8:69) states that the court rules on the basis of the notice of appeal, the documents produced, the preliminary investigation and the investigation at the hearing. The courts however, are allowed to *complement* the legal grounds brought forward, and they may also *complement* the factual grounds. (i.e. if someone argues merely that he may not be put in detention because he cannot be removed, courts are allowed to 'translate' this argument in legal terms as an appeal to Article 15 para 4 RD, and the case law based upon this provision).

Thus, in Dutch administrative law, there is a crucial difference between *ex officio* control/ scrutiny on the one hand, and *ex officio* complementation of legal/factual grounds on the other. *Ex officio control* (i.e. completely independent from the grounds that have been brought forward by the parties) is not allowed, and the Council of State may, upon appeal, destroy the judgement on the ground that the court has 'trodden outside the boundaries of the dispute' (Council of State, 1 June 2007, 200703267/1). Thus, if the TCN concerned has not disputed the grounds for detention, the court may not control them. The same goes for the requirement of due diligence (Council of State 17 December 2007, 200707746/1), or a real prospect for removal (Council of State, 1 April 2009, 200901412/1). See for more on this in part III in the questionnaire.

There is one exception to this prohibition of *ex officio control*, which is if the legal rules that are checked concern *rules of public order*. Those may be the subject of *ex officio control*. Rules of public order are understood as rules that are fundamental for the functioning of the legal order, independent from the wishes, knowledge or interest of the parties. An example of such a rule of public order – which can thus be checked by the Council of State independently of the question whether the parties have brought an argument pertaining to it forward – is the rule in Article 94 para 2 Aliens Act (see above), laying down the maximum period after which the court hearing the appeal against the detention shall have its hearing (see Council of State, 11 February 2005, 200409759/1).

See for more on this also the answers to Q9.1.

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

If the detained TCN concerned does not appeal himself it can take a long time until a decision on the lawfulness of his detention is taken by a judicial authority (28 days and 14 days and 7 days) is almost two months.

The *prohibition* of *ex officio* control – except for rules of public order – seems at odds with the nature of the habeas corpus procedure, and the fact that relationship state-alien is unequal. Moreover, there is recurring criticism re the quality of legal aid for the detainees in the Netherlands, which would warrant a more active position of the judge. It has been argued that the distinction between complementing the grounds of appeal and *ex officio* control has been interpreted too strictly by immigration judges. Moreover, other high courts of appeal, also dealing with administrative law (tax law, social security etc.) do not interpret article 8:69 of the GALA in the same strict way. Crucially, the strict interpretation of 8:69 by the Council of State seems at odds with the underlying idea of the notification system (if the TCN concerned has not appealed the detention himself, the minister must sent a notification which will be dealt with as an appeal by the court). If there can be no *ex officio* control, the notification system seems not to be able to offer any protection to the detainee.

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

If a person is arrested and brought to a place (police office) for an interview in order to determine whether or not their stay is illegal, the authorities are obliged to inform the individual that they can consult a solicitor during the interview. If the person concerned wishes to be assisted by a solicitor, the authorities will notify one, according to a duty solicitor scheme, unless the person has their own solicitor. The solicitor needs to be present within two hours. If their presence at the interview is not desired by the alien, they need to visit him within 24 hours after the notification. This solicitor also handles the appeal. There is a system of points according to which the solicitor gets paid by the state (presence hearing, visit, appeal, further appeal.)

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

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

Please specify, if the answer is 'else'

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

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

If relevant, please provide here a brief explanation. Please also elaborate on advantages and inconveniences of this option.

- Hearing only immigration law cases?

If relevant, please provide here a brief explanation. Please also elaborate on advantages

and inconveniences of this option.

In the Netherlands, the district courts have separate chambers for immigration law cases. These chambers do all kinds of immigration and asylum cases (also naturalisation), including detention cases. However, the judges that sit in these chambers work as judges in at least one other field of administrative law.

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

If relevant, please provide here a brief explanation. Please also elaborate on advantages and inconveniences of this option.

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?

YES

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**:

Second level of jurisdiction is exercised by the Council of State. Such appeal is only possible against the decision by the district court on the *first appeal* against the detention (or against the decision by the court on the appeal against the prolongation after 6 months – see below).

According to the Aliens Act (Article 85), the appeal needs to be directed *against the judgment by the district court*. Thus, arguments need to target the judgment in first instance – and not the detention order. As such, they cannot be a mere repetition of what has been argued in first instance, and the appeals procedure before the Council may not be intended to resubmit to judgment the full dispute. As such, it is not permitted to bring forward an entirely *novel complaint* in the appeals procedure before the Council of State.

The judicial control exercised in the second level of jurisdiction by the Council is thus primarily confined to the judgment by the court in first instance. However, in some instances, the Council seems to exercise *ex nunc* judicial control, for instance when it concerns questions relating to a reasonable prospect of removal (if a reasonable prospect of removal has ceased to exist during the appeals procedure before the Council, the detention will be declared unlawful).

More substantially, it seems to me that the second level of jurisdiction (exercised by the Council of State) is more formal and deferent to the administration than the judges in the district courts.

Q6. If the detention is **ordered/endorsed by a judicial authority**, does your Member State's legislation provide for **a second level of jurisdiction** for the examination of the lawfulness of detention?

YES NO

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

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:

2. SECOND and SEBSEQUENT 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?

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

Both automatic and possible upon application of the detainee. Detention in the Dutch system is not ordered for a specific period, and is thus only limited in a general sense by the provisions in the Aliens Act (Art 59), stipulating that detention may not last for more than 6 months, unless an order for extension is made. The order for extension is subject to the same form of judicial control as the initial decision to detain as was explained above (Q1): According to 94 Aliens Act, the Minister shall notify the court within 28 days from that an order for extension has been made, except in the cases in which the detained TCN has herself installed an appeal against the order for extension. The notification will be dealt with by the court in the same way as it deals with an appeal. The lawfulness of an order for extension can only be controlled by the judge in these two cases – Thus if there has been no appeal against the extension, and neither has a notification been sent, the order cannot be controlled (Council of State, 26 March 2012, ECLI:NL:RVS:2012:BW0598). The judgement by the court on the extension order can be appealed against at the Council of State – again the same regulations apply (appeal directed against the judgement – no novel arguments).

- 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 same applies as with regard to the initial decision ordering the detention – the judge is not allowed to apply the law *ex officio* – except for those rules that can be seen as rules of public order (8:69 GALA).

Thus, in a recent judgment, the Council ruled that the provisions in the Dutch Aliens Act limiting the duration of the detention to 6 months, except for those cases in which an extension order is made by the authorities, are not of such a nature that they can qualify as rules of public order. Thus, according to the Dutch Aliens Act (Article 59 para 5), detention ends after 6 months, unless the competent authorities order an extension (article 59, par 6). An order for extension would have to be made before the six month period ended. However, the order was made after the period ended. Although the applicant had not complained about it, the first instance court ruled that, if detention lasted longer than six months, it had to assess *ex officio* whether or not the decision to extend the detention was made before the end of the six month period. Having regard to the fact that the decision was made after that period had ended, the court ruled that the detention had become

unlawful immediately after the last day of the six month period, and ordered the immediate release from detention of the applicant. In the view of the first instance court, article 59, par 5 and 6 of the Aliens Act contain requirements of public order, as they explicitly limit the duration of the detention, unless an extension order is made. The Council of State however decided that 'the meaning of these paragraphs for the rule of law is not of such importance, that their validity has to be ensured, regardless of the will or knowledge of parties; it neither affects the jurisdiction of the Court.' They could thus not be applied *ex officio*, and the judgment in first instance was quashed (Council of State 16 January 2013, 201210956/1/V3).

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

It is good that an order for extension will eventually always be controlled by a judge through the notification system. The narrow interpretation of the competence to apply the law *ex officio* by the Council is a disadvantage and seems at odds with the notion of the habeas corpus procedure. Moreover, it seems in contrast with the notification procedure (See Q1).

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:

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**:

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

  If relevant, please provide here a brief explanation. Please also elaborate on advantages and inconveniences of this option.

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

  If relevant, please provide here a brief explanation. Please also elaborate on advantages and inconveniences of this option.

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

If relevant, please provide here a brief explanation. Please also elaborate on advantages and inconveniences of this option.

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

If relevant, please provide here a brief explanation. Please also elaborate on advantages and inconveniences of this option.

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

If relevant, please provide here a brief explanation. Please also elaborate on advantages and inconveniences of this option.

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

If relevant, please provide here a brief explanation. Please also elaborate on advantages and inconveniences of this option.

