LATVIJAS CILVĒKTIESĪBU CENTRS

LATVIAN CENTRE FOR HUMAN RIGHTS

Co-funded by the European Union

Final Report

Developing good practices: promoting compliance with the Return Directive in Latvia, Lithuania and Slovakia

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Riga, 2015

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This report is prepared in the framework of the project "Developing good practices: promoting compliance with the Return Directive in Latvia, Lithuania and Slovakia" coordinated by the Latvian Centre for Human Rights and implemented in co-operation with the following partner organisations:

LIETUVOS RAUDONOJO KRYŽIAUS DRAUGIJA

Lithuanian Red Cross Society (Lithuania)

HUMAN RIGHTS LEAGUE
LIGA ZA ĽUDSKÉ PRÁVA

Human Rights League (Slovakia)

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TABLE OF CONTENTS

PART II: PROJECT EVENTS AND GOOD PRACTICES

INTRODUCTION

This Final Report (hereafter – the Report) is prepared under the Project „Developing good practices: promoting compliance with the Return Directive in Latvia, Lithuania and Slovakia" (hereafter – the Project). The Project was implemented from September 2013 to July 2015 by the Latvian Centre for Human Rights in partnership with Lithuanian Red Cross Society and the Slovak Human Rights League. The overall objective of the Project was to promote the compliance of legislation and practices of return in the three countries with the European Union (hereafter – the EU) Directive 2008/115/EC[1] (hereafter – the Return Directive, Directive) and international standards through exchange of experience and best practices among the return practitioners from several member states.

The **objective** of the Report is two-fold. **Firstly** – to assess the legislation and practice of Latvia, Lithuania and Slovakia in light of the EU Return Directive together with international and European standards related to return. **Secondly**, the Report aims to disseminate the Project's results to various European and national stakeholders. The Return Directive aims to ensure effective return policy in the Member States (hereafter – MSs), built on common standards, ensuring that persons are returned in a humane manner and with full respect for fundamental rights and dignity. In this framework, the Report focuses on good practices and areas for improvement with regard to return.

The Report is comprised of two parts. The structure of the **first part of the Report** follows the logics of the return procedure. It includes the assessment of legislation and practice of the three countries in view of adoption of return decisions, voluntary departure, forced removal, postponement of removal, imposition of entry bans, procedural protection measures, detention and alternatives to detention, as well as monitoring the forced removal. Conclusions can be found at the end of each Chapter, and recommendations to stakeholders are offered at the end of Part I of the Report. The **second part of the Report** overviews other Project activities in order to identify good practices in the area of return of third country nationals (hereafter – TCNs) in the countries analysed, as well as other EU MSs that were involved in the Project.

The first part of the Report is based on the national reports prepared by the national experts of the three countries,[2] supplemented with an overview of

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1 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, Official Journal of the European Union, L 348/98, 24.12.2008.

2 Latvian Centre for Human Rights, *The Return of Third-Country Nationals: Standards and their Implementation in Latvia*, Riga, 2015 (hereafter – the Latvian report); Lithuanian Red Cross Society, *Study on Return and Removal of Third-Country Nationals. National Report* (hereafter – the Lithuanian report), Vilnius, 2015; Messova, B., Stevulova, Z, Compliance with the Return Directive in Slovakia. National Report, Bratislava, 2015 (hereafter – the Slovak report).

international and European standards in the field of return of TCNs. The second part relies exclusively on information provided by the national partners in the three countries and observations during the final Project Conference by the author of this Report.

The Report is provided for national authorities, international and non-governmental organizations, lawyers, working in the area of return of migrants, as well as other organizations and persons who may be interested in the most recent developments in this area.

ABBREVIATIONS

ASF	Act on Stay of Foreigners
Art.	Article
AVR	Assisted voluntary return
AOB	Austrian Ombudsman Board
BBAP	Bureau of Alien and Border Police of Presidium of Police Force in Slovakia
BFA	Federal Agency for Immigration and Asylum in Austria
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CPT	European Committee for the Prevention of Torture
CRC	Convention on the Rights of the Child
EC	European Commission
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EMN	European Migration Network
ERF	European Return Fund
Etc.	Et cetera
EU	European Union
FRA	Fundamental Rights Agency
FRC	Foreigners' Registration Centre
HMIP	Her Majesty`s Inspectorate of Prisons
HRAB	Human Rights Advisory Board (Austria)
HRL	Human Rights League (Slovakia)
JRS	Jesuit Refugee Service
ICCPR	International Covenant of Civil and Political Rights
ICJ	International Commission of Jurists
ICMPD	International Centre for Migration Policy Development
IDC	International Detention Coalition
IO (s)	International Organization (s)
IOM	International Organisation for Migration
LCHR	Latvian Centre for Human Rights
LRCS	Lithuanian Red Cross Society
MOJ	Ministry of Justice
MOI	Ministry of Interior
MS (s)	Member State (s)
NGO (s)	Non-governmental organization (s)
NPM (s)	National preventive mechanism (s)
OCMA	Office of Citizenship and Migration Affairs of Latvia
OPCAT	Optional Protocol to the Convention Against Torture
Para.	Paragraph
RCL	Red Cross Luxembourg
RRC	Refugee Reception Centre
SBG	State Border Guard of Latvia
SBGS	State Border Guard Service of Lithuania
SHC	Slovak Humanitarian Council
TCN(s)	Third country national(s)
VMÖ	Austrian Human Rights Association
UN	United Nations
UAM (s)	Unaccompanied minor (s)

EXECUTIVE SUMMARY

The Report is comprised of two parts. Part I of this Report focuses on the assessment of legislation and practice of Latvia, Lithuania and Slovakia in light of the EU Return Directive together with International and European Standards related to return. Part II overviews other activities carried out under the Project in order to identify good practices during the process of return TCNs in analysed countries and other EU MSs.

All three countries that have been analysed in the Report transposed provisions of the Directive in their national legislation by 2011, but the improvement in transposition of several provisions is still necessary. Institutional infrastructure for implementation of the Directive falls within the competence of the Ministries of Interior (hereafter – MOI(s)) and involves central migration, police and border guard authorities in the three countries. The number of return and removal decisions per year in the three countries varies from 1000 to 2000.

All countries use a voluntary departure period of 7 to 30 days (can be prolonged) and generally ensure preference for voluntary departure to forced removal. However, in Slovakia this preference was stronger before the transposition. Voluntary return programmes in the three countries are project-based. Considerations of the best interest of the child, family or health issues and non-refoulement are included in return and removal proceedings either directly in the legislation, or implemented in the case law. However, the application of these considerations in practice is either ambiguous or causes concerns. The three countries include a possibility to grant a residence permit in case of non-return, but the practical implementation in all of them is constrained by inconsistencies in legislation or practical obstacles (like a lack of required documents, legal residence or resources). They also offer a legal possibility not to adopt a return decision in circumstances provided by the Directive, but the legal regulation is inconsistent or incomplete.

The legal regulation established by the three countries on removal of foreigners is generally in compliance with the requirement established by the Directive for the implementation of a return decision. The provisions on the use of coercive measures of the Directive are not disposed in Latvia, while the two other countries regulate it in the general legislation on police powers. Lithuania and Slovakia have certain restrictions on expulsion of minors. These two countries establish guarantees before the return. They also provide assistance to unaccompanied minors (hereafter – UAMs) before a decision on return is taken.

All three countries provide a possibility of entry bans and its withdrawal in their legislation.

The standards of the Directive on procedural safeguards, which relate to adoption and evaluation of decisions, are implemented and all three countries provide for a possibility of appeal against return or removal decisions.

With regard to detention and alternatives to detention, the basis for detention in Latvia and Lithuania reflects the standards provided in the Directive: detention for removal is related to the situations mentioned in the Directive. Latvia and Lithuania introduced the list of criteria to determine the risk of absconding or hampering return procedures, while there is a lack of explicit legal regulation in Slovakia. All three countries comply with requirements of the Directive concerning the time limit of detention and its prolonging. The principle of proportionality and necessity in Lithuania and Slovakia is embodied either in legislation or case law, but Latvia does not refer to it. All mentioned countries have a number of elements of periodic review of detention lawfulness, as required by the Directive. However, it is not yet firmly established in legislation or practice. All of mentioned countries comply with requirements of the Directive that the TCNs detained for immigration purposes are located separately from other detained persons. The obligation to allow contacts for detained TCNs is implemented only at the legislative level, but is limited in practice due to the lack of access to lawyers and other reasons.

All three countries have established the basis for forced return monitoring in legislation, but there is a lack of implementing legislation in Lithuania. Independent bodies in Latvia and Lithuania carry out monitoring, while the Slovak system is mixed.

The Report highlights several areas regulated by the Directive, which would benefit from improvements in the three countries:

1. **Ensuring the preference of voluntary return over removal.** Lithuania excludes irregular migrants (except asylum seekers and vulnerable persons) from granting voluntary departure period, while those detained TCNs, for whom return decisions are issued, do not have any real possibility to apply for voluntary return. Voluntary return programmes are not sufficiently promoted; as evidenced by small number of returnees in the three countries, they suffer from lack of funding and sustainability.
2. **Removal and postponement of it.** Safeguards of necessity and proportionality for the use of handcuffs during transportation of a foreigner are not specified in Slovakia. Lithuanian practice on prioritization of criminal prosecution for illegal entry instead of return/removal procedure and imposition of sanctions may unduly hamper the implementation of return. With regard to postponement of removal, Lithuania applies stricter requirements in case of need for emergency medical aid. However, the procedure for postponement in case of non-refoulement and victims of trafficking is not regulated.
3. **Concerns with entry bans**. 1) Latvian legislation does not provide for criteria to determine the duration of entry bans. Possibility of unlimited ban cause concerns in the context of obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter – ECHR). 2) Lower threshold than provided in the Directive for application of a threat to state security or public policy ground exists in Lithuania. 3) The withdrawal and suspension of an entry ban is a discretionary power in Latvia in comparison

with the imperative in the Directive. 4) There is a lack of criteria for decision making on withdrawal or suspension of entry bans in Slovakia and Lithuania. 5) No legal possibility exist to withdraw or impair an entry ban period in Lithuania when the person is able to establish that she/he has departed in a full compliance with a return decision.

4. **Treatment of vulnerable persons** does not meet standards of the Directive in Latvia and Lithuania. The provisions on detention of the Immigration Law of Latvia do not include any reference to the term `vulnerable groups`. In Lithuania, the Foreigners' Registration Centre (hereafter – FRC) is not adjusted to accommodation of vulnerable persons, while conditions in Slovakia comply with the requirements only partially. Despite provisions in the law, legal aid to UAMs in practice is not available in Lithuania. Slovakia provides appointment of custodian/guardian. Latvia provides access only to basic (primary) education for returnees. In Slovakia, this access is available only to children with legal status and those detained for more than 3 months.
5. **Age assessment procedures** in mentioned countries are not appropriate due to application of limited methods, lack of legal representatives in procedures and the lack of requirement to consider ethnic origin and cultural particularities of an individual examined by professionals – experts who are familiar with the child's ethnic and cultural background.
6. **Procedural guarantees.** Concerns exist with regard to the implementation of requirements on free legal aid in practice, provision of information on detention to detainees in Lithuania, the implementation of the right to appeal in practice. In Latvia, the period between the return decision and the actual deportation is very short. Independence of the body of appeal (Slovakia) and compliance with the Directive and international standards in connection with a suspensive effect of appeal (Latvia and Slovakia) is of concern. Linguistic assistance is offered during the court proceedings, but does not include the stage of preparation of an appeal in Lithuania.
7. **Detention and alternatives to detention.** In Lithuania and Latvia, the basis for detention that extends beyond the permissible one, either in law, or in practice, is problematic. Considerations of national security, public order or safety and criminal offence in Latvia and Lithuania are also problematic in view of the requirements of the Directive and the Court of Justice of the EU (hereafter – CJEU) case law. In Latvia, the term of pre-court detention (10 days) is excessively long if compared to criminal cases where detention is possible for 48 hours. The choice of alternatives to detention is still very limited in Latvia and Slovakia. Despite increased use of alternatives, they are not widespread. A number of conditions imposed reduce the effectiveness of access to it, including a lack of accommodation, social relations and financial resources, or limiting to humanitarian situations only. The housing conditions in the FRC in Lithuania do not ensure dignified and humane living.

8. Implementation of **monitoring of forced return** is constrained in practice as the procedure of monitoring is not regulated and there is no state monitoring system apart from project-based monitoring, which depends on availability of funds in Lithuania or capacity due to a new function is limited in Latvia, or funding insufficient in all countries. Practice is unclear despite legal regulation, as there is no operational system in Slovakia. None of the countries offers professional training for return monitors. The passive role of the monitor affects the effectiveness of monitoring in Latvia and Lithuania.

More favourable treatment than provided in the Directive, exist with regard to: a) requirements for the quality of reception upon return of minors (Lithuania applies higher requirements); b) entry bans are not applied to minors in Latvia; c) a prolonged detention period is impossible in case of families with minors or other vulnerable persons in Slovakia; d) special rules with regard to detention of children and families with children exist in all three countries, while Lithuania provides for a more favourable standard thus covering families and all other vulnerable persons.

Part II of the Report provides for an overview of other Project activities, which highlight good practices of community based care models as alternatives to detention; methods used, like individualized screening and assessment of vulnerable persons; Dutch case management system, principles applied by the Dutch authorities as regards detention, importance of clear information on all possible legal options available to the foreigner concerned in Belgium; temporary regularisation possibilities in Belgium for persons who cannot be returned; return houses in Belgium and family unit in Austria; as well as methods of age assessment, applied in Austria.

The Project Recommendations focus on three main areas and highlight: a) a need for increased use of alternatives to detention, investment in new alternatives, promotion of enhanced engagement of municipalities, communities and NGOs in offering alternatives, further steps to be taken to ensure judicial review of detention by an independent body and with free legal aid for detainees; b) improvements needed in the system of age assessment to include a complex of methods as to be reliable; and guidance from the EU that is necessary for identification of vulnerable persons; c) a need for building trust between return authorities and monitors, engagement of returnees in the process, training of monitors and possibility of exchange with experienced monitors, as well as inclusion of the three countries in the EURINT project (partnership in 21 European migration and return organizations, and the EU Agency of Frontex to develop and share European best-practices in the field of return).

PART I:

COMPARATIVE REPORT ON THE IMPLEMENTATION OF THE RETURN DIRECTIVE IN LATVIA, LITHUANIA AND SLOVAKIA

CHAPTER I.
Background: legislative developments, institutional infrastructure and statistical trends

Legislation

Two of the countries analysed in this Report transposed the provisions of the Return Directive in their national legislation in 2011, after the deadline for transposition has expired,[3] while Slovakia has done it before the deadline.[4] The legal status of TCNs, including their stay, termination of stay, return, removal and detention is regulated in all three countries in the laws on foreigners. In **Latvia,** the Directive was transposed in the Latvian Immigration Law (hereafter – the Immigration Law) through amendments of 26 May 2011 (entered into force on 16 June 2011), and additional provisions adopted on 5 December 2013 (entered into force on 1 January 2014). Based on these amendments, the Cabinet of Ministers adopted the rules specifying the return procedure.[5] The provisions on access to remedies in return process, state-funded legal aid were introduced, while detention for the purpose of removal was more precisely regulated, the rules on alternatives to detention were adopted.[6]

In **Lithuania**, relevant provisions are in the Law on the Legal Status of Foreigners of the Republic of Lithuania of 29 April 2004 (hereafter – Aliens' Law). Lithuania transposed the Directive through the amendments to the Law of 8 December 2011 (entered into force on 1 February 2012).[7] Additional provisions were adopted on

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3 December 2010.

4 European Commission, *Communication to the Council and European Parliament on EU Return Policy*, COM(2014) 199 final, Brussels, 28.3.2014, p. 12.

5 The Regulations No. 454 "Regarding Forced Removal of TCNs, Departure Document and the Issue Thereof" of 21.06.2011, in force from 01.07.2011; The Regulations No. 630 "Regarding the Procedures by Which the Republic of Latvia Shall Receive and Provide Assistance to the European Union Member States and Schengen Agreement States for Forced Return by Air, as well as the Procedures by Which Joint Flights Shall Be Organised Among the European Union Member States and Schengen Agreement States" of 16.08.2011, in force from 19.08.2011.

6 Latvian report, Chapter 2.1.1

7 The Law Amending and Supplementing Articles 2, 19, 77, 113, 114, 125, 126, 127, 128, 129, 132, 133, 139 of the Law on the Legal Status of Aliens of the Republic of Lithuania and the Law's Annex No XI-1786 of 8 December 2012.

9 December 2014 (entered into force on 1 March 2015)[8]. Several other legal acts also transpose the Directive.[9] A considerable part of return related provisions were available in legislation even before the transposition, although providing for different legal regulation not necessarily in compliance with the Directive[10]. In **Slovakia,** the provisions of the Directive were transposed in 2009 and additional provisions were adopted in 2011 in the Act on Stay of Foreigners (hereafter – Foreigners' Act, ASF) of 22 November 2011 (entered into force on 1 January 2012). It introduced the definitions of illegal stay and of TCNs, voluntary departure, risk of absconding and others.[11] Bylaws regulate details of the implementation of the Foreigners Act,[12] while several acts on general administrative procedures; judicial review and legal aid are also relevant.[13]

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[8] The Law Amending the Law on Legal Status of Aliens of the Republic of Lithuania No. IX-2206 of 9 December 2014.

[9] Order No 1V-429 of the Minister of the Interior of the Republic of Lithuania "On adopting decisions charging a TCN with a duty to leave, a TCN's removal, return and transit through the territory of the Republic of Lithuania and their implementation rules" of 24 December 2004 (the Order on Return); Resolution No 436 of the Government of the Republic of Lithuania "On approval of rules for creating and managing the list of TCNs who are subject to a ban of entry to the Republic of Lithuania" of 20 April 2005 (the Rules for Creating and Managing the List of TCNs Who Are Prohibited from Entering the Republic of Lithuania); Order of the Director of the Migration Department under the MOI No 3K-33 "On approval of procedure for evaluating the criteria for establishing or shortening the period of a TCN's ban for entering the Republic of Lithuania or eliminating data of a TCN from the national list of TCNs who are prohibited from entering the Republic of Lithuania" of 14 April 2014 (the Order on Entry Bans); Order No A1-229/1V-289/V-491 of the Minister of Social Security and Labour, the Minister of Internal Affairs and the Minister of Health of the Republic of Lithuania "On approval of Order on procedure for determination of age, accommodation of unaccompanied third-country minors who are not asylum seekers, carrying out other procedural actions and providing other services to such persons of 23 April 2014 (the Order on Unaccompanied Minors); Order No 4-332 "On approval of the Description of procedure for organizing and implementing escorts for returned third-country nationals" of 20 April 2012 (the Procedure for Organising Escorts).

[10] E. g. the period of voluntary departure was up to 15 days and no possibility to extend it was available, foreigners could be prohibited from entry for indefinite time and the criteria for imposing the bans were not clear, while maximum detention period was not envisaged. Lithuanian report, Chapter 1.1.

[11] Slovak report, Chapter 2.1.1.

[12] Regulation of the Minister of Interior No. 26/2007 on procedures regarding placement of foreigners into centres of police detention of foreigners, Command of the Director of the Bureau of the Alien and Border Police of the Presidium of the Police Force No. 54/2013 regulating methodology of procedures in matters of administrative expulsion of foreigners, detention of TCNs and voluntary return of TCNs from the territory of the Slovak Republic.

[13] Act No. 71/1967 Coll. on Administrative Procedure, Act No. 99/1963 Coll. on Civil Procedure Code, Act No. 327/2005 Coll. on Provision of Legal Aid to Persons in Material Need.

Institutional framework

Institutional infrastructure for implementation of the Directive falls within the competence of Ministries of Interior in the three countries and involves central migration, police and border guard authorities. In **Latvia**, the Office of Citizenship and Migration Affairs (hereinafter – the OCMA) or the State Border Guard (hereinafter – the SBG), both under the MOI, take the decisions on return and removal orders, entry bans and prohibitions to enter the Schengen territory; SBG carries out forced removal. [14] The Minister of Interior and the Minister of Foreign Affairs may also take a decision on entry bans under certain conditions.[15] The return or removal order and entry ban may be appealed to the higher authority, Administrative District Court, or cassation may be submitted to the Supreme Court.[16] Legal Aid Administration provides free legal aid in appeals of return or removal order.[17] The SBG is entitled to take pre-court decisions on detention (up to 10 days), to detain foreigners and release them from detention.[18] The State Police can detain a foreigner for three hours until handing him over to the SBG.[19] With the opening of the accommodation facility for detained foreigners "Daugavpils" (hereinafter – detention centre "Daugavpils") after the closure of the detention facility "Olaine" in May 2011, the decisions on detention of persons in return procedure fall under the Daugavpils Court, while regional court reviews the appeals. The International Organisation for Migration (hereafter – IOM) provides support for voluntary return, while the Ombudsman's Office is responsible for monitoring forced return. Just a few NGOs provide support to irregular migrants – Latvian Centre for Human Rights provides legal aid on case-by-case basis and the Latvian Red Cross assists in providing humanitarian aid and education of minors.[20]

In **Lithuania,** the institutional system includes police, the State Border Guard Service (hereafter – SBGS) under the MOI and its' subordinate body – Foreigners' Registration Centre (hereafter – FRC), the Migration Department to the MOI, courts and the Refugee Reception Centre. Decisions on return are taken and removals are implemented by the territorial units of the SBGS or police depending on the place of stay of the TCN. They also propose entry bans, which is then decided by the Migration Department. The later also decides on removal and its suspension, entry bans, issue of permits in case of non-removal, adopts return decisions for ex-asylum seekers. Detention beyond 48 hours and accommodation of TCNs is ensured by the FRC. Complaints regarding return and removal decisions or entry bans are considered by

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14 Immigration Law of 31.10.2002, in force from 01.05.2003, Section 44 (1), Section 46 (3).
15 *Ibid*, Section 61.
16 *Ibid*, Section 50 (1), 50^1(1), (2).
17 Amendments to the State Guaranteed Legal Aid Law of 04.08.2011, in force from 07.09.2011.
18 Immigration Law, Section 51, Section 54, Section 59, Section 59.[4]
19 *Ibid,* Section 53.
20 Latvian report, Chapter 2.1.2.

the regional administrative courts. First instance courts of the general competence resolve detention issues. The Supreme Administrative Court considers complaints on return or removal and detention of TCNs as the appellate instance. Local IOM office is involved in supporting voluntary returns and Lithuanian Red Cross Society carried out monitoring of removals so far.[21]

In **Slovakia**, police authority is authorised to issue return decisions, decide on granting a period for voluntary departure, impose entry bans, order detention or assign alternative measures to detention. Voluntary return is facilitated by IOM, while the bodies of the MOI and NGOs monitor forced return. There are 2 centres for police detention of foreigners in Sečovce (eastern Slovakia) and in Medveďov (western part of the country). Their main role is to execute decisions on detention of TCNs and take steps for implementation of the return decisions.[22] The superior police authority – one of 4 Directorates of the Alien and Border Police, examines appeals against return decisions. Detention decisions are reviewed by Regional courts in Kosice and Bratislava in first instance and by the Supreme Court at second instance. Provision of free legal aid in appeal procedures is ensured by the Centre for Legal Aid under the Ministry of Justice by its own lawyers or through appointed attorneys. Assisted voluntary return programme is implemented by IOM, while the bodies of the MOI and NGOs may monitor forced return.

