**Research and Documentation Directorate**

# RESEARCH NOTE

**Review of the lawfulness of detention of third-country nationals – Scope of own-motion reviews and applicable rules**

[…]

Subject:
- Extent of own-motion powers held by courts in the review of the lawfulness of the detention of third-country nationals ;
- Rules applicable to the statement of reasons for judicial decisions relating to detention measures.

[…]

*April 2021*
*[…]*

## SUMMARY

## INTRODUCTION

1. The Research and Documentation Directorate (RDD) has been asked to draw up a research note on the question of whether a court reviewing the lawfulness of an administrative measure imposed on a natural person, substantially limiting a fundamental right of that person, such as a measure depriving a person of liberty, may – or must – examine all the matters of fact and of law that appear relevant to assess that lawfulness, including those not relied upon by that person. It has also been asked to examine whether in the Member States concerned there is a provision, or a corresponding practice stemming from case-law – and potential actions under constitutional law against such a provision or practice – allowing all or some of the courts ruling on the lawfulness of detentions to state in a summary manner the reasons for decisions rejecting actions or appeals, by merely indicating, essentially, that none of the points can be accepted, without providing any further explanation.

2. This research note covers the solutions applicable in **the Czech Republic, Estonia, Finland, France, Germany, Ireland, Italy, Lithuania, Poland, Romania, Slovenia** and **Spain**[1].

3. With regard to the topic studied, the research and analysis have focused primarily on administrative detention measures adopted against third-country nationals, as this appeared to be the most suitable topic for a comparative study that would provide useful answers to the questions posed in the request for a note. This note

[1] With regard to the research into the various legal systems, it should be pointed out at the outset that this research, carried out in the various national databases, has encountered certain difficulties, in the light of the sometimes limited access to the relevant information. In particular, the case-law of the courts of first instance has not always been accessible, whilst it is that case-law that is most likely to reveal preliminary procedural issues and points initially raised by the parties. Moreover, given the way decisions are drawn up, in a significant number of cases the analysis of the relevant national case-law found has not always made it possible to establish with certainty all the initial points submitted by the parties, for the purpose of verifying what exactly they relied on and what the court might have had to raise of its own motion. Lastly, as the availability of relevant sources was uneven across the Member States considered, the completeness of the information gathered might also vary from one Member State to another.

therefore does not cover 'judicial detention' in respect of criminal matters. However, depending on the circumstances of an individual's arrest and the allegations that might be made against him or her, the administrative measures may also be taken at the end of an initial period of police custody.

4. This research note deals indistinctly with cases where foreign nationals who are staying illegally are placed in detention for the purposes of their removal to a third State or their transfer to a Member State, in accordance with the relevant EU rules, and cases where the persons concerned are also, at the same time, applicants for international protection and are protected as such by the relevant provisions of EU law.

5. The specificity of the subject matter should also be noted. In many Member States, this topic is characterised by the hybrid nature of the rules in respect of the placement in detention of foreign nationals and the litigation related to those rules. Detention measures in respect of third-country nationals are generally of an administrative nature (usually adopted by a police authority or a public authority invested with public power) and, in most of the legal systems selected for this analysis, involve an 'ordinary' court (where the distinction between the administrative and ordinary courts exists in the legal systems in question), or possibly, and more specifically, a criminal court. Given the 'administrative' nature of the detention measure, the intervention of an ordinary court is thus meant to be a guarantee of the respect for individual freedom by public authorities. In many Member States, therefore, litigation concerning the placing and keeping in detention of foreign nationals is characterised by the intervention of both administrative and judicial authorities. In the context of the lawfulness review carried out by the court having jurisdiction, that is not without consequence on the determination of that court's remit and powers[2].

[2] On this subject, see Part I.D below.

6. In order to provide relevant and structured answers to the question posed, it is necessary to analyse the remit of the court[3], which is part of the general question of the court's role in conducting the proceedings according to the powers granted to it by the legal system in question[4]. In addition, the question of the role attributed to the parties in the proceedings must also be taken into account, depending on the nature of the matter under consideration (administrative, criminal or civil) and the applicable procedural rules.

7. Consequently, the study aims to identify the cases in which the court may or must raise of its own motion substantive points, comprising matters of fact and/or of law. When, in the legal systems concerned, it has not been possible to identify precise rules relating to the matter of the remit of the court in respect of the detention of foreign nationals, the analysis has been carried out as regards the general principles guiding the remit of the court, according to the nature of the proceedings concerned and the nature of the review carried out (Part I). Next, the rules on the statement of reasons for decisions on the detention of foreign nationals and any potential arrangements for resorting to a summary statement of reasons in the subject matter under consideration are set out (Part II).

## I. JUDICIAL REVIEW OF THE LAWFULNESS OF DETENTION

8. In all the legal systems studied, the initial decision placing a foreign national in detention, whether he or she is staying illegally or is an applicant for international

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3 The concept of 'remit of the court (*office du juge*)' is understood here to mean '*l'ensemble des pouvoirs et devoirs attachés à [la fonction du juge]*' ('all the powers and duties attached to [the court's function]'), Cornu, G., *Vocabulaire juridique*, 7th ed., 2005, PUF, Paris, p. 620.

4 In that respect, in the absence of rules systematically laid down in writing, aside from the customary objections of inadmissibility and lack of jurisdiction that the court may raise of its own motion, it is worth pointing out the difficulty of investigating an area where concrete solutions are most often related to the judge's procedural practice.

protection, is adopted on the basis of an administrative decision[5] aimed at the removal of that foreign national. As it is a serious limitation of personal liberty, it requires the intervention of a court, which will rule – systematically in some of the national legal systems examined, and in others after an action has been brought – on its lawfulness and/or on any extension of the detention.

9. The study of that judicial review, first of all, addresses the legal nature of those detention measures (Part A). In addition, this study explores the conditions for the lawfulness of such detention measures (Part B). Moreover, it explores the issue of which court has jurisdiction over the matter and which procedural rules it applies (Part C). Lastly, it examines the scope of that review, which involves defining both the court's remit and the option, or obligation, it has to raise points of its own motion (Part D).

## A. NATURE OF DETENTION MEASURES

10. Depending on the Member State, detention measures in respect of third-country nationals can be administrative or judicial in nature. That option which Member States have – of choosing the nature of those measures – is in particular set out in Article 15(2) of Directive 2008/115[6], which states that detention is to be ordered by administrative or judicial authorities.

11. In 10[7] of the 12 legal systems covered by this study, a *measure placing a person in detention* is systematically an *administrative measure*. Of those 10 Member

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5 In the majority of cases [obligation to leave the national territory, expulsion measures, or transfer decisions adopted under Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ 2013 L 180 p. 31)], detention is based on an administrative removal decision. In a limited number of situations, depending on the legal system, detention will be imposed on the basis of a stay in the country's territory having been prohibited by a court.

6 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98).

7 Those are **the Czech Republic, Estonia**, **Finland**, **France**, **Ireland**, **Italy**, **Lithuania**, **Poland**, **Romania**, and **Slovenia**.

States, 8 lay down that a measure placing a person in detention is to be adopted by a police officer or border guard **(Estonia**[8], **Finland**[9], **Ireland**[10], **Italy**[11], **Lithuania**[12], **Poland**[13], **the Czech Republic**[14], **Slovenia**). In another Member State, the placing of a person in detention is ordered by a prefect (**France**)[15]. Lastly, in the last of those 10 Member States, the placement in detention, although classified as an administrative measure, is ordered by a public prosecutor upon request by the Inspectoratul General pentru Imigrări (General Inspectorate for Immigration, **Romania**).

12. Thus, out of the 12 legal systems studied, the initial decision placing a person in detention is *judicial in nature* (or is so in principle) in two Member States. Placement in detention in the **Spanish** legal system is systematically ordered by

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8 In **Estonia**, a police officer, a border guard, or an officer of the National Security Authority orders the initial placement in detention.

9 In **Finland**, detention is decided by a police officer, an officer of the National Bureau of Investigation (KRP), an officer of the Security and Intelligence Service (SUPO), a border guard with at least the rank of lieutenant, or an official of the Rajavartiolaitos (Border Guard) authorised to that end.

10 In the **Irish** legal system, it is an immigration officer or a member of the Garda Síochána (Irish police) who orders the initial placement in detention. Irish administrative law does not provide for the detention of natural persons and, in that Member State, there is no specific system for detaining a person who is the subject of a deportation order ; however, limited detention may be imposed in case of non-compliance with such an order. For the sake of readability, the term 'detention' will be used to refer to those limited detention situations referred to in the previous sentence.

11 In **Italy**, this is a police prefect.

12 In **Lithuania** there is an arrest, followed by detention for up to 48 hours. After that period, any detention has to be ordered by a court.

13 In **Poland**, a police officer or a border guard only order an arrest for 48 hours (followed by the placement in detention in a centre under the responsibility of border guards or a police station). That measure involving deprivation of liberty is prior to two other measures involving deprivation of liberty that may be decided by an ordinary court, namely a 'simple' detention and detention 'with a view to removal'. In concrete terms, those two other detention measures are also (quasi-)administrative measures, even though they are ordered by an ordinary court of general jurisdiction (in practice, the criminal section of a district court), by means of an order issued at the request of the authority concerned (for example, a border guard).