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

Persons detained under Article 59 Aliens Act can at any time appeal their continuing detention, provided that the court has pronounced its judgment on the *first* appeal (against initial detention). There is no *automatic* formal periodic review, although the administration is bound by the obligation to exercise due diligence and annul the detention if it has become unlawful. There is no possibility to appeal the judgment.

There are however some exceptions to the impossibility of second level judicial review by the Council of State (against the judgment in first instance on an appeal against continued detention). In the first place, the judgment by the court can be subject to appeal in the case that the court has designated an appeal against an order for extension as an appeal against continuing detention (Council of State, 22 November 2012, 201203691/1/V4). More fundamentally, second level judicial control is possible in the case of a violation of fundamental principles which would imperil the guarantees of a fair trial. Thus, if the court in first instance has violated the right to be heard, or not acted in accordance with the speediness requirement in Article 5 para 4 ECHR (i.e. Council of State, 8 February 2013, 201210726/1/V3), the detained TCN can appeal the judgment and the Council of State can review it. In a recent judgment, the Council of State judged that fundamental principles had been violated, because the court had decided on the awfulness of detention without taking into account the reaction of the third-country national with regard to the report of the minister on the progress of the removal proceedings. The appeal was granted, and the case referred back to the court in first instance (see Council of State, 21 September 2016, 201605819/1/V3, ECLI:NL:RVS:2016:2590).

Before 1 April 2004, the minister was obliged to send a notification to the court after a certain interval if the detainee would not appeal himself against continuing detention, but such an obligation does not exist anymore. This has resulted in a decrease in legal protection for the detainee, who can however, at any time, install judicial proceedings himself as explained above.

Another difference with the appeal against the initial detention order is that the court, when deciding on an appeal against ongoing detention is not obliged to hear the detained TCN (a possibility that was justified by the legislature by the fact that the Aliens Act does not limit in any way the frequency to appeal against ongoing detention).

Appeals against ongoing detention (unsurprisingly) focus mostly on questions of due diligence and real prospect of removal.

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

If relevant, please provide here a brief explanation. Please also elaborate on advantages and inconveniences of this option.

Please also elaborate here on any differences in the control of lawfulness of renewal order between the first and the second levels of jurisdiction

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

Before April 1 2004, the minister was obliged to send a notification to the court after a certain interval if the detainee would not appeal himself against continuing detention, but such an obligation does not exist anymore. This has resulted in a decrease in legal protection for the detainee, who can however, at any time, install judicial proceedings himself as explained above.

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

YES NO

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

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:

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

If relevant, please elaborate on this issue with reference to relevant case-law, providing some specific examples of such control

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

The judge may control whether the factual grounds that the administration brings forward for detention are correct. The same goes for the question what action is being taken by the administration in order to effect the removal of the detained alien.

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

In general, in Dutch administrative law two kinds of judicial review can be distinguished. Firstly, the so called full review. In this kind of review, the judicial test is without any restraint and the judge may substitute its own discretion for that of the decision-making authority. This review is rather rare in the Netherlands. More common is the so called restraint review. In this kind of review, the court has to respect the discretionary space that is given the decision making authority by law.

One should expect that in cases dealing with Habeas Corpus, the juridical review would be full. However, in the Netherlands, even in these cases the judicial review has generally been restrained. In a judgement dealing with the issue of less coercive measures, the Council of State in response to the Return Directive introduced a new type of review: the 'somewhat restrained' review. In judging on cases dealing with detention, the court firstly assesses (if at least grounds of appeal were made on that issue; the court will not do so *ex officio*) whether there is a risk that the TCN concerned will abscond or avoids or hampers the preparation of return or the removal process. If the court assesses that there indeed is such a risk, the question may arise (again, only if grounds for appeal were made on the issue) whether or not the decision-making authority could have applied a less coercive measure. Because the risk of absconding and/or avoiding or hampering is already assessed, the TCN will have to show special facts and circumstances concerning him personally, which could lead the judge to the conclusion that the decision making authority should have applied a less coercive measure. In doing so, the judge was obliged to neither make a full or restraint review, but a 'somewhat restrained' review.

The Council of State has however changed its view on the deference of the court controlling the lawfulness of detention as a response to the ECJ judgement in Mahdi. Now, according to the Council of State, the question as to whether less coercive measures can be applied is to be judged in full by the court (23 January 2015, 201408655/1/V3, ECLI:NL:RVS:2015:232,). However, as we shall see below, the court is still not really able to substitute the judgement by the administration for its own. We shall see that the difference which the new type of review has made in practice is quite small.

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

Some elements of detention cases are formally not subject to restrained review:

Is there a real prospect of removal?

Do the grounds brought forward by the administration justify detention?

Has a return decision been taken .

Does the administration act with due diligence?

Should the administration have applied less coercive measures?

However, especially with regard to the grounds of detention, the lack of a real individualised assessment of the risk of absconding by the court makes the so-called full review full mostly in name. Generally, I find this a problem with terms such as full review, constrained review (and especially, the somewhat restrained review!): courts may use these terms quite arbitrarily, and as such it happens regularly that they, under the guise of a declared restrained review, actually carry out a full review (and vice versa). See for more on this in Part III of the questionnaire.

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:

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):

The term proportionality as such (*evenredigheid*) is seldom used by the courts. However, they do to a certain extent balance the interference with the right to liberty one the hand against the interest of the authorities to keep a person in detention on the other. Main elements that are taken into account:

- Length of the detention
- Cooperation alien
- Due diligence authorities
- With regard to minors, the Council of State requires the Minister to make a concrete assessment of the measure in relation to the age of the minor before resorting to detention. See Council of State, 3 June 2013, 201302775/1/V3. The same applies to a family with minor children. See Council of State, 13 May 2013, 201302956/1/V3.
- If there have been breaches of procedural law in the procedure resulting in detention (i.e. unlawful arrest), the gravity of the violation is balanced against the interests of the authorities by keeping the person detained (see part II of the questionnaire).
- Arguments pertaining to less coercive measures seldom lead to unlawful detention in the case law of the Council of State, except when it concerns ill people, or very old people.
- As such, the Council of State sometimes divides the proportionality test in two parts: in the first place it assesses whether the minister was right to find that a less coercive measure would not sufficiently ascertain the removal of the TCN concerned. Even if that is the case, the Minster will have to assess, according to the Council, if the detention is nevertheless disproportional on account of special circumstances brought forward by the TCN himself (Council of State, 7 December 2004, 200407830/1). However, very often the two parts of the test are not dealt with separately.

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

If relevant, please elaborate briefly on your answer with reference to relevant case-law, providing some specific examples of such control

NO

Expediency falls within the margin of appreciation of the administration, and as such the judge cannot substitute its own judgement for the judgment by the administration. See Q18, but more specifically part III of the questionnaire, as the distinction between control and legality can be blurred, especially when it comes to questions such as due diligence and whether there is a reasonable prospect of removal. In the judgment of 28 April 2011 (201100194/1/V3), the Council of State allowed for the somewhat restrained judicial control, precisely because of the word 'effectively' in the first sentence of Article 15 RD (see for more on this Q52.2).

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:

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:

[Above, there is section 1-5, but no title for Part I]

II. ELEMENTS OF LAWFULNESS NOT EXPLICITELY 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

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

The RD was implemented too late in the Netherlands. Before implementation, there was some litigation concerning the obligation to define objective criteria in law regarding the 'risk of absconding' (Article 3 para 7 RD). Such objective criteria had *not* been defined in the law in force before the RD. The minister however, frequently refused illegally staying third-country nations a period for voluntary return, a decision that he based on a provision in the Aliens Act which stipulated that persons who have never had a legal title for their stay are not granted any period for voluntary return. However when the RD entered in force, the Council of State judged that the relevant provision in the Aliens Act was too general and broad, and would thus not satisfy the requirement 'objective criteria defined by law' (Council of State, 9 November 2011, 201106883/1/V3).

Later, the implementation legislation put down criteria that may justify to conclude that there is a risk of absconding (see below) in a AMVB (order in council – a law made by government). Before the Council of State it was argued that as the objective criteria had not been codified by the formal legislature (lawmaking by government *and* parliament), it did not satisfy the requirement laid down in Article 3 para 7 RD. The Council of State however did not agree: 'by laying down such criteria in generally binding regulations, the obligation to define by law is fulfilled' (Council of State 5 October 2012, 201 201 249/1/V4).