Statistical trends

The number of irregular migrants in **Latvia** has increased over the last years, while in **Slovakia** it was decreasing for irregular border crossing, but increasing for apprehensions of irregular stayers. However, the numbers of migrants in these countries are still not significant in EU terms. Generally, the numbers of voluntary returns have been increasing since the transposition of the Directive. For instance, in **Latvia**, the number of persons who returned under voluntarily return programmes has increased from 26 persons in 2009 to 94 in 2012,[23] mainly as a result of increase in asylum applications since 2011[24] and new legislation. The numbers of forced removals decreased in **Latvia** and **Slovakia**, but were increasing in **Lithuania** over the last years. Overall, the total number of return and removal decisions in the three countries is in the range of 1000-2000. For example, in **Latvia**, the total number of return orders and forced return decisions exceeded 2,000 in 2012 and decreased

[21] Lithuanian report, Chapter 1.1.
[22] Section 90 (2) and Section 92 of the ASF.
[23] Latvian report, Chapter 2.2.1.
[24] From 50 – 60 in previous years, up to 335 in 2011, 189 in 2012, 185 in 2013 and 364 in 2014. See OCMA at http://www.pmlp.gov.lv/lv/sakums/statistika/patveruma-mekletaji.html

to about 1,500 in 2014.[25] In **Lithuania**, the total number of TCNs who were returned, obliged to depart or removed has been increasing since 2008 (903), and the highest number thereof was in 2012 (1947), while in 2013 it dropped to 1812. Voluntary departures were increasing throughout 2008-2014, reaching a peak of 1618 persons in 2011. Suspensions of removal decisions are rare. Statistics of detention in return procedures represent increasing numbers and the use of alternatives to detention are rare.

In **Slovakia**, since 2008 the number of foreigners detected during the irregular crossing of the external border, the border with Ukraine, has decreased from 994 in 2008 to 400 in 2011. Slight increase in 2012 (almost 700) was followed by a decline in 2014 (240). The number of irregular stayers, on the other hand, has been oscillating around 1000 foreigners detected each year. In most recent years, the phenomenon of decline of apprehensions at the border may have resulted in refocus of attention of the Alien and Border Police to irregular stay. In 2014 there were 240 cases of irregular crossing of the border and 1064 foreigners were detected staying without legal residence. The period of 2005 – 2007 demonstrated a stable number of around 2700 removal decisions taken each year. Major drop followed in 2008 (to 1800 cases), and it further decreased to 1235 in 2009. The statistical data shows a steady decline in removal decisions except 2014. In 2010 Slovak police authority decided 903 cases, while 643 in 2013, but the number got up to 1027 in 2014, mainly due to increase in irregular migration from Ukraine. **Slovakia** does not disaggregate data of voluntary and forced returns in the statistics. Only assisted voluntary return is reported separately. During 2005 – 2011, around 100-150 foreigners annually utilized possibility of assisted voluntary return with IOM, but the numbers have been decreasing in recent years (54 foreigners in 2012, 57 in 2014). Unlike Lithuania, where the numbers of detentions have been increasing, **Slovakia** has evidenced a steady decrease since 2007 (1100), 2008 (580), 2012 (175), but increase was noted in 2014 (411), mainly due to changes in legislation enabling detention of asylum seekers.[26]

[25] Latvian report, Chapter 1.2.
[26] Slovak report, Chapter 2.1.2.

CHAPTER II.
Voluntary departure

International and European standards

Within the EU context, in accordance with Article 3(3) of the Directive, 'return' means the process of a TCN going back — whether in voluntary compliance with an obligation to return, or by enforced procedure — to his/her country of origin, or a country of transit in accordance with Community or bilateral readmission agreements or other arrangements, or another third country, to which the TCN concerned voluntarily decides to return and where he will be accepted. Thus, under the Directive, return includes both voluntary departure and enforced removal of the person from the territory of a Member State. In accordance with the Directive, as interpreted by the CJEU in *El Dridi* case, the stages of the return procedure established by the Directive correspond to a gradation of measures to be undertaken in order to enforce the return decision. This gradation results from the measure, which allows the person concerned the most liberty, namely granting a period for his/her voluntary departure, to measures, which restrict that liberty the most, namely detention in a specialised facility.[27] It follows that, in accordance with the Directive, Member States should prefer voluntary return to forced return. When adopting a return decision, a period for leaving the territory on their own should be fixed, unless it would undermine the purpose of a return procedure.[28] The preference of voluntary return is also noted in the Twenty Guidelines on Forced Return of the Committee of Ministers of the Council of Europe (hereafter – CoE), which note the obligation to carry out regular assessments and, if necessary, develop voluntary return programmes.[29] Voluntary return is preferable to forced return because: a) it presents far fewer risks with respect to human rights; b) is cheaper; c) more attractive to returnees (with reintegration assistance); d) creates sustainable return and contributes to development in the country of origin.[30] Successful return projects require all or most of the following elements: pre-return advice and counselling, training/employment assistance, assistance for travelling to and/or re-establishment in the country of ori-

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27 CJEU, C-61/11 PPU, *Hassen El Dridi, alias Soufi Karim,* 28 April 2011, para. 41.

28 Para. 10, the preamble of the Return Directive.

29 Guideline No. 1, Twenty Guidelines on Forced Return of the Committee of Ministers of the CoE, September 2005, p. 10.

30 PACE, Committee on Migration, Refugees and Population, Doc. 12277 *Voluntary return programs: an effective, humane and cost-effective mechanism for returning irregular migrants*, 4 June 2010.

gin/housing, follow-up assistance and post-return counselling.[31] Therefore the CoE recommends to host states to promote voluntary return, in particular by affording the returnee a reasonable time for complying voluntarily with the removal order, by offering practical assistance such as incentives or meeting the transport costs, by providing complete information to the returnee, in a language he/she can understand, about the existing programmes of voluntary return, in particular those of IOM and other similar organisations.[32] The Directive equally calls on MSs to promote voluntary return, including the provision of enhanced return assistance and counselling, also making best use of the relevant funding possibilities offered under the European Return Fund.[33]

Implementation

Return Directive, Article 7 (1)
A return decision shall provide for an appropriate period for voluntary departure of between 7 and 30 days, without prejudice to the exceptions referred to in para. 2 and 4. Member States may provide in their national legislation that such a period shall be granted only following an application by the TCN concerned. In such a case, Member States shall inform the TCNs concerned of the possibility of submitting such an application.
The time period provided for in the first subparagraph shall not exclude the possibility for the TCNs concerned to leave earlier.

In **Latvia**, the provisions on voluntary return before the transposition were rather short, stating that a return decision, obliging to leave the country within 7 days, shall be adopted in case the foreigner has violated the procedure of entering or residing in Latvia.[34] The state could, on humanitarian grounds, revoke or suspend the execution of a return decision. In **Lithuania**, the period of voluntary return could not exceed 15 days and no minimum period was established, no possibility to prolong it existed in legislation until amendments in 2011. The adoption of return decisions for TCNs, who came in irregular manner and were rejected as refugees, was also problematic. If these persons were in the asylum procedure, they could not express consent with voluntary return, as it would be treated as a waiver of the asylum application.[35] Thus, following rejection of the asylum application, a removal decision was issued imme-

[31] Commission of the European Communities, *Communication from the Commission to the Council and the European Parliament on a community return policy on illegal residents*, COM(2002) 564 final, 14.10.2002, p. 22; CAHAR, *Comments on the Twenty guidelines*, September 2005, comment to Guideline No. 1.
[32] Twenty Guidelines on Forced Return, p. 11.
[33] Para. 10, the preamble of the Directive.
[34] Immigration Law (with amendments until 15.06.2011), Section 41 (1) and (2).
[35] Data presented by the Migration Department, 01.07.2014, quoted from the Lithuanian report, Chapter 2.1.

diately. Amendments to the legislation have made the adoption of a return decision in these cases possible since 1 March 2015. In general, legal regulation in **Slovakia** preferred voluntary departure to forced return even before the transposition. Contradictory, the focus on voluntary return and its actual preference was then stronger. If a foreigner applied for assisted voluntary return before execution of expulsion decision, the police authority would not enforce his/her departure, if assisted voluntary return would take place within 90 days. Previous legislation required determination of the time limit for voluntary departure as a mandatory part of the decision on administrative expulsion.[36] The Act on Stay of Foreigners in its version before transposition, defined the maximum time limit for departure of up to 30 days. According to previous legislation, police ensured forced return if the foreigner has not departed within the time limit; or if it was possible to presume from the beginning that he will obstruct the execution of administrative expulsion, in case of application of readmission agreement; or if a foreigner could not depart due to the lack of a valid passport or financial resources.[37] On the contrary, the law stated that decision on administrative expulsion was not to be executed if a foreigner was unable to obtain travel document even with the assistance of an embassy of his country of origin and his departure could not be secured.[38]

All three countries transposed Art. 7(1) of the Directive by introducing a voluntary departure period of 7-30 days and ensuring preference for voluntary departure to forced return (except **Lithuania**, where exclusion of irregular migrants with some exceptions is not in line with the Directive). However, the legislation was more favourable to voluntary return in **Slovakia** before the transposition, while in **Lithuanian** practice frequently only a minimum period is granted. Following the transposition of the Directive in **Latvia,** from 16 June 2011,[39] the term to leave the country was extended in line with the Directive, from 7 to 30 days, or allowing to leave earlier,[40] or, upon certain circumstances, the foreigner may be issued with a duty to leave less than in seven days.[41] The same period exists in **Lithuania**[42] and **Slovakia**.[43] The laws in **Latvia** also introduced a possibility for a foreigner to apply for aid of international organisations, associations and foundations in order to voluntarily return to his country.[44] A return order in Latvia is issued when the fact of illegal stay of

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36 Slovak report, Chapter 2.2.
37 Section 59 of the ASF.
38 *Ibid*, Section 59 (4).
39 Amendments to the Immigration Law of 26.05.2011, in force from 16.06.2011.
40 Immigration Law, Section 43 (1).
41 *Ibid*, Section 43 (3). However, until the end of 2014 this provision has not been applied. Latvian report, Chapter 2.2.1.
42 Article 127 (1) of the Aliens' Law.
43 Section 83 (1) of the ASF.
44 Immigration Law, Section 45 (1).

a foreigner has been substantiated,[45] but no evident specific reasons for adoption of a removal order exist.[46] In practice, after the transposition of the Directive, the return is preferred to removal. In **Lithuania**, a decision on return is adopted when:[47]

TCN's visa has been cancelled or residence permit revoked;

- TCN stays in the Republic of Lithuania after the expiry of validity of the visa or the temporary residence permit, or the period of visa-free stay;
- TCN lawfully entered into the Republic of Lithuania, but stays here without possessing a temporary or a permanent residence permit where he is obliged to possess one;
- TCN who illegally came to the Republic of Lithuania or illegally stays therein, but he/she is a vulnerable person, an asylum seeker, or a foreigner, who was not granted asylum, and agrees to return to a third-country voluntarily with assistance of international or non-governmental organisation (from 1 March 2015).

The period for voluntary return is granted having evaluated the TCN's possibilities to depart as soon as possible. This term commences from the date of serving the return decision to the TCN.[48] In practice of Vilnius Migration Board, various circumstances are taken into account in order to determine the period for voluntary departure, e. g., the duration of legal stay in Lithuania, family relationships with persons living in Lithuania, social, economic and other connections, health state of the TCN, the period necessary for actual departure, etc. Longer periods are usually fixed for TCNs who are from distant countries with complicated travelling options. 7 days period is usually assigned for TCNs from the neighbouring countries (e. g., Russia, Belarus). Though TCNs are granted a period of 7-30 days for voluntary return, in practice usually the minimum term is assigned. However, voluntary departure period is not granted for persons who arrive to Lithuania in irregular manner. Exceptions are available to asylum seekers and vulnerable persons only. Also, detained TCNs for whom return decisions are issued have no actual possibility to apply for voluntary return.[49] This is not compatible with the Directive.

Following the transposition of the Directive, current legislation **in Slovakia** maintains a preference for voluntary departure, but it is weaker than before transposition, because determination of the time limit for departure is regulated as an optional part of the decision on administrative expulsion (previously it was mandatory part of the decision). The period for voluntary departure is assigned in

[45] *Ibid*, Section 41 (1).
[46] Section 46 (1), see also Chapter IV on the grounds for removal orders.
[47] Article 125 (1) of the Aliens' Law.
[48] *Ibid*, Article 127 (1).
[49] Lithuanian report, Chapter 2.1.

duration between 7 to 30 days and can be prolonged taking into account previous length of stay, private and family life, and health status of a TCN.[50] Police would abstain from enforcement, if it is not possible to obtain a valid passport, maximum duration of detention expired and departure of foreigner is impossible to implement.

Statistics on voluntary returns

In **Latvia,** due to the transposition of the Directive voluntary return is more "accessible" and could be applied more frequently than before, especially with regard to the possibility to participate actively in voluntary return programmes offering aid for return. Following the transposition, the number of persons who returned voluntarily with the assistance IOM has increased significantly:[51]

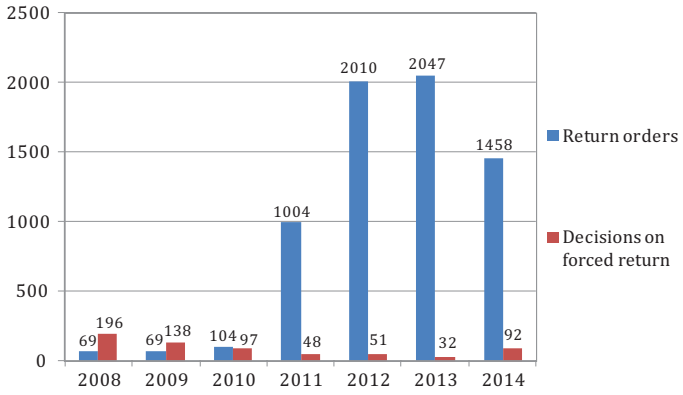
Figure 1. Number of voluntary returns in Latvia, 2009-2014

Year	Persons
2009	26
2010	16
2011	73
2012	89
2013	82
2014	94

At the same time, the increase of persons returning voluntarily could be also partially related to sharp increase in numbers of asylum seekers that is observed since 2011.52 Also, the number of return orders has increased significantly (see Figure 2 below): from 104 in 2010 (and even less in previous years) to 1458 in 2014. Consequently, the number of removal decisions has dropped from 138 in 2009 to 32 in 2013 but went rather high again in 2014 (92).53

[50] Section 83 (1) of the ASF.
[51] Latvian report, Chapter 2.2.1.
[52] See OCMA at http://www.pmlp.gov.lv/lv/sakums/statistika/patveruma-mekletaji.html; Latvian report, Chapter 2.2.1.
[53] See OCMA at http://www.pmlp.gov.lv/lv/sakums/statistika/lemumi-par-izraidisanu-un-izbraukSanas-rikojumi.html; Latvian report, Chapter 2.2.1.

Figure 2. Decisions on voluntary return orders and removal orders



Source: Data of OCMA.

Although persons, who take advantage of voluntary departure, dominate in **Lithuania**, it should be noted that during the whole period the number of the TCNs who took advantage of the voluntary departure programmes is still very low as illustrated below:

Figure 3. Voluntary departures from Lithuania vis-à-vis removals and departures under voluntary return programmes in the period of 2008-2014

Year	Voluntary departure	Voluntary departure under programmes	Removals
2008	769	15	123
2009	1035	0	144
2010	1188	54	137
2011	1618	47	125
2012	1459	65	236
2013	1520	43	279
2014	1886	66	362

Slovakia does not report on official numbers of voluntary returns based on a decision on administrative expulsion with the determined time limit to depart from Slovakia; and the number of those who complied with this obligation voluntarily. Only statistics on assisted voluntary returns is available. During 2005 – 2011, around 100

to 150 foreigners annually used a possibility of assisted voluntary return with IOM. Since 2012 the number dropped to around 50 foreigners each year.[54]

Figure 4. Departures under voluntary return programmes, Slovakia, 2012-2014

Year	Persons
2012	54
2013	50
2014	57

However, some data were collected during this study for 2014. It shows that out of 1027 decisions taken in 2014 on administrative expulsion 554 contained the time limit for voluntary departure from Slovakia, which constitutes about 53 per cent of all expulsion decisions. Although data is only available for 2014, it may be assumed that voluntary departure presents quite a substantive element of Slovak return policy. However, it is not possible to state how many of voluntary return decisions with time limit for departure have been complied with and how many have not, since official statistics is not available.[55]

Voluntary return programmes

Voluntary return programmes or their funding in the three countries are project-based, though **Lithuania** and **Slovakia** contain a reference to the promotion of voluntary return in migration policy document.[56] In **Latvia**, the programme is financed by the European Return Fund (hereafter – ERF) and the state. Since 2009 these programmes are managed by IOM office in Latvia. Foreigners are provided with assistance for return costs and reintegration aid. However these programmes suffer from a lack of funding.[57] Voluntary return programmes in **Lithuania** are carried out by IOM Office since 1998, while since 2010 these programmes are supported by the ERF. A number of projects have been implemented annually in the period of 2010-2014. These projects focused on information for foreigners, counselling, creation

[54] Slovak report, Chapter 2.2.
[55] Slovak report, Chapter 2.2.
[56] Guidelines of Migration Policy of Lithuania approved by Resolution No 79 of the Government of the Republic of Lithuania of 22 January 2014, point 22.3.4; Migration policy of the Slovak Republic. Perspective until the year 2020, the Government of the Slovak Republic Resolution No. 574 of 31 August 2011.
[57] Latvian report, Chapter 2.2.1.

of databases and capacity building for officials, as well as reintegration support.[58] Legal framework of the assisted voluntary return programme of IOM in **Slovakia** is operating since 1998 under a cooperation agreement between IOM and the MOI.[59] The main concern with regard to assisted voluntary return (hereafter – AVR) in Slovakia is that the police decide if the foreigner could benefit from the programme. After registration with IOM, police decides on inclusion of a foreigner into AVR programme. It must be highlighted that this decision, however, is not supported by existing legal framework, and it is impossible for a foreigner to seek remedy in case of a negative decision. Thus, the assistance with voluntary return is not understood as a right of a foreigner, but as a measure which police is authorized to use within its discretion.[60]

Extension of voluntary departure period

> **Return Directive, Article 7 (2)**
> Member States shall, where necessary, extend the period for voluntary departure by an appropriate period, taking into account the specific circumstances of the individual case, such as the length of stay, the existence of children attending school and the existence of other family and social links.

In **Latvia**, such a possibility is linked to a request of the foreigner. The authorities have a right to prolong the time period initially indicated in the return decision for a time period not exceeding one year in Latvia[61] and up to 30 days in certain cases in **Lithuania** (since 1 March 2015[62]). Previously it was only possible when the foreigner could not depart due to objective reasons beyond his/her control.

According to the **Latvian** Immigration Law and practice, the authorities, when deciding to extend the time period of voluntary return, take into account the circumstances of each case, in particular – duration of stay in Latvia, family or social ties, minor child who attends a school in Latvia.[63] Similar reasons are taken into account in **Lithuania**, [64] while other circumstances are: the foreigner is in need of emergency medical assistance, when this is confirmed by the consultative commission of the health care institution, foreigner cannot be returned due to objective reasons (he does not possess a valid travel document, there is no possibility to get travel tickets, etc.).[65] In practice, a period for voluntary return is extended by

[58] Lithuanian report, Chapter 2.1.
[59] Slovak report, Chapter 2.2.
[60] *Ibid,* Chapter 2.2.
[61] Immigration Law, Section 43 (1)-(2).
[62] Article 127(3^2) of the Aliens' Law.
[63] Immigration Law, Section 43 (2), also Latvian report, Chapter 2.2.3.
[64] Article 128 (1) points 1-3 of the Aliens' Law
[65] *Ibid*, Article 128 (2) points 3-4.

taking into account the circumstances mentioned in the Order on Returns, as well as circumstances like: illness, suspension of bank activities (TCN's accounts are frozen); unforeseen circumstances (e.g., illness, death of a relative, etc.). Cases also included situations when TCNs were challenging return decisions in court. It should be noted however that *the test of objective reasons that do not depend on TCN* provided for by the Aliens' Law is more restrictive that the wording of the Directive *the specific circumstances of the individual case.*[66] In **Latvia**, additionally the authorities may revoke or suspend the execution of voluntary return decision issued or the removal order if the circumstances have changed, which were the basis for the adoption of the decision, or on humanitarian grounds.[67] In **Slovakia**, the time limit for departure may be extended, even repeatedly, proportionally to the length of previous stay, private and family affairs, health condition of a TCN, etc. If police authority extends the time limit for departure, it provides a foreigner with a document certifying the reason and time until which the enforcement of the decision on administrative expulsion is prolonged. The possibility of extension of the period for departure is formulated as an authorization of the police. It is, however, unclear if a foreigner shall or may request for extension of this time period. Also, it is not evident from the legal regulation that if such a request is submitted, the police would respond with a regular decision which could be appealed, if negative. However, the application of this possibility could not be checked in practice, as statistical information on such extension was not available.[68] In the period of 2011-2014, the OCMA in **Latvia** extended the period of voluntary return in 23 cases, due to health condition; the need for children to attend school until the end of the academic year; the need to complete business in Latvia, family circumstances, etc.[69]

Return Directive, Article 7 (3)
Certain obligations aimed at avoiding the risk of absconding, such as regular reporting to the authorities, deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a certain place may be imposed for the duration of the period for voluntary departure.