14 In **the Czech Republic**, the cizinecká policie (Foreign Police) orders the placement in detention of illegally staying foreign nationals, while the Ministerstvo vnitra (Ministry of the Interior) orders that placement in respect of foreign nationals who are applicants for international protection.

15 In the **French** legal system, the prefect acts by virtue of a public power prerogative.

an ordinary court[16] (specifically, a court of preliminary investigation, which is a criminal court), at the request of the investigative body (part of the administrative authorities).

13. Furthermore, in **Germany,** detention is in general ordered by a court[17]. In that Member State, in certain cases, a measure placing a person in detention may be taken by an office responsible for the detention request, which must promptly submit the case to the courts[18].

14. In contrast to **Spanish** and **Romanian** law, under which a court or a public prosecutor decides on the initial placing of a person in detention, in the other legal systems studied, the potential intervention of a court is or may be[19] subsequent. Thus, **German** law requires, in the case of a detention measure taken by the administrative authorities, that the person concerned be promptly brought before a court so that the latter rules on the administrative measure. The Basic Law prescribes the necessity of expedition in cases of deprivation of liberty. Under **Finnish** law, a court promptly reviews decisions placing a person in detention, at the latest four days after the start of detention. **Irish** law contains a similar provision, requiring a detained person to be brought before the court having jurisdiction as soon as possible. In some of the legal systems covered by this study,

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16 According to the Ley Orgánica 4/2000 sobre derechos y libertades de los extranjeros en España y su integración social (Organic Law 4/2000 on the rights and freedoms of foreign nationals in Spain and their social integration) of 11 January 2000 (BOE No 10 of 12 January 2000, p. 1139), no measure placing a person in detention may be enforced without judicial authorisation.

17 As a general rule, in **Germany**, ordinary courts have jurisdiction for detaining a person. Only a court may decide on the lawfulness and the extension of deprivation of liberty under the first sentence of Article 104(2) of the Grundgesetz für die Bundesrepublik Deutschland (Basic Law of the Federal Republic of Germany ; 'the Basic Law'), as amended by the Law of 29 September 2020 (BGBl. I p. 2048). According to the second sentence of that provision, a judicial decision must be sought without delay for any deprivation of liberty not ordered by a court. Those principles apply also to deprivation of liberty measures carried out by the police in matters of security, as well as in the context of the criminal justice system.

18 More specifically, that concerns, in particular, the detention of foreign nationals in order to ensure their removal and the detention of foreign nationals who have returned unlawfully after having been expelled.

19 That is the case in **Germany**, because the placement in detention may be ordered by a court or by the administrative authorities, under the system described in paragraph 13.

an initial 48-hour detention is possible without judicial intervention, in order to enable the removal of the foreign national or the completion of the formalities necessary for applying for judicial authorisation or 'validation', or a judicial extension of the detention (that is the case in **Estonian**, **French**, **Italian**, **Lithuanian** and **Polish** law).

15. **Finnish**[20], **Italian**[21] and **Slovenian**[22] law make it mandatory for the administrative authority that has decided to place a person in detention to inform or seise the court having jurisdiction to examine the lawfulness of the detention. Thus, in those three Member States, any detention is systematically subject to judicial review without the detained person needing to bring an action.

16. National legislatures have therefore not regulated in the same way the moment in which a court may or must intervene to rule on a public authority request or decision to detain foreign nationals. The systems examined provide for the more or less rapid intervention of a court to authorise or validate the placement in detention. Thus, although the **Spanish** system sets out that a decision placing a person in detention is a judicial decision and not an administrative measure, the judicial review operated by the court of that Member State will still be included in the scope of this comparative study, considering the fact that the request to place a person in detention emanates from a public authority, that act being thus comparable to an administrative measure being validated by a judicial authority.

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20 In **Finland**, the court having jurisdiction is automatically seised with reviewing the lawfulness of the decision placing a person in detention, by means of a communication issued by the official who has decided it.

21 In **Italy**, the police prefect who ordered that a foreign national be placed in detention must refer the matter within 48 hours of adopting his or her decision to the court having jurisdiction so that the latter 'validates' the adopted administrative measure by issuing a decree within the following 48 hours, during a mandatory validation hearing.

22 In **Slovenia**, the President of the Upravno sodišče (Administrative Court) is automatically seised with reviewing the lawfulness of the decision placing a person in detention when the time actually spent in detention exceeds three months, by means of a communication issued by the Ministrstvo za notranje zadeve (Ministry of the Interior).

17. In the same sense, with regard to *keeping a person in detention*[23], in most of the national legal systems included in this note, the administrative authority assesses whether it is appropriate to keep a person in detention. With the exception of two Member States, that assessment results in an administrative decision. It is that administrative measure that is, or may be, the subject of judicial review, which takes the form of a judicial decision authorising the extension of the detention. As for the two Member States referred to above, **Germany**[24] and **Estonia**[25], the decision on whether to keep a person in detention is taken by a court.

## B. CONDITIONS FOR THE LAWFULNESS OF DETENTION MEASURES

18. With the exception of **Ireland**, where Directive 2008/115 is not applicable[26], and which has therefore only transposed Directive 2013/33[27] in that area, all other Member States covered by this note have transposed EU law into national law[28]. Regulation No 604/2013 is directly applicable in all the legal systems of the Member States covered by this note.

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23 It should be pointed out that, in **France**, the generic phrasing ('*maintien*') only covers, *stricto sensu*, the very specific case of 'keeping' applicants for international protection in detention. In other cases, the expression used is 'extension' ('*prolongation*') of the detention measure.

24 In **Germany**, the decision on the extension of deprivation of liberty is taken by the ordinary courts.

25 In **Estonia**, detention is extended by order of an administrative court, upon request of the police officer or border guard concerned.

26 In **Ireland**, there are two laws governing the detention of foreign nationals. First, the International Protection Act 2015 (see Section 20(1) thereof) governs the detention of non-European Economic Area nationals, both those staying illegally and those staying legally. Second, the Immigration Act 1999 (see in particular Section 5 thereof) governs the detention of illegal third-country nationals who fail to comply with a deportation order issued against them.

27 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of persons seeking international protection (OJ 2013 L 180, p. 96).

28 It should be recalled that the safeguards of Article 9 of Directive 2013/33 apply directly, due to the reference made by Article 28(4) of Regulation No 604/2013.

19. The grounds for detention under EU law are set out for illegally staying third-country nationals in Article 15 of Directive 2008/115[29], and for third-country

[29] As that provision is the relevant basis for national transposition measures, it is recalled for the purposes of this note : Article 15 (Detention) :

'1. Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when : (a) there is a risk of absconding or (b) the third-country national concerned avoids or hampers the preparation of return or the removal process. Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.

2. Detention shall be ordered by administrative or judicial authorities. Detention shall be ordered in writing with reasons being given in fact and in law. When detention has been ordered by administrative authorities, Member States shall : (a) either provide for a speedy judicial review of the lawfulness of the detention to be decided on as speedily as possible for the beginning of detention ; (b) or grant the third-country national concerned the right to take proceedings by means of which the lawfulness of detention shall be subject to a speedy judicial review to be decided on as speedily as possible after the launch of the relevant proceedings. In such a case Member States shall immediately inform the third-country national concerned about the possibility of taking such proceedings.

The third-country national concerned shall be released immediately if the detention is not lawful.

3. In every case, detention shall be reviewed at reasonable intervals of time either on application by the third-country national concerned or ex officio. In the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority.

4. When it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 no longer exist, detention ceases to be justified and the person concerned shall be released immediately.

5. Detention shall be maintained for as long a period as the conditions laid down in paragraph 1 are fulfilled and it is necessary to ensure successful removal. Each Member State shall set a limited period of detention, which may not exceed six months.

6. Member States may not extend the period referred to in paragraph 5 except for a limited period not exceeding a further twelve months in accordance with national law in cases where regardless of all their reasonable efforts the removal operation is likely to last longer owing to : (a) lack of cooperation by the third-country national concerned, or (b) delays in obtaining the necessary documents from third countries.'

nationals seeking international protection in Article 8 of Directive 2013/33[30] and Article 28 of Regulation No 604/2013[31]. Those provisions, by defining the rules applicable to the placing and keeping of persons in detention, make it possible to establish the conditions for the lawfulness of detention measures.

20. Schematically, in the legal systems included in this study, the conditions for the lawfulness of detention measures – which thus have their origin in EU law – concern, without claiming to be exhaustive, the competence of the body adopting the act placing a person in detention, the risk of the detained person absconding, the adequacy of other measures that are less restrictive than detention, the due diligence of the administrative authorities in the removal procedure, and the protection afforded to minors and their families and to vulnerable persons in that area. More specifically, it appears that the conditions of the arrest preceding the

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30 As that provision is the relevant basis for national transposition measures, it is recalled for the purposes of this note : Article 8 (Detention) :

'1. Member States shall not hold a person in detention for the sole reason that he or she is an applicant in accordance with Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [OJ 2013 L 180, p. 60].

2. When it proves necessary and on the basis of an individual assessment of each case, Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively.

3. An applicant may be detained only : (a) in order to determine or verify his or her identity or nationality ; (b) in order to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant ; (c) in order to decide, in the context of a procedure, on the applicant's right to enter the territory ; (d) when he or she is detained subject to a return procedure under Directive 2008/115 […], in order to prepare the return and/or carry out the removal process, and the Member State concerned can substantiate on the basis of objective criteria, including that he or she already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that he or she is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision ; (e) when protection of national security or public order so requires ; (f) in accordance with Article 28 of Regulation (EU) No 604/2013 […].