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.)*

Generally, if procedural rules are breached, this will not result in the court automatically declaring the detention unlawful. Instead, the judge will engage in a balancing exercise, through which the judge assesses the seriousness of the breach of procedure and the detained alien's interests infringed on the one hand, and interests served with the detention on the other hand. Thus, the use of an unregistered interpreted at the hearing (taking place before detention is ordered) did not result in unlawful detention, as the TCN concerned had not made explicit whether and how he had been disadvantaged. In its assessment, the Council did take account of the grounds for detention (Council of State 3 July 2012, 201204997/1/V3). The same balancing act was engaged in, in a case in which a detained TCN had not been able to speak with her lawyer alone: The Council of State considered the grounds for detention on the one hand (inter alia her refusal to cooperate), and the fact that she had not made clear whether and what negative consequences she had suffered as a result of the procedural breach; and it concluded that the detention was not unlawful (Council of State 9 January 2012, 201111225/1/V3). This rule may apply to all kinds of procedural breaches, also concerning breaches of procedure that taint the arrest prior to the detention.

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:

II. ELEMENTS OF LAWFULNESS NOT EXPLICITELY 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

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

The RD was implemented too late in the Netherlands. Before implementation, there was some litigation concerning the obligation to define objective criteria in law regarding the 'risk of absconding' (Article 3 para 7 RD). Such objective criteria had *not* been defined in the law in force before the RD. The minister however, frequently refused illegally staying third-country nations a period for voluntary return, a decision that he based on a provision in the Aliens Act which stipulated that persons who have never had a legal title for their stay are not granted any period for voluntary return. However when the RD entered in force, the Council of State judged that the relevant provision in the Aliens Act was too general and broad, and would thus not satisfy the requirement 'objective criteria defined by law' (Council of State, 9 November 2011, 201106883/1/V3).

Later, the implementation legislation put down criteria that may justify to conclude that there is a risk of absconding (see below) in a AMVB (order in council – a law made by government). Before the Council of State it was argued that as the objective criteria had not been codified by the formal legislature (lawmaking by government *and* parliament), it did not satisfy the requirement laid down in Article 3 para 7 RD. The Council of State however did not agree: 'by laying down such criteria in generally binding regulations, the obligation to define by law is fulfilled' (Council of State 5 October 2012, 201 201 249/1/V4).

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.)*

Generally, if procedural rules are breached, this will not result in the court automatically declaring the detention unlawful. Instead, the judge will engage in a balancing exercise, through which the judge assesses the seriousness of the breach of procedure and the detained alien's interests infringed on the one hand, and interests served with the detention on the other hand. Thus, the use of an unregistered interpreted at the hearing (taking place before detention is ordered) did not result in unlawful detention, as the TCN concerned had not made explicit whether and how he had been disadvantaged. In its assessment, the Council did take account of the grounds for detention (Council of State 3 July 2012, 201204997/1/V3). The same balancing act was engaged in, in a case in which a detained TCN had not been able to speak with her lawyer alone: The Council of State considered the grounds for detention on the one hand (inter alia her refusal to cooperate), and the fact that she had not made clear whether and what negative consequences she had suffered as a result of the procedural breach; and it concluded that the detention was not unlawful (Council of State 9 January 2012, 201111225/1/V3). This rule may apply to all kinds of procedural breaches, also concerning breaches of procedure that taint the arrest prior to the detention.

Procedural requirements have become stricter in response to the *Mahdi* judgment by the ECJ, in particular when it concerns the requirement on the administration to give detailed reasons for detention in the decision to detain. Thus, according to the Council of State, factual and legal reasons

for the detention have to be specified in the order for detention (Council of State 15 April 2015, 201502024/1/V3, ECLI:NL:RVS:2015:1309). This means that the Minister has to state clearly that a real prospect of removal is not lacking, and that the less coercive measures do not suffice. In those cases that the third-country national has not argued to the contrary in the hearing before the detention order is taken, the minister has to mention that fact in the detention order (Council of State 15 April 2015, 201502024/1/V3, ECLI:NL:RVS:2015:1309). The clear and reasoned decision-making has to be laid down in the detention order itself – not in a *later* document following the detention order (Council of State, 14 July 2016, 201602722/1/V3, ECLI:NL:RVS:2016:2071).

Similarly, in the decision in which extension of detention after 6 months is ordered, clear and reasoned decision-making is required. Thus, a mere referral to the order of detention is not sufficient – all the requirements for lawful extension have to be addressed by the minister, as well as all the requirements for an initial lawful detention, as put down in paras 1 and 4 of Article 15 (Council of State, 23 January 2015 201408655/1/V3, ECLI:NL:RVS:2015:232; and Council of State, 23 February 2015, 201408880/1/V3, ECLI:NL:RVS:2015:674).

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:

III. PARTICULAR ELEMENTS OF ART. 15 RD

1. PURPOSES OF DETENTION

Q26. Does the **judge** controlling the lawfulness of pre-removal detention **also control the lawfulness of a return decision**?

YES and NO

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

YES in the case that the return decision is a *separate* decision (which happens in the case that it is taken in reaction to illegal stay.

NO in the case that the return decision is part of a negative decision of the administration on the application for a residence permit (including asylum applications).

The possibility for simultaneous review is not provided by the legislation implementing the RD. Thus, different procedures for contesting the return decision and the detention order are provided for in the Aliens Act. In this respect, a further distinction should be made between a return decision that is part of another decision of the administration (on an application for asylum or a residence permit) and return decisions that are a mere reaction to illegal stay (and are thus not accompanied by another administrative decision).

In a judgment of 21 March 2011 (201100307/1/V3), the Council of State considered that detention may only be resorted to if a return decision has been taken by the administration. The existence of a return decision is a condition for the lawfulness of detention, so the court dealing with the appeal against the detention may ascertain itself of the *existence* of such a decision. If the administration had failed to take such a decision, the court would have to declare the detention unlawful. However, the Council of State also considered in this judgment that the system of legal remedies as laid down in the Aliens Act would prevent the court that controls the detention to control the *lawfulness* of the return decision.

However, in a later – landmark – judgment the Council of State reversed its conclusion. It considered that the separateness of the procedures concerning an appeal against a mere return decision (i.e. not coupled with a decision by the administration regarding a residence permit) and an appeal against the detention, could result in the situation in which the right guaranteed in Article 6 of the Charter would be violated, as well as the right contained in Article 5 para 4 ECHR (requirement of a speedy decision, and that the detainee be released in the case of unlawful detention), and Article 15 para 2 of the RD. It considered that the circumstances on which a mere return decision is based are in most cases the same as the circumstances on which detention would be based, but that the separateness of the procedures appealing these measures could result in a situation in which the court controlling the detention would not be able to order the release of the detained TCN if the return decision was unlawful. The Council of State thus ordered that appeals against mere return decisions and detention would have to be dealt with simultaneously by the courts from that moment onwards (Council of State 17 April 2013, 201209288/1/V3). Note that the judge controlling the detention will thus control the lawfulness of the return decision *only* if the detainee has appealed against the return decision (no *ex officio* control of its lawfulness). Also note that the lawfulness of the return decision that is to be controlled by the courts in these cases does not go further than establishing whether the stay has indeed become unlawful, and questions relating to the period of voluntary return. If the TCN concerned claims that removal would violate Article 3 ECHR, they will have to start another procedure (see also Q32).

However, in a recent judgment (Council of State, 27 March 2014, 201401207/1/V3), it declined to apply the same reasoning to a situation in which detention was based upon a return decision that formed part of the administrative decision concerning the refusal of a residence permit or asylum application. It clearly distinguished between a mere return decision, and a return decision that formed part of such a broader decision by the administration. In this later case, the Council judged

that the complexity of the appeal procedure against the decision by the administration declining the residence permit/asylum request would make it *unsuitable for simultaneous control by the court controlling the lawfulness of the detention*. The time limits that apply to both procedures are different (for detention much shorter, see above), and in the case that the administrative decision also entails an entry ban, it should be appealed against at the administration, before the courts can judge about its lawfulness.

The Council of State did not elaborate upon the way in which its conclusion related to Article 6 of the Charter, Article 5 para 4 ECHR (requirement of a speedy decision, and that the detainee be released in the case of unlawful detention) and Article 15 para 2 RD. Thus, in the case that the decision by the administration on the request of a residence permit also entails a return decision and an entry ban, it may take very long before a court can judge on the lawfulness of the return decision (term for deciding on administrative appeals is 19 weeks with the possibility to extend with a further 13 weeks, after that the court will have a sitting within 13 weeks after it has received the appeal, and it pronounces judgment 6 to 12 weeks after its sitting). This means that questions relating to the lawfulness of declining a term for voluntary return – a consideration upon which decisions to detain are subsequently based – cannot be dealt with by the judge controlling the lawfulness of the initial detention. Instead, the detainee will have to wait until a court has controlled the lawfulness of the return decision (which, as we saw above, can take a long time), and then, if the court has found fault with it, appeal against the detention again.