According to **Lithuanian** law, these alternative measures to detention may be imposed for the duration of the period for voluntary departure: regular reporting to the territorial police agency; obligation to report to the territorial police agency about TCN whereabouts by means of communication; entrusting the care of an unaccompanied minor to a relevant social agency; entrusting the care of the TCN to a citizen of the Republic of Lithuania or a TCN legally resident in the Republic of

66 Lithuanian report, Chapter 2.1.
67 Immigration Law, Section 49.
68 Slovak report, Chapter 2.2.
69 Latvian report, Chapter 2.2.3.

Lithuania who is related to the TCN. So far **Latvia** and **Slovakia** has opted not to implement this provision.

Return Directive, Article 7 (4)
If there is a risk of absconding, or if an application for a legal stay has been dismissed as manifestly unfounded or fraudulent, or if the person concerned poses a risk to public policy, public security or national security, Member States may refrain from granting a period for voluntary departure, or may grant a period shorter than seven days.

All the countries transposed this provision. The compliance with the Directive raises concerns in **Lithuania** and **Slovakia**. In **Latvia,** more favourable provisions exist, as it has chosen to grant a period shorter than seven days instead of refraining from the granting thereof under the Directive, in cases when applying for a residence permit, a foreigner has provided false information or the application for a residence permit is clearly unfounded.[70] In **Lithuania**, a period for voluntary departure is not granted to TCNs who arrive in irregular manner, thus removal decision is adopted at once.[71] Different regulation is established only in respect of asylum seekers and vulnerable persons. Recent amendments to the legislation (in force since 1 March 2015) make it possible to refuse voluntary return period or reduce it to less than 7 days, if there is a reason to believe that a foreigner may abscond in order to avoid returning to a foreign country or an obligation to leave Lithuania.[72] Also, a period for voluntary departure is not granted and a removal decision is immediately adopted for the TCNs if their stay in Lithuania constitutes a threat to national security or public policy[73] and if there is a ground to believe that a foreigner may abscond.[74] Although the Aliens' Law does not provide for a possibility to refrain from granting a period for voluntary departure if a TCN's application for legal stay has been rejected as manifestly unfounded or fraudulent, the standard established by the Law is applicable to a wider circle of persons than the one provided for in the Directive. In accordance with the law all TCNs who have come illegally are not granted a period for voluntary departure and are not able to take advantage of assistance for voluntary departure provided by the IOM. Also, detained TCNs subject to a return decision, i.e., who have been granted a period for voluntary departure, are actually unable to benefit from IOM assistance, because they are not released from detention and thus cannot comply with the return decision, and can only be removed from Lithuania. Such a practice does not comply with the requirement of the Directive and international standards providing preference to voluntary return.

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70 Immigration Law, Section 43 (3).
71 Article 126 (1) of the Aliens' Law.
72 Article 127 (3^1) of the Aliens' Law.
73 Article 126 (1) points 2–3 of the Aliens' Law.
74 Article 127 (3^2) of the Aliens' Law.

Practical situation
A Citizen of Georgia Z. L. illegally came to Lithuania and was detained. During the detention he applied for asylum in Lithuania. However, later Z. L. agreed to return voluntarily with assistance of IOM. Thus on 6 May 2014 the Migration Department adopted a decision to terminate the examination of application for asylum and a decision to leave voluntarily within 20 days was adopted. Z.L. was however unable to comply with this decision, as the FRC addressed the court for extension of his detention, which was extended until 20 August 2014.[75]Although the TCN was granted a period for voluntary departure, and IOM agreed to provide him assistance, he had no possibility to comply with decision and was later removed.

In **Slovakia**, the law provides for situations when time limit for departure shall not be given. In transposing this provision of the Directive, Slovak authorities chose to regulate this as a prohibition of application of voluntary return and omitted the possibility to shorten the time limit for departure to a period below 7 days.[76] This is where it can be presumed that a TCN would abscond or in any other manner obstruct execution of decision on administrative expulsion, especially if his identity cannot be established; if a TCN endangers security of the country, public order, public health or rights and freedoms of others; or if conditions for application of detention are met.[77] Such a regulation does not fully comply with the Directive since the last ground is not supported by its text. The police authority when considering determination of the period for voluntary departure in decision on administrative expulsion is directly establishing whether there are reasons for detention of a foreigner. Only if reasons for detention are not established, a period for voluntary departure can be determined, thus this does not favour the application of voluntary return. However, it should be noted that conditions of detention shall be examined in a separate procedure on detention and detention can only be applied as a last resort after consideration of less coercive measures. System, which does not provide opportunities for application of any alternative measures on the scale between voluntary and forced return according to Art. 7 (3) of the Directive and its effective preference of voluntary return are therefore questionable.[78]

Conclusions

- Preference of voluntary return to forced removal is generally implemented in the legislation and practice of the three countries analysed. However, two of the countries limit the application of the voluntary return in a manner, which

[75] Decision of the District Court of Švenčionys Region in administrative case No. A-616-617/2014 of 19.05.2014.
[76] Slovak report, Chapter 2.2.
[77] Section 83 (2) of the ASF.
[78] Slovak report, Chapter 2.2.

is not compatible with the principles of the Directive. **Lithuania** limits it by exclusion of persons who come to Lithuania irregularly, while **Slovakia** grants voluntary return period as an option and if detention is not applicable.

- Art. 7(1) and (2) of the Directive are fully transposed in the **three countries** and only Lithuania uses measures provided in Art. 7(3). Practice shows that minimum time limits are assigned in **Lithuania** and the test of "*specific circumstances of the individual case"* for extension of voluntary departure period is applied more restrictively.
- Art. 7(4) of the Directive are fully transposed in **Latvia**, while **Lithuania** has opted to use it only partially. Among concerns are access to voluntary return programmes for detained TCNs (**Lithuania**), prohibiting police from determination of period for voluntary return if grounds for detention are found and positioning assisted voluntary return as discretion of the police rather than a right of individual (**Slovakia**).
- Voluntary return programmes are not sufficiently promoted in the three countries, as evidenced by low numbers of returnees, they suffer from a lack of funding and sustainability, and are not usually prioritized in the national EU funds' programming. Where support for voluntary return is granted it is focused on assisted voluntary return, but does not cover individual support (**Slovakia**), nor persons who have come in irregular manner (**Lithuania**).

CHAPTER III.
Return decision and the right to stay/ Exceptions of return decisions

International and European standards

The Return Directive shall be implemented in line with the 1989 United Nations Convention on the Rights of the Child[79] (hereafter – CRC), where the principle of the "best interests of the child" is recognized as a primary consideration in dealing with all aspects related to children. CRC prohibits any discrimination on the basis of the status of a child as being unaccompanied or separated, or as being a refugee, asylum-seeker or migrant.[80] While the term "best interests" broadly describes the well-being of a child, it is not possible to give a conclusive definition of what is in the best interests of the child, as this depends on a variety of individual circumstances, such as age, level of maturity of the child, presence or absence of parents, the child's environment, etc.[81] However, some international institutions have elaborated helpful guidelines, providing for principles to be followed in order to ensure best interests of a child.[82] In addition, the Directive takes into account the principle of non-refoulement as enshrined in the 1951 Geneva Convention Relating to the Status of Refugees and the jurisprudence of the European Court of Human Rights (hereafter – ECtHR) and other human rights bodies. In addition, the family and health considerations shall be taken into account, as ECtHR held in exceptional cases that very serious health considerations or the need to preserve the family life shall prevent expulsion. Art. 5 of the Return Directive provides for several basic principles, which should be taken into account when implementing the Directive: 1) the best interests of the child; 2) family life; 3) the state of health of TCN concerned, and 4) respect to the principle of non-refoulement. The latter is included also in Art. 9(1)(a) of the Directive, requesting that a removal shall be postponed when it would violate the principle of non-refoulement. During the period for which removal has been postponed, as well as during the whole period for voluntary departure granted, the Directive in its Art. 14(1) determines

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79 Recital 22, the preamble of the Directive.

80 Committee on the Rights of the Child, *General Comment No. 6 (2005) Treatment of unaccompanied and separated children outside their country of origin*, p. 8. See the use of "best interests" in: UNHCR, *Guidelines on Formal Determination of the Best Interests of the Child*, Provisional Release, May 2006, p. 40.

81 UNHCR, *Guidelines on Determining the Best Interests of the Child*, May 2008, p. 6.

82 Committee on the Rights of the Child, *General Comment No. 6 (2005),* p. 9.

that several principles are taken into account as far as possible in relation to third-country nationals: 1) family unity with family members present in their territory is maintained; 2) emergency health care and essential treatment of illness are provided; 3) minors are granted access to the basic education system subject to the length of their stay; 4) special needs of vulnerable persons are taken into account.

Best interests of the child, family life, state of health and non-refoulement

> **Return Directive, Article 5**
> When implementing this Directive, Member States shall take due account of:
> (a) the best interests of the child;
> (b) family life;
> (c) the state of health of the third-country national concerned, and respect for the principle of non-refoulement.

In all three countries Art. 5 of the Directive is transposed in the legislation or implemented in the case law. In **Latvia**, according to the Immigration Law, the authorities, when deciding to extend the time period of voluntary departure, take into account the circumstances of each case, in particular – duration of stay, family or social ties, minor child who attend a school in Latvia.[83] In **Lithuania**, the Aliens' Law provides that in taking a decision on return or removal the following circumstances need to be taken into account:[84]

1) the period of the third-country national's lawful stay in the Republic of Lithuania[85];
2) the third-country national's family relationship with persons residing in the Republic of Lithuania;
3) the third-country national's social, economic and other connections in the Republic of Lithuania[86];
4) type and extent of dangerousness of the committed violation of law.

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[83] Immigration Law, Section 43 (2).
[84] Article 128 (1) of the Aliens' Law.
[85] The wording of Article 128 (1) point 1 of the Aliens' Law, which has come into force since 1 March 2015. From now on: the period of the third-country national's stay in the Republic of Lithuania.
[86] The wording of Article 128 (1) point 3 of the Aliens' Law, which has come into force since the 1 March 2015. From now on: the third-country national's social, economic and other ties in the Republic of Lithuania, also whether a person has minor children who attend school in the Republic of Lithuania under the formal education programs.

In Slovakia, the Foreigners' Act provides for taking into consideration of private and family life, health status and other vulnerabilities in procedure on administrative expulsion.[87]

References to the principle of best interest of the child can be found in the national legislation on protection of children in all three countries.[88] Specific references to this principle in immigration legislation and removal process is found in **Latvia**, but it only concerns UAMs.[89] In **Lithuania**, the Aliens' Law does not provide for a general requirement to take account of the best interests of the child in the context of return. However, the implementing legislation establishes several provisions following from this principle. The principle is also reflected in the case law of the administrative courts of Lithuania.

Example of case-law
When evaluating a decision whereby a citizen of Vietnam with a minor child who were illegally staying in Lithuania were imposed an obligation to depart from Lithuania, the Supreme Administrative Court of Lithuania stated that <...> *The panel has evaluated the evidence contained in the case and states that the applicant's son N. M. D. T. who now is almost nine years old, learns at Klaipeda <...> elementary school. According to the applicant, he was born in Lithuania and has never been in Vietnam, in addition, his father has been issued a permit for temporary residence in Lithuania, and he lives here. It is obvious, that under such circumstances returning the applicant and her son to Vietnam may have an adverse effect on the applicant's son. <...>*

In **Slovakia**, the legislation and case law also contains the principle of the best interest of the child, which should guide all actions by all public authorities vis-à-vis the child. If a child of a minor age is found on the territory of Slovakia, police officer shall inform the closest office of social-legal care of children – local office of labour, social affairs and family. This notification obligation shall serve the purpose of supervision of the observation of the principle of the best interest of the child by the body responsible and trained for care for children.[90] According to the Slovak law, children under 18 years of age can be administratively expelled only if it is in their best interest.[91]

In **Latvia**, specific legal provisions with regard to family considerations exist in relation to extension of the time period for voluntary return where the authority may grant additional period up to one year, taking into account also family ties of the person.[92] In **Lithuania** the provisions related to ensuring the principle of respect

87 Section 83 (4) and (8) of the ASF.
88 Protection of the Rights of the Child Law of the Latvian Republic, Section 6; Slovak report, Chapter 2.5.; Art. 4 of the Law on Protection of the Rights of the Child of the Republic of Lithuania.
89 Immigration Law, Section 50^8 (1).
90 Slovak report, Chapter 2.5.
91 Section 83 (8) let. (a) of the ASF.
92 Immigration Law, Section 43 (2).

for **family life** are established in the Aliens' Law[93] and implementing legislation.[94] Therefore, when adopting decisions on return or removal of a TCN, on extending a period for voluntary departure[95] and on imposing an entry ban (shorter period is assigned), in **Lithuania,** protection of family life (family relationship with persons in Lithuania) should be taken into account. This obligation should be applied during the entire return procedure, not only in the process of deciding on return (removal), during detention, while organising and implementing removal, etc. The arguments that before adopting a return or removal decision the best interests of the child and the principle of family life should be taken into account are confirmed in the case law of Slovakia[96] and Lithuania,[97] which also takes into account Article 8 of the ECHR. Administrative practice is however ambiguous and decisions on non-removal are rarely based on this ground.

Example of shorter entry ban because of the family
Despite the TCN had lived in Lithuania for a long period of time (came to Lithuania in 1963), his mother, sister, as well as spouse, daughter who were Lithuanian citizens lived in Lithuania, he was removed from Lithuania. But due to family relations, a period of 1-month entry ban was fixed for him[98].

Example of case law
The courts referring to Art. 5(1) (b) and 6(1) of the Directive *state that "<...> When solving the issues on returning a TCN all significant factual circumstances including personal reasons related with protection of personal and family life, and the need to ensure the protection of the rights of minors have to be assessed in each individual case"; or: "In this case it is necessary to assess whether the relationship between the persons is close; whether the persons have created their home, the duration of their common life, and whether there are no circumstances which would deny the existence of factual family life.*[99]

In **Slovakia**, the application of these considerations may result in time period for voluntary departure being extended,[100] duration of the ban on entry shortened or

[93] Article 128 (1) point 2 of the Aliens' Law.
[94] Points 8.2, 11.2, 15.2, 19.2, 23.2, 27.2, 30.2, 34.2, 37.2, 42.2, 42.4 of the Procedure for Imposing Entry Bans; Order on Return, para. 43.
[95] Para. 43 of the Order on Return.
[96] Slovak report, Chapter 2.4.; Decisions of the Supreme Administrative Court of Lithuania in administrative cases: No A^{756}-2681/2012 of 03.09.2012; No A^{822}-486/2013 of 07.05.2013; No A^{662}-1041/2013 of 13.05.2013; No A^{756}-1242/2014 of 18.02.2014.
[97] Decisions of the Supreme Administrative Court of Lithuania in administrative cases: No. A^{756}-2681/2012 of 03.09.2012; No. A^{822}-486/2013 of 07.05.2013; No. A^{662}-1041/2013 of 13.05.2013; No. A^{756}-1242/2014 of 18.02.2014.
[98] Decision No. (15/5-3)1U-11 of the Migration Department of 05.02. 2013.
[99] Ruling of the Supreme Administrative Court of Lithuania in administrative case No. A^{662}-1041/2013 of 13.05.2013.
[100] Section 83 (1) of the ASF.

decision on administrative expulsion not taken at all.[101] Police authority shall not decide about administrative expulsion or about imposition of ban on entry to a vulnerable TCN, if such measures were disproportionate with regard to his private or family life, length of stay, health status, age and connections to the country of origin.[102] Like in Lithuania, in Slovakia also, police examines all these considerations throughout the entire decision-making process on administrative expulsion separately and independently of the asylum procedure.[103] If obstacles based on the non-refoulement principle arise after decision on administrative expulsion has been already issued, police cannot enforce decision until the obstacle exists. Police issues a document certifying the reason and time until which enforcement of decision has been postponed.[104] The legislation in **Slovakia** does not explicitly regulate obligation to postpone the implementation of decision (and issuance of the document) for reasons other than non-refoulement.

In **Latvia**, since the transposition of the Directive there have been only a few judgements of administrative courts concerning family ties/private life in return/removal procedures[105] or other judgements concerning immigration issues involving family life.[106] With regard to health situations, in **Latvia** the SBG is obliged to suspend the implementation of forced removal of the TCN for a specific period of time if the state of health of the foreigner prevents the implementation of forced removal.[107] In **Lithuania**, apart from legislation, health issues are also taken into account in the courts' practice.[108] In **Slovakia,** administrative expulsion and duration of the entry ban shall be proportionate to the state of health and age of a vulnerable TCN.[109] If a TCN developed a disease threatening public health after granting first residence in **Slovakia** and it happened later than 3 months from entry to Slovak territory, he is protected against forcible expulsion.[110]

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[101] *Ibid,* Section 83 (4).

[102] Section 83 (4) of the ASF.

[103] Slovak report, Chapter 2.4.

[104] *Ibid,* Section 84 (5), (6).

[105] Judgments of Administrative District Court: No. A420525512, 07.05.2014; No. A42025612, 07.05.2014; Judgment of Senate of the Supreme Court, No. SKA-311/2013 (A420540612), 06.09.2013.

[106] For example, concerning residence permit annulment or refusal to extend it or adopting an entry ban. Judgments of Administrative District Court: No. A420560512, of 05.11.2013; No. A420561412, of 28.12.2013; No. A420572312, of 03.07.2014; Judgment of Administrative Regional Court, No. A420412811, of 30.06.2014. Some important new judgments arising from cases before the transposition of the Directive: Judgment of Senate of the Supreme Court, No. SKA-546/2012 (A42631208), of 28.11.2012.

[107] The Regulations of the Cabinet of Ministers No.454 "Regarding Forced Removal of Third-country Nationals, Departure Document and the Issue Thereof", Paras. 20.1 and 20.2.

[108] Ruling of the Supreme Administrative Court of Lithuania in administrative case No. A822-486/2013 of 07.05.2013.

[109] Section 83 (4) of the ASF.

[110] Slovak report, Chapter 2.3.

Concerning the principle of non-refoulement, **Lithuania** and **Slovakia** mentions it as an "obstacle to expulsion".[111] In **Latvia,** the national law does not contain a clause that removal should be postponed if it would violate the principle of non-refoulement, however, the SBG is obliged to suspend the implementation of forced removal of a TCN for a specific period of time if the circumstances referred to in the Immigration Law are determined;[112] if expulsion is inconsistent with international commitments of Latvia.[113] Due to lack of practice the interpretation of these provisions of the Immigration Law remain unclear, but the **Latvian** Ombudsman's Office expressed its concerns with regard to possible violations of the principle of non-refoulement.[114]

Exceptions of return decisions

Return Directive, Article 6 (2) and (3)
2. Third-country nationals staying illegally on the territory of a Member State and holding a valid residence permit or other authorization offering a right to stay issued by another Member State shall be required to go to the territory of that other Member State immediately. In the event of non-compliance by the third-country national concerned with this requirement, or where the third-country national's immediate departure is required for reasons of public policy or national security, paragraph 1 shall apply.
3. Member States may refrain from issuing a return decision to a third-country national staying illegally on their territory if the third-country national concerned is taken back by another Member State under bilateral agreements or arrangements existing on the date of entry into force of this Directive. In such a case the Member State, which has taken back the third-country national, concerned shall apply paragraph 1.

All three countries provide for possibilities in their legislation not to adopt a return decision in circumstances provided in Art. 6 (2) and (3) of the Directive. However, the transposition is deficient in **Slovakia** and **Lithuania** due to inconsistent regulation, while in **Latvia** its practical implementation is unclear despite transposition in the Immigration Law.[115] In **Lithuania** Art. 6 (2) of the Directive is implemented in the Aliens' Law[116] and in **Slovakia** – in the Foreigners' Act.[117] It should be noted that the logics of the Directive is immediate voluntary departure without issuance of the return decision. If compliance is not ensured, MS shall issue a return decision

[111] Section 81 (1) of the ASF.
[112] The Regulations of the Cabinet of Ministers No. 454 "Regarding Forced Removal of TCNs, Departure Document and the Issue Thereof", para. 20.3.
[113] Immigration Law, Section 47.
[114] Ombudsman of the Republic of Latvia, *Report of the Year 2012 of the Ombudsman of the Republic of Latvia*, Riga, p. 72.
[115] Section 42 (1).
[116] Articles 125 and 126 of the Law.
[117] Section 82 (13) of the ASF.

preferring voluntary return. In **Lithuania**, in case the foreigner does not depart to another MS, the removal decision would be immediately issued, contrary to this logics.[118] In **Slovakia**, the legislation does not safeguard return of a TCN to the country of residence and omits regulation of mandatory preference of request for immediate voluntary compliance with obligation to depart to the MS of residence before issuance of return decision in such case. With regard to implementation of Art. 6(3) of the Directive, **Lithuania** introduced this exception into its national legislation from 1 March 2015 only,[119] before it was not explicitly envisaged. However, the Aliens' Law provided that if international agreements of Lithuania provide different provisions than in the Law, provisions of international agreements would prevail.[120] Thus bilateral (readmission) agreements concluded by Lithuania and other MSs could have been directly applicable. In practice, TCNs are rarely transferred to EU MSs. More often TCNs are transferred to Lithuania.[121]

Return Directive, Article 6 (4)
Member States may at any moment decide to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory. In that event no return decision shall be issued. Where a return decision has already been issued, it shall be withdrawn or suspended for the duration of validity of the residence permit or other authorisation offering a right to stay.