The grounds for detention shall be laid down in national law.

4. Member States shall ensure that the rules concerning alternatives to detention, such as regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place, are laid down in national law.'

31 As Regulation No 604/2013 is directly applicable in the Member States, reference is made to the text of the article of that regulation.

placement in detention are also part of the conditions for the lawfulness of the measure placing a person in detention in some Member States[32].

### C. COURT ENTRUSTED WITH THE REVIEW OF THE LAWFULNESS OF DETENTION MEASURES AND PROCEDURAL RULES APPLIED

21. In the different legal systems covered by the study, the review of the lawfulness of detention measures has not been entrusted to the same courts. As the area of law for which a court is responsible has an impact on its remit[33], it is appropriate to account for that variety of courts having jurisdiction. Furthermore, given that, from a procedural point of view, the administrative, civil or criminal nature of the applicable rules may have an impact on the remit of the court concerned – and in particular on its own-motion powers – because of the variety of principles governing the procedures concerned[34], it is worth noting the variety of laws or procedural codes applicable in that field, sometimes within the same national legal system. Lastly, not all Member States included in this study provide for the same possibilities of remedies in respect of that type of litigation, in terms of appeals and/or appeals on a point of law.

22. Thus, as regards the courts having jurisdiction in that field, in five national legal systems, the review of the lawfulness of those detention measures has been entrusted exclusively to ordinary courts (that is the case in **Germany**[35], **Finland**[36],

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32 This is explicitly apparent from the **Spanish**, **French**, **Irish** and **Polish** laws.

33 For example, in legal systems where there is a distinction between the administrative and ordinary courts, an ordinary court is not systematically the court annulling the administrative measures that it rules as being unlawful.

34 On this topic, see Part I.D.1 below.

35 Procedurally, in **Germany**, the Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit (Law on proceedings in family matters and in matters of non-contentious jurisdiction) of 17 December 2008 (BGBl. I, pp. 2586, 2587), as amended by the Law of 12 February 2021 (BGBl. I, p. 226) ('the FamFG'), is applicable. As a general rule, the rules laid down in that law apply to judicial decisions concerning the deprivation of liberty of foreign nationals in order to ensure their removal. It should be mentioned that criminal law, in particular the provisions of the Strafprozessordnung (Code of Criminal Procedure) concerning detention, applies when a case entails criminal prosecution.

36 Under **Finnish** law, the oikeudenkäymiskaari 7/1734 (Code of Judicial Procedure), which is applied by the ordinary courts, is applicable in that area.

**Italy**[37], **Poland**[38] and **Romania**)[39]. In three Member States (**Estonia**[40], **Slovenia**[41], and **the Czech Republic**)[42], administrative courts have jurisdiction for that type of review. In **Spain**, it is a criminal court (court of preliminary

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37 The **Italian** courts with jurisdiction in that area apply the following :

- decreto legislativo n. 286 – Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero (Legislative Decree No 286 consolidating the provisions regulating immigration and the rules relating to the status of foreign nationals), of 25 July 1998 (GURI No 191 of 18 August 1998, Ordinary Supplement to the GURI No 139, p. 5) ;
- decreto legislativo n. 142 – Attuazione della direttiva 2013/33/UE recante norme relative all'accoglienza dei richiedenti protezione internazionale, nonché' della direttiva 2013/32/UE, recante procedure comuni ai fini del riconoscimento e della revoca dello status di protezione internazionale (Legislative Decree No 142 implementing Directive 2013/33/EU laying down standards for the reception of applicants for international protection as well as Directive 2013/32/EU on common procedures for granting and withdrawing international protection) of 18 August 2015 (GURI No 214 of 15 September 2015, p. 5) ;
- decreto-legge n. 13 – Disposizioni urgenti per l'accelerazione dei procedimenti in materia di protezione internazionale, nonché per il contrasto dell'immigrazione illegale (Decree-Law No 13 laying down urgent measures for the acceleration of procedures in the field of international protection, as well as for the fight against illegal immigration), of 17 February 2017 (GURI No 40 of 17 February 2017, p. 1) [Decreto-Legge convertito con modificazioni dalla legge 13 aprile 2017 (Decree-Law converted with amendments by Law No 46 of 13 April 2017) (GURI No 90 of 18 April 2017, p. 1)] ; and
- regio decreto n. 1443 – Codice di procedura civile (Royal Decree No 1443, Code of Civil Procedure).

38 The **Polish** courts having jurisdiction for that type of litigation apply the Kodeks postępowania karnego (Code of Criminal Procedure).

39 In **Romania**, an ordinary court (the Curtea de Apel, the court of appeal of the place of the detention centre concerned) has jurisdiction for that kind of litigation ; in addition, the Legea contenciosului administrativ nr. 554/2004 (Law on Administrative Proceedings) of 2 December 2004 (*Monitorul Oficial al României* No 1154 of 7 December 2004) also provides for the possibility for the court having jurisdiction to review, *by way of exception*, the lawfulness of an administrative act in the context of the settlement of a case – of its own motion, or at the request of the interested party. Procedurally, the Law on Administrative Proceedings governs the jurisdiction of the civil and administrative litigation chambers of a court of appeal to review, by way of exception, the lawfulness of a detention measure, with the Codul de procedură civilă (Code of Civil Procedure) equally applying, as *lex generalis*, to such proceedings.

40 The **Estonian** courts having jurisdiction in that area apply the Halduskohtumenetluse seadustik (Code of Administrative Court Procedure).

41 In **Slovenia**, the Zakon o upravnem sporu (Law on Administrative Proceedings) (Uradni list RS, Nos 105/06, 107/09 – odl. US, 62/10, 98/11 – odl. US, 109/12 in 10/17 – ZPP-E) is applicable.

42 The **Czech** courts having jurisdiction in that area apply the soudní řád správní (Code of Administrative Justice).

investigation) that hears the case[43], while in **Ireland**, the case is heard by a court of general jurisdiction[44].

23. Two legal systems have mixed rules for allocating jurisdiction in that area. In **France**, litigation is divided between the ordinary and administrative courts. Since the most recent reform in 2016, which transferred jurisdiction from the administrative courts to the ordinary courts, it is the latter [the *juge des libertés et de la détention* (judge responsible for matters relating to liberty and detention)] that have the main jurisdiction in that area, reviewing the lawfulness of the placement in detention and deciding on that detention's potential extension. An administrative judge (of an administrative court) retains residual jurisdiction to review the lawfulness of measures to keep in detention certain foreign nationals who have applied for international protection[45]. In **Lithuania**[46], a court of general jurisdiction [apylinkės teismas (District Court)] is entrusted with those matters at first instance, whilst appeals are brought before an administrative court [the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania)].

24. As regards the remedies available against such detention measures, it should be noted that six Member States provide for three levels of judicial review

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43 The **Spanish** courts having jurisdiction over that type of litigation apply the Organic Law 4/2000 on the rights and freedoms of foreign nationals in Spain and their social integration, and, in the alternative, the Real Decreto de 14 de septiembre de 1882, por el que se aprueba la Ley de Enjuiciamiento Criminal (Code of Criminal Procedure), even though neither the procedure nor the detention come within the scope of criminal law.

44 A District Court has jurisdiction in that area. Procedurally, the International Protection Act 2015 and the rules of adversarial proceedings apply.

45 The **French** administrative courts retain jurisdiction to review the lawfulness of the decision to keep a foreign national in detention when the latter has submitted an application for international protection while in detention, and when the prefect considers, on the basis of objective criteria, that that application has been submitted with the sole aim of preventing the enforcement of the removal order. Moreover, whereas **French** civil courts having jurisdiction in that respect apply the Code of Civil Procedure, the **French** administrative courts responsible for the residual litigation apply the Code of Administrative Justice.

46 **Lithuanian** courts having jurisdiction over that type of litigation apply the administracinių bylų teisenos įstatymas (Law on Administrative Procedure) (TAR, 2016, No. 2016-16849).

(**Estonia**[47], **Finland**, **France, Germany,** and **Poland**[48]). In five other legal systems, there are two levels of judicial review in respect of those measures (**the Czech Republic**, **Ireland**, **Italy**, **Lithuania**, **Slovenia** and **Spain**). In one legal system (**Ireland**) there are three levels of judicial review for a certain type of action (*habeas corpus* applications)[49] and, presumably, two levels of judicial review for actions based on the law[50]. There is only one level of judicial review against such measures in one Member State (**Romania**).

25. A specificity should also be pointed out in relation to the **Spanish** and **Polish** legal systems, and to a lesser extent, by way of example, in relation to the **French** and **Italian** legal systems, with regard to the criminal law treatment, or the proximity to criminal matters, of detention or certain situations prior to detention (arrest, police custody, temporary detention, etc.)[51]. Thus, although judicial decisions have clearly indicated, in some legal systems **(France**, **Spain**, **Italy**, **Romania**), that the detention measure, although depriving a person of liberty, could not be assimilated to a criminal penalty, it should be pointed out that some States have voluntarily decided to benefit from the expertise of criminal-law judges in the judicial treatment of administrative detention litigation, in particular when the ordinary court entrusted with the review of the lawfulness of the detention measure is also called upon to review it in the light of the initial arrest **(France**, **Spain**, **Ireland, Poland**).