The court controlling the lawfulness of detention will thus not verify the facts established in the return proceedings (such as the questions relating to the period granted or not for voluntary return). If the return decision is annulled, the ground for detention disappears, and the detainee will thus be released by the administration.

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 and NO: In the sense that only <u>one of the purposes</u> is recognized in Dutch legislation (carrying out the removal process).

It might be relevant to underline here that *preparation of return is not a ground for detention* in the Netherlands: detention is explicitly linked to *removal*. Thus, detention based upon 59 Aliens Act should aim at the removal of the detained alien, which is understood as the *forcible* removal, therewith excluding all forms of voluntary return. According to the Council of State, it is ultimately the coercion involved which determines whether one can speak of removal. This does not mean that detention cannot end with voluntary return, but rather that detention is not allowed *if return can only be effected voluntary* (in other words if there is no prospect of removal, see Council of State 17 December 2004, 200409206/1).

In a recent case, the minister had appealed to the RD in order to argue that preparation of return (voluntary return with the assistance of the IOM) could also be a ground for detention under the RD. The Council of State did not agree, as this purpose of detention is not implemented in Dutch legislation, it cannot be relied upon by the government against an individual (prohibition of reverse vertical effect), See Council of State, 11 April 2014, ECLI:NL:RVS:2014:1391.

Aside: It is striking that the Council of State – in spite of its insistence upon the link between detention and forcible removal – allows the administration to require of detained aliens to declare that they return voluntarily when applying for papers at the embassies of their countries of origin. If these aliens refuse to do so, and for this reason are not provided with papers, it accordingly considers that the TCN concerned does not cooperate, which is a factor to be taken into account in assessing whether (extension of) detention is lawful. See for more on this in Q32.

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:

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*):

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

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**:

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:

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**?

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:

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

  Due diligence does not impact on the reasonableness of the prospect of removal but impacts directly on the lawfulness of detention.

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

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

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

It is important to note here that when controlling the lawfulness of detention, Dutch courts may not judge the *lawfulness* of removal. They may only control the lawfulness of a return decision if this return decision is not taken in the context of another procedure (i.e. application for asylum/residence permit). Furthermore, if someone argues that their removal will violate art 3 ECHR (etc.), they will have to bring this claim forward in a separate procedure (for example the asylum procedure). However, the courts will judge whether there is a factual impossibility of removal (*feitelijke belemmering*), as such an impossibility will result in the absence of a reasonable prospect of removal. Sometimes the question regarding the (*im)possibility of removal* is of course influenced by questions relating to the *lawfulness of removal*.

This mix between factual and legal impossibility is illustrated well by case law by the Council of State on removal to South Somalia in summer 2012. Thus, South Somalia was only accessible via the airport in Mogadishu. However, the Minister recognised that the situation in Mogadishu could be qualified as a situation falling under Article 15c of Directive 2004/83/EC. This meant that it would be 'factually impossible' to remove persons to South Somalia. As such a reasonable prospect of removal was absent, the detention would be unlawful (Council of State, 17 July 2012, 201202473/1).

However, in April 2013, the Council of State considered that the Minister did no longer regard the situation in Mogadishu as falling under the scope of 15c of Directive. It held that in view of the improved safety of the city and the roads to and from the airport, there was no longer a factual impossibility to travel there (or from there onwards). Note that it did *not* judge whether the Minister had correctly evaluated the situation in Mogadishu as no longer falling under 15c, but just assessed whether or not there would be a factual *impossibility of removal* (Council of State, 17 April 2013, 201301037/1).

- **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)*

The obligation to leave the country also entails an obligation to cooperate fully with the authorities in the removal process (Council of State, 14 November 2005, 200507769/1). If the TCN concerned refuses to cooperate, for example in the investigation to his identity and nationality, a longer period of detention may be warranted. The Council of State will not easily conclude that there is no reasonable prospect of removal in the case that the third country national does not cooperate – it will rather sanction the prolongation of the detention. Only if voluntary return such as with the assistance of the IOM is the *only* possible option for return, the detainee may be released, for reasons explained above. As was also mentioned above, the Council of State even considers that it is permissible to require of the TCN concerned that he declare that he returns voluntarily if otherwise the authorities of the country of origin will not issue documentation/travel documents. If he refuses to do so, it will *not* be concluded that a reasonable prospect of removal is lacking, but that a longer period of detention is justified on account of the conduct of the TCN (Council of State, 4 September 2008, 200805361/1, and Council of State 23 April 2009, 200901771/1).Recently, the Council of State judged that forced return is not possible to Iraq, which means that a reasonable prospect of removal is lacking, and thus detention not lawful, *independently of the behaviour of the third-country national* (Council of State, 10 February 2016, ECLI-NL-RVS-2016-431, 201600363/1/V3).

In another case, the visit of the TCN to the authorities of the country of origin (Afghanistan)

in order to get documents had been planned for a time more than 6 months after the detention had been ordered. The Council of State considered that a reasonable prospect of removal in this case did not cease to exist, because the TCN could have requested to reschedule the meeting at an earlier date – which could have made a difference. This, in addition to the fact that the TCN concerned did not cooperate at all in the removal process, meant that a longer period spent in detention was to be blamed on the TCN, and that it could not be said that a reasonable prospect of removal had ceased to exist (Council of State, 20 February 2012, 201112568/1/V3.

- **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))*

Regarding the conduct of the state of return, the Dutch case law can be summarised as follows: A prospect of removal does not lack, when:

- the Dutch authorities request the country to where the alien could possibly be removed to issue a laissez passer, and;

- the authorities of that country accept the request and promise to start investigations whether or not the alien is a national of that country, and;

- the authorities of that country have in the past issued laissez-passers (even if only one or two per year) or the Dutch authorities discuss (at a high level) the willingness in general of the authorities of the third country to issue laissez-passers (see Council of State 6 August 2008, 200805059/1 and 24 June 2008, 200802518/1). General principle seems to be that there is a reasonable prospect of removal as long as it is not certain that negotiations will not yield any result – except when this has been ongoing for a long time (see below).

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

See above – often negotiations concern Memoranda of Understanding – in which agreement is reached on the ways in which and the conditions under which TCN's without documentation will be readmitted. Long negotiations that have not yielded any results are in themselves not necessarily enough for the Council of State to conclude that there is no reasonable prospect of removal. This depends on the circumstances of each case (reasons for not reaching agreement) – and the actions of the Dutch authorities (due diligence) are taken into account when the Council assesses whether detention can continue while waiting for the outcome of negotiations.

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

Interim measures taken by the ECtHR in individual cases will generally result in the conclusion that prospect of removal within a reasonable time frame is lacking (Council of State, 25 September 2009, 200905651/1/V3). Recent case law has focused on the question if interim measures which have been taken by the ECtHR regarding persons who share the same country of origin as the detained alien affect the detention. We can deduce from these cases that these interim measures, if they lack explicit justification by the ECtHR, they can in any case not have any impact on the detention of other TCN's from these countries,. See Council of State, 6 September 2013, 201306297/1/V3.

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

Generally, it will be considered by the court that such proceedings, although they may cause some postponement in the removal process, will not result in a situation in which a reasonable prospect of removal will cease to exist. This may be different if there are any concrete indications that it will take a long time before a decision is made in the judicial proceedings with a suspensory character. See Council of State, 17 December 2004, 200409206/1.

- 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)

As mentioned above, when controlling the lawfulness of detention, Dutch courts may not judge the *lawfulness* of removal. This is a question that is to be addressed in another procedure (for example the asylum procedure). However, the courts will judge whether there is a factual impossibility of removal (*feitelijke belemmering*), as such an impossibility will result in the absence of a reasonable prospect of removal. Sometimes the question regarding the (*im)possibility of removal* is of course influenced by questions relating to the *lawfulness of removal*. Thus, the question whether or not return will be impossible on account of legal obstacles such as the right to family life or non-refoulement will have to be dealt with in another procedure. In other words, a TCN who argues that his removal will be in violation with the right to respect for family life will have to apply in a different procedure for a right to stay on this ground. Similarly, a TCN who argues that removal will violate the obligation of *non-refoulement* will be required to file an application for asylum/international protection. If the state of health of the TCN concerned will make removal impossible, he or she can appeal to article 64 of the Aliens Act, according to which removal of the TCN will not be resorted to as long as his state of health does not permit such removal. A successful appeal to Article 64 will result in the suspension of the obligation to return (in the return decision), because it affords a *right to stay* for the TCN concerned on the basis of Article 8 Aliens Act. As such detention will not be continued.

- Else

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

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

YES NO 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:

The more time passes, the more stringent the test regarding reasonable prospect of removal seems to become.