All **three countries** include a possibility to grant a residence permit in case of non-return, but the practical implementation in all of them is constrained by the inconsistencies in legislation, practical obstacles (like the lack of travel documents or resources) or information on practical implementation is not available at all. In **Latvia**, the Immigration Law provides a list of other conditions, when the return decision is not issued. However, there are no legal norms providing for legalisation of the status and the rights of persons who cannot be returned. The head of the OCMA or an authorized official has a right, on humanitarian grounds, to take a decision to allow the foreigner to reside in Latvia for a specific period of time. In practice, there were only a few cases, when persons, including minors with their families, could not be returned because the states concerned refused to receive them; however, the removal

[118] Lithuanian report, Chapter 2.2.
[119] Article 125 of the Aliens' Law was supplemented with para. 3, which states that a return decision or obligation to leave Lithuania may not be adopted if according to the international agreements concluded by Lithuania on return of illegally staying TCNs (readmission agreements) illegally staying TCN is accepted by: EU Member State, if the agreement has come into force until 13 January, 2009, or country, which is not EU Member State.
[120] Article 144 of the Aliens' Law.
[121] Lithuanian report, Chapter 2.2.

orders were in force.[122] A lack of required documents has been a serious obstacle for acquiring the temporary residence permit for some foreigners in the return procedure in Latvia. According to the OCMA, a foreigner has the right to be granted a temporary residence permit only if he or she has a valid travel document (passport).[123] There were situations when persons, who were unable to obtain required documents from the embassies, including juveniles, were not granted the status of the stateless person and they were kept in detention for several periods of time, as their return was not possible. Such situation does not correspond to the Directive's principle "return or regularise", in particular as concerns the best interests of the child.[124] In cases, where the Immigration Law does not provide for granting a residence permit, a temporary residence permit may still be issued for up to five years: 1) by the Minister of Interior, if it complies with the state interests of Latvia; or 2) by the Head of the OCMA, if it complies with the norms of international law, or is related to reasons of a humanitarian nature.[125] According to the Latvian case-law, the reasons of a humanitarian nature should be understood narrowly by using the opposite arguments – weather a refusal to grant a residence permit would be inhuman, or would cause serious moral or physical suffering for the person concerned. The Supreme Court, when referring to the ECtHR's case law, has indicated that, in order to fulfil the criteria for the issue of a residence permit on humanitarian grounds, suffering due to the health condition should be very serious (strong pain or condition, which could lead to death in the nearest future).[126] Another option for obtaining a temporary residence permit is acquiring the status of a stateless person if a person is not a citizen of any state, as provided by the Law on the Stateless Persons.[127]

Practical application of this provision in **Lithuania** raises concern, as the provisions of the Aliens' Law require that the person applying for a residence permit shall be legally in the country.[128] The situation should be differentiated before and after 1 March 2015. Before this deadline, there was a possibility to issue a temporary residence permit in Lithuania in case where *the TCN could not be removed from Lithuania according to the procedure established by the Law or his removal from Lithuania has been postponed […].*[129] After 1 March 2015 amendment the Aliens' Law states specific reasons when residence permit can be issued, which means that residence permit is not issued in each and every case when a person cannot

[122] Latvian report, Chapter 2.3.2.
[123] Immigration Law, Section 4 (1). Judgement of the Administrative Regional Court, No. A420559910, Archive No. AA43-0867-13/17.
[124] Latvian report, Chapter 2.3.2.
[125] Immigration Law, Article 23 (3).
[126] The Judgement of the Supreme Court Senate, Case No. A42396507 (SKA-189/2009), 02.04.2009.
[127] According to OCMA, as of 01.01.2015, there were 180 stateless persons in Latvia.
[128] Article 28 (3) of the Aliens' Law.
[129] *Ibid,* Article 40 (1) point 8.

be returned. Currently, the specific reasons for non-removal and serving a basis for residence permit are as follows:

Reasons for residence permit in case of non-removal in Lithuania:

1. When unaccompanied minor cannot be returned to the country of origin;
2. When in the country of return (removal) the person may be subjected to persecution on the grounds of race, religion, nationality, political opinion or membership of a social group or may be tortured, i.e., on the grounds of the principle of non-refoulement;
3. When the third-country national is a victim of crimes related to trafficking of human beings;
4. When expulsion of the third country national is suspended for more than a year due to family relationship with the persons who live in Lithuania, social, economic and other connections with Lithuania, having under age children who attend school in Lithuania, nature and extent of the committed crime. These circumstances have not ceased during the year and the TCN is not detained.

After 1 March 2015, a person may not be returned or removed from Lithuania due to the circumstances specified above and a temporary residence permit should be issued. However, legal regulation is inconsistent and in one case it provides that after having determined the fact of inability of return (removal), the permit is issued immediately, while in other case – that the permit is issued after 1 year following the suspension of implementation of removal decision (i.e., in the cases where removal is impossible because of technical or objective reasons).[130] Thus it may happen that the persons whose removal has been suspended find themselves in an uncertain situation where they are neither removed nor receive a document confirming their stay in the territory of the country. In practice, issuance of residence permits in case of non-removal is rare. Worthwhile noting that issuance of residence permit when a person cannot be expelled due to technical reasons is not regulated at all.[131] Another concern relates to the procedure for issuing these permits. As already reported, a decision on return (removal) is not adopted, in case of family circumstances, period of legal stay, social or economic connections, principle of non-refoulement,[132] however, the procedure for granting temporary residence permits to these persons is not

[130] In accordance with Article 132 of the Aliens' Law: if third country to which he can be sent refuses to accept him; the TCN needs basic medical aid the necessity of which is certified by an consultative commission of doctors of a healthcare institution; he cannot be removed because of objective circumstances (the TCN does not possess a valid travel document, there is not possibility to obtain travel tickets, etc.).

[131] Lithuanian report, Chapter 2.3.

[132] Article 128 (1) points 1-3, Article 130 points 1-2 of the Aliens' Law.

regulated. A lack of clear regulation results in situations whereby the court cancels the return or removal decision, however, a permit is not issued.[133]

The principle of "return or legalise" in Lithuanian case law

<...> It is obvious that after having stated that the circumstances specified in Art. 128 (1) of the Aliens' Law are important in a specific case and determine that he will not be removed from Lithuania, his further stay in Lithuania will have to be legalised. <...> Such interpretation of the provisions of the Aliens' Law is also confirmed by the provisions of Art. 40 (1) point 8, which specify that a temporary residence permit may be issued or replaced to a TCN if he/she may not be removed from Lithuania in accordance with the procedure of this Law[134]

Another problem relates to extension of temporary residence permits, as Lithuanian by-laws require that before extension of the validity of the permit a TCN meets the conditions established by the laws. According to the Order on Issuance of Temporary Residence Permits,[135] he shall provide to the migration service various documents, including confirmation that the foreigner has sufficient financial means. Due to a lack of right to be employed or limited employment possibilities, these persons often do not have regular income or sufficient funds, thus are unable to present supporting documents as required. There are difficulties in leasing accommodation or acquiring health insurance, which are also required. Thus, on one hand, a person may not be removed, but on the other hand, as he is unable to present the documents required, a temporary residence permit may not be issued. In practice, permits are extended, thus the situation is less problematic than based on the laws.[136]

In **Slovak** law, there is a possibility for police to grant tolerated residence for a number of reasons (respect for private/family life, victim of trafficking, principle of *non-refoulement*, etc.). Police may also use the provisions on permanent residence without fulfilling the legal requirements required otherwise.[137] If conditions for any form of residence are met, decision on administrative expulsion shall not be issued at all. If it had been issued already, it shall be cancelled or postponed until conditions for residence are still fulfilled. The EU law preference of granting the residence permit, even if temporary, for humanitarian, compassionate or other reasons, over the

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133 Decision No (15/2-2-8K-K54)10K-29910 of the Migration Department of 10.10. 2012.

134 Decision of the Supreme Administrative Court of Lithuania in administrative case No. A^{858}-2332/2011 of 17.10.2011; decision of the Supreme Administrative Court of Lithuania in administrative case No. A^{756}-1242/2014 of 18.02.2014

135 Paras. 17 and 18 of the Order No 1V-329 of the Minister of the Interior of the Republic of Lithuania "On approval of the description of the procedure for submitting documents for a permit for temporary residence in the Republic of Lithuania and issuing, replacing, cancellation of permits for temporary residence in the Republic of Lithuania, as well evaluating whether the marriage or registered partnership agreement has been concluded, or a child has been adopted in order for a third-country national to obtain a permit for temporary residence in the Republic of Lithuania".

136 Lithuanian report, Chapter 2.2.

137 Section 46 (2) of the ASF.

decision on administrative expulsion is not sufficiently reflected in the Slovak return and migration policy and legislation. In practice, valid decision on administrative expulsion presents a substantial obstacle to obtain any form of residence in Slovakia, quite often despite family and private life. There have not been any measures adopted in Slovakia enabling legalization of stay of irregularly staying foreigners. Applications for residence are discouraged by legal prohibition of application for residence permit during asylum procedure, during detention[138] or during procedure on administrative expulsion,[139] as well as by legal requirement of submission of application for temporary or permanent residence at Slovak embassy abroad.[140]

Return Directive, Article 6 (5)
If a TCN staying illegally on the territory of a MS is the subject of a pending procedure for renewing his or her residence permit or other authorization offering a right to stay, that Member State shall consider refraining from issuing a return decision, until the pending procedure is finished, without prejudice to paragraph 6.

In **Lithuania**, the transposition of this provision is not complete, considering that the submission of request for a residence permit does not guarantee a possibility of stay pending the adoption of the decision. The legislation does not provide for such an exception. However, under the Order on Visas, TCNs who have submitted an application for issuing (amending) a permit for residence may be issued a national visa for the period of pending application.[141] In practice, return decisions are usually not adopted for TCNs who applied for extension of their permits, and only an administrative infringement protocol may be drawn and administrative penalty imposed for them.[142] Although the application for renewal or change of residence before its expiration extends authorized stay pending decision in **Slovakia**, irregularly staying TCNs are prevented from application for residence (exception is only for permanent residence of TCNs who are stateless or for reasons requiring special consideration).[143] No information on the implementation of this provision exists in **Latvia.**

[138] Section 31 (3), 44 (1), 59 (2) of the ASF.
[139] Proposal of amendment of Section 59 (2) of the ASF, which prohibits application for tolerated residence of a foreigner who is subjected to procedure on administrative expulsion.
[140] Slovak report, Chapter 2.4.
[141] Para. 66.101.
[142] Lithuanian report, Chapter 2.2.
[143] Section 46 (2) of the ASF.

Conclusions

- All three countries include considerations of the best interest of the child, family or health issues and non-refoulement in return and removal proceedings either directly in the legislation or implement it in the case law. However, in practice the application of these considerations is either ambiguous or raise concerns.
- All three countries provide in their legislation for possibilities not to adopt a return decision in circumstances provided in Art. 6(2) and (3) of the Directive. However, the legal regulation is inconsistent in Lithuania (removal decision is issued immediately if the foreigner fails to depart), Slovakia did not transpose Art. 6(2) correctly and does not regulate mandatory preference of immediate voluntary return to issuance of return decision, while practice in Latvia is unclear.
- All countries include a possibility to grant a residence permit in case of non-return, but the practical implementation in all of them is constrained by inconsistencies in legislation, practical obstacles (like a lack of required documents, legal residence or resources) or information on practical implementation is not available. In Latvia a possibility to regularise the status is left to the discretion of migration authorities.

CHAPTER IV.
Removal and postponement of removal

International and European standards

One of the aims of the Return Directive is to pursue the establishment of an effective removal and repatriation policy for persons to be returned,[144] therefore the TCNs who illegally stay in the territory of Member States, should be returned to the country of origin or another third country to which they have the right to enter and where they would be accepted. As already mentioned, the measures exercised under the Directive in respect of the TCNs who illegally stay in the territory of a MS must be implemented gradually from the mildest ones and only when it is ineffective, more restrictive measures should be used. Therefore, first of all, a period for voluntary departure should be granted, unless provision of such a period would be ineffective and not justified in order to reach the goals of the Directive. This may happen if a TCN's stay would constitute a threat to national security or public policy, there would exist a risk of absconding or his application for legal stay would be rejected as manifestly unfounded or fraudulent.[145] Meanwhile, if the TCN does not comply with an obligation to return within the period for voluntary departure, this obligation should be enforced according to Art. 8 (1) of the Directive.

In terms of removal of the TCNs who are illegally staying in the territory of a MS, an important aspect is criminalisation of illegal stay, which was analysed in several cases of the CJEU, first of all, in *El Dridi,* and later – in *Achughbabian*, *Sagor* and *Mbaye*. According to the CJEU, the Directive does not prohibit qualifying an illegal stay as a criminal misdemeanour and providing for criminal law sanctions in order to discourage from violation of the laws and to punish for that.[146] However, in case of situation provided for in Art. 8 (1) of the Directive, the obligation to apply removal from the country must be carried out as soon as possible. In practice, most likely, the MS, which has ascertained that a TCN stays illegally, before enforcing a return decision or even before adopting such a decision would carry out prosecution and impose a custodial sentence if necessary.[147] However, such a custodial sentence may jeopardise the attainment of the objective pursued by the Directive, namely, the establishment of an effective policy of removal and repatriation of illegally staying

[144] Recital 2, the preamble of the Return Directive; *El Dridi* case, para. 3.
[145] Article 7 (4) of the Return Directive.
[146] CJEU, C-329/11 *Achughbabian,* 6 December 2011, para. 28.
[147] *Ibid,* para. 45.

TCNs, if the decision on removal is not enforced.[148] Therefore, MSs may apply criminal responsibility to TCNs for illegal entry or stay on their territory, but this should not infringe on the purpose of the Directive – to ensure speedy removal of the foreigner from the EU territory.

In accordance with the Twenty Guidelines, states should seek cooperation with returnees, provide them with information about removal arrangements, opportunity to prepare for return, their fitness for travel shall be ensured through medical examinations.[149] Pursuant to Article 8(4) of the Directive and its interpretation by the CJEU,[150] Member States may use coercive measures only as a last resort, such measures have to lead in an effective and proportionate manner to return and may not exceed reasonable force. They have to be implemented as provided for in national legislation in accordance with fundamental rights and with due respect for the dignity and physical integrity of the TCN concerned. The use of force and its limitations are specified in the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials,[151] the European Committee for the Prevention of Torture (hereinafter – CPT) standards[152] and also in the Twenty Guidelines.[153] These international and European documents, together with the case law of the ECtHR,[154] contain guidelines on how to carry out removal under dignified conditions, without excessive use of force.

Although the Directive states that all necessary measures should be exercised in order to enforce a return decision, it also lays down certain criteria when a removal decision shall be postponed.[155] In some cases postponement of removal is mandatory, while in others it is left to the discretion of the MSs.[156] Mandatory postponement of removal is provided for: when it would violate the principle of non-refoulement, and for as long as the court's decision is suspended, while in other cases Member States may postpone removal for an indefinite period in accordance with the specific circumstances of an individual case. The circumstances, which have to be considered include: physical or mental state of the person; technical reasons, for instance, lack of transport resources or obstacles related to personal identification.

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148 *El Dridi* case, para. 59.
149 Guidelines No. 15-16.
150 *Achughbabian* case, para. 36.
151 27 August to 7 September 1990. See also: UN Code of Conduct for Law Enforcement Officials, 17 December 1979.
152 CoE, CPT Standards, CPT/Inf/E (2002) 1 – Rev. 2013.
153 Guidelines No. 15-19.
154 See for the overview of the ECtHR case law in: FRA, *Handbook on European law relating to asylum, borders and immigration*, 2014 edition, pp. 171-178.
155 Article 9 of the Return Directive.
156 *Ibid,* Article 9 (1) and (2).

Grounds for removal

Return Directive, Article 8(1)
Member States shall take all necessary measures to enforce the return decision if no period for voluntary departure has been granted in accordance with Article 7(4) or if the obligation to return has not been complied with within the period for voluntary departure granted in accordance with Article 7.

All three countries transposed this provision of the Directive, although in **Lithuania**, the principle of priority of voluntary return does not apply to irregular migrants. In **Latvia**, the Immigration Law generally complies with the Directive's principle that the national authorities may take a removal order if no period for voluntary departure has been granted[157] or if the obligation to return has not been complied within the voluntary return period.

Grounds for removal decision in Latvia

1. If certain circumstances exist[158]:
    1) the foreigner is hiding his or her identity, provides false information or refuses to co-operate in other ways;
    2) the foreigner has crossed the external border, avoiding border checks, as well as has used a forged travel document, forged visa or residence permit;
    3) the foreigner cannot indicate a place where he or she will reside until the end of the relevant removal procedure and submit the apartment or house owner's written confirmation of the commitment to provide accommodation or the foreigner is unable to show the amount of money which is sufficient to stay at the hotel until his expulsion;
    4) a competent State or foreign institution has provided information, which is the basis for considering that the foreigner threatens the State security, public order or safety;
    5) the foreigner is involved in promoting illegal immigration;
    6) the foreigner has been convicted of a criminal offence committed in the Republic of Latvia, for which the sentence intended is related to the deprivation of liberty for at least one year;
    7) the foreigner has previously avoided a removal procedure in the Republic of Latvia or in another Member State of the European Union;
    8) the foreigner has unjustifiably failed to execute the voluntary return decision;

[157] I.e., if there is a risk of absconding, if an application for a legal stay has been dismissed, or if a person concerned poses a risk to public policy, public security or national security.
[158] Immigration Law, Section 46 (1) and Section 51 (2).

9) the foreigner has unjustifiably failed to fulfill the specified obligation to register with the relevant unit of the State Border Guard;
10) the foreigner has previously arbitrarily left an accommodation center for detained foreigners or detention premises;
11) the foreigner has entered the Republic of Latvia, without complying with the decision on inclusion in the list or decision on prohibition to enter the Schengen territory.

2. If the Minister of Interior or the Minister for Foreign Affairs, in particular cases, stipulated in the law,[159] has taken a decision to forbid a foreigner's entry to Latvia;
3. If the Minister for Foreign Affairs decides that a foreigner is an undesirable person for the Republic of Latvia *(persona non grata)*.[160]

A removal order can also be issued to a foreigner, if those certain circumstances, mentioned under point 1 above, are detected after the issue of the voluntary return decision.[161] Before the transposition of the Directive, forced return of a minor was not provided for,[162] this was more favourable provision in respect to minors.[163] Yet, with the 2011 Immigration Law amendments, the law does not provide any exceptions with regard to removal orders for minors, including unaccompanied minors.[164]

Grounds for removal decision in Lithuania:[165]

1. Failure to comply with the obligation to depart from Lithuania within a set time period or failure to depart voluntarily from Lithuania within the time limit set in the return decision or when a period for voluntary departure has not been granted because there is a reason to believe that a foreigner may abscond;
2. Unlawful entry or stay in Lithuania if there are no grounds obliging the TCN to depart or return from Lithuania;

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[159] *Ibid*, Section 61 (1); Section 46 (5). In these cases, if the foreigner is located in Latvia, the SBG shall adopt a decision on removal in eight days.

[160] *Ibid*, Section 61(2), Section 46 (5).

[161] *Ibid*, Section 46 (2).

[162] *Ibid,* Section 48.[2] Reading of the Immigration Law of 15.06.2011. However, a specific "sending" procedure was in place (without consequences and formal procedure of a forced removal). Immigration Law, Section 59.[6] Reading of the Immigration Law of 15.06.2011.

[163] In the proposed amendments to the Draft Directive, the Committee on Development even proposed that the best interests of the child dictate that the expulsion of UAMs be prohibited. European Parliament, *Report on the proposal for a directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (COM(2005)0391 – C6-0266/2005 – 2005/0167(COD))*, 20 September 2007, p. 47.

[164] Immigration Law, Section 50.[8]

[165] Article 126 (1) of the Aliens' Law.

3. Foreigner's stay in Lithuania constitutes a threat to national security or public policy;
4. A decision has been made to remove a TCN from another state where the Council Directive 2001/40/EC applies.

The legal acts of Lithuania do not provide for a possibility to adopt an immediate decision on removal of a TCN without granting a period for voluntary departure, if a TCN's application for legal stay has been rejected as manifestly unfounded or fraudulent. However, legal acts do not allow TCNs who came illegally to depart voluntarily except vulnerable persons and asylum seekers. Meanwhile, the court has not adopted yet a single decision on removal of a TCN on the ground of a threat to national security or public policy.[166] A specific problem exists in Lithuania with regard to criminalization of persons for irregular entry. Even though the Criminal Code of Lithuania provides for release from responsibility for irregular border crossing when the foreigner is removed from Lithuania, in practice, the authorities charge irregular migrants with criminal offences, which results in a legal situation where even return decision cannot be taken.[167] This practice may be considered as incompatible with the purposes of the Directive, as it unduly hampers the implementation of return of a foreigner.[168]

In **Slovakia**, the Foreigners' Act distinguishes between mandatory and optional decision on administrative expulsion[169] and no separate decision on removal is issued, but legal order regulates situations in which police authority ensures enforcement of the return decision.

Grounds for removal in Slovakia:

1. If the administrative expulsion decision did not contain determination of the time period for voluntary departure or if a TCN not travelled out of territory of Slovakia within the time period for voluntary departure;[170]
2. If a foreigner crossed the external border without authorization or intentionally avoided or refused to undergo border control after having crossed the external border, also if he was staying on the territory of the Slovak Republic irregularly;
3. If return is taking place under readmission agreements;[171]

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166 Lithuanian report, Chapter 2.3.

167 According to para. 9 of the Order on Return a decision imposing an obligation to depart, return or removal may not be adopted if a measure of suppression, which restricts his right, to depart from Lithuania has been imposed.

168 Lithuanian report, Chapter 2.3.

169 Section 82 of the ASF.

170 *Ibid*, Section 84.

171 *Ibid*, Section 84 (1) let. f).

4. If a foreigner cannot travel out of the country himself, because he possess either no financial resources or no valid travel document.[172]

On the contrary, police would not enforce decision, if it is not possible to obtain a valid travel document, maximum duration of detention was exhausted and departure of a foreigner is impossible to implement or if a TCN applied for AVR before enforcement of the decision.

Return Directive, Article 8 (3)
Member States may adopt a separate administrative or judicial decision or act ordering the removal.