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47 In **Estonia**, there are two levels of judicial review in respect of an administrative court's order to extend detention.

48 If the arrest measure followed by an order placing a person in detention is taken into account.

49 Remedy under Article 40.4 of the Bunreacht na hÉireann (Irish Constitution). On that remedy, see paragraph 50 below.

50 Remedy before a District Court (court of first instance) on the basis of the International Protection Act 2015 and/or the Immigration Act 1999.

51 In some systems, the procedural logic followed by the court, on account of the applicable procedure, may be similar to that of criminal proceedings, with more extensive investigative powers, which can have an impact on the court's remit and how it conducts the proceedings.

## D. SCOPE OF JUDICIAL REVIEW

26. The question of the court's power to raise of its own motion points that have not been raised by the parties refers, in practice, to various scenarios that are capable of justifying such an initiative on its part. The principles governing the remit of the court[52] vary according to the legal traditions concerned, the subject matter under consideration and the procedural system in force (Part 1). Moreover, given the often mixed nature (administrative, civil or criminal) of litigation concerning the detention of foreign nationals, depending on the national legal system in question, the court's own-motion intervention may focus on various points relating to customary procedural or jurisdiction objections, but also on substantive points, in view of the importance of the rules to be protected and the deprivation of liberty nature of the detention measures in question (Part 2). Lastly, as the extent of the court's own-motion powers varies from one Member State to another, it will be necessary to provide an outline of those powers separately for each legal system concerned (Part 3).

### 1. REMIT OF THE COURT

27. It should be borne in mind that the *jura novit curia* principle is one of the leading principles governing the remit of the court with regard to its role in organising and conducting proceedings.

28. On the basis of that principle, it is for the court to classify the facts legally and to determine the legal rule applicable to the dispute, that is, to know the law (that is the case in **the Czech Republic, Estonia**, **France**, **Germany**, **Italy**, **Poland**, and **Romania**).

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52 As the legislation applicable to the detention of foreign nationals often lacks explicit provisions on the court's own-motion powers (**Estonian**, **Finnish**, **Romanian** and **Slovenian** law can be cited as examples), the question of the possibility for the court to raise matters of fact or of law in litigation relating to the detention of foreign nationals often makes it necessary to identify in advance the principles guiding the remit of the court in the various legal systems considered. In some cases, that identification can only result from a systematic analysis of the case-law or, in its absence, from an interpretation of general texts on the procedure applicable by the court, in order to apply them to the specific matter of the detention of foreign nationals.

29. The powers granted to the court in the conduct of the proceedings, in relation to the role granted to the parties, also determine the scope of its remit. Thus, depending on the legal classification of the detention measures in question, and on the procedure applicable to them (administrative, civil or criminal), the court's powers in the conduct of the proceedings can vary significantly.

30. In legal systems where the applicable procedure can be described as 'adversarial'[53], a balance is sought between the prerogatives held by the court for the purpose of conducting the proceedings and the necessary respect of the adversarial principle regarding the parties to the proceedings. Rules of that type generally correspond to the rules applicable in civil procedure (that is the case in **France**, **Italy** and **Romania**, for example), which, in addition to the necessary respect for the adversarial principle (requiring that questions of law and of fact be discussed with the parties, including when they are identified by the court of its own motion), comply also with the 'dispositive' principle[54], which, in general, places the parties at the heart of the introduction and conduct of the proceedings, defining the subject matter of the proceedings, which is binding for the court entrusted with responding to the claims.

31. If the court, by virtue of its remit, has extensive powers of initiative in the conduct of the proceedings, or even investigative powers, the procedure is more likely to

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53 It is the '*caractère d'une procédure dans laquelle les parties ont, à titre exclusif ou au moins principal, l'initiative de l'instance, de son déroulement et de son instruction ; se dit aussi du principe qui, dans un type de procédure, confère aux parties un tel rôle*' ('character of a procedure in which the parties have, exclusively or at least principally, the initiative of the proceedings, their progress and organisation ; it also refers to the principle which, in a type of procedure, confers on the parties such a role'), Cornu, G., see note 3, p. 13.

54 *Principe dispositif* (Dispositive principle) : *'a. Principe directeur du procès civil en vertu duquel le juge doit se prononcer sur tout ce qui est demandé et seulement sur ce qui est demandé […]. b. Désigne parfois l'autre principe directeur qui interdit au juge de fonder sa décision sur des faits qui ne sont pas dans le débat […].'* ('a. The guiding principle of civil litigation whereby the court must decide on everything that is sought and only on that which is sought […]. b. Sometimes refers to the other guiding principle which prohibits the court from basing its decision on facts that are not part of the discussion […]).'), Cornu, G., see note 3, p. 313.

be classified as 'inquisitorial'[55]. The court will then have broader own-motion powers to intervene. Criminal procedure, inasmuch as it aims at adopting a penalty and leaves a great deal of room for investigation by the court, is generally considered as being 'inquisitorial'.

32. In the Member States covered by the research note, administrative litigation is also sometimes used in that sense. Thus, in **Estonia**, while subject to the dispositive principle, the review of the lawfulness of detention measures gives rise to the principles of administrative litigation being applied ; that litigation is based on the inquisitorial principle, which is discretionary in nature. The court having jurisdiction must therefore rule on the lawfulness of the measure, if necessary on its own initiative, in the light of all the relevant rules and circumstances and, where appropriate, gather evidence of its own motion in order to establish the facts of the case. The same is true in some respects in **the Czech Republic**, **Lithuania** and **Slovenia**.

33. On account of the mixed nature of the matter of detention of foreign nationals, it is not uncommon for the intervention of the court having jurisdiction to lead to a combination of those powers.

34. In **Spain**, the detention of foreign nationals gives rise to the rules of criminal procedure being applied ; that procedure can be classified as inquisitorial and seems to allow the court to identify of its own motion points of law or of fact when reviewing the lawfulness of detention measures. By contrast, that is not the case in **Poland** or **Ireland** (excluding *habeas corpus* applications)[56] where, although the first court to review the lawfulness of detention measures also applies criminal

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55 '*Qui repose sur l'initiative du juge, sous les distinctions qui suivent. 1. Caractère d'une procédure dans laquelle toute initiative vient du juge : l'introduction de l'instance (saisine d'office), la direction du procès, la recherche des faits et la réunion des éléments de preuve. […] 2. Plus étroitement, caractère d'un système de preuve dont le juge a la maîtrise*. […]' ('Based on the initiative of the court, with the following distinctions. 1. Character of a procedure in which all initiative comes from the court : the introduction of the case (own-motion referral), the direction of the proceedings, the research of the facts and the gathering of evidence. […] 2. More narrowly, the character of a system of evidence over which the court has control. […]'), Cornu, G., see note 3, p. 485.

56 On this type of remedy, see paragraph 50 below.

procedure, the procedure remains adversarial, with the court seemingly having to confine itself to examining the points of law or of fact raised by the parties.

35. Moreover, an ordinary court applying civil litigation principles to the detention of foreign nationals does not necessarily mean that the court cannot carry out an examination of its own motion. On the contrary, in that area, in **Germany**, the procedure applied by the court is subject to the inquisitorial principle, inasmuch as it is for the court to examine of its own motion all the matters of fact necessary to rule on the case in question and, where necessary, the matters of law, for example in the light of foreign law[57].

36. That is also the case in **Italy**, where the review carried out by the civil court entrusted with validation, which is seised automatically, can be classified as inquisitorial, as the court must review the procedure for adopting the detention measure and, on that basis, has the power to review of its own motion the material facts and conditions of the placement in detention. In **Finland**, the examination of the case-law of the ordinary courts having jurisdiction seems also to show that the court automatically reviews the lawfulness of measures placing a person in detention of its own motion.

37. In **France**, the determination of the court's remit and its power to raise points of law of its own motion stems also from the combination of the adversarial principles of civil procedure and the more specific rules established by the legislation on the administrative detention of foreign nationals, authorising the ordinary court having jurisdiction to examine, on its own initiative, any failure to comply with the forms prescribed by law under penalty of nullity or any failure to comply with essential procedural requirements, provided that the irregularity found has had the effect of infringing the rights of the foreign national. The court –

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[57] The inquisitorial principle does not necessarily exclude the application of the dispositive principle, according to which the parties exercise sole control over a dispute. The own-motion principle applies in cases of detention where the public authorities initiate the procedure. Nevertheless, it should be noted that the interested party has the possibility of bringing an action. In addition, the parties are also obliged to cooperate with the courts in clarifying the facts.

which cannot formally annul the administrative detention measure, but may only order the release of the person concerned – may also decide, on its own initiative, to release that person when 'the legal or factual circumstances warrant it'.

38. In some Member States, reviewing the lawfulness of the detention of foreign nationals can also lead to the simultaneous or parallel application of the principles of civil and administrative litigation. In **Romania**, a Member State in which the ordinary courts (the civil and administrative litigation chambers of the court of appeal concerned) have jurisdiction for that type of litigation, and where the Law on Administrative Proceedings provides also for the *possibility* of verifying the lawfulness of an administrative act at any time, in the context of the settlement of a case, by way of exception, either of its own motion or at the request of the interested party, in practice the courts do not seem to go beyond the points raised by the parties. In **France**, the residual jurisdiction of the administrative courts, limited to actions brought against decisions to 'keep a person in detention' taken following an asylum application considered dilatory by the administrative authority, gives rise to the application of general principles of administrative litigation, under which, in general, the principle prohibiting ruling *ultra petita* is tempered by the derogation rules whereby the court raises points involving matters of public policy of its own motion.