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):

This depends on the circumstances of each case, and the behaviour of the TCN concerned in particular plays an important role in assessing what is reasonable (Council of State, 20 February 2012, 201112568/1/V3). Generally, it will be 6 months (Council of State, 6 September 2013, 201306297/1/V3), except for those cases in which the TCN concerned refuses to cooperate. Thus, in a case already referred to above (Q32), the visit of the TCN to the authorities of the country of origin (Afghanistan) in order to get documents had been planned for a time more than 6 months after the detention had been ordered. The Council of State considered that a reasonable prospect of removal in this case did not cease to exist, because the TCN could have requested to reschedule the

meeting at an earlier date – which could possibly have made a difference. This, in addition to the fact that the TCN concerned did not cooperate at all in the removal process, meant that a longer period spent in detention was to be blamed on the TCN, and that it could not be said that a reasonable prospect of removal had ceased to exist (Council of State, 20 February 2012, 201112568/1/V3.

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

- Limit their assessment to **an abstract or theoretical possibility of removal**
- Require **clear information on its timetabling or probability** to be corroborated with relevant **statistics** and/or **previous experience in handling similar cases**
- Else (the answer is somewhere between the two options above).

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

In a steady flow of jurisprudence throughout the years, the Council of State has held that detention is lawful when a prospect of removal does not lack. According to that jurisprudence, a prospect of removal does not lack, when:

– the Dutch authorities request the country to where the alien could possibly be removed to issue a laissez passer, and

– the authorities of that country accept the request and promise to start investigations whether or not the alien is a national of that country, and

– the authorities of that country have in the past issued laissez-passers (even if only one or two per year) or – the Dutch authorities discuss (at a high level) the willingness in general of the authorities of the third country to issue laissez-passers.

As such, the Council of State does require concrete information with regard to the probability of successful removal within a certain period, to be corroborated with evidence, but it is quite easily convinced that the evidence justifies the conclusion that a reasonable prospect of removal is not lacking (See Council of State, 13 May 2011, 201101548/1/V3). Thus, even in cases where a country of origin (China) had not issued any laissez passer for more than a year, the fact the negotiations were taking place between China and the Netherlands with regard to this issue convinced the Council of State that a reasonable prospect of removal was not lacking – notwithstanding the fact that these negotiations had not yielded any concrete results (Council of State, 6 August 2008, 200805059/1). In a case of an Iraqi national, there had been no expulsions for one year followed by two recent expulsions, which also justified the conclusion that a reasonable prospect of removal was not lacking (Council of State 24 June 2008, 200802518/1). In case law dealing with Somalia, the existence of negotiations also justified the conclusion that reasonable prospect was not lacking (201306297/1/V3), even if the only two expulsions that had been carried out after the Minister had concluded that removal was lawful had failed (Council of State, 6 September 2013, 201306297/1/V3).

As mentioned above, the Council of State has recently conceded that a reasonable prospect of removal to Iraq is lacking, seeing that this country does not accept returnees that have been forced to return (Council of State, 10 February 2016, ECLI-NL-RVS-2016-431, 201600363/1/V3).

Note: the Council of State holds that its interpretation of the concept ‘prospect of removal’ does not differ from the interpretation of the concept, given by the ECJ in Kadzoev. However, in Kadzoev the ECJ seems to demand that ‘a reasonable prospect exists’, whereas the jurisprudence of the Council of State (only) requires that ‘a reasonable prospect does not lack’ (See Council of State, 13 May 2011, 201101548/1/V3). This may account for the rather permissive case law of the Council of State. So far no preliminary reference has been made on this point.

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

  If relevant, please elaborate on this issue with reference to relevant case-law, providing some specific examples of such control

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

  The way in which the Council of State formulates the test points towards *full control*. Thus, it assesses whether there 'are grounds for the conclusion that a reasonable prospect of removal is lacking' (Council of State, 13 May 2011, 201101548/1/V3), not using terms that may point towards a margin of appreciation. However, as the criteria which it uses are rather permissive, it leaves much leeway for the administration (see Q35).

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:

As mentioned above, the Council of State has explicitly ruled on the question as to whether its interpretation of the concept of a reasonable prospect of removal differs from the interpretation by the Court of Justice of 15(4) RD in Kadzoev (Council of State, 13 May 2011, 201101548/1/V3). It held that its interpretation of the concept 'prospect of removal' does not differ from the interpretation of the concept, given by the ECJ in Kadzoev. However, in Kadzoev the ECJ seems to demand that 'a reasonable prospect exists', whereas the jurisprudence of the Council of State (only) requires that 'a reasonable prospect does not lack' (See Council of State, 13 May 2011, 201101548/1/V3).

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:

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 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:

The Aliens Act stipulates in Article 59 that the detention of an illegally staying TCN can be resorted to if public order so requires. Public order has – also before the RD was implemented – always been understood as to require detention if there were indications that the TCN concerned would avoid their removal or abscond.

In the legislation implementing the RD, the grounds that may warrant the conclusion that a risk of absconding a risk of absconding and/or avoiding/hampering the preparation of return or the removal process exists, provided in an exhaustive list.

It should be noted that although there the law mentions both these two grounds (i.e. avoiding/hampering the return on the one hand, and absconding on the other), it does not further distinguish between them. Also in the practice of the courts there is no difference , as the judge controlling the lawfulness of detention may use *both criteria* interchangeably to assess the concrete grounds for detention, independently from the ground that the administration has brought forward (Council of State, 3 December 2012, 201207844/1). Thus, the concrete grounds enumerated in the law (i.e. not in possession of sufficient resources), can be used to argue both in favour of a risk of absconding, and of avoiding/hampering the return proceedings.

Following a steady flow of jurisprudence from the Council of State, a distinction is made between substantial (heavy) grounds and non substantial (light) grounds. *The law (Article 5.1b Aliens Decree) demands that at least two grounds are applicable.*

Substantial grounds are:

- the TCN has not entered the country lawfully, or has tried to do so;
- the TCN has evaded supervision for some time;
- the TCN has received in the past a visa, decision, notification, or notice, laying on him the obligation to leave the country before the end of a specified period, and has not done so voluntarily;
- the TCN does not cooperate in assessing his identity or nationality;
- the TCN has, with reference to his application for permission to stay in the country, given false or contradictory statements regarding his identity, nationality or his journey to the Netherlands or any other Member State;
- the TCN has gotten rid of travel- or identifying documents, without any need to do so;
- the TCN has in the Netherlands made use of false or falsified documents;
- the TCN has been declared an undesirable alien according to the law in the Netherlands, or an entry ban has been issued against him according to the law;
- the TCN has declared that he will not fulfil his obligation to return (as defined in the Return Directive) or his departure to the Member State that is responsible for his application for asylum (according to the Dublin regulation);

The Council of State has on several occasions ruled that substantial grounds in itself lead to the conclusion that a risk of absconding/avoiding/hampering exists. The decision making authority is therefore not obliged to give any further explanation, *unless the TCN shows that the grounds concerned are factually incorrect or in his specific case inapplicable*.

Non-substantial grounds are:

- the TCN does not fulfil one or more obligations, laid down in chapter 4 of the Aliens act (*e.g.* the obligation to report to the authorities on a regular basis);
- the TCN has unsuccessfully applied more than once for a residence permit;
- the TCN has no permanent residence;
- the TCN has no sufficient resources;
- the TCN is suspected of or convicted for a crime;
- the TCN has worked although he was not allowed to do so according to the Law.

The Council of State has on several occasions ruled that *non-substantial grounds cannot in itself lead to the conclusion that a risk of absconding/avoiding/hampering exists. The decision making authority is therefore obliged to give further explanation*.

It should be remarked that in 'normal' cases, even two non-substantial grounds may give rise to the conclusion that a risk of absconding/avoiding/hampering exists.

Thus, if the minister argues that the TCN does not possess sufficient resources, he will have to explicitly justify why this fact warrants the conclusion that he avoids or hampers the return procedure in this individual case (Council of State 13 May 2011, 201101548/1/V3). In other words, the minister has to make the case that not possessing sufficient resources, or no permanent residence, or a criminal conviction is directly linked to an act by the TCN concerned from which it may be deducted that he will avoid or hamper the return procedure (Council of State, 19 March 2012 201103323/1/V3 and 21 March 2011, 201100555/1/V3). The required, individual, justification by the Minister may be provided at the hearing by the court. However, if it is not provided, the detention will be unlawful.

However, if the TCN has not fulfilled his obligation to return (or any of the other substantial grounds are applicable), the minister is not obliged to give further justification: this fact in and of itself can be sufficient (provided that another ground is also applicable) for assuming he avoids or hampers the return procedure. This will even be the case if the TCN concerned has always fulfilled his reporting obligations (Council of State, 23 September 2011, 201104448/1/V3). The burden of proof is reversed in these cases: if the TCN can show that in his specific case, these grounds do not warrant the conclusion that he avoids the return procedure, the judge will take account of the individual circumstances that are put forward (Council of State 13 May 2011, 201101548/1/V3; Council of State, 27 April 2012, 201201182/1/V3; Council of State 14 November 2011, 201107762/1/V3).