Two of the analysed countries (**Lithuania** and **Latvia**) transposed this provision, while **Slovakia** opted not to issue a separate removal decision. In **Latvia**, the removal order is an administrative act.[173] In **Lithuania**, a decision on removal is also formalized by a separate act[174] (administrative or court decision[175]). After the expiration of the period for voluntary departure a decision on removal is adopted, thus removal may not be implemented under the return decision. Removal decision shall be enforced immediately, unless there are circumstances allowing for the suspension of its enforcement.[176] In practice, decisions on return of a TCN when the obligation to depart voluntarily was not complied with are adopted by the Migration Department within quite a short period of time (1-5 days of even on the same day[177]), whereas it takes longer to adopt a decision when a person has come illegally.[178] There is no separate decision on removal being taken in **Slovakia**, because removal in terms of Slovak legal order is understood as enforcement or execution of a decision on administrative expulsion and is carried out in the abovementioned situations.

[172] *Ibid.*
[173] Immigration Law, Section 1 (5^2).
[174] Article 127 (1) point 5.
[175] If a person is removed because of a threat to national security or public policy, Vilnius Regional Administrative Court decision would be issued, Article 127 (5) of the Aliens' Law.
[176] Article 127 (2) of the Aliens' Law.
[177] Decisions of the Migration Department: No. (15/5-3)1U-31 of 02.04.2013; No. (15/5-5)1U-95 of 01.08. 2013; No. (15/5-3)1U-82 of 29 .04.2014; No. (15/5-3)1U-88 of 12 .05.2014.
[178] Lithuanian report, Chapter 2.3.

Use of force during removal procedure

Return Directive, Article 8 (4)
Where Member States use — as a last resort — coercive measures to carry out the removal of a TCN who resists removal, such measures shall be proportionate and shall not exceed reasonable force. They shall be implemented as provided for in national legislation in accordance with fundamental rights and with due respect for the dignity and physical integrity of the third-country national concerned.

This provision is not transposed in **Latvia** and the foreigners' legislation in **Lithuania** and **Slovakia** (norms exist in the general legislation applicable to the use of force by police). In **Latvia**, there are no legal norms providing that coercive measures are used as a last resort and the principle of proportionality should be observed, as well as that removal should be carried out taking into account foreigner's dignity and physical integrity.[179] National law refers to the EU legal acts, including security provisions for joint removals by air,[180] as provided by Art. 8 (5) of the Directive. Although the SBG affirms that the use of coercive measures is included in the training programme of officials, which work in convoying, the Immigration Law would benefit from transposition of this provision. The Ombudsman's Office has not established any violations during monitoring of the first five actual removals in 2013 – 2014 and no restraint measures were used.[181]

In **Lithuania**, there are no provisions on the use of coercive measures in the legislation on foreigners. Certain provisions can be found in the Procedure for Organizing Escorts,[182] which provides that an escort team may exercise reasonable and proportional measures in case of direct and serious danger in order to prevent a TCN subject to return from escaping, injuring himself or a third person or causing damage to property, and has the right to use handcuffs or restraining measures. Removal monitoring results show that no coercive measures were used in practice by the FRC in the cases observed.[183] General provisions established in the legislation

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[179] The use of coercive measure is regulated by the Border Guard Law, adopted on 27.11.1997, in force from 01.01.1998, Section 17. More specifically the measures of restraint and their use are regulated in the Regulations of the Cabinet of Ministers No.55 „Regarding the Types of Special Means and the Procedures for the Use Thereof by Police Officers and Border Guards" of 18.01.2011, in force from 28.01.2011.

[180] The Regulations of the Cabinet of Ministers No 454 "Regarding Forced Removal of Third-country Nationals, Departure Document and the Issue Thereof", para. 13.

[181] Latvian report, Chapter 2.2.2.

[182] Para. 27 of the Procedure for Organising Escorts of Lithuania.

[183] LRCS. Report *'Monitoring the removal of third-country nationals'* of 12 June 2014 (non-public); LRCS. Report *'Monitoring the removal of foreigners'* of 26 April 2014 (non-public); LRCS. *A Compilation of Practice of Lithuania Implementing Return and Removal of TCNs,* 2012, point 15; LRCS. *Presentation of results of removal monitoring: return and removal standards and their practical implementation in Lithuania,* 2013.

regulating activities of the police and SBGS officials are also applicable for the use of coercive measures, which also seems to be the case in Slovakia. In **Slovak Republic**, the legislation allows a police officer to use handcuffs during police transportation of a foreigner through the territory of Slovakia to the border of the neighbouring country, according to the Act on Police Force. The law is satisfied with the mere need to transport a foreigner; it does not explicitly require further conditions of aggression, resistance, or other illegal or threatening behaviour of a foreigner or risk of absconding. Neither does the law require prior request for voluntary compliance and warning about the use of handcuffs, if the request is not complied with.[184] The Act on Police Force also regulates other situations of use of force, but it does not specifically refer to TCNs.

Postponement of removal

Return directive Article 9 (1), (2)
1. Member States shall postpone removal:
(a) when it would violate the principle of non-refoulement, or
(b) for as long as a suspensory effect is granted in accordance with Article 13(2).
2. Member States may postpone removal for an appropriate period taking into account the specific circumstances of the individual case. Member States shall in particular take into account:
(a) the third-country national's physical state or mental capacity;
(b) technical reasons, such as lack of transport capacity, or failure of the removal due to lack of identification.

In **Latvia**, these requirements are only partially implemented: removal shall be suspended due to state of health of the TCN or technical reasons, or delayed issuance of the travel document,[185] but the laws do not provide for suspensive effect of appeals.[186] Also, the national law does not include non-refoulement clause, but suspension of removal is envisaged if expulsion is inconsistent with international commitments of the Republic of Latvia.[187] In **Lithuania** and **Slovakia** the principle of non-refoulement is mentioned as an "obstacle to expulsion", which temporarily postpones removal.[188] In **Lithuania**, removal may be postponed in case of appeal (unless no suspensive effect is provided for state security and public policy reasons); refusal to accept a foreigner by the country of return; need of medical aid; objective reasons preventing

[184] Slovak report, Chapter 2.4.
[185] The Regulations of the Cabinet of Ministers No. 454 "Regarding Forced Removal of TCNs, Departure Documents and the Issue Thereof", paras. 20.1-20.2.
[186] Latvian report, Chapter 2.2.3.
[187] The Regulations of the Cabinet of Ministers No. 454, Para. 20.3; Immigration Law, Section 47.
[188] Article 128 (2), Articles 130, 139 of the Aliens' Law, points 57, 60, 61 of the Order on Return (Lithuania). Section 81(1) of the ASF (Slovakia).

removal (e.g. no travel document[189]); non-refoulement; reflection period for victim of trafficking.[190] In **Slovakia,** a TCN would be protected against forcible expulsion if he developed a disease threatening public health after being granted first residence in **Slovakia** and it happened later than 3 months from his entry to the Slovak territory.[191] There is also a possibility to suspend the removal in case of appeal,[192] due to age, private and family life or length of stay in Slovakia (but for vulnerable TCNs only).[193]

Among the concerns in this area in **Lithuania**, firstly, situations provided by the Order on Return[194] could be mentioned. Foreigners quite frequently agree with the removal decision and agree to be removed prior to the end of the period of appeal, which entitles the authorities to remove the person. It should be noted that TCNs usually sign such a consent in Lithuanian language. Considering this, doubts may raise about the individual's true will to sign the consent. Secondly, postponement of removal in case of need of medical care is possible only on the basis of conclusion of medical commission, while detained TCNs live in the centre where only family doctors and available and their certificate is not fit for this purpose.[195] Thirdly, the possibility to suspend removal for technical reasons is possible only if the identity is established, otherwise removal decision cannot be taken. Fourthly, the principle of non-refoulement is embodied in the law, but no obligation to postpone removal exists in this connection in the laws, as well as it would not be taken into account after removal decision has been adopted. The same situation applies to the reflection period granted to victims of trafficking. In **Slovakia** there are concerns about making exceptions to suspensive effect at the border, thus Art. 9 (1) of the Directive is not fully observed. Also, Art. 9 (2) is not transposed fully, since legislation does not bind the police to take into account technical reasons, such as lack of transportation ability or lack of identification.

Conclusions

- Legal regulation established by the **three countries** on removal of foreigners generally complies with the requirement to take every necessary step in order to implement a return decision established by the Directive, Art. 8(1) and (2) is transposed. However, **Lithuanian** practice on prioritization of criminal prosecution for illegal entry instead of return/removal procedure

[189] Article 128 (2) points 1-4 of the Aliens' Law.
[190] *Ibid,* Article 130.
[191] Slovak report, Chapter 2.3.
[192] Section 55 of the Administrative Procedures Code.
[193] Section 83 (4) of the ASF.
[194] Para. 59 of the Order on Return.
[195] Lithuanian report, Chapter 2.3.

and imposition of sanction – arrest and custodial sentence, may raise an issue of compatibility with the objectives of the Directive and the CJEU case law, as it may unduly hamper the implementation of return of foreigners.

- Art. 8 (3) of the Directive is transposed in legislation of the **two countries**, as removal decision is adopted as a separate act (administrative or judicial), while **Slovakia** does not adopt a separate decision on removal, but enforces decision on administrative expulsion if not complied with voluntarily.
- The use of coercive measures is regulated by the general legislation on police powers in **two of the countries**, and is not transposed in **Latvia**. In **Slovakia**, the safeguards of necessity and proportionality for using handcuffs during transportation of a foreigner through the territory are not established, which may raise concerns with regard to requirements of the Directive and the ECtHR case law. **Lithuania** regulates the proportionality and reasonableness in the use of coercive measures only in the Procedure for Organising Escorts and general legislation on police powers.
- Art. 9 (1)(b) of the Directive is partially implemented in all of the countries. In **Lithuania** stricter requirements are applied for postponement of removal in case of need for medical aid, while the procedure for postponement of removal in case of non-refoulement and victims of trafficking is not regulated. Suspensive effect is not provided in **Latvia**, while exceptions to it at border procedures may raise concerns in **Slovakia**.

CHAPTER V.
Return and Removal of Children

International and European standards

While the CRC does not contain any specific provisions on expulsions, the Committee on the Rights of the Child has adopted a detailed General Comment on the treatment of unaccompanied and separated children outside their country of origin, which addresses the subject. States parties should not return a child to a country "where there are substantial reason to believe that there is a real risk of irreparable harm to the child, such as, but by no means limited, to those contemplated under Art. 6 and 37 of the Convention."[196] The Return Directive and the Twenty Guidelines[197] provide that before issuing a return decision UAMs shall be provided with assistance. When referring to assistance, the guideline specifically mentions legal assistance. Other assistance could cover: temporary guardianship, accommodation services, education, health care, and social services. The right to education irrespective of the status shall be guaranteed to all children.[198] Pursuant to Art. 28 of the CRC, free primary education should be made available to all children. There is also an increasing agreement on the need to ensure the right of all children to secondary education, as confirmed by the recent ECtHR case law. The ECtHR has stated that education is a particular social right where stricter scrutiny applies in the assessment of the proportionality of the discrimination based on "nationality" or "immigration status".[199]

The Directive requires and the PACE recommends to assure contacts with family members in the country of origin, minors must be accompanied on the return journey, and reception in the country of origin must be organised.[200] The reception needs shall

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[196] Committee on the Rights of the Child, *General Comment No. 6* (2005), para. 27; Art. 6 protects the right to life and Art. 37 deals mainly with the prohibition of torture and other cruel, inhuman or degrading treatment and the right to liberty and security of the person.

[197] Guideline No. 2 (5).

[198] CoE, *Resolution on the Human Rights of Irregular Migrants (Resolution 1509 (2006))*, para. 13.6. Committee on the Rights of the Child, *General Comment No. 6*, p. 14; Article 14 of the EU Fundamental Rights Charter; Article 2 of Protocol No. 1 of the ECHR; Article 14 and Protocol No. 12, Article 2 of Protocol No. 1; ECtHR, *Timishev v. Russia*, Application No. 55762/00 and 5597400, Judgment of 13 December 2005.

[199] ECtHR, *Ponomaryovi v. Bulgaria,* Application No. 5335/05, Judgment of 21 June 2011, para. 49; ICJ, *Practitioners Guide on Migration and International Human Rights Law*, Updated edition 2014, p. 261.

[200] PACE, *Voluntary return programmes: an effective, humane and cost-effective mechanism for returning irregular migrants*, 10.6.1.

include reintegration assistance together with possible education and other support for the minor and possible income generation support for the family of the minor.[201]

In order to benefit from assistance before return decision is taken, persons need to be treated as minors. Thus, age assessment procedures are very important. However, such procedures should be undertaken as a measure of last resort when doubts that the person is older than 18 are supported by objective circumstances.[202] Furthermore, such age assessment, according to the Committee on the Rights of the Child, "should not only take into account the physical appearance of the individual, but also his or her psychological maturity [..]".[203] The main international and European standards on age assessment could be summarized as follows: 1) physical integrity of the child should not be violated, 2) the individual benefits the doubt, 3) the methods shall respect human dignity and be least invasive, 4) evaluation is done by a multidisciplinary panel (of qualified professionals), 5) a guardian should be appointed before the proceedings, 6) the individual shall be informed on the method and possible consequences, 7) there should be clear provisions on the procedures accessible to the public, 8) there is a possibility to challenge the decision.[204]

Assistance to UAMs and best interest of the child principle

Return Directive, Article 10 (1)
Before deciding to issue a return decision in respect of an unaccompanied minor, assistance by appropriate bodies other than the authorities enforcing return shall be granted with due consideration being given to the best interests of the child.

All three countries consider as minors persons who are below the age of 18 years, while UAM is a person who has arrived to the territory unaccompanied by parents or any other legal guardian or who has come accompanied but has been left

[201] *Ibid*.

[202] Jakulevičienė, L., Siniovas V., *Methodology on Identification of Vulnerable Asylum Seekers and Work with Them*. Vilnius 2014, p. 43.

[203] Committee on the Rights of the Child, *General Comment No. 6 (2005)*, p. 11.

[204] See, for example: UNHCR, Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, 22 December 2009, para. 75; the Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures for granting and withdrawing refugee status contained equal prerequisites, Article 17; EC, Communication from the Commission to the European Parliament and the Council. *Action Plan on Unaccompanied Minors (2010 – 2014)*, 6 May 2010; Separated Children in Europe Programme (SCEP), p. 11; Position Paper on Age Assessment in the Context of Separated Children in Europe, 2012; European Asylum Support Office (EASO), Age Assessment Practice in Europe, December 2013; FRA, *Separated, asylum-seeking children in European Union Members States — Comparative* report, 2011, pp. 53-55.

unattended.[205] The best interests of the child principle is analysed in Chapter III of this Report, thus is not separately covered here.

Lithuania and **Slovakia** have certain restrictions on expulsion of minors. In **Lithuania**, removal of UAMs is not possible, these minors may only be returned to the country of origin, i.e., when the obligation to return is carried out voluntarily.[206] In addition, return may be applicable only in limited cases where certain conditions are met, like where the availability of appropriate care is established and person's needs, age and the level of self-dependency in the third country to which he is returned is taken into account.[207] In addition, decision on return is adopted if UAM has a valid travel document, his parents or other lawful representatives are found or consent of the state authority in charge of care of children to accept the UAM is obtained.[208] The law obliges the state authorities to cooperate with third-countries and IOs under international agreements concluded for solving the issue regarding return of UAMs.[209] This cooperation translates to concrete obligations to organize a search of family members when information about UAM is received by the Migration Department.[210] In **Slovakia**, administrative expulsion of minors is overall prohibited by the law, except if this is in the interest of a child. In **Latvia**, legislation before transposition of the Directive was more favourable and contained a prohibition of return of minors, but no similar references exist in the current laws.

UAMs shall be provided with assistance before return. In **Latvia**, UAMs are accommodated in childcare institutions and receive the necessary health care free of charge.[211] In **Lithuania**, UAMs irrespective of the legality of their stay are guaranteed accommodation, healthcare (problematic in practice), social services, free legal assistance (but not in practice) and a possibility to attend secondary and vocational schools and to contact NGOs or IOs.[212] Refugee Reception Centre plays the main role in provision of assistance to UAMs[213] and is usually appointed as their guardian.[214] The minor shall be placed under temporary guardianship (curatorship) within 3 days.[215] One of the problems faced in Lithuania is that the order on accommodation of UAMs is not well regulated, thus they are placed in the RRC only when the court

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[205] Art. 2(16) of the Aliens' Law of Lithuania; Section 50^8 of Immigration Law; Section 2 letter (a) (3.) of the Act No. 305/2005 on Social-Legal Protection of Children and Social Guardianship.
[206] Lithuanian report, Chapter 2.4.
[207] Art. 129 (1) of the Aliens' Law.
[208] Para. 22 of the Order on Return.
[209] Art. 129 (3) of the Aliens' Law.
[210] *Ibid,* Article 32 (3).
[211] Latvian report, Chapter 2.2.3. b).
[212] Article 32 (2) of the Aliens' Law.
[213] *Ibid,* Article 79 (5).
[214] *Ibid,* Article 32 (1).
[215] Article 3.250 (2) of the Civil Code.

adopts a decision on application of alternative measure to detention.[216] Also in **Slovakia** UAMs are placed into institutional care irrespective of legality of their stay and the court decision on placement shall be taken within 24 hours.[217] Court later appoints the Office of Labour, Social Affairs and Family as a custodian or a guardian of UAM. Foster home for UAMs ensures medical health checks. UAMs are consulted in order to determine the best solution for them and interpretation is ensured.[218]

Guarantees of return to adequate reception facilities

> **Return Directive, Article 10 (2)**
> Before removing an unaccompanied minor from the territory of a Member State, the authorities of that Member State shall be satisfied that he or she will be returned to a member of his or her family, a nominated guardian or adequate reception facilities in the State of return.

With regard to guarantees, required by the Directive before return of a minor can take place, only **Lithuania** and **Latvia** included such guarantees in the legislation. **Lithuania** provides for more favourable treatment in the legislation as compared with the requirements of the Directive, as it establishes stricter requirements for quality of reception upon return. In **Latvia,** if UAM shall be returned, the SBG has an obligation to communicate with the relevant institutions or NGOs, which monitor the rights of children in this state and ensure the handing over of the UAM to a family member, legal representative of parents, representative who monitors the observance of the rights of children, or a representative of the institution, which ensures placing of the child in a suitable accommodation.[219] Also, in case of forced return, the SBG can accompany the minor to the place of residence or a specialised institution in the country of destination.[220] When taking a decision on convoying the minor, the authority shall evaluate whether there is a need to hand him over to one of the mentioned persons/institution.[221] In the period of 2011-2014, 3 decisions on forced return of UAMs were adopted in Latvia (all in 2014) and they were returned together with their relatives or acquaintances. No return decisions for UAMs have taken place until the end of 2014.[222] While in **Lithuania**, if parents or other lawful representatives of UAM are found, the Refugee Reception Centre shall be notified, which, having as-

[216] Point 3 of Art. 15(2) of the Aliens' Law.
[217] Section 75a of the Act No. 99/1963 Coll. Civil Procedure Code.
[218] Section 50 of the Act No. 305/2005 on Social-Legal Protection of Children and Social Guardianship.
[219] Immigration Law, Section 508 (3).
[220] The Regulations of the Cabinet of Ministers No.454 "Regarding Forced Removal of TCNs, Departure Document and the Issue Thereof", para. 11(4).
[221] The Regulations of the Cabinet of Ministers No. 454, para. 12(6).
[222] Latvian report, Chapter 2.4.3.

sessed the best interests of the child, draws a recommendation on transfer of UAM to parents or other lawful representatives.[223] If return is in the best interests of the child, the RRC must send the case to police for decision on return to be taken.[224] Considering this regulation, it may be stated that the provisions in relation to return of minors in Lithuania are more favourable if compared with the Directive. Firstly, the Aliens' Law sets forth strict requirements for quality of reception – that a minor will be duly taken care of taking into account his needs, age and self-dependence level, while the Directive does not directly fix any preconditions. Secondly, there is no possibility to return a child to a reception institution. Return is only possible to a state institution in charge of care or protection of children.[225] In **Slovakia**, administrative expulsion of a minor is possible only if it is in his interest. However, legislation does not provide specific instructions and guarantees for case of return of UAMs.

Age assessment

Age assessment procedures are carried out in all three countries, but the legal regulation is far from sufficient, while the application of limited methods of age assessment makes the systems in two of the countries deficient. In **Slovakia**, the age assessment procedure may prevent them from effective enjoyment of freedom from detention.[226] In **Latvia**, there are no legal provisions on age assessment, but in practice it is ordered.[227] A relevant legal document is the one regulating procedures for court forensic expert-examination.[228] There is no reference to other state authorities, except parties involved in criminal or civil proceedings and the court itself, which are authorized to request for such an expertise.[229] The Forensic Centre uses a normative enactment "Age assessment method",[230] which is not publicly available.[231] The expertise (age assessment) is to be made by a commission, consisting of radiologists and dentists[232] and consists of the person's inquiry (interview) and a visual inspection of the person,[233] besides, an X-ray of the skeleton has to be made.[234] There are certain

[223] Order on UAMs, para. 26.
[224] *Ibid*, para. 27.
[225] Lithuanian report, Chapter 2.4.
[226] Slovak report, Chapter 2.5.
[227] Latvian report, Chapter 2.4.2.
[228] The Regulations of the Cabinet of Ministers No. 51 "Procedures for the performance of court forensic expert-examination" of 06.02.2001, in force from 10.02.2001, para. 18.
[229] *Ibid*, para. 18 (2).
[230] No. 2-20/VTMEC-1/336 of 7 February 2013, adopted by the Council of Forensic Experts.
[231] "Age assessment method" No. 2-20/VTMEC-1/336 of 07.02.2013., Section VI and Section VIII, 2.1.
[232] *Ibid,* Section VIII, 1.2.
[233] *Ibid,* Section VIII, 2.4., 2.5., 2.6.1.
[234] *Ibid,* Section VIII, 2.6.3.

guarantees: 1) the inquiry cannot be made in an interrogative manner,[235] 2) that inspection of minors is to be carried out in presence of parents, psychologists, social workers,[236] 3) all results have to be in written form,[237] 4) to be carried out by highly qualified physicians,[238] 5) the experts have to undergo internal tests of skill and regular training or qualification.[239] However, there are also a number of shortcomings: 1) there is no specific procedure for detecting whether the person is of age, i.e., not a minor;[240] 2) no provisions regulating situations when the age of the person is not clear and ensure the dignity of the person; 3) no rules for contesting the results of the examination.[241]

In **Lithuania,** provisions on age assessment are in the Aliens' Law.[242] UAMs who are staying in irregular manner and have not submitted an application for asylum or residence do not fall under the Aliens' Law provision on age assessment,[243] but under the Order on Unaccompanied Minors of 23 April 2014 in case of doubts about the age, an age assessment examination may be carried out also for them.[244] Examination is carried out with the consent of UAM, or on a basis of a court decision. Before giving the consent, information of the purpose, possible outcomes to health and legal consequences of the examination should be provided to UAM in a language that he can understand. However, the procedure does not envisage the participation of a representative and is very swift (the official must address the respective healthcare institutions within 48 hours at the latest[245]), thus the consent expressed by UAM may raise doubts as to its legal validity. The authorities have to apply the presumption that the person is a minor. The necessity of appointment and participation of a guardian has also been confirmed by the Ombudsman for the Rights of Child on 19 December 2013.[246] The only method used in Lithuania is an X-ray examination, thus could be of concern, as also expressed by the Ombudsman: *the requirement to assess the mental*

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235 *Ibid,* Section VIII, 2.4.3.