39. Lastly, the possibility for the court to raise points of its own motion can also be based on the level, or nature, of the proceedings in question. Thus, while the court of first instance ruling on the lawfulness of detention measures may have a broad power, whether formalised or implied, to raise points of its own motion in its examination of the lawfulness as to the substance (**Estonia**, **Finland**[58], **France**[59],

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58 Resulting from the automatic intervention of the ordinary court.

59 Power devolved to the ordinary court, which may only order the release of the person concerned, without the power to annul the administrative act initially placing that person in detention. The ordinary court intervenes only as court deciding on the validation of the initial administrative detention on an action by the person concerned and/or as a court ruling on the extension of the initial administrative detention on a reasoned request submitted by the administrative authority (see paragraphs 24 and 61).

**Ireland**[60], **Italy**[61], **Lithuania**, **Poland**[62], **Slovenia)**, the powers granted to the court hearing the appeal or the appeal on a point of law can, at the same time, be more limited because of the nature of the review carried out at that stage of the proceedings (**Germany**)[63] and therefore comply with the general principles of 'adversarial' litigation (**Finland**, **France**, **Italy**, **Poland**).

### 2. SUBSTANTIVE POINTS THAT MAY OR MUST BE RAISED BY THE COURT OF ITS OWN MOTION

40. Customarily, the procedural rules of Member States provide for an option or an obligation for courts to raise of their own motion the lack of jurisdiction and inadmissibility points[64].

41. With regard to substantive points, in principle, points relating to the infringement of EU law, in the event of a national provision to the contrary, must be raised by the national courts of their own motion. That is obviously the case in the area of detention of foreign nationals, due to the obligation of transposition by the Member States of Directives 2008/115 and 2013/33[65] and the obligation to apply Regulation No 604/2013[66].

42. Before explaining in more detail, for each of the legal systems covered by this note, the substantive scope of the court's own-motion powers in that area, it should

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60 In the context of *habeas corpus* applications.

61 Resulting from the automatic intervention of the ordinary court.

62 Resulting from the initial placement of the person concerned in detention by applying the rules of criminal (inquisitorial) procedure.

63 An appeal on a point of law brought before the Bundesgerichtshof (Federal Court of Justice, Germany) may be based on an infringement of the law.

64 That is for example the case in **the Czech Republic**, **Finland**, **France**, **Germany, Lithuania**, **Poland**, **Romania** and **Slovenia**.

65 See paragraph 19 above.

66 In the area covered by the research note, the conditions for the lawfulness of detention measures originating in EU law, this study does not attempt to provide a snapshot of how each of the Member States concerned has transposed the two directives in question. The aim of the research has been to identify the matters of fact and of law that must be raised by the court of its own motion and those that may be thus raised, without their European or national origin, which cannot be systematically identified, being a topic of discussion.

be noted from the outset that the comparative study has brought to light certain similarities among the legal systems.

43. Thus, in the first place, in the specific litigation concerning the review of the lawfulness of detention measures in respect of foreign nationals, in all the legal systems covered by this study (except for **Romania**[67]), it appears that the court entrusted with that type of litigation – sometimes only at one of the levels of jurisdiction concerned – is bound by an *obligation* to raise some or all of the matters of fact and of law relevant to assessing that lawfulness (that is the case in **the Czech Republic**, **Estonia**, **Finland**[68], **France**[69], **Germany**, **Ireland**[70], **Italy**[71], **Lithuania**, **Poland**[72], **Slovenia and Spain**).

44. In particular, in several Member States, points concerning the infringement of rights or principles of a constitutional nature (in particular in **the Czech Republic**[73], **Estonia**, **Ireland**, **Italy**, **Slovenia,** and **Spain**), as well as points concerning the protection of the fundamental rights of detained persons (in

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67 The research carried out has not made it possible to identify any substantive points that the court entrusted with that type of litigation may or must identify of its own motion in **Romania**. On the contrary, in that Member State, in the relevant case-law found on the subject, the court, under the dispositive principle governing national civil procedure, seems to examine only the points raised by the detained person or by the administrative authority (General Inspectorate for Immigration).

68 In **Finland**, it would seem that that obligation is imposed on the courts of first instance dealing with that type of litigation.

69 In **France**, that obligation is imposed on the court with regard to purely legal points. On the concept of 'purely legal points', see paragraph 61 below.

70 In **Ireland**, that is the case for *habeas corpus* applications.

71 In **Italy**, as is the case in **Finland**, that obligation is imposed on the courts of first instance entrusted with that type of litigation.

72 In **Poland**, that obligation is imposed on regional courts (courts of appeal in respect of that type of litigation).

73 Nevertheless, it seems that **Czech** courts in general confine themselves to raising those points of their own motion specifically in relation to administrative penalties – in case of breach of the principles of *ne bis in idem* and of retroactivity in respect of the offender concerned. One case has been identified in which the Ústavní soud (Constitutional Court, Czech Republic) ruled that a point concerning the infringement of the right to a fair trial may also be raised by a court of its own motion.

**Estonia**, **Germany**, **Ireland**[74] and **Slovenia**[75]) must be raised by the court of its own motion. Lastly, certain points relating to the placement in detention or the material conditions of detention may or must be raised by the court of its own motion in several of the legal systems in question (in particular in **Estonia**, **Finland**, **France**, **Germany** (obligation), **Lithuania**, **Poland** and **Slovenia**).

45. In the second place, the comparative study shows that two Member States provide for the *option* for the same court, or for the court at a certain level of jurisdiction, to raise of its own motion certain matters of fact or of law that it considers relevant for the assessment of that lawfulness (that is the case in **Finland**[76] and in **France**)[77].

46. With regard to the differences found in the course of this comparative study, it can first be pointed out that, among the 11 Member States referred to in paragraph 43, it is sometimes only courts at certain levels of jurisdiction which are concerned by that obligation to raise points of their own motion. In addition, the number and scope of the matters pertaining to a lawfulness review that may or must be raised of a court's own motion varies from one Member State to another. Lastly, it should be noted that the court's own-motion review is not always justified on the same grounds. While in some Member States the court has an obligation to raise of its own motion certain matters pertaining to the review of lawfulness, as a result of the principles governing the procedure (see Part I.D.1) or of the full review of lawfulness which is incumbent on it, some legislatures

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74 In that respect, see the description of the *habeas corpus* remedy below.

75 In two decisions concerning the review of the lawfulness of the placement in detention, the Upravno sodišče (Administrative Court, Slovenia) verified of its own motion that the detention conditions applied to the foreign nationals concerned complied with Article 4 of the Charter of Fundamental Rights of the European Union, which provides for the prohibition of torture and inhuman or degrading treatment or punishment (Upravno sodišče (Administrative Court), judgment and order I U 1517/2014 of 22 September 2014, ECLI:SI:UPRS:2014:I.U.1517.2014, paragraph 11 ; Upravno sodišče (Administrative Court), judgment and order I U 722/2018-15 of 10 April 2018, ECLI:SI:UPRS:2018:I.U.722.2018.15, paragraph 32).

76 In that Member State, it would seem that that option is available to the court of appeal entrusted with that type of litigation. On this matter, see paragraph 56 below.

77 In that regard, see paragraph 61 below.

have justified the existence of an own-motion power of the court by referring to the concept of 'public policy'. In a final group of Member States, such review of the court's own motion is imposed by law and/or case-law.

### 3. SCOPE OF THE COURT'S OWN-MOTION POWERS IN THE DIFFERENT LEGAL SYSTEMS

47. For example, in **Germany**, the law[78] provides for the obligation on the part of the court to examine of its own motion the facts necessary to decide the case[79]. As regards the scope of the own-motion examination, the choice of the matters to be examined depends on the assessment of the court, which has a certain discretionary power, taking into account the specificities of each case. The court concerned carries out the 'necessary' examination of its own motion, confining itself to the facts and matters necessary to rule on the case in question. The court is not empowered to raise facts without any reason.

48. With regard to the own-motion examination of detention, the court ruling on the detention, deciding in particular on the existence of grounds warranting detention, is, as a rule, bound by the decisions of the administrative authorities and the relevant administrative case-law on removal. Nevertheless, taking into account the guarantees of fundamental rights, which embody the requirements applicable to an own-motion review, the court ruling on the detention is, in the first place, obliged to ensure that the factual basis for its decision is sufficiently complete

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78 The principle of own-motion examination (*Amtsermittlungsgrundsatz*) is provided for in Paragraph 26 of the Law on proceedings in family matters and in matters of non-contentious jurisdiction. A court which does not comply with the requirements of that principle during the own-motion examination would be infringing the fundamental right to liberty of the detained person (see Bundesgerichtshof (Federal Court of Justice), order of 15 September 2016, V ZB 43/16, ECLI:DE:BGH:2016:150916BVZB43.16.0, paragraph 5).