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

Q40. Does your Member State's legislation further specify the meaning of ***hampering*** the preparation of return or the removal process?

YES NO 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:

See above – judges do not make a difference between avoiding on the one hand, or hampering the return on the other hand.

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

2.2 Risk of absconding

Q41. Does your Member State's legislation define ***objective criteria*** based on which the existence of a risk of absconding can be assumed?

YES NO 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***):

See above. As the court will assess the grounds (both substantial and non-substantial) that the minister puts forward as justification for detention in light of *both criteria* for detention (even if the minister has only put forward one of them), the above-mentioned grounds (Q39.1) can also warrant the conclusion that there is a *risk of absconding*.

The result is that even if a judge concludes that the grounds do not justify to assume that a risk of absconding exists, for example on account of the family situation of the TCN concerned, he has to control the detention also in light of the other criterion, i.e. avoiding or hampering the return procedure (Council of State, 3 December 2012, 201207844/1/V3).

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:

As mentioned above, the legislation implementing the RD enumerates these criteria exhaustively. However, the RD was implemented too late in the Netherlands. It may be interesting to underline here that at the time that the RD was applicable, but not implemented, a risk of absconding could not constitute a ground for detention, as the criteria for assuming such a risk had not been defined in law (Council of State, 21 March 2011, 201100555/1/V3).

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?

See above: non-substantial grounds always need to be corroborated by individual circumstances, otherwise the detention will be unlawful. With regard to substantial grounds, the burden of proof is reversed: only if the TCN concerned argues that these are not applicable, or cannot justify the conclusion that there is a risk of absconding in his individual situation, will the judge take account of these.

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:

See above. As the court will assess the grounds (both substantial and non-substantial) that the minister puts forward as justification for detention in light of *both criteria* for detention (even if the minister has only put forward one of them), the above-mentioned grounds (Q39.1) can also warrant the conclusion that there is a *risk of absconding*.

The result is that even if a judge concludes that the grounds do not justify to assume that a risk of absconding exists, for example on account of the family situation of the TCN concerned, he has to control the detention also in light of the other criterion, i.e. avoiding or hampering the return procedure (Council of State, 3 December 2012, 201207844/1/V3).

Q45. Having regard to the phrase 'in particular' in Art. 15(1) RD, does either your Member State's legislation or the relevant case-law **allow any other ground of detention** apart from 'avoiding/hampering return' and 'a risk of absconding' (*please note that **we do not refer here to public order grounds** which are excluded from Art. 15(1) RD*)?

YES NO

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:*

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**:

Since the RD became applicable, the conclusion that the TCN concerned avoids or hampers the return procedure, or that there is a risk of absconding, has to be justified by relying on two grounds (see Q39.1), whereas before one ground could be sufficient. Moreover, the court will pay more attention to individual circumstances.

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:

The government has drafted a proposal for a new law on detention and return, which deals mostly with the regime for detention. However, the proposal also includes an amendment to the Aliens Act in that it proposes to reformulate Article 59 Aliens Act. The term public order will be removed, and instead the formulation of the grounds for detention will be more in line with the RD (avoiding or hampering return/risk of absconding). This will presumably of little consequence for the case law, seeing that the term public order was always interpreted in light of these grounds.

3. ALTERNATIVES TO DETENTION

Q48. Does your Member State's legislation oblige administrative or judicial authorities taking detention decisions to consider alternatives to detention?

YES NO

Before April 2013, policy, not law, stipulated clearly that the administration investigates whether a less coercive measure can be used (Aliens Circulaire 2000 A6/1) The new Circulaire does not make this obligation explicit. The obligation has not been put down in law. According to the Council of State, it is not necessary that the Minister explains in the detention order (or any other part of the file) that less coercive measures would not suffice. The Council of State seems to hold the opinion that, when it is assumed that the TCN avoids or hampers the return or when there is a risk of absconding, there will be no room for a less coercive measure, except if the TCN concerned brings forward special circumstances.

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

- Registration obligation

  In 2011, a pilot project was started. One of the alternatives to detention is a registration obligation. The TCN concerned is obliged to register periodically with the Aliens Police in his municipality. It is applied to those TCN's who do not avoid or hamper the return proceedings, and who have a regular place to stay, Until now, there is no case law on this obligation. It is important to note that TCN's need to satisfy strict criteria in order to participate in the pilot – which are formulated in such a way as to result in a situation in which those TCN eligible for such alternatives would probably not be detained anyhow.

- Deposit of (travel) documents

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

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

In 2011, a pilot project was started. One of the alternatives to detention is bond. The money is returned when the TCN has left the territory of the EU. It is difficult to find further information on how this alternative works in practice. No case law.

- Regular reporting to the authorities

Same as registration obligation.

- Community release/supervision

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

- Designated residence

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

- Electronic tagging

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

- Home curfew

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

- Else

If relevant, please elaborate here on pertinent provisions and related case-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**?

In judging on cases dealing with detention, the court firstly assesses (if at least grounds of appeal were made on that issue; the court will not do so *ex officio*) whether there is a risk that the TCN concerned will abscond or avoids or hampers the preparation of return or the removal process. If the court assesses that there indeed is such a risk, the question may arise (again, only if grounds for appeal were made on the issue) whether or not the decision-making authority could have applied a less coercive measure. Because the risk of absconding and/or avoiding or hampering is already assessed, the TCN will have to show special facts and circumstances concerning him personally, which could lead the judge to the conclusion that the decision making authority should have applied a less coercive measure (Council of State 28 April 2011, 201100194/1/V3).

If the judge agrees that there is a risk of absconding, that very fact seems to warrant the conclusion that alternatives will not be sufficient. Thus, if an TCN has previously evaded supervision by the authorities, the judge will conclude that the minster has not unjustifiably concluded that a less coercive measure would not suffice (Council of State, 11 November 2013, 201308975/1/V3). Also, if there is a risk of absconding, the fact that the TCN concerns cooperates with the authorities, will not be a reason to consider alternatives (Council of State 28 April 2011, 201100194/1/V3).

Q51. When the TCN concerned **<u>avoids or hampers the return procedures</u>**, 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**?

Even if there is no risk of absconding, the fact that the TCN concerned avoids or hampers the return procedure, for example by declaring that she will not leave voluntarily, can be enough to conclude

that alternatives will not be sufficient (Council of state, 27 April 2012, 201201182/1/V3). The Council of State seems to hold the opinion that, as soon as it is assumed that the TCN avoids or hampers the return or when there is a risk of absconding, there will be no room for a less coercive measure, *except if the TCN concerned himself brings forward special circumstances.* These circumstances will generally lie in the physical or mental health of the TCN concerned.

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

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*):

Policy, not law, stipulates that the administration investigates whether a less coercive measure can be used. Before the *Mahdi* judgment, the Council of State was of the opinion that it was not necessary that the Minister justifies the detention in the detention order (or any other part of the file) by arguing that less coercive measures would not suffice. However, that situation has changed now: the minister will have to argue that less coercive measures do not suffice in the detention order.

The Council of State assumes that, as soon as it is assumed that the TCN avoids or hampers the return or when there is a risk of absconding, there will be no room for a less coercive measure, *except if the TCN concerned himself brings forward special circumstances.* These circumstances will generally lie in the physical or mental health of the TCN concerned (Council of State, 28 August 2013, 201306872/1/V3). *Only* if the TCN brings forward individual circumstances which would justify a less coercive measure, will courts consider these.

However, if the TCN has brought forward such circumstances in the hearing taking place before the detention, the minister has to take account of these, and argue why he has not opted for less coercive measures. If he has not done that, the detention will be unlawful, as was the case with the detention of a TCN who suffered from depression and had argued that detention worsened his mental state (Council of State 29 June 2016, 201604420/1/V3, ECLI:NL:RVS:2016:1908.)

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

  As a result of the RD, the Council of State has modified its formerly restrained review of the question as to whether less coercive measures would suffice. First it held that the courts where obliged to use a 'somewhat restrained review' (Council of State 28 April 2011, 201100194/1/V3). Later, as a result of Mahdi, it has changed the somewhat restrained review to a *full review*. However, changes in practice have been minimal, as the Council of State confuses the control of the question as to less coercive means would be sufficient, with the question as to whether detention would be disproportionate *strictu sensu*. Thus, it controls the grounds for detention, and then assesses whether the third country national has brought forward circumstances that would make the use of detention unreasonable, in view of his personal circumstances (Council of State 10 April 2015, 201502024/1/V3, ECLI:NL:RVS:2015:1309). The *necessity* of detention is not addressed separately. Indeed, the Council of State has even held that there is no reason to consider alternatives because the third-country national does not leave *voluntarily* (Council of State, 10 September 2015, 201408880/1/V3, ECLI:NL:RVS:2015:674).