236 Section 2.5.4. However, this provision is unclear. It does not contain reference to guardians and it is not clear whether the presence of psychologists and social workers is cumulative. Besides, it is also unclear whether assisting persons for a minor participate in the interview or only (as is written at the moment) during the inspection.

237 Section VIII, 3.2.

238 Section XI, 1.

239 Section XI, 4. and 5.

240 The Method contains a disclaimer that the age could be determined only roughly – for children and teenagers with precision of 1-2 years, for adolescents – 2-3 years and for older persons – 5-10 years, Section IX.

241 Latvian report, Chapter 2.4.2.

242 Article 123 of the Aliens' Law.

243 *Ibid,* Article 123 (1).

244 Paras. 12-18 of the Order on UAMs.

245 *Ibid,* Point 13.

246 Note No. (6.1.-2013-141)-PR-253 of the Ombudsman for the Rights of Children of the Republic of Lithuania of 19 December 2013.

maturity during age assessment as well (as a part of a complex examination) remained (and remains) unimplemented, […]. In addition, the provisions on age assessment do not establish a requirement to consider the individual's ethic origin, cultural particularities, and that the examination would be performed by professionals with appropriate expertise and familiarity with child's ethnic and cultural background.[247] The procedure for age assessment for UAMs could be considered as incompatible with the principle of ensuring the best interests of the child. Foreigners´ Act in **Slovak Republic** provides that if age of a person claiming to be a minor is in question, age assessment shall be conducted, provided no other means exist. Age assessment for the purpose of asylum procedure is regulated more favourably in the Asylum Act, however, in most cases the Migration Office uses the age established by the police. The main concern is presumption of majority, followed by a lack of appointment of a custodian/guardian, lack of complex methodology and professionals with appropriate expertise, as well as effective remedy. The method used in general is X-ray of wrist bones, based on which radiologist issues expert opinion.

Education

Access to education for children irrespective of their legal status in the country is provided for both in **Latvia** and **Lithuania**. In **Latvia,** this right was introduced with the amendments to the Education Law in 2010 (the right to acquire basic education for free).[248] UAMs residing in a childcare institution attend the educational institution according to their physical and mental development.[249] There is no specific legal act, however, regulating how the access to education for children pending return should be organized (only available for asylum seeking children).[250] There is a need to have certain documents,[251] but in practice, no major problems for children in detention were identified,[252] except that in 2014 education was not provided to minors from

[247] Lithuanian report, Chapter 2.4.

[248] Law on Education of 29.10.1998, in force from 01.06.1999, Section 12 (5). In Latvian legislation there are four levels of education defined: 1) pre-school education; 2) basic education; 3) secondary education; and 4) higher education. See: Education Law, Section 5 (1).

[249] The Regulations of the Cabinet of Ministers No. 707 "Procedures by which Alien Minors Enter and Reside in the Republic of Latvia Unaccompanied by Parents or Guardians", para. 25.

[250] The Regulations of the Cabinet of Ministers No. 149 "Regarding the Procedures for Enrolment of Students in and Discharge from General Educational Institutions and the Mandatory Requirements for Moving Them up into the Next Grade" of 28.02.2012, in force from 09.03.2012.

[251] Para. 5 (1) of the general legal act requests that a child has the personal identity number, which children pending return/removal normally would not have. Besides, para. 7 (1) requests that there is a document confirming education acquired (if any) or, in case has been issued in another state, a decision on recognition of education document shall be shown.

[252] Information obtained during the LCHR monitoring visit to the detention centre „Daugavpils" on 11.06.2014.

Vietnam due to language barrier.[253] **Lithuania** establishes a right of UAMs to learn at secondary and vocational schools,[254] irrespectively of the legality of their stay.[255] In practice, all UAMs who live in the RRC attend local school. The **Slovak** Act on Schools[256] extends the right to education to children of foreigners with legal residence in Slovakia, children of asylum seekers and to UAMs. In case of children of irregularly staying TCNs, legislation ensures their access to education in detention places only. TCNs below 15 years of age have access to leisure activities, including games and recreation, and education, if detention lasts longer than 3 months.[257] In case of TCNs who are not placed in detention (alternatives to detention or under voluntary departure period or registered in the AVR programme), Slovakia does not facilitate access to education.

Conclusions

- **Lithuania** and **Slovakia** have certain restrictions on expulsion of minors and also provide for assistance to UAMs before a decision on return is taken. Despite provisions in the law, legal aid to UAMs in practice is not available in **Lithuania**, while in **Slovakia** access to professional legal aid for UAMs is replaced by appointment of custodian/guardian and lack of funding affects access to interpretation. Legal regulation in **Lithuania** on accommodation of UAMs on the basis of a court decision as an alternative to detention is not appropriate.
- **Lithuanian** and **Latvian** legal acts ensure access to education for children irrespective of their legal status pending return, but **Latvia** guarantees access to basic (primary) education only. This may not be in line with the developing standards of international human rights law to make secondary education accessible to all children without any discrimination. **Slovakia** guarantees access to education only for foreign children with legal status and those detained, provided their detention is longer than 3 months.
- Only **Lithuania** and **Latvia** included guarantees before return of a minor in legal acts. More favourable treatment as compared with the Directive exists in **Lithuania**, as it establishes stricter requirements for quality of reception upon return.

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253 Latvian report, Chapter 2.4.4.
254 Article 32 (2) point 2 of the Aliens' Law.
255 Order No. ISAK-789 of the Minister of Education and Science "On implementation of education of children of TCNs who have come for working or living to the Republic of Lithuania in secondary schools", points 1 and 2.
256 Section 146 of the Act No. 245/2008 Coll. on Schools.
257 Section 96 (2) of the ASF.

- Age assessment procedures in **all of the countries** may not be considered appropriate due to application of limited methods, lack of legal representatives in these procedures and lack of requirement to consider the individual's ethnic origin, cultural particularities, and the examination to be performed by professionals with appropriate expertise and familiarity with the child's ethnic and cultural background.

CHAPTER VI.
Entry bans

International and European standards

An entry ban prohibits individuals from entering a state from which they have been expelled. The ban is typically valid for a certain period of time and ensures that individuals who are considered dangerous or non-desirable are not given a visa or otherwise admitted to enter the territory.[258] Since the ban may have been predicated on a situation, which was specific to the state that issued it, questions sometimes arise as to the proportionality of a Schengen-wide ban, particularly if other fundamental rights are involved, such as when reuniting a family. Entry ban is defined in Article 3(6) of the Return Directive as administrative or judicial decision, or act prohibiting entry and stay on the territory of the MSs for a specified period, accompanying a return decision. Art. 11 (1) of the Directive establishes obligatory and optional grounds for imposing an entry ban. The ban should normally not extend beyond five years. This has been confirmed by the CJEU in *Filev and Osmani* case concluding that the MSs are under an obligation to limit the effects in time of any entry ban in principle to a maximum of five years independently of an application made for that purpose by the relevant TCN.[259] In addition, the ECtHR has held that entry bans may infringe on Art. 8 of the ECHR if not proportionate or necessary in a democratic society,[260] or if no effective means of obtaining withdrawal of an entry ban are available.[261]

Implementation

Return Directive: Article 11 (1)
Return decisions shall be accompanied by an entry ban:
(a) if no period for voluntary departure has been granted, or
(b) if the obligation to return has not been complied with.
In other cases return decisions may be accompanied by an entry ban.

Legal regulation on entry bans is ensured in all the three countries in compliance with the Directive. However, some deviations from the Directive's provisions exist and thus more favourable provisions are also available. For instance, in **Latvia**, upon issuing a return decision the authorities (the OCMA and the SBG) have discretionary

[258] FRA, *Handbook on the law on borders, asylum and immigration*, p. 30.
[259] CJEU, C-297/12, *Filev and Osmani*, 19 September 2013, paras. 27, 34, 39-41.
[260] ECtHR, *Nada v. Switzerland*, Application 10593/08, Judgment of 12 September 2012, paras. 198-199.
[261] *Ibid*, para. 213.

power to decide on application of an entry ban in case the foreigner has not complied with a return decision, therefore providing more favourable legislation.[262] The authorities are left with discretion in a number of occasions.[263] Both the return decision and a removal order contain inclusion of the TCN in the list (i.e., national entry ban) and the entry ban into the Schengen territory,[264] if it is detected that the TCN has entered Latvia illegally and no circumstances for residence exist.[265] There are situations when entry bans are not applied because of serious illness.[266]

A good practice in Latvia is not to apply the entry ban in certain categories of cases, for example, to minors.[267]

In **Lithuania**, provisions on entry bans reflect the Directive.[268] A TCN may be subject to entry ban for a period not exceeding 5 years. Mandatory imposition of an entry ban is applicable in case of removal from Lithuania.[269] Art. 11(1) is implemented also in legislation of the **Slovak Republic**. Entry ban is always imposed in case a period for voluntary departure is not given.[270] Also, it shall be a mandatory part of the decision on administrative expulsion, if a foreigner did not comply with his obligation to depart voluntarily, unless already previous decision contained part on entry ban.

In Latvia, entry bans can be applied by the OCMA, the SBG or Director of the Consular Department or a diplomatic official of the representation who is authorised to perform consular functions.[271] Other institutions, like the MFA or the MOI could also authorise it in certain situations. In Lithuania, a decision on entry ban is adopted by the Migration Department on its own initiative or the proposal of another institution (a list of bodies is wide, e.g.: police, the SBGS, the MFA, and others).[272] A copy of a decision on entry ban shall be sent via registered post to the TCN. The obligation to inform individuals of a decision on entry ban follows also from the case law of the Supreme Administrative Court of Lithuania. As the right of appeal is provided by the Aliens Law,[273] the court considers that the applicant should be aware of the

[262] Immigration Law, Sections 44 (1) and 61(4) and (5.) Statistics on entry bans see: EMN, *Good practices in the return and reintegration of irregular migrants: Member States' entry bans policy and use of readmission agreements between Member States and third countries. A Study from the European Migration Network, 2014,* p. 15.
[263] Immigration Law, Section 46 (3) and Section 61 (4), (5).
[264] *Ibid*, Section 4 (3).
[265] *Ibid*, Sections 41 (5) and 46 (4).
[266] Latvian report, Chapter 2.6.2.
[267] Immigration Law, Section 46 (3).
[268] Article 133 of the Aliens' Law.
[269] *Ibid,* Art. 133 (2).
[270] Section 77 (1) of the ASF.
[271] Immigration Law, Section 61(2), (3).
[272] Article 133 (5) of the Aliens' Law.
[273] Article 136 of the Aliens' Law.

decision in order to exercise the right of appeal.[274] The grounds for imposing the ban as an obligation are expanded in Slovakia besides those covered by the Directive. If a foreigner has not travelled out of the country on the last day of his authorized residence,[275] entry ban is up to discretion of police authority and if imposed, shall be in duration of one year. In other situations, the entry ban is optional. Special situation is when decision on administrative expulsion relates to AVR – it does not contain an entry ban. In this case, decision on administrative expulsion determines the time limit for AVR, but does not contain any ban on entry.[276]

The grounds for imposing entry bans in the three countries:

Grounds	Latvia	Lithuania	Slovakia
No period for voluntary departure has been granted (Directive)	X	X	X
The obligation to return has not been complied with (Directive)	X	X	X
Visa, residence permit was refused, revoked	X	X	X
Served the punishment in the country	X		X
Violated procedures for entry or residence	X	X	X
Other	X	X	X

Return Directive, Article 11 (2)
The length of the entry ban shall be determined with due regard to all relevant circumstances of the individual case and shall not in principle exceed five years. It may however exceed five years if the third-country national represents a serious threat to public policy, public security or national security.

The duration of entry bans in the three countries is very different, ranging from 30 days to 3 years in Latvia, from 1-10 years in Lithuania and Slovakia. The duration in **Latvian** legislation is thus more lenient than in the Directive. However, the Latvian legal acts do not contain specific criteria for determining the length of entry bans. The authorities claim that the following circumstances are taken into account: the cause of the violation and its circumstances, the circumstances mitigating or aggravating the liability, violation of the Immigration Law in previous border crossings, and the subjective attitude of the foreigner. No statistics on the length of entry bans is available.[277] In **Lithuania**, determination of periods is specified in the Order on

[274] Decision of the Supreme Administrative Court of Lithuania in administrative case No A631745/2010 of 03.01.2011.
[275] Section 82 (2) let. n) of the ASF.
[276] Section 82 (9) of the ASF.
[277] Latvian report, Chapter 2.5.1.

Imposing Entry Bans of 14 April 2014, which establishes the criteria to be taken into account in this respect. The list of criteria is determined individually taking into account whether a return or removal decision has been adopted and the grounds for such decisions. In accordance with this Order, the ban periods range from 1 to 3 years and are shortened in case of family members in Lithuania. With regard to situation of *threat to the state security and public policy*, the national legislation departs from the provisions of the Directive, as it provides just for a threat to the state security or public policy, while the Directive mentions a serious threat, thus a higher threshold for applying provision[278] (emphasis added). Rejected asylum seekers and those returned or removed could be imposed entry bans ranging from 1 to 2 years if their asylum application was considered as manifestly unfounded, repetitious, or if they constitute a threat to state security or public policy.[279] No entry ban is imposed in case of voluntary return with the assistance of IOs or NGOs. In line with Art. 11(2) of the Directive, the length of entry ban is determined with due regard to all relevant circumstances of the individual case (but this is not applied in practice) since 1 March 2015.[280] On one hand, the Order on Entry Bans determines that a decision to impose an entry ban is adopted taking into account: current family, social, economic and other relations of a TCN in Lithuania; duration and reasons of illegal stay; previous obligation to depart or return; illegal departure or refusal/cancellation of a visa. On the other hand, the provisions of this Order show that determination of periods is fixed to specific periods (e. g., 1 year, 3 years, etc.).[281] More discretion is left only in case of failed asylum seekers or persons granted asylum. In addition, the case law of Lithuania recognizes that the duration of an entry ban should be determined *inter alia* considering the facts of illegal border crossing and misuse of the procedure. The courts are of the opinion that the duration of an entry ban should be determined in accordance with the principles of reasonableness and proportionality.

Case law on duration of bans

The decision to impose a ban to enter Lithuania for the applicant has been adopted in view of the fact that the applicant has violated the procedure for entering into the territory and misused the asylum procedure. The court holds that the fact that the applicant was seeking to take advantage of the asylum procedure for other purposes than the ones for which it had been developed, allows stating that the applicant has misused the asylum procedure, and the fact that the applicant has crossed the state border illegally is confirmed by evidence of the case, therefore it should be stated that the Department has imposed the ban for entering Lithuania reasonably, and the court holds the period of two years fully reasonable and proportionate[282].

Vilnius District Administrative Court

[278] Lithuanian report, Chapter 2.5.

[279] Order on Entry Bans, points 44-45 and 47-48.

[280] Article 133 (5) of the Aliens' Law.

[281] Lithuanian report, Chapter 2.5.

[282] Decision of Vilnius District Administrative Court in administrative case No I-1874-629/2013 of 28.02.2013.

In **Slovak Republic**, the duration of entry ban may be usually from 1 to 5 years.[283] The law provides for specific regulation on minimum and maximum time limits based on different actions of the foreigner. For example, if reasons for administrative expulsion were irregular border crossing, intentional avoiding of the border control, irregular stay, presenting a threat to security of state, public order or to public health, concluding a marriage of convenience, cancellation or revocation of a visa, submission of false, incomplete or misleading information, ban on entry may be from 1 to 5 years based on police discretion. 10 years ban can also be imposed, which is beyond the maximum duration provided by the Directive, but it relates to a serious threat to state security and public order, thus is considered as compatible with it. The law provides for a possibility to impose an entry ban with shorter duration than the one suggested by the legal framework.[284] Decision on application of an entry ban is also governed by general rules of the Administrative Procedures Code, therefore must be individual, considering all the circumstances of the case. Decision shall be based on properly established facts of the case and it shall be reasoned.[285]

Return Directive, Article 11 (3)
Member States shall consider withdrawing or suspending an entry ban where a third-country national who is the subject of an entry ban issued in accordance with paragraph 1, second subparagraph, can demonstrate that he or she has left the territory of a Member State in full compliance with a return decision.
Victims of trafficking in human beings who have been granted a residence permit pursuant to Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities shall not be subject of an entry ban without prejudice to paragraph 1, first subparagraph, point (b), and provided that the third-country national concerned does not represent a threat to public policy, public security or national security.
Member States may refrain from issuing, withdraw or suspend an entry ban in individual cases for humanitarian reasons. Member States may withdraw or suspend an entry ban in individual cases or certain categories of cases for other reasons.

Withdrawal of entry bans is possible in **Latvia**, but legal regulation differs from the provisions of the Directive. The legislation provides that decision on prohibition to enter the Schengen territory or reduce the time period prohibiting entry[286] may be adopted, but there is no obligation to do that – Latvian legislation provides for a discretionary power in comparison with the imperative in the Directive. Withdrawal or suspension of the entry ban is possible if the circumstances for issue of administrative act have changed, including contradictions to Latvia's international

[283] Section 82 (3) of the ASF.
[284] Section 83 (4) of the ASF.
[285] Slovak report, Chapter 2.6.
[286] Immigration Law, Section 44 (3).

obligations, or on humanitarian grounds.[287] The entry ban is not included in the voluntary return decision in Latvia if the TCN has been recognised as a victim of trafficking in human beings or has been involved in facilitating irregular immigration and has co-operated with state institutions.[288] Legislation on entry bans in **Latvia** does not contain a specific reference to proportionality, except general Administrative Procedure Law.[289] In principle, the proportionality and justification of entry bans is ensured by the possibility to appeal the initial decision to a higher authority and later in the court, including via the cassation procedure of the Supreme Court.[290] In practice, it could be seen that in some cases the authority has taken into account the human rights of the foreigner.[291] The authorities state that no entry bans are applied to minors, persons who have not seriously violated the rules of residence in Latvia and to persons who have violated the rules of residence due to health problems, besides, it always evaluates family and private life aspects, as when the foreigner has parents or other close family members in Latvia.[292] The Supreme Court concluded that even if the authority does not have discretionary power to decide whether or not to issue an entry ban, it has to take into account the person's right to family life. Therefore the authority, upon issuing any administrative act, has to evaluate whether it does not disproportionally restrict person's fundamental rights.[293] No case law of the administrative court is available on direct appeals against entry bans since the implementation of the Directive (June 2011) until end of 2014. Latvian legislation does not provide for a direct challenge of entry bans, although the return/removal order could be contested partially as provided by the Administrative Procedure Law.[294] Usually, it is contested as part of the whole return decision/removal order. In the period from second half of 2011 to end of 2014 the period of an entry ban has been reduced or revoked in 38 decisions.[295]

Withdrawal and shortening of entry bans in **Lithuania** is regulated only by the bylaws – the Order on Entry Bans and Resolution No 436 of the Government,[296] while

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[287] *Ibid*, Section 49.

[288] However, this condition does not apply to a third-country national who poses a threat to the state security, public order or safety. Immigration Law, Section 44 (2).

[289] Administrative Procedure Law, Section 13 and 66.

[290] Immigration Law, Sections 50 and 50.[1]

[291] For example, a long term previous stay in Latvia and strong ties with it was a prerequisite of not applying an entry ban or – a person in need of an additional therapy after the operation was spared of the imposition of an entry ban.

[292] Latvian report, Chapter 2.5.2.

[293] Judgments of Senate of the Supreme Court, No. SKA-89/2007 of 08.03.2007, p. 5; No. SKA-409/2007 of 25.10.2007, p. 6.

[294] For example, Administrative Procedure Law, Section 78 (2)(2) and Section 184 (1)(1).

[295] Latvian report, Chapter 2.5.2.