79 That principle of own-motion examination seeks to ensure that the facts are established, without prejudice to the right of the parties to dispute some of them. In that respect, that principle performs a corrective function of the different procedural situation of the parties – in this case, a natural person and administrative authorities – whilst taking into account the fact that the parties are obliged to cooperate with the court in clarifying the facts.

before deciding on the case at hand[80]. In that respect, the hearing of the detained person is an essential part of the own-motion review of a detention, as it makes it possible to gather the facts relevant to the case[81]. In the second place, in some cases the court is obliged to carry out its own examination of the removal of the person concerned, for example when there has been no decision by the administrative authorities[82]. In the third place, the court must examine whether the detention decisions were taken promptly[83]. In addition, the principle of proportionality requires that the length of a person's detention be limited.

49. In the same sense, under **Estonian** law, in application of the inquisitorial principle and the principle of proper application of the law (*jura novit curia*) referred to above, the lawfulness of the detention must be examined in the light of all the relevant matters of fact and of law, on the court's own initiative, during the review of lawfulness which it carries out within the first 48 hours of detention.

50. In the **Irish** legal system, all the judgments of the superior courts concerning the lawfulness of detention measures in respect of foreign nationals have been handed down as a result of *habeas corpus* applications[84]. The Supreme Court's decision

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80 The court ruling on the detention must, as a general rule, consult the administrative files (Bundesverfassungsgericht (Federal Constitutional Court, Germany), order of 27 February 2009, 2 BvR 538/07, *Neue Juristische Wochenschrift* (NJW), 2009, pp. 2659, 2662, paragraph 20 ; Bundesgerichtshof (Federal Court of Justice), order of 10 June 2010, V ZB 204/09, *Neue Zeitschrift für Verwaltungsrecht* (NVwZ), 2010, pp. 1172, 1173 et seq., paragraph 26) and try to obtain additional information from the administrative authorities concerning the removal (Bundesgerichtshof (Federal Court of Justice), order of 25 February 2010, V ZB 172/09, *Neue Zeitschrift für Verwaltungsrecht* (NVwZ), 2010, pp. 726, 728, paragraph 24), where that information is necessary to decide on a ground for detention.

81 Article 103(1) of the Basic Law and Paragraph 420(1) of the FamFG require that the person concerned be heard. See also, in that respect, Bundesverfassungsgericht (Federal Constitutional Court), previous note, pp. 2659, 2661, paragraph 33.

82 Bundesgerichtshof (Federal Court of Justice), order of 16 December 2009, V ZB 148/09, *Praxis der Freiwilligen Gerichtsbarkeit* (FGPrax), 2010, p. 50.

83 That is provided for in the second sentence of Article 2(2) of the Basic Law, read in conjunction with Article 104(2) of the Basic Law. More specifically, the fundamental right to liberty, as provided for in the second sentence of Article 2(2) of the Basic Law prescribes the requirement of rapid action (*Beschleunigungsgebot*) in cases involving deprivation of liberty.

84 See Article 40.4 of the Constitution of Ireland.

in *Application of Michael Woods*[85] – which related to such an application and illustrates the court's active role in that area – stated that, in such proceedings, the court may decide to release an unlawfully detained individual on the basis of matters of fact or of law not relied upon by him or her. As the Supreme Court in that judgment stated that courts are 'required to be alert for other grounds which could render the detention unlawful' than those raised by the applicant, given the investigative role of courts in cases concerning that type of application, it would appear that that must be understood as an obligation. That obligation for the court to identify of its own motion matters of fact or of law that could render the detention unlawful is, however, limited to those matters that the court considers relevant to that end.

51. With regard to the delimitation of points involving matters of public policy in that Member State, it seems that the right of access to legal advice falls under this heading. In particular, the right to reasonable access to a lawyer has been elevated to a constitutional right[86]. In addition, in a 2000 judgment[87], the Supreme Court, on a reference by the President of Ireland to review the constitutionality of two provisions of the Illegal Immigrants (Trafficking) Bill 1999, stated that the right to apply to the court is a fundamental right in *habeas corpus* proceedings, finding that, as a result, the procedural powers of the courts having jurisdiction to hear them are as ample as the defence of that right requires, thereby validating the own-motion powers of those courts.

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85 Supreme Court, Application of Michael Woods [1970] I.R. 154. In that judgment, that Irish court stated that '[t]he High Court, on receipt of a complaint under Article 40, s. 4, sub-s. 2, of the Constitution, is required to order the release of the person detained unless satisfied that he is being detained in accordance with the law. The same duty rests on the Supreme Court. This means that both courts are not confined to an examination of the illegality complained of by the applicant but are required to be alert for other grounds which could render the detention unlawful.'

86 On this subject, see Sheridan, A., *Returning Rejected Asylum Seekers : Practices and Challenges in Ireland*, ESRI Research Series Number 65, 2017, available at https://emn.ie/files/p_201707030349252017_EMN%20Rejectedasylumseekers_online.pdf, p. 23.

87 Supreme Court (Ireland), Re Illegal Immigrants (Trafficking) Bill 1999 [2000] IESC 19.

52. In **Slovenia**, the Law on administrative proceedings also subjects that type of litigation to the inquisitorial procedure. In that area, the court is bound by the legal basis as it appears from the decision placing the person in detention and cannot substitute it with another basis. According to the case-law of the Upravno sodišče (Administrative Court), when reviewing the lawfulness of the placement in detention, that court must examine of its own motion the lawfulness of all conditions in respect of any placement in detention that exceeds three months[88]. While it is possible to bring an action against the decisions of the Ministry of the Interior placing a person in detention before the Administrative Court, a decision of the Administrative Court is open to appeal. With regard to the extension of detention, the Administrative Court refers to the *Mahdi* judgment[89], according to which a judicial authority deciding upon an application for the extension of detention must be able to rule on all relevant matters of fact and of law in order to determine whether such an extension is justified, which requires an in-depth examination of the matters of fact specific to each individual case. According to the case-law of the Vrhovno sodišče (Supreme Court)[90], the court is required to raise of its own motion the arrangements as regards such detention and verify the material conditions. It must therefore consider whether it is a 'placement in a centre or outside a centre', both of which allow for some freedom of movement, or whether it is a 'placement in detention', which restricts freedom of movement.

53. Within the **Spanish** legal system, the law contains indications on the matters pertaining to the review of the lawfulness of detention measures that must be

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88 By contrast, the Ministry of the Interior is responsible for the own-motion review of any detention of less than three months.

89 Judgment of 5 June 2014, *Mahdi*, C-146/14 PPU (EU:C:2014:1320).

90 Vrhovno sodišče (Supreme Court, Slovenia), order of 9 July 2015, X Ips 339/2013, ECLI:SI:VSRS:2015:X.IPS.339.2013.

raised by the court of its own motion[91]. It could be deduced from the remit of the court, as described in the law, and from the inquisitorial principle applicable to that type of litigation, that the court exercises a review of the lawfulness by examining all the relevant matters of fact and of law, including of its own motion.

54. In two other Member States, it would appear that the review of the lawfulness of detention measures involves an obligation for the court to raise of its own motion those matters which it considers relevant on account of having to perform a *'full' review of the lawfulness*.

55. That is the case in **Finland**, where, although the law does not specify the matters pertaining to a review of lawfulness that must be raised by a court of its own motion, it does not limit the matters pertaining to the lawfulness review that the court must examine to those raised by the detained person. The court of first instance entrusted with that type of litigation (Finnish : käräjäoikeus ; Swedish : tingsrätt, District Court, Finland) seems to have to examine all the matters of fact and of law it considers relevant, thus including those not raised by the detained person[92].

56. In the same Member State, it would appear that the hovioikeus (Swedish: hovrätt, Court of Appeal, Finland), in the context of a complaint (extraordinary remedy to challenge serious procedural defects) that may be lodged with it against a decision of a district court, has the option of raising of its own motion certain matters that it considers relevant. It appears that it is able to examine not only the procedural issues relied on by the detained person, but also, exceptionally for that type of litigation, the substantive issues. In two decisions of the Itä-Suomen hovioikeus

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91 Second subparagraph of Article 62(1) of Organic Law 4/2000 on the rights and freedoms of foreign nationals in Spain and their social integration states that the court, 'in accordance with the principle of proportionality, shall take into consideration the circumstances of the case and, in particular, the risk of non-appearance due to the lack of an address or identification documents, the actions of the foreign national aimed at hindering or avoiding expulsion, as well as the existence of previous convictions or administrative penalties and other pending criminal proceedings or administrative penalties'.

92 That seems to be reflected in the first instance case-law found in that area. Although it is not possible to classify the procedure before that court of first instance as inquisitorial, that court plays a decisive role in the conduct of the proceedings.

(Court of Appeal, Eastern Finland) in January and March 2020[93], that court appears to have considered of its own motion whether there were coercive measures that were less stringent than detention. As such less stringent measures were deemed insufficient in that case, the two complaints were dismissed. By contrast, the Korkein oikeus (Swedish: Högsta domstolen, Supreme Court, Finland), in the context of an appeal against a decision of a court of appeal on a complaint, may presumably only examine the matters raised in the statement of appeal.

57. **Italian** law also requires the civil court entrusted with validating the measure placing a person in detention to carry out a full review of its lawfulness, including the review of the procedure for adopting it. Given that the validation hearing (and the review of lawfulness that it implies) is systematic, that is, it is not triggered by an action brought by the detained person (the police prefect who ordered the detention must refer the matter to the court having jurisdiction to validate it), and in the light of that requirement of a full review of the lawfulness of that measure, the question of limiting the review of lawfulness to the points relied on by the detained person does not arise.