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

As a result of the RD, the Council of State has modified its formerly restrained review of the question as to whether less coercive measures would suffice. First it held that the courts where obliged to use a '*somewhat restrained review*' (Council of State 28 April 2011, 201100194/1/V3). Later, as a result of Mahdi, it has changed the somewhat restrained review to a *full review*. However, changes in practice have been minimal, as the Council of State confuses the control of the question as to less coercive means would be sufficient, with the question as to whether detention would be disproportionate *strictu sensu*. Thus, it controls the grounds for detention, and then assesses whether the third country national has brought forward circumstances that would make the use of detention unreasonable, in view of his personal circumstances (Council of State 10 April 2015, 201502024/1/V3, ECLI:NL:RVS:2015:1309). The *necessity* of detention is not addressed separately. Indeed, the Council of State has even held that there is no reason to consider alternatives because the third-country national does not leave voluntarily (Council of State, 10 September 2015, 201408880/1/V3, ECLI:NL:RVS:2015:674).

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*):

Alternatives to detention are only seriously considered by judges on the basis of individual circumstances that relate to physical or mental health, or old age (see above). Even then, it seems mre of a procedural requirement, in the sense that the minister has to argue well why he did, despite these circumstances, not apply less coercive means.

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

See Q52.2

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:

As mentioned above, the government has drafted a proposal for a new law on detention and return, which deals mostly with the regime for detention. However, the proposal also includes an amendment to the Aliens Act in that it proposes to reformulate Article 59 Aliens Act, and explicitly includes the requirement that detention will be justified only if less coercive measures will not suffice. Perhaps this change may have an impact on national judicial practice.

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

Initial detention in the Netherlands is not ordered for a specific period. The initial detention order thus does not indicate any fixed period of time for detention. It is limited by the 6 month period as states in the RD. One month is calculated as 30 days (Council of state, 22 august 2012, 201204695/1.

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

If relevant, please elaborate here on pertinent provisions and related case-law. Please also explain which considerations play a defining role in determining an exact length of detention and whether courts can substitute their own discretion to that of decision-making authority when deciding on an exact length of detention

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.)?

From the date of actual placement in detention. However, in some cases, the period *before* the actual detention is taken into account when the courts determine due diligence, for example when someone has been in criminal detention, and the authorities know that he would be removed afterwards (Council of State 23 January 2009, 200808571/1).

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

See Q56: detention is not ordered for a specific period, there is thus no subsequent detention, just an extension after 6 months. The authorities are bound to assess the necessity of ongoing detention periodically.

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

If relevant, please elaborate here on pertinent provisions and related case-law. Please also explain which considerations play a defining role in determining an exact length of detention

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

If relevant, please elaborate on this issue with reference to relevant case-law, providing some specific examples of such control

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

The judicial control that the detention is as short as possible is closely linked to the question

of due diligence and the prospect of removal within a reasonable time. As such, this question cannot be answered on its own. The behaviour of the TCN concerned plays an important role in answering these questions. It is as such a full test, where the court can replace the assessment of the authorities with its own assessment of the situation. However, as stated above (Q36), the criteria which the court uses to assess whether there is a prospect for removal within a reasonable time are rather permissive, and as such the so-called full test leaves much leeway for the administration (see Q35). See for more on this the questions relating to due diligence.

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:

N/A

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:

4.2 Due diligence

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

The Council of State distinguishes between two kinds of actions, taken by the authorities in order to prepare the return of a TCN.

1. actions that can potentially lead to deportation, because they 'focus on obtaining data that have a direct meaning for the process of achieving deportation' ('real actions'). For example:

* any hearing of the TCN that may lead to establishing his identity and nationality;
* filling in a request for delivering a laissez-passer and sending it to the competent authorities who are requested to deliver the LP;
* booking a flight ticket
* requesting another Member State to take back or take over the TCN (Dublin)
* etc.

2. actions that are necessary to go through the process, but cannot in itself lead to deportation (administrative actions, see Council of State, 29 June 20009, 200902859/1).

* transferring the TCN from one detention centre to another or to a deportation centre
* transferring files considering the TCN
* appointing a coordinator
* etc.

Although the Council of State has never pinpointed time limits, from the judgements available it may be deduced that within 14 days after the detention has begun, at least one 'real action' has to be taken by the competent authorities, unless these authorities show a valid reason for not undertaking that kind of action within that period. That was for example the case when the TCN, as a result of an mental illness, could not be heard for a period of three weeks during which medication was given to improve his mental state (Council of State 23 January 2008, 200708271/1).

On the other hand, there are situations in which the Council of States expects the competent authorities to take 'real actions' with more than 'due diligence'. That may be the case when the TCN is in possession of authentic and valid identifying documents. In a case where the TCN had a valid passport and had a residence permit in Spain, the Council of State found that, as the authorities had taken the first 'real action' on the tenth day after the beginning of the detention, they had not acted with due diligence (Council of State 28 August 2009, 200905432/1). In another case where the TCN had a valid passport and the first 'real action' was taken on the seventh day, the Council of State held that the authorities did act with due diligence (Council of State 29 October 2009, 200906877/1).

Another situation in which the Council of State expects the authorities to act with more than normal due diligence, is when the detention is planned. This happens for example in so called Dublin cases, where the TCN may be placed in detention in order to secure the transfer to another Member State. The competent authorities know (several days before) when the TCN will be picked up from the reception centre and taken to the detention centre, and what actions have to be taken to transfer the TCN. In such a case, the Council of State held that as the first 'real action' was taken on the seventh day after the beginning of the detention, and the authorities did not provide for a valid reason, they had not acted with due diligence.

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

  If relevant, please elaborate on this issue with reference to relevant case-law, providing some specific examples of such control

- a full control not limited to a manifest error assessment

  Courts can substitute their own discretion to that of decision-making authority when deciding if the administration acted with due diligence. The reviewing court can ask the authorities for details regarding the action taken by the latter. If such details are not provided, or if they are insufficient, the detention will be unlawful. See Council of state, 10 December 2009, ECLI:NL:RVS:2009:BK7184. See also Council of State, 31 January 2008, 200708863/1. Thus, in this case, the Council of State ruled that the fact that a departure interview was conducted only on the fifteenth day of the detention, and no other effective actions to prepare for the removal were performed, meant that the authorities had not acted with due diligence. It took account of the fact that the Minister had not brought forward any circumstances that could have justified his inaction. See also Council of State, 31 January 2008, 200708863/1, in which the Council of State decided that the fact that the Minister could have acted with more speed as regards part of the removal process did not mean that he had not acted with due diligence taking the whole process into account.

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**:

N/A

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:

4.3 Removal arrangements in progress

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

The question whether removal arrangements are in progress is not dealt with separately by the courts, but is dealt with in the assessment of due diligence. See Q61. Thus, if no actions that can potentially lead to deportation, because they 'focus on obtaining data that have a direct meaning for the process of achieving deportation ('real actions') have been taken within 14 days, the conclusion will be that the authorities have not acted with due diligence. For example, in a judgement of 10 December 2009 (ECLI:NL:RVS:2009:BK7184) the Council of State ruled that the fact that a departure interview was conducted only on the fifteenth day of the detention, and no other effective actions to prepare for the removal were performed, meant that the authorities had not acted with due diligence. It can be deduced from the case law that actions that are necessary to go through the process, but which cannot in itself lead to deportation (administrative actions, see Council of State, 29 June 20009, 200902859/1) in themselves are not seen as indicative that removal arrangements are sufficiently in progress.

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

  If relevant, please elaborate on this issue with reference to relevant case-law, providing some specific examples of such control

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

  Full control, see Q61.

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*):

Strasbourg proceedings are generally not addressed in the context of the length of the detention, but in the assessment as to whether there is a prospect of removal within a reasonable time. See Q32 above.

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

Same as above: such proceedings are addressed in the question as to whether there is a prospect of removal within a reasonable time. See Q32.

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

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

Q69. Does the period when **asylum proceedings** are pending have any impact on calculating the length of detention?