[296] Resolution No 436 of the Government of the Republic of Lithuania "On approval of Rules for creating and managing the list of TCNs who are prohibited from entering the Republic of Lithuania" of 20 April 2005, point 16.

suspension of entry bans is not envisaged. A decision on withdrawing or shortening an entry ban in each case should be made duly taking into account the entirety of all circumstances related to a specific case. As of 1 March 2015, an exception to an entry ban is included in the Aliens' Law.[297] It covers foreigners, who were expelled from Lithuania because had not left the country within the period assigned or had not voluntarily departed within the time limit set in the return decision, if had been issued temporary residence permit as victims of human trafficking and do not pose threat to state security or the society. However, the legislation of Lithuania does not provide for an explicit possibility to withdraw or shorten an entry ban period when the person is able to establish that he has departed from Lithuania in full compliance with a return decision. Art. 11(3) of the Directive thus has not been fully implemented.[298] On the contrary, Art. 11(3) of the Directive is transposed into **Slovak** legislation. It provides that if a foreigner who was administratively expelled can show he departed from Slovakia within the time period determined in the decision on administrative expulsion or if he departed within the programme of assisted voluntary return, the MOI may abolish the ban on entry.[299] While the Slovak legislation is generally scarce on criteria for decision making on abolishing the ban, it states that when deciding about abolishment of entry ban or about allowing entry to Slovakia, police do not apply general rules of the Administrative Procedures Code. This means that they do not issue a regular decision in case of refusal to abolish a ban or allow entry. These decisions are fully in discretion of police authority and cannot be reviewed by appeal body or court.[300] In addition, the MOI may allow entry of a foreigner, despite he had been imposed an entry ban, and if the purpose of his planned stay is for humanitarian reasons.[301] The possibility to allow entry of a foreigner who had already been banned entry to Slovakia, for exceptional reasons can be understood as a prerogative of the state, rather than the right of a foreigner. However, as the decision on abolishment of the ban may affect the rights and duties of an individual, the general principle on issuing proper decision in such procedure shall be followed. Therefore, it would be important to provide for normal administrative procedure on abolishment of entry ban.[302] With regard to victims of human trafficking, the provisions of the Directive are transposed in the Foreigners' Act in **Slovakia**, which provides that a foreigner who was a victim of human trafficking and is older than 18 years of age shall be granted a tolerated residence, while first 90 days are granted to him as a contemplation period.[303] The legislation does not specifically prohibit imposition of entry bans to victims of

[297] Article 133 (2^2) of the Aliens' Law.
[298] Lithuanian report, Chapter 2.5.
[299] Section 86 (1) of the ASF.
[300] Slovak report, Chapter 2.6.
[301] Section 86 (2) of the ASF.
[302] Slovak report, Chapter 2.6.
[303] Section 58 (2) let. c) of the ASF.

trafficking. When deciding about administrative expulsion of vulnerable persons or foreigners with residence in Slovakia, police shall consider if the consequences of the ban would not be disproportional to private and family life, length of stay in Slovakia, health state, age and connection to the country of origin.[304]

Conclusions

- All three countries provide for a possibility of entry bans in their legislation, and more favourable standards exist in **Latvia**. However, there is a lack of criteria for determining the duration of entry bans in the **Latvian** legislation, and a possibility of unlimited ban for Latvia could raise concerns in the context of ECHR obligations. In **Lithuania**, the legislation departs from Art. 11(2) of the Directive as it provides for a lower threshold of threat to state security or public policy.
- Directive's provisions on withdrawal of entry bans are partially implemented in the three countries. In **Latvia**, the withdrawal and suspension is a discretionary power in comparison with the imperative in the Directive. Legislation is scarce on withdrawal and shortening of entry bans in **Slovakia** and **Lithuania**, there are no criteria for decision-making or grounds. Since the rules of administrative procedure do not apply to withdrawal of entry ban in **Slovakia**, no regular decision is issued and no appeal is available. In **Lithuania**, no explicit legislative possibility exists to withdraw or shorten an entry ban period when the person is able to establish that he has departed from Lithuania in full compliance with a return decision.

[304] Slovak report, Chapter 2.6.

CHAPTER VII.
Procedural Guarantees

International and European standards

In the context of procedural guarantees, three rights are of particular relevance in case of return: a) right to information; b) effective remedy; c) legal assistance. The right to information on the reasons for expulsion is covered by the effective remedy requirements in Art. 13 of ICCPR, Art. 13 of the ECHR and Art. 1 of Protocol 7 of ECHR, which lists procedural safeguards relating to expulsion. Access to information requires a right to submit reasons for expulsion, and the ECtHR has found violations of Art. 13 if these reasons were not communicated to aliens (due to their formalistic nature);[305] violations of Article 1.1(a) Protocol 7 were also found.[306] The Twenty Guidelines also provide that the removal order should be addressed in writing to the individual or his representative, or sent by registered mail.[307] Also, the authorities are encouraged to indicate the bodies from which further information may be obtained concerning the execution of the removal order and the consequences of non-compliance with the removal order.[308] In accordance with Art. 12 (1) of the Return Directive, decisions adopted in the context of return have to be adopted in writing, by specifying factual and legal reasons for such decisions. Information of factual reasons may be limited only for the purposes of national safety, defence, public safety and prevention, investigation, determination and prosecution of criminal acts. These decisions need to be translated to the foreigner concerned. The CJEU has confirmed that the statement of reasons on which a measure is based shall state the reasoning of the institution[309] and this requirement is related to the effectiveness of judicial review.[310]

With regard to effective remedy, it is agreed internationally that the remedy must be prompt, effective, accessible, impartial, independent, enforceable, and lead to

[305] ECtHR, *C.G. and Others v. Bulgaria*, Application No. 1365/07, Judgement of 24 April 2008, ECtHR, *M.S.S. v. Belgium and Greece* [GC], Application No. 30696/09, Judgement of 21 January 2011.

[306] ECtHR, *Nolan and K. v. Russia*, Application No. 2512/04, Judgment of 12 February 2009. For more detailed analysis see: ICJ, *Migration and International Human Rights Law.* p. 154; FRA, *Handbook on European Law Relating to Asylum, Borders and Immigration*, pp. 95-115.

[307] Guideline No. 4.

[308] CAHAR, *Comments to the Twenty Guidelines*, Guideline No. 4 (2).

[309] CJEU, C-439/11, *P. Ziegler v. Commission*, 11 July 2013, para. 115.

[310] CJEU, C-300/11, *ZZ v Secretary of State for the Home Department,* 4 June 2013, paras. 65-69.

cessation of or reparation for the human rights violation concerned.[311] The ECtHR also requires in expulsion cases that: (a) access to case documents and information on the forthcoming legal procedures be available; (b) translated material and interpretation in case of need; (c) effective access to legal advice and, if necessary, to legal aid; (d) the right to participate in adversarial proceedings; (e) reasons for the decision to expel.[312] The right to effective remedy before impartial body, which has the power to review the removal order and suspend the execution of removal is also provided in the Twenty Guidelines.[313] In the EU, Art. 47 of the EU Charter of Fundamental Rights requires that: *"Everyone whose rights […] are violated has the right to an effective remedy before a tribunal […]. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice."*[314] The European Commission (hereafter – EC) has been concerned that in most EU MSs, the foreigner has to apply for the suspensive effect, which can be rejected by the judge.[315] Thus, although the Return Directive does not impose the obligation of the MSs for automatic temporary suspension of the enforcement of return decisions,[316] the CJEU has held that the Directive read together with Art. 19(2) and 47 of the Charter of Fundamental Rights shall be interpreted as requiring suspensive effect of appeal.[317]

The right to free legal assistance, in particular where the person to be removed does not have sufficient financial means for necessary legal assistance is provided by the Twenty Guidelines.[318] Paragraph 11 of the preamble of the Directive emphasizes that a common minimum set of legal safeguards on decisions related to return should be established to guarantee effective protection of the interests of the individuals concerned. The necessary legal aid should be made available to those who lack sufficient resources. The ECtHR also pronounced in *Suso Musa v. Malta*, that in some cases a lack of free legal aid may raise an issue of accessibility to a remedy (detention

311 ICJ, *Migration and International Human Rights Law*, p. 147.

312 *Ibid*, p. 168.

313 Guideline No. 5.

314 For detailed analysis on effective remedy see: FRA, *Handbook on European Law Relating to Asylum, Borders and Immigration*, pp. 99-102; pp. 109-113.

315 EC, *Communication from The Commission to the Council and the European Parliament on EU Return policy*, p. 23.

316 The authority or body mentioned in paragraph 1 shall have the power to review decisions related to return, as referred to in Article 12 (1), including the possibility of temporarily suspending their enforcement, unless a temporary suspension is already applicable under national legislation (Article 13 (2)).

317 CJEU, C-562/13, *Abdida*, 18 December 2014, para. 53.

318 CAHAR, *Comments to the Twenty Guidelines,* Guideline No. 5.

case).[319] In practice, extending legal aid subject to conditions of Art. 15 (3) to (6) of the Directive reduces the effectiveness of remedies in many EU MSs and is a reason of a low numbers of appeals of return decisions, as pointed out by the EC.[320]

Access to information

> **Return Directive, Article 12 (1)**
> Return decisions and, if issued, entry-ban decisions and decisions on removal shall be issued in writing and give reasons in fact and in law as well as information about available legal remedies. The information on reasons in fact may be limited where national law allows for the right to information to be restricted, in particular in order to safeguard national security, defence, public security and for the prevention, investigation, detection and prosecution of criminal offences.

In all three countries decisions are adopted in writing and in principle have to state the facts and the law, as well as notify about available legal remedies, thus comply with the requirements of the Directive. In **Latvia**, the amendments to the Immigration Law in 2011 included an obligation of the national authorities, upon issuing the return decision or the removal order, to provide information regarding the nature of the violation, the decision on entry ban into the Schengen territory, the procedures for contesting the decision, etc.[321] Although the law does not explicitly require that the return decision or the removal order give reasons in fact and in law, but mentions "the nature of the violation", while in practice, the OCMA has provided such reasons with references to the law and facts.[322] The return decisions also include information on the consequences of non-compliance with the decision.[323] In **Lithuania**, based on legal regulation, decisions on return, removal of TCNs or entry bans should be always adopted in writing, without any exceptions for this requirement. As these decisions are individual administrative acts, their adoption is governed by the general public administration legislation, which provides that an individual administrative act has to be supported by objective data (facts) and legislative norms, and the measures of impact applied should be substantiated. This act should clearly formalize the obligations imposed or rights granted.[324] The Order on Returns also establishes requirements for decisions.[325] A return decision is adopted by supporting it with the

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[319] ECtHR, *Suso Musa v. Malta,* Application 42337/12, Judgment of 27 July 2013, para. 61.
[320] EC, *Communication from The Commission to the Council and the European Parliament on EU Return policy*, p. 23.
[321] Immigration Law, Section 41 (5), Section 46 (4).
[322] Latvian report, Chapter 2.6.1.
[323] Immigration Law, Section 46, para 1, Section 51, para 2(8).
[324] The Law on Public Administration of the Republic of Lithuania No. VIII-1234 of 17 June 1999, point 8 (1) and (2).
[325] Point 30 of the Order on Return.

factual circumstances determined and by the legal norms.[326] A decision for suspending the enforcement of a removal decision is substantiated with the factual circumstances determined and the legislation.[327] No separate requirements for a decision imposing an entry ban are established, but all decisions adopted by the public administration subjects are subject to common requirements for individual legal acts. Similarly like in Slovakia, the administrative laws also provide that an administrative act has to specify the procedure for it's challenging.[328] This obligation is also established in the Order on Returns.[329]

Example of the decision:
In accordance with Article 138 of the Law on Legal Status of Aliens of the Republic of Lithuania, this decision may be subject to appeal before (Vilnius, Kaunas, Klaipėda, Šiauliai, Panevėžys) Regional Administrative Court within 14 days after the date on which the decision is served[330]

In **Slovakia**, return order, entry ban and detention are imposed in a form of an individual decision – decision on administrative expulsion, decision on ban of entry and decision on detention. Individual administrative decisions, similarly as in Lithuania, are governed by requirements of the general administrative procedures and must mandatorily contain sentence with reference to specific legal provision applied, reasoning with description of facts of the case, evidence and their evaluation, arguments leading to final legal qualification of the situation. Last, but not least mandatory part of an individual decision is information about possible appeal. Decisions must be in written form and are processed in Slovak language.[331] Problems may arise with decisions on abolition of entry bans, which are not considered regular decisions thus cannot be appealed.

Concerning the limitations on information about the factual reasons, **Lithuania** and **Slovakia** embody them in the national legislation,[332] while **Latvia** provides for general limitations concerning state secrets in administrative law.[333]

[326] *Ibid,* point 55.2
[327] *Ibid,* point 60.
[328] Article 8 (2).
[329] Para. 55.5.2 of the Order.
[330] Annex No. 10 to the Order on Return.
[331] Slovak report, Chapter 2.7.1.
[332] Article 140[1] (3) of the Aliens' Law; Section 120 (2) let. (i) of the ASF.
[333] Administrative Procedure Law, Section 67 (8).

Good practice in Lithuania –
decision adopted may not be based exclusively on classified information
In Lithuania, a decision adopted may not be based only on the information, which constitutes a state or official secret (classified information). This is confirmed by the case law of the Supreme Administrative Court of Lithuania, which refers to the jurisprudence under Art. 6 of the ECHR: *[…] the panel of judges is of the opinion, that in the case considered the private interests of an individual and the public interest may not be opposed, they need to be combined, and this means that correct balance should be ensured between these interests in accordance with the criteria established by the Constitutional Court, the ECtHR and the judicial institutions of the EU. <…> the conclusion is not possible only on the grounds of the secret materials possessed by the respondent as the only evidence in the case considered. […]*[334] *(emphasis added).*

Return Directive, Article 12(2)
Member States shall provide, upon request, a written or oral translation of the main elements of decisions related to return, as referred to in paragraph 1, including information on the available legal remedies in a language the third-country national understands or may reasonably be presumed to understand.

Requirements on translation are transposed in all three countries. The legislation in **Latvia** provides that the relevant institution shall provide an oral or written translation for the foreigner in a language, which he understands or should justifiably understand, if necessary, using the services of an interpreter.[335] This is applied with regard to the return decision or the removal order, the decision on entry ban, explaining the essence thereof and the procedures for contesting, as well as informing regarding the rights of the foreigner to legal aid.[336] Upon the request of a foreigner the institution, which issued the relevant administrative act, shall ensure the translation of the main components of the return decision or removal order (the establishment of facts, justification, legal obligation imposed on the addressee, information on appeal). As a guarantee of notification, the return decisions require the foreigner to sign upon receipt that he has been informed on its content, the procedure for contesting the decision in the language, which the foreigner understands. The return decisions also include the signature of interpreter and the responsible authority; the foreigners are normally provided with an oral interpretation of the return decisions. All three countries experience difficulties with interpreters who are not always providing high quality services or interpreters of rare language are not available at all.[337] In practice, however, there were several complaints of the foreigners in the forced

[334] Decision of the Supreme Administrative Court in administrative case No. A662-1575/2013 of 21.01.2013.
[335] Immigration Law, Section 48 (2).
[336] *Ibid*, Section 48 (1). The same provisions apply to decisions contested to a higher authority (first instance appeal) (Immigration Law, Section 50 (1)).
[337] Latvian report, Chapter 2.6.1.

return procedure on poor quality or insufficient translation of the removal orders and information on the remedies, as concluded by the Ombudsman's Office during monitoring of forced return in Latvia.[338] Similar complaints have been noted in Slovakia.

Differently from Latvia, **Lithuanian** legislation provides that decisions on return or removal always have to be interpreted into the language that the TCN can understand, without a special request for that and in its' entirety, which constitutes a more favourable standard if compared with the Directive. Decisions are interpreted when served. A general principle is that all documents have to indicate: the language that can be understood by the TCN to which the document has been translated; whether an interpreter was invited (if so, the interpreter has to sign and to indicate his data).[339] The territorial police agencies or a division of the SBGS familiarises TCN with a decision in a language that he can understand (decision is read in full). Copies of a decision shall be signed by the TCN, the official and the interpreter.[340]

Example of information about return decision[341]

The decision has been read and explained to me: _____
The decision has been served on _____
(date)

Interpreted from/to the _____ language to/from the Lithuanian language being familiar with the administrative liability in accordance with Article 187^2 of the Code of Administrative Offences of the Republic of Lithuania:
Interpreter _____
(signature, name and surname, date of birth, residence address)

The information can be found also in the decisions of the Migration Department on removal. The practice shows that for some languages interpreters are not used and decision is interpreted by the official, in other cases services of interpreters are used either resorting to those who are employed by the migration board or hired under agreements for interpretation services. However, in practice of other institutions, like the FRC, the decision is sometimes interpreted by shortening some motives of it.[342] One of such situations is illustrative of some practical problems experienced.

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338 Tralmaka I., *Survey of persons in forced return procedure*, presentation in the seminar "Elaboration of the system of monitoring forced return", organized by the Ombudsman's Office on 18.07.2014.
339 Point 18 of the Order on Return.
340 *Ibid,* points 31.2, 56.1 and 56.2.
341 Annex No. 10 to the Order on Return.
342 Lithuanian report, Chapter 2.6.

Practical situation
Two citizens of the Socialist Republic of Vietnam were being familiarised with a decision of the Migration Department on their removal from Lithuania. Familiarisation with the decision was taking place in Russian, without the participation of an interpreter. The text of the decision was interpreted from Lithuanian to Russian by the official, and one of the Vietnamese, whose Russian was poor.[343]

In general, no translation in writing of an individual decision is provided in **Slovakia**. However, upon request of a foreigner, police authority is obliged to provide written translation of reasons of administrative expulsion, imposition of entry ban, or of obligation to depart from Slovakia and information about possibility to appeal in a language understood by a foreigner or the one he can reasonably understand.[344] The general regulation obliging police authority to provide written information about the ways to challenge a decision is applicable.[345] This information is mandatory part of the decision and is provided in Slovak language. The right of provision of written information in the language a foreigner understands or is reasonably expected to understand, is in this case constructed as individual right applicable only upon request of a foreigner. Also, the law does not specifically require provision of information about legal consequences of non-compliance with decision on administrative expulsion or about consequence of arriving to Slovakia despite valid entry ban. No decision is taken for forced return, except for detention as a measure for the purpose of enforcement of decision on administrative expulsion. Forced return is implemented by direct enforcement of the decision on administrative expulsion. No special information obligation is associated with the initiation of steps leading to enforcement of decision on administrative expulsion.[346]

Effective remedy

Return Directive, Article 13 (1) and (2)
1. The third-country national concerned shall be afforded an effective remedy to appeal against or seek review of decisions related to return, as referred to in Article 12(1), before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence.
2. The authority or body mentioned in paragraph 1 shall have the power to review decisions related to return, as referred to in Article 12(1), including the possibility of temporarily suspending their enforcement, unless a temporary suspension is already applicable under national legislation.

[343] *Ibid.*
[344] Section 77 (3) of the ASF.
[345] Section 3 (2) of the Act on Administrative Procedure No. 71/1967 Coll.
[346] Slovak report, Chapter 2.7.1.

In Latvia, prior to the transposition of the Directive, the Immigration Law provided for the right to appeal the return orders to a higher authority and to the court,[347] but not decisions on forced return.[348] The amendments of 2011 brought significant improvements with regard to the remedy: both the return and the removal order, also the decision included therein on an entry ban may be appealed to a higher authority (within seven days after their coming into effect);[349] the Administrative District Court (within seven days after coming into effect thereof);[350] the Supreme Court by submitting a cassation.[351] In practice, the number of appeals is rather small. 4 appeals of return orders and 4 appeals of removal orders were submitted to the Administrative District Court during 2011-2014, while majority of foreigners did not express the wish to appeal decisions, as they planned to return voluntarily. From 1 July 2011 to 31 December 2014, 26 return decisions issued by OCMA and 64 return decisions issued by the SBG were appealed to the higher authority or reviewed.[352] In 2011 – 2014, the OCMA and the SBG have issued a total of 6,520 return orders while 247 foreigners were removed.

As obstacles to effective appeal in **Latvia** are short time periods between the adoption and informing on the return order and the actual expulsion (in several cases from one to five days); some foreigners were informed on the removal decisions already at the airport before departure or shortly before departure.[353] This is confirmed with two court judgements, which indicated that the returnees were informed on the removal decision a day before deportation.[354]

In **Lithuania**, decisions on return, removal or entry ban may be appealed to administrative courts within 14 days after serving the decision to the TCN.[355] Further appeal is possible to the Supreme Administrative Court,[356] whose decision is final and may not be challenged. Remedy available at administrative courts in Lithuania could be considered effective, as it looks into the merits of the case and is not bound by the arguments of the appeal, the whole case is reviewed.[357] Similarly as in Latvia, in practice, only very few foreigners appeal against removal decisions (see Figure 5 below).

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347 Immigration Law (with amendments until 26.05.2011), Section 42.
348 *Ibid*, Section 46 (3).
349 Immigration Law, Section 50 (1).
350 *Ibid*, Section 50^1 (1).
351 *Ibid*, Section 50^1 (2)
352 Latvian report, Chapter 2.6.2.a).
353 Interview with representatives from the Ombudsman's Office on 27.08.2014, Latvian report, Chapter 2.6.2.a).
354 Judgement of the Administrative Regional Court No.A420525512, 07.05.2014; Judgement of the Administrative Regional Court No. A420525612, 07.05.2014.
355 Articles 137-138 of the Aliens' Law.
356 Article 127 (1) of the Law on Administrative Procedure.
357 *Ibid,* Article 136.

Figure 5.

2008	5
2009	2
2010	3
2011	4
2012	1
2013	2
2014	1 (out of 362 removal decisions)

In **Slovakia**, there are some concerns with regard to implementation of these provisions of the Directive. The procedure on appeals against expulsion or entry ban if issued separately, is governed by general rules of administrative procedures and the Foreigners' Act contains no special regulation on this. According to the Administrative Procedures Code, appeal shall be reviewed by the police authority of higher hierarchy and carries suspensive effect.[358] Police authority cannot be considered as an impartial body, which enjoys safeguards of independence according to the requirements of the Directive. If appeal is not successful, a foreigner may further submit an appeal to the court, which does not suspend the implementation of the decision. However, the court could suspend the execution of the decision if its enforcement may result in irreparable harm.