58. However, at the level of an appeal on a point of law, judicial review in that Member State is limited to points alleging infringement of the law raised by the appellant. The Corte Suprema di cassazione (Supreme Court of Cassation, Italy) cannot extend the scope of its review, being bound by the principle, enshrined in the Code of Civil Procedure, of correspondence between what is sought and what is decided. That principle means that the Corte Suprema di cassazione (Supreme Court of Cassation) must decide on the whole claim, that it cannot decide beyond the limits of the submitted claim, and that it cannot decide on objections the identification of which is left to the initiative of the parties. Nevertheless, it is

[93] Itä-Suomen hovioikeus (Court of Appeal, Eastern Finland), decisions of 13 January 2020, No 8, R20/15, and 12 March 2020, No 129, R20/236.

clear from the case-law of that court that it may decide questions not raised by the main party, provided that they are preliminary to the main question.

59. **Lithuanian** law refers in particular to the existence of *points involving matters of public policy* to justify the own-motion power of the court entrusted with that type of litigation. Thus, in that Member State, at first instance, pursuant to the Law on Administrative Proceedings, the court assesses of its own motion the circumstances relevant to the proper resolution of the dispute. It defines the scope of that assessment itself[94] and is not bound by the claims of the parties in the main proceedings. That law specifies also that the court cannot go beyond the scope of the application, except in cases where it is required by public policy, or where not going beyond the scope of the application would significantly undermine the rights and legitimate interests of the State, a municipality or a person. On appeal, the court of the same legal order must also go beyond the scope of the statement of appeal when it is required by public policy, or when not going beyond the scope of the statement of appeal would significantly undermine the rights and legitimate interests of the state, a municipality or a person. By way of illustration, it is apparent from the case-law that the court takes into account, inter alia, the vulnerability of the detained person. Thus, if keeping a person in detention is likely to worsen the health of a person suffering from a mental illness, the court is to assess that situation of its own motion and may annul the detention.

60. In some of the legal systems included in this study, even though the inquisitorial principle is not applied to that type of litigation, a full review of lawfulness is not

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94 According to that law, given its active role in the conduct of the proceedings, the court may propose to the parties to present additional evidence, or obtain it at the request of the parties or of its own motion. According to the case-law of the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania), the court may and must have recourse to the possibility of obtaining evidence if it appears in the course of the proceedings that additional data are necessary for the circumstances relevant to the solution of the dispute to be established and examined in a complete and objective manner (Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court), judgment of 15 February 2012 in case No A-63-1343-12). However, only evidence that is directly related to the dispute and which can confirm or refute circumstances necessary for the resolution of the dispute is considered relevant in the process of assessing evidence (Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania), judgment of 16 May 2018 in case No A-1641-556/2018).

imposed on the national court entrusted with it, and the existence of points involving matters of public policy is not explicitly stated, *legislation and/or case-law require(s) the court to raise of its own motion certain matters pertaining to the review of lawfulness*.

61. Thus, in the **French** legal system, it appears that the court entrusted with that type of litigation, in application of the Code de procédure civile (Code of Civil Procedure) (and also of the Code de justice administrative (Code of Administrative Justice) for the residual litigation for which the administrative court is responsible)[95], may raise of its own motion points of law, provided it submits them to the adversarial process. The court must raise them of its own motion when the points are purely legal, meaning points that do not require the assessment of any fact that has not been submitted to the court ruling on the merits. In addition, under the Code de l'entrée et du séjour des étrangers et du droit d'asile (Code on the entry and stay of foreign nationals and the right of asylum)[96], the court may raise of its own motion an irregularity relating to a failure to comply with the forms prescribed by law under penalty of nullity or relating to the failure to comply with essential procedural requirements. However, the court may only order that the measure placing a person in detention be lifted if the irregularity has had the effect of infringing the rights of the foreign national. Although there is no definition of those concepts in the law, the examples found in the case-law show that they include the lack of information regarding the procedures for taking a foreign national's fingerprints, or failure to provide information to the lawyer appointed by the detained foreign national. Moreover, the judge responsible for matters relating to liberty and detention may also – on his or her initiative, or at

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95 Pursuant to Article 16 of the **French** Code of Civil Procedure, 'the court must, in all circumstances, ensure the observation of as well as itself observe the adversarial principle. The court cannot accept in its decision the points, explanations and documents put forward or produced by the parties unless they have been able to discuss them in adversarial proceedings. It *may not base its decision on the points of law which it has raised of its own motion without first inviting the parties to submit their observations* […]' (emphasis added). For the administrative court entrusted with residual litigation in that area, the same rule is set out in Article R. 611-7 of the Code of Administrative Justice.

96 Article L. 552-13 of the Code on the entry and stay of foreign nationals and the right of asylum.

the request of the public prosecutor and after having given the administrative authority the opportunity to submit its observations – decide at any time to release the foreign national when the legal or factual circumstances warrant it[97].

62. In **Poland**, the Ustawa o cudzoziemcach (Law on Foreign Nationals) of 13 June 2003 (Dz. U. 2013 position 1650) provides also for an obligation of the court ruling on appeal in that area [Sąd Okręgowy (Regional Court, Poland)] to examine of its own motion the potentially harmful conditions of the placing in detention of the foreign national. In particular, it must consider whether the detention could endanger the life or physical and mental health of a detained person, as well as whether his or her physical and mental condition may warrant a presumption that he or she has been subjected to violence. In that regard, the Sąd Najwyższy (Supreme Court, Poland) ruled that, in order to assess the lawfulness of the placement in detention, in the context of examining its impact on the psychological state of the detained person, the general-jurisdiction courts having jurisdiction are obliged to summon experts and are not allowed to assess such a circumstance on their own[98]. It appears from a ruling of the Sąd Najwyższy (Supreme Court) of 4 February 2015[99] that such a rule should apply to the entire procedure concerning the placement of foreign nationals in specialised centres, starting with the district courts.

63. Lastly, **Czech** law provides for a number of points that must be raised by the court entrusted with that type of litigation of its own motion. Thus, according to the Code of Administrative Justice, the court must review of its own motion the potential non-existence of an administrative decision to place or keep a person in detention. In addition to certain already mentioned infringements of constitutional rights, the case-law requires own-motion review in respect of whether rules have

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97 Article R. 552-18 of the Code on the entry and stay of foreign nationals and the right of asylum.

98 Sąd Najwyższy (Supreme Court,), judgment of 2 March 2017, No II KK 358/16.

99 Sąd Najwyższy (Supreme Court), judgment of 4 February 2015, No III KK 33/14.

been applied other than those that must be applied and whether a legal act is null and void.

## II. STATEMENT OF REASONS FOR JUDICIAL DECISIONS ON DETENTION MEASURES

64. The comparative study has shown that the obligation to state the reasons for judicial decisions is the general rule in all the legal systems considered (Part A). In some legal systems, limited exceptions to that general rule allow the court to state the reasons for its decisions in a summary manner (Part B).

### A. OBLIGATION TO STATE REASONS

65. The right to effective judicial protection – a constitutional tradition common to the Member States of the European Union and a principle enshrined in the Charter of Fundamental Rights of the European Union and the Convention for the Protection of Human Rights and Fundamental Freedoms – which encompasses the obligation to state reasons, is an essential guarantee against arbitrariness and a founding principle of the rule of law. The obligation to state reasons is therefore naturally laid down **in all the legal systems studied**.

66. The formal obligation to state reasons, which is distinct from the substantive obligation to provide a legal basis for a decision, specifically enables the applicant to exercise his or her right of action and the court to exercise its review. In exercising that review, the court must in turn give reasons for its decisions[100]. The extent of such a statement of reasons may vary, depending on whether the actions are pursued in fact or in law, and whether those judicial decisions are delivered at first instance, second instance, or by a court ruling on an appeal on a point of law.

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[100] As examples of legislative formulations of the obligation to state reasons : in **France**, Article 455 of the Code of Civil Procedure states that 'the judgment must be reasoned. It shall state the decision in the form of an operative part' ; Article L. 9 of the Code of Administrative Justice provides for its part : 'Judgments shall be reasoned' ; in **Italy**, the sixth paragraph of Article 111 of the Constitution states that 'All judicial measures must be reasoned.' ; in **Lithuania**, according to Article 87(4) of the Law on Administrative Procedure, the judicial decision must state (1) the facts of the case established by the court, (2) the evidence on which the court bases its conclusions, (3) the arguments of the court which warrant the rejection of certain evidence, (4) the provisions of the law applied.

The statement of reasons may also be more or less extensive as a consequence of national legal traditions, the procedure applied (administrative, civil or criminal) to the matter in question and, consequently, the court's remit.

67. In that respect, it should be noted that litigation concerning judicial decisions on the detention of third-country nationals is not an exception to the principle of the obligation to state reasons[101], except in special cases[102].