YES NO

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

When someone is detained in order to effect his removal, and he applies for asylum the detention may be continued (although a new balancing of interests is required). The Council of State has ruled that although during the asylum procedure, the TCN concerned does not fall under the scope of the RD, this time will be relevant for calculating the sixth month period, because detention also in this case has been ordered in order to effect removal. Thus, the time of the asylum procedure is fully included when calculating the (maximum) length of detention (Council of State, 26 March 2012, 201200367/1/V3). As such, the authorities are obliged to exercise due diligence, also during the asylum procedure, although actions that entail contact with the authorities of the country of origin must be omitted (Council of State, 5 December 2007, 200707523/1.)

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**:

N/A

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:

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**

The Aliens Act provides for the possibility to prolong the detention with 12 months if the removal will take more time because (1) the TCN concerned does not cooperate; or (2) the required documents from third countries are delayed. Often, both circumstances will apply in cases of extension, but only one is sufficient (council of State, 23 May 2012, 201200631/1).

Lack of cooperation is framed in the context of the legal duty to leave the Netherlands, which requires, among other things, that the alien provides full cooperation to any attempt by the Minister to effect the return of the alien to her country of origin. If the TCN concerned refuses to do anything to get documents, or refuses to submit any document in order to clarify her identity, it will be assumed that this ground for prolongation is applicable, , that is to say, if the delay in removal is due to the lack of cooperation. Due diligence obligation applies as well (25 March 2011, ECLI:NL:RVS:2011:BP9560). Also, if aggressive behaviour/non-cooperation makes removal more difficult, because the authorities need to book a special flight, extension is justified as well (Council of State 29 April 2008, ECLI:NL:RVS:2008:BD1541)

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

This ground is interpreted rather broadly by the Council of State, as prolongation on this ground will be possible whenever there are delays in obtaining the documents and there is no reason to believe that the removal of the TCN concerned – provided he or she cooperates, will be unsuccessful. As such, for an extension of the duration of the detention is not required that, at the time of the extension decision, it has already been established that and when the requested laissez passer will be granted. However, the duty of due diligence will continue to apply. (Council of State, 26 March 2012, ECLI:NL:RVS:2012:BW0598).

- Else

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

If relevant, please elaborate on this issue with reference to relevant case-law, providing some specific examples of such control

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

There are no terms used that point towards a restrained control – the judge is weighing the evidence himself, and allowed to substitute his own judgment to that of the decision making authority (See for example Council of State, 23 May 2012, ECLI:NL:RVS:2012:BW6815). Note however, that the Council of State has held that the court may not control the lawfulness of the decision to prolong the detention *ex officio* (Council of State, 16 January 2013, 201210956/1/V3). See for more on this Part I of the questionnaire. Thus, it is up to the TCN concerned to bring forward the specific grounds on which he contests the order, and the courts may not control these grounds on their own initiative.

Q73. When deciding on the extension of detention, is **a new assessment of a risk of absconding** conducted?

YES NO

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

The Council of State has held that when deciding on the extension of the detention after 6-months, the authorities are required to assess also whether the other requirements for a lawful detention are met, such as prospect of removal, due diligence, and the balancing of interests (Council of State, 25 March 2011, 201100097/1, and Council of State, 13 July 2012, 201205751/1). Note however, that courts will only control this assessment if the TCN has explicitly appealed the extension on these grounds. There is no control of the courts *ex officio* of these elements (Council of State, 13 July 2012, 201205751/1).

Q74. When deciding on the extension of detention, is **a new assessment of alternatives to detention** conducted?

YES NO

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

The Council of State has held that when deciding on the extension of the detention after 6-months, the authorities are required to assess also whether the other requirements for a lawful detention are met, such as prospect of removal, due diligence, and the balancing of interests (Council of State, 25 March 2011, 201100097/1, and Council of State, 13 July 2012, 201205751/1). Theoretically, this means that the question of less coercive measures also has to be addressed. Note however, that courts will only control this assessment if the TCN has explicitly appealed the extension on these grounds. There is no control of the courts *ex officio* of these elements (Council of State, 13 July 2012, 201205751/1). Furthermore, if it concerns less coercive measures, the courts apply a restrained test (see above).

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**:

Before the RD, national policy determined that the six-month period could also be exceeded if the alien had been declared undesirable or if he had serious criminal antecedents. However, the Council of State ruled that this policy was not in line with the provisions of the Return Directive, in which the necessary requirements for prolongation of detention beyond a six-month period are limited to the fact that the alien does not cooperate, or that the necessary documentation from third countries is delayed (Council of state, 25 March 2011).

As mentioned above, the Mahdi judgement has brought about significant changes with regard to the requirement that the order for extension of the detention has to give clear reasons for the extension, conforming to para 6 of Article 15, and address the elements of lawful detention as laid down by paras 1 and 4 of Article 15.

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:

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)?

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:

Before the RD became applicable, case law of the courts indicated that after half a year, generally, the interest of the TCV concerned to be released outweighed the interest of the authorities in continuing the detention. This presumption seems to be still prevalent in the case law, but it can be rebutted if the alien has not cooperated in the removal proceedings (Council of State, 29 April 2008, 200802562/1). The latter case concerned an Algerian national who could not be removed with a regular flight due to his (verbally) aggressive behaviour and general unwillingness. The Algerian authorities would not allow a charter flight to land, and he would thus have to be returned via another country (Tunisia). The minister had experienced diplomatic difficulties in achieving this. The Council took into consideration that the Minister was analysing alternative routes for removal,

and that the laissez passer was still valid, and concluded that in this case the interest of the TCN concerned to be released did *not* outweigh the interest of the authorities in continuing the detention.

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

  If the court finds the detention unlawful, the TCN concerned should be released immediately (Aliens Circulaire A6/6.2.3 Vc 2000). According to the Council of State, this means that the detention has to be ended *within* six hours after the judgement of the court has been sent to the authorities (Council of State, 3 December 2003, LJN AO2973.).

  Note that procedural procedural flaws, such as an unlawful arrest preceding the detention do not always cause the detention to be unlawful. In these case, judges may balance the seriousness of the procedural breach, and the interests impaired by it, against the interest that is served with detention. If however, they decide that this results in the conclusion that the detention is unlawful, the detainee should be released.

- 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

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

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

  If relevant, please elaborate on relevant provisions and pertinent case-law and distinguish in case between questions of form and of substance

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

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

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?

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:

With regard to this question, distinction should be made with regard to two possible scenarios.

In the first place, if the TCN has never been practically released but remained in the power of the authorities, detention is only possible if the circumstances have changed (see Q78 above – thus within 6 hours after the release was ordered, new circumstances arise. For example: the detention was ended because there is no reasonable prospect of removal but within the six hour time span the required documents arrive).

In the second place, there is the case that the TCN is released, and his subsequent arrest does not immediately follow his release. In this case, detention is allowed, but if the former detention was unlawful because a reasonable prospect of removal was absent, there have to be indications that this reasonable prospect is no longer absent (Council of State, 11 January 2007, 200608728/1).

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?

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:

There is no specific legislation on this, but just as in the question above, it will have to be shown that there are concrete indications that is prospect of removal is no longer absent. The strictness with which this test is exercised will depend on the time that has passed between the detentions,

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:

Article 106 Aliens Act provides for the possibility of compensation in the case of unlawful detention. The amount of compensation is 105 euro per day for unlawful detention in a police cell, and 80 euro per day for unlawful detention in a detention centre. It is possible for the court to lessen the amount of compensation, taking account of the behaviour of the TCN concerned, in particular a refusal to cooperate in the return (Council of State 19 June 2013, 201211655/1). Thus, in the case of a unlawful detention because a return decision was lacking, the TCN had refused to hand over his passport to the minister. The Council of State held that the TCN concerned had not done enough to limit the damage done to him, and thus the compensation that he was entitled to was limited with 50% (Council of State, 1 September 2016, 201605107/1/V3 ECLI:NL:RVS:2016:2442).

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

It is always done, as an appeal against the detention automatically includes a request for compensation. See part I of the questionnaire.

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**:

If possible, please also provide percentage of persons released as a result of the judicial control and if possible, please differentiate between the percentage of release at the first and second level of jurisdiction.

If there are no statistics, please try to elaborate on the number of persons released on the basis of the experiences of judges, lawyers or NGO representatives that you contacted or following your personal experience as a judge and/or lawyer.

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:

Judicial control of detention is always guaranteed in the Dutch system, even if the detainee does not appeal the detention himself. Furthermore, the fact that there is no limitations on the number of times and the frequency that the detainee can appeal ongoing detention is good.

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

As a result of a policy change, from 13 September 2013, detention of minors was seldom used. However, since October 2014, detention of minors is permitted again, with a maximum of two weeks. As such, there is no best practice anymore on this point, except for the fact that arguably, courts control this type of detention stricter (Council of State, 3 June 2013, 201302775/1/V3 and 13 May 2013, 201302956/1/V3).