With regard to suspensive effect of appeals of return decisions, not all of the three countries meet the requirements of the Directive. In **Latvia**, the provision that no suspensive effect is granted in such cases was deleted by the Immigration Law amendments in 2013.[359] Although the clause on the suspension of return decisions and entry bans in appeal cases is not included in the law, according to the OCMA, such decisions are suspended if a person submitted an appeal to the higher authority.[360] However, the law states that submission of an application to the court shall not suspend the operation of the return decision or the removal order and the decisions included therein and decision on entry ban.[361] The Administrative Procedure Law still provides for the right of an applicant to request provisional regulation, if there is a cause to believe, *inter alia*, that the appeal decision of an administrative body

[358] Section 55 of Administrative Procedures Code.
[359] Immigration Law, Section 50.
[360] EMN, *Policy report on Migration and asylum situation in Latvia, Reference year 2013*, Riga, March 2014, p. 54.
[361] Immigration Law, Section 50^1 (1).

could cause serious damage, or it is *prima facie* unlawful.[362] Since the transposition of the Directive, there have been no cases when contesting the removal order had suspensive effect.[363] Thus Latvian practice is not fully in line with the Directive's and ECHR requirements on the suspensive effect. In **Lithuania**, appeal to the court suspends the enforcement of removal decisions and even the adoption of a return or removal decision when a residence permit or asylum is refused and is appealed. However this applies only to decisions where a residence permit is terminated, but not when it is not issued or not prolonged. The exception is also in cases where a removal decision is based on a threat of the TCN to state security or public policy. Whereas in other cases, the enforcement of a decision may be suspended when the court adopts a ruling, i.e., applies a measure securing the claim regarding suspension of enforcement of the decision.[364] According to the Law on Administrative Procedure,[365] the party may address the court with a reasoned application for such a measure or the court may apply it on its own initiative. A measure securing the claim may be applied at any stage of the process if in its absence the enforcement of the court's decision may be impeded or becomes impossible. One of the measures securing the claim is temporary suspension of the effect of the challenged act.[366] Thus, enforcement of return decisions that are not automatically suspended by submitting an appeal may be suspended during the period for consideration of the appeal. As Supreme Administrative Court practice shows, such circumstances as presence of family in Lithuania, long period of residence in Lithuania, availability of economic and social relations are sufficient grounds for applying protection measure by suspending the effect of the return decision.[367]

In **Slovakia**, general rule is that appeal carries suspensive effect.[368] However, it may be excluded in certain cases.[369] These exceptional situations are defined by the requirements of urgent public interest or the risk of suffering an irreparable harm for a party to the procedure or someone else due to suspension of enforcement of the decision. The urgency of the public interest shall be reasoned in the decision about exclusion of suspensive effect of appeal.

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362 Administrative Procedure Law (adopted 25.10.2001), Section 195. In such a case, the court may take a decision which, pending judgment of the court, substitutes for the requested administrative act or actual action of the institution; the court can also impose a duty on the relevant institution to carry out a specific action within a specified time period or prohibit a specific action. Ibid, Section 196 (1), (2.)

363 Latvian report, Chapter 2.6.2.b).

364 Article 139 (1-3) of the Aliens' Law

365 Article 71 (1) of the Law on Administrative Procedure.

366 Ibid, Article 71 (3).

367 Decision of the Supreme Administrative Court of Lithuania in administrative cases: No. AS[602]-273/2012 of 13.01.2012; No. AS[575]-580/2012 of 24.08.2012; No. AS[822]-768/2013 of 09.10.2013; No. AS[662]-839/2014 of 23.07.2014.

368 Section 55 of the Administrative Procedures Code.

369 *Ibid,* Section 55 (2).

Although such decision can have serious consequences, the law prohibits possibility to appeal it, which provides further restriction in accessing the effective remedy. In practice, police tends to use exceptions to suspensive effect regularly in several specific situations, in particular in application of readmission agreement with Ukraine at the border, when detention shall be ordered or when a foreigner is considered to pose a threat to national security.[370] The situation described below exemplifies practical problems of access to effective remedy.

Exception to suspensive effect in Slovakia
Exclusion of suspensive effect in border procedures means that a person can be returned to the territory of Ukraine within few hours and has no real and effective possibility to access a lawyer while being on the territory of Slovakia. As the legal period for appeal is 15 days only, it might be impossible for such an individual to seek legal aid from abroad (especially if return to Ukraine is followed by detention). In addition, in practice, TCNs frequently give up their right of appeal immediately after they receive the decision on return or detention in some police departments. What is of concern is that the consents are given in Slovak language in the form pre-formulated by police as a blank form to be used for this occasion.371

Legal aid and linguistic assistance

Return Directive, Article 13 (3) and (4)
3. The third-country national concerned shall have the possibility to obtain legal advice, representation and, where necessary, linguistic assistance.
4. Member States shall ensure that the necessary legal assistance and/or representation is granted on request free of charge in accordance with relevant national legislation or rules regarding legal aid, and may provide that such free legal assistance and/or representation is subject to conditions as set out in Article 15(3) to (6) of Directive 2005/85/EC.

In **Latvia**, state legal aid is granted for appeal of a return and a removal decision if: a) a foreigner does not have sufficient resources, he is residing in Latvia and execution of the voluntary return decision or removal order issued in relation to him is suspended; b) he was detained under Immigration Law and is placed in special premises or an accommodation centre.[372] An application regarding a request for state guaranteed legal aid suspends the period for appeal until such aid is granted or refused.[373] The Legal Aid Administration takes a decision on legal aid within 10 days following the request from the OCMA or SBG.[374] It is also possible to request

[370] Slovak report, Chapter 2.7.2.
[371] *Ibid*.
[372] Immigration Law, Section 50.[2] (1), (3), (5), (6).
[373] *Ibid*, para. 4.
[374] Law on State Guaranteed Legal Aid, Section 23 (1[1]).

legal aid under the Law on State Guaranteed Legal Aid.[375] In practice there has been only one case when legal assistance for contesting a return decision before the court was requested. With regard to legal representation other practical problems are noted in Latvia. For instance, serious barriers for formalising representation with a notarised power of attorney, due to the fact that the persons were detained, had no ID documents and had no necessary resources, including for interpretation services, etc., are reported.[376] Legal aid in **Lithuania** in the process of return is established only in the general legislation (the Law on the Bar provides for a right to enter into agreement with a lawyer,[377] the Law on Administrative Procedure and the Order on Accommodation in the FRC).[378] However, TCNs fall out of the scope of the general mechanism of state guaranteed legal aid, since it applies only to legal residents of Lithuania or other EU MSs.[379] The requirements of the Directive are not properly implemented, as the Aliens' Law[380] and the Order for Accommodation in the FRC[381] have provisions on free legal aid, but it is provided only to UAMs, asylum seekers and TCNs in detention cases. Also, even in detention cases where such assistance is provided, it is frequently quite formal in practice (e.g., lawyers do not object the detention of a foreigner) and also limited to representation in court hearing, which means that no legal advice is given before that and no support in making appeal is provided.[382] Considering that asylum seekers enjoy free legal aid in appealing against a return, removal, or an entry ban decision, this may sometimes tempt the TCNs to ask for asylum in order to enjoy these benefits, as well as could be considered as discriminatory. Clearly, in the absence of effective free legal aid combined with placement in detention, lack of Lithuanian language skills and any support from the outside, the possibilities of TCNs to effectively defend their rights and submit appeals against removal without a lawyer are limited.[383] In **Slovakia,** the right to free legal aid in procedure on expulsion is guaranteed by Slovak law[384] and shall be provided by the Legal Aid Centre. Provision of free legal aid is possible from the moment the decision on administrative expulsion has been delivered, provided that a TCN submitted a request for legal aid to the Centre and has no other legal representative.[385] Existence

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375 *Ibid*, Section 22 (7^1).

376 Latvian report, Chapter 2.6.2.c).

377 Article 2 (1), Article 48 (1) of the Law on the Bar.

378 Point 17.9 of the Order for Accommodation in the FRC: *persons accommodated in the centre are entitled to hire an attorney in law by their own funds.*

379 As in accordance with Article 11 (1) and (2) of this law.

380 Article 32 (2), point 5, Article 71 (1), point 3, and Article 116 (1).

381 Point 17.3 of the Order.

382 Lithuanian report, Chapter 2.6.

383 In accordance with the data of the Yearbook of the Migration Department, the following appeals were considered at courts: in 2008 – 5, 2009 – 2, 2010 – 3, 2011 – 4, 2012 – 1, 2013 – 2.

384 Act No. 327/2005 Coll. on Provision of Legal Aid to Persons in Material Need.

385 *Ibid,* Section 24c.

of material need is examined only with regard to those who had legal residence in Slovakia before decision on return was taken. The scope of legal aid includes also interpretation, if necessary, and ensuring translation of documents needed for decision of the court or police authority.[386] On the other hand, individuals who are returned in the border procedures have no practical access to it, as highlighted by the Office of Ombudsperson in Slovakia.[387]

Concerning the obligations of MSs on **linguistic assistance** under the Directive, it is also limited. **Lithuania** guarantees it only in court proceedings and does not include the preparation of appeal. In accordance with the Law on Administrative Procedure, persons who cannot speak Lithuanian, are guaranteed the services of an interpreter during the process. Those services are paid from the state budget.[388] However, the right to take advantage of an interpreter's services does not include the requirement to translate all court's procedural documents into the language that the person concerned can understand.[389]

Conclusions

- The standards of the Directive related to adoption and evaluation of decisions in all three countries are implemented: decisions are adopted in writing and in principle have to state the facts and the law, as well as notify about available legal remedies. Only **Lithuania** and **Slovakia** implements requirements for restrictions on information and in **Lithuania** good practices exist.
- All three countries implement Art. 12 (2) of the Directive, while more favourable standards are in **Lithuania**, where decision is translated in full, but is not always implemented in practice. In **Slovakia,** no separate removal decision is taken, and no provision of information about procedures is required.
- All three countries provide for a possibility of appeal against return or removal decisions. However, there are some concerns with regard to implementation of the right to appeal in practice: in **Latvia** the time between the return decision and the actual deportation is very short, the independence of appeal body (**Slovakia**) and compliance with the Directive and international standards as concerns the suspension effect of appeal (**Latvia** and **Slovakia**) is of concern.

386 *Ibid*, Section 5c.
387 The report of the Ombudsperson on the access to legal aid for TCNs who are detained, Bratislava, June 2013, p. 15.
388 Article 9 (4).
389 Decision of the Supreme Administrative Court of Lithuania in administrative case No A^{556}-888/2010 of 09.07.2010.

- The implementation of the requirements on legal aid needs to be improved in all three countries. In **Latvia** and **Slovakia,** it is provided in the law, but is problematic in practice, or access to it is constrained. **Lithuania** does not have such provisions in legislation, save same exceptions for vulnerable groups of individuals, but they are not implemented in practice, too.
- In **Lithuania**, linguistic assistance is guaranteed only during the court proceedings and does not include the stage of preparing an appeal.

CHAPTER VIII.
Detention and alternatives to detention

International and European standards

Under international law, the right to liberty and security of person is fundamental. Interference with this right is permitted only in exceptional circumstances and must not be arbitrary. The notion of arbitrariness includes compliance with the law, but goes beyond lawfulness and entails compliance with the principles of necessity and proportionality.[390] **Firstly**, detention should be based on the grounds set forth in the law in a clear and exhaustive manner. In the context of immigration detention, Art. 9 (1) of the ICCPR and Art. 5 (1) of the ECHR limit these grounds to two specific situations:[391] a) to prevent unauthorized entry to the country, and b) pending deportation or extradition. Art. 15 (1) of the Return Directive only allows keeping in detention a TCN who is subject to return procedures in order to prepare the return and/or carry out the removal when there is a risk of absconding or the TCN concerned avoids or hampers the preparation of return/removal process (emphasis added). Furthermore, the Directive requires that the national law defines the objective criteria, which justify that a foreigner may abscond. Several rules are important in this context under CJEU case law: a) though listed as detention grounds in the ECHR, national security and public order cannot be based on the Return Directive.[392] According to Fundamental Rights Agency (hereafter – FRA), *"Deprivation of liberty based on crime prevention [..] should be governed by the same rules, regardless of the legal status of the person concerned [...]. These grounds should therefore not be regulated by alien or immigration law, but in other pieces of legislation"* (emphasis added).[393] b) detention during removal process should be only for the purpose of expulsion, while extending detention is not justified solely due to the lack of identity documents.[394] c) detention with a view of determining whether foreigner's stay is lawful, is possible, but should be brief: *"the competent authorities are required, [...] to act with diligence and take a position without delay on the legality or otherwise of the*

[390] De Bruycker, P. (ed.), *Alternatives to Immigration and Asylum Detention in the EU. Time for Implementation*. 2015, p. 16.
[391] Article 5 (1)(f) of the ECHR.
[392] CJEU, C-357/09, *Kadzoev*, 30 November 2009; *El Dridi* case, para. 70.
[393] FRA, *Detention of Third-Country Nationals in Return Procedures.* November 2010, p. 24.
[394] CJEU, *Mahdi 146/14 PPU,* 5 June 2014.

stay of the person concerned. Once it has been established that the stay is illegal, the said authorities must, [...] adopt a return decision".[395]

Secondly, the status of alternatives to detention by now is well established in European standards, the case law and the Return Directive. The Twenty Guidelines state that *„A person may only be deprived of his liberty, with a view of ensuring that a removal order will be executed, if [...], after a careful examination of the necessity of deprivation of liberty in each individual case, the authorities of the host state have concluded that compliance with the removal order cannot be ensured as effectively by resorting to non-custodial measures such as supervision systems, the requirement to report regularly to the authorities, bail or other guarantee systems"* (emphasis added).[396] Thus detention may be applicable only in the case where other milder coercive measures cannot be effectively applied[397] and alternatives to detention should be first considered in each individual case.[398] Alternatives to detention may have a wide variety of forms and they impose various degrees of limitation on the freedom of movement.[399] Similarly to detention, alternatives to detention should be governed by the law and be subject to human rights standards, including the periodic review by an independent authority, the right to submit complaints and remedies.[400] Moreover, alternatives to detention should not be used as alternative forms of detention; nor should they become alternatives to release.[401] Alternatives are increasingly used because detention policies are frequently ineffective, expensive, have dire consequences on physical and psychological health of migrants and detrimental to the relationship between the state authorities and the individual.[402] However, unlike the other EU instruments applicable to asylum seekers, the Return Directive does not explicitly require MSs to establish national rules concerning alternative schemes, nor does it list examples of alternatives.[403]

Thirdly, detention should last for as short a period as possible and only maintained as long as removal arrangements are in progress.[404] When it appears that a reasonable prospect of removal or grounds of detention no longer exist, or the

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395 *Achughbabian* case, paras. 29 and 31.

396 Guideline No. 6.1.

397 *Mahdi* case, para. 67, Art. 15 (1) of the Return Directive.

398 FRA, *Handbook on European Law Relating to Asylum, Borders and Immigration*, p. 147.

399 Edwards A., *Back to Basics. The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, April 2011, pp. 51-81.

400 UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, p. 22.

401 *Ibid*, p. 23.

402 De Bruycker, P. (ed.), *Alternatives to Immigration and Asylum Detention in the EU. Time for Implementation*, p. 21-26.

403 *Ibid*, p. 44.

404 *El Dridi* case, para. 39.

maximum period of detention has expired,[405] detention ceases to be justified and the person concerned is released immediately. The Directive sets a maximum period of detention of 6 months with an extension of 12 months in limited cases.

Fourthly, detention should respect the procedural guarantees to prevent its arbitrariness. According to the Return Directive (Art. 15(2)), it should be ordered by administrative or judicial authorities, in writing, with reasons of fact and law being given, as well as speedy judicial review of the lawfulness of detention provided, while the person detained should get information on the appeal and immediate release in case of unlawful detention shall be ordered.

In addition, paragraph 17 of the preamble of the Directive provides that TCNs in detention should be treated in a humane and dignified manner with respect for their fundamental rights and in compliance with international and national law. Based on Art. 16 (1) of the Directive, detention has to take place in specialised detention facilities, and in the absence of such, the TCNs in detention shall be kept separately from ordinary prisoners. The CJEU has stated that the Directive does not permit a MS to detain a TCN for the purpose of removal in prison accommodation together with ordinary prisoners even if the TCN consents thereto.[406] The Twenty Guidelines require that *"care should be taken in the design and layout of the premises to avoid, as far as possible, any impression of a "carceral" environment."*[407] Also, according to the CoE standards, special high security or safety measures shall be applied only in exceptional cases on individual basis with clear procedures to be followed and the right of the detainee to submit a complaint with an opportunity to appeal to an independent body.[408] Therefore, the grounds of placing in an isolation cell should be carefully examined in each individual case. Emergency health care and essential treatment of illness has to be provided in detention centres and particular attention shall be paid to the situation of vulnerable persons.[409] TCNs kept in detention have to be systematically provided with information, which explains the rules applied in the facility and sets out their rights and obligations. Such information has to include information on their entitlement to contact the competent national, international and non-governmental organisations and bodies.[410]

Stricter requirements apply for detention of children and families in view of their vulnerable situation, thus according to the Twenty Guidelines and Art. 17 of

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405 Article 15 (5), (6).

406 CJEU, C-473/13, *Thi Ly Pham*, 17 July 2014, paras. 21-22; CJEU, C-473/13, *Bero and Bouzalmante*, 17 July 2014, paras. 24-32.

407 Guideline No. 10.

408 Committee of Ministers, European Prison Rules, Appendix to Recommendation Rec (2006)2 to the Member States on the European Prison Rules, 11 January 2006, Section 53.1 – 53.7. See also: 19th General Report on the CPT's activities covering the period 1 August 2008 to 31 July 2009 [CPT/Inf(2009)27], Section 88.

409 Article 16 (3), (4) of the Return Directive.

410 *Ibid,* Article 16 (5).

the Directive, children can only be detained as a measure of last resort for a shortest period of time and families have to be ensured privacy in a separate accommodation. Children in detention shall be given a right to education, recreational activities and leisure.[411]

Grounds of detention

Return Directive, Article 15 (1) and (4)
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.
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.

All three countries relate detention for removal to the situations mentioned in the Directive. However some extend them beyond the permissible grounds (**Lithuania** and **Latvia**) either in law or in practice. Furthermore, practice raises concerns. In **Latvia**, before transposition the laws did not require return decision for detention to be possible. The SBG had the right to detain an alien, except a minor alien who has not reached the age of 14 years on grounds of illegal border crossing, national security or public order/safety reasons, forced removal or punishment by expulsion.[412] In fact, being an irregular immigrant *per se* was sufficient for the justification of detention of foreigners, including those residing in the territory of Latvia for decades, but having failed to regularize their status, e.g. change their Soviet passports in the 1990s.[413] Such a practice could to a large extent explain the large proportion of detained foreigners (see Figure 7 below). Following the transposition of the Directive, the Immigration Law in **Latvia** allows detention of a foreigner only for the purpose of return, including those imposed an additional punishment of removal.[414] In **Lithuania**, detention of foreigners is envisaged by the Aliens' Law.[415] As stated by the Supreme Administrative Court of Lithuania, the grounds for detention of TCNs are integral with the aims of detention which are established in the legislation: *a TCN's freedom of movement may be restricted in Lithuania only in the interests of state security or public policy, or public*

[411] Guideline No. 11, Art. 17 of the Return Directive.
[412] Immigration Law (with amendments until 15.06.2011), Section 51 (1).
[413] Latvian report, Chapter 2.7.1.
[414] Immigration Law, Section 51 (1).
[415] Article 113 (1) and (2) of the Aliens' Law.

health or morals, for crime prevention purposes or seeking to protect the rights and freedoms of other persons.[416] In **Slovakia**, detention is possible in all phases of return process, including preparations before a decision on return has been reached.[417] Detention during preparation of the return decision is conditioned with one of the two additional requirements: risk of absconding or avoidance, or obstruction of the process of expulsion.[418] Detention for this purpose shall be limited to 48 hours. If police authority fails to issue a return decision within this time limit, a TCN must be released from detention.[419] However, these requirements do not apply in case of removal procedure. The **Slovak** authorities preferred not to include the criteria for use of detention since they consider that paras. a) and b) of Art. 15(1) of the Directive are only examples of situations when detention may be ordered. Therefore, while the legislation enumerates situations of mandatory enforcement of removal, it does not establish the criteria to guide authorization of detention for the purpose of enforcing expulsion. Thus legal regulation does not contain sufficient safeguards to limit the ordering of detention for the purpose of enforcing removal in line with the Directive.[420]

Detention grounds	Latvia	Lithuania	Slovakia
Return or removal procedure is applicable to the foreigner	X	X	X
Foreigner is subject to return to a third country or another EU Member State in accordance with readmission agreement	X		X
A TCN has entered or stays in the country illegally		X	
To prevent entering the country without a permit		X	
To prevent absconding during the procedure or to enforce cooperation in situation when foreigner avoided or obstructed the administrative expulsion	X		X
TCN is suspected of using forged documents		X	
TNC's stay in the country constitutes a threat to public security, public policy or public health		X	
Other grounds	X	X	X

As a result of transposition, a list of circumstances for determining when a foreigner will hamper or avoid the return procedure or when a risk of absconding exists was

[416] *Ibid,* Article 112 of the Aliens' Law, Decision of the Supreme Administrative Court of Lithuania in administrative case No. N[17]-2752/2006 of 14.12.2006.
[417] Section 88 (1) let. a)-d) of the ASF.
[418] *Ibid,* Section 88 (1) let. a) points 1. and 2.
[419] *Ibid,* Section 88 (11).
[420] Slovak report, Chapter 2.8.1.

introduced in the **Latvian** laws,[421] and in **Lithuania** it was done only from 1 March 2015.[422] Risk of absconding of TCN in **Slovakia** is defined as a situation when based on reasonable grounds or direct threat it can be assumed that a TCN will abscond or will hide, especially in the cases mentioned below.[423] If identity of a foreigner is not established immediately or if he does not enjoy legal residence in Slovakia or if there are reasons for imposition of entry ban for more than three years, the authorities would consider that there is a risk of absconding in an individual case. In practice, the risk assessment is carried out by police in every case, based on available information, circumstances and context related to the case.[424]

Reasons for hampering or avoiding return procedure or a risk of absconding	Latvia	Lithuania	Slovakia
Non-established or concealed identity, provision of false information or refusal to co-operate in other ways	X	X	X
Crossing external border avoiding border checks, using forged travel document, visa or residence permit	X		X
Lack of place of residence during removal procedure or financial means	X	X	
Threat to national security, public order or safety	X	X	
Involvement in facilitating illegal immigration	X		
Conviction for criminal offence	X		
Previous avoidance of removal procedure	X		
Failure to comply with voluntary return decision	X	X	X
Leaving an accommodation centre or detention premises	X	X	X
Other reasons (e.g. failure to comply with alternative to detention, no family, social, economic or other relations in the country, etc.)	X	X	X

Worthwhile noting that considerations of national security, public order or safety and criminal offence of foreigner[425] are problematic in **Latvia** and **Lithuania** in light of the Directive and the CJEU case law. In **Latvian** practice, detention of foreigners has

[421] Immigration Law, Section 51 (2).
[422] Art. 113(5) of the Aliens' Law.
[423] Section 88 (2) of the ASF.
[424] Slovak report, Chapter 2.8.1.
[425] Immigration Law, Section 51, para 2 (4), (6)

not been strictly limited to the purpose of