68. More specifically, in the area of detention of foreign nationals, the obligation to state reasons for judicial decisions has been enshrined in law in several Member States. For example, in **Germany**, an order placing a person in detention under the first subparagraph of Paragraph 38(3) of the FamFG must be reasoned, such order having to include the matters of fact and of law relevant to the case. The mere indication of a ground for detention is not considered sufficient in that regard. Without a statement of reasons, the time limit for bringing an action does not begin to run. The law requires also that the operative part of the order contains a designation of the detention indicating the type of detention and the date on which it ends. The decisions of the appeal courts must also be reasoned (Paragraph 69(2) of the FamFG), and the abovementioned provisions concerning the first instance rules apply *mutatis mutandis* (Paragraph 69(3) of the FamFG). In **Spain**, the second subparagraph of Article 62(1) of the Organic Law 4/2000 on the rights and freedoms of foreign nationals in Spain and their social integration lays down that the court 'shall rule by reasoned order' when reviewing the lawfulness of decisions on detention measures. In **Estonia**, Paragraph 265(3)of the Code of Administrative Court Procedure requires that every detention order is to state the reasons on which the court has based its conclusions, as well as the relevant legislation in the case at hand. In **Finland**, the first subparagraph of

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101 By way of example, in **France**, an examination of the case-law reveals that even in the event of the release of a detained foreign national decided by the judge responsible for matters relating to liberty and detention on the grounds of the 'infringement of his or her rights', the judicial decision is set aside upon an appeal on a point of law when the obligation to state reasons is not strictly complied with.

102 On those cases, see Part II.B below.

Paragraph 126 of the ulkomaalaislaki 301/2004 (Law on Foreign Nationals), as amended by Law No 813/2015, sets out that the judicial decision 'must state the ground for detention', thus clarifying the general obligation to state reasons enshrined in the Code of Judicial Procedure. Under **Polish** law, the judicial order placing a person in detention must contain reasoning stating and explaining precisely the legal and factual grounds for placing a foreign national in a guarded centre.

69. The study therefore has not revealed any provisions or case-law practices allowing all or some courts ruling on the lawfulness of detention to state in a summary manner the reasons for their decisions to reject actions or appeals.

### B. EXCEPTIONS ALLOWING SUMMARY STATEMENT OF REASONS

70. Some exceptions[103] to the abovementioned principle of the obligation to state reasons for judicial decisions, or arrangements specific to the matter under consideration, exist in some of the legal systems studied. The following scenarios are given as examples and are not intended to be exhaustive.

71. Depending on the nature of the review carried out, a distinction can be made between scenarios in which reasons are stated for judicial decisions given after redress is sought based on the facts (first instance, appeal)[104] or on the law (appeal

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[103] The research carried out has not revealed any case-law of a constitutional or other nature relating to the provisions and case-law presented in this part.

[104] In **Estonia**, the Riigikohtu halduskolleegium (Administrative Chamber of the Supreme Court) has held that, although a detention order must contain the reasons for the lack of recourse to less restrictive measures than detention, the court hearing the action challenging an order of the court of appeal may, nevertheless, confirm the order made in the previous instance if it is satisfied that the detention is proportionate and justifies that position (Riigikohtu halduskolleegium (Administrative Chamber of the Supreme Court), order of 29 January 2015 in Case No 3-3-1-52-14). Thus, that also applies to the Riigikohus (Supreme Court), which, in reviewing the order of a court of appeal on an action against such an order (*määruskaebus*), may reject that action and uphold the order made at first instance. In **France**, in the context of the principle set out in Article 455 of the Code of Civil Procedure, the appeal court is obliged to respond to the points raised in the statement of appeal (even in the absence of the appellant or his or her representative).

on a point of law). In some Member States (for example, **Germany**[105] and **France**[106]), the superior courts entrusted with appeals on a point of law seem to be able to resort to a more summary statement of reasons[107].

72. In the **French** legal system, an examination of administrative case-law also seems to show that it is possible to use a shorter statement of reasons than in civil or criminal law. This is also evident in **Poland** from the examination of general case-law, and more specifically, criminal case-law in which administrative law is applied.

73. Taking into account the position of the parties, in **Lithuania**, the Law on Administrative Procedure also allows the court to give a summary statement of reasons when the defendant unreservedly agrees with the claims of the applicant.

74. Beyond the abovementioned systems in which a summary statement of reasons is allowed by way of exception, for decisions rejecting actions or appeals, there are a few examples of systems that allow for summary reasons to be stated at the stage of judicial review during the 'validation' of the detention measure. In that respect, in the context of exceptional circumstances, since 7 May 2020, under the measures 'necessary to mitigate the effects and consequences of the spread of

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105 In **Germany**, Paragraph 74(7) of the FamFG provides that the Bundesgerichtshof (Federal Court of Justice), deciding on an appeal on a point of law based on an infringement of law, may refrain from providing a statement of reasons for a decision, when that statement would not be capable of clarifying legal issues of fundamental importance, to develop the law or to guarantee the uniformity of case-law. The provision concerns also the concise statement of reasons of a decision (*argumentum a fortiori*). It was introduced taking into account the fact, inter alia, that detention cases are admissible without an entry of appearance for the person concerned and that the introduction of such an action results in an increase in the number of cases before the Bundesgerichtshof (Federal Court of Justice). The court has discretionary power to decide on the simplification of the formalities for stating reasons.

106 However, this is subject to the developments under way since 2019 in **France**, where the Cour de cassation (Court of Cassation) has undertaken to modify its methods for writing judgments and to resort to a more extended (fuller) statement of reasons in the most significant judgments, particularly in the event of reversals of case-law, new legal solutions, unification of the case-law or instances where fundamental rights have been called into question.

107 In **the Czech Republic**, subject to the applicability of that provision to detention measures, the Code of Administrative Justice initially provided for the possibility of not stating reasons for the non-admissibility of an appeal on a point of law in international protection cases. The Nejvyšší správní soud (Supreme Administrative Court), however, has made almost no use of that possibility. That provision was lifted on 1 April 2021.

COVID-19', **Estonia** has amended its law on the detention of foreign nationals[108], which now provides for a special rule in cases where an exceptionally high number of applications for detention has been submitted to the court having jurisdiction in the matter and that court is not able to review the detentions in question in accordance with the applicable procedure. In such a case, the court may, 'due to an objective impediment', issue a detention order without the usually required descriptive part and without stating reasons. If the detained person wishes to challenge such an order, then the court concerned is obliged to provide him or her with a descriptive statement of reasons as soon as possible. To date, there is no case-law on this topic.

75. In **Italy**, decrees adopted by courts, unlike orders and judgments, have a mainly preparatory function for the proceedings, and do not normally require a specific statement of reasons, except when required by law, as is the case in the proceedings in chambers that apply to the validation of detention. The court ruling on detention is not exempt from the obligation to state reasons, but that obligation is not as broad as the corresponding obligation in respect of orders or judgments and the reasons stated may be more summary. The court, without reproducing them in the decision, may then merely state which matters, among those stated in the application before it, have convinced it to take the measure requested, and prove, even implicitly, that it has examined the question at issue in its entirety.

## CONCLUSIONS

76. First of all, with regard to the judicial review rules in respect of detention measures, the comparative study shows, in the first place, that the system applicable to detention measures varies between the Member States. While in most of them those measures are administrative in nature, they are dealt with by ordinary (civil or criminal) and/or administrative courts, depending on the legal

[108] The Välismaalasele rahvusvahelise kaitse andmise seadus (Law on the granting of international protection to foreign nationals) (RT I, 2020, 4) and the Väljasõidukohustuse ja sissesõidukeelu seadus (Law on forced departure and the prohibition of entry) (RT I, 2020, 3).

system, resulting in the application of different procedural rules in the Member States.

77. In the second place, in that area, the conditions for the lawfulness of detention measures originate in EU legislation (Directive 2008/115, Directive 2013/33 and Regulation No 604/2013).

78. Lastly, with regard to the scope of judicial review of the lawfulness of detention measures, the analysis has revealed (i) that the court's remit is in particular governed by the *jura novit curia* principle. The extent of its substantive review and its role in the organisation and conduct of the proceedings are largely determined, depending on the legal system, by the adversarial or inquisitorial principle. The analysis has highlighted (ii) the fact that in almost all the legal systems involved, those principles require the court to raise of its own motion certain substantive points, which differ from one legal system to another. In two Member States, the court having jurisdiction also has the option of raising of its own motion certain matters of fact or of law other than those which it is obliged to raise of its own motion. In some legal systems, sometimes only courts at certain levels of jurisdiction are concerned by that obligation or option to raise points of their own motion.

79. The number and scope of the matters of fact and of law pertaining to the review of lawfulness that must or may be raised by the court of its own motion vary from one Member State to another. In particular, it appears that in several legal systems, certain substantive points must be raised of its own motion by the court entrusted with that type litigation. That applies, for example, to points relating to the protection of the fundamental rights of the detained person, to the infringement of constitutional rights or principles, and to the placement in detention or the material conditions of detention. Lastly, in the Member States which provide that such points must or may be raised by the court of its own motion, the legislature has not always justified the existence of an own-motion power of the court by resorting to the concept of 'public policy'.

80. With regard to the rules on stating reasons for decisions in that area, it is apparent from the study that the judicial decisions adopted in matters of detention of foreign nationals, in so far as those matters are characterised by the adoption of measures depriving persons of liberty, are in principle subject to the obligation of stating reasons, which is part of the principle of effective judicial protection. Variations in the substance and form of the required statement of reasons can be observed, in general, with regard to the nature of the judicial review carried out (action or appeal on the facts or on a point of law), with regard to the already known matters pertaining to the applicant's case file, depending on the level of the proceedings under way (first or second instance, court ruling on an appeal on a point of law, adoption of an order validating the detention measure or its subsequent extension), on account of the prior agreement of the parties, or, in one Member State, on account of exceptional circumstances.

[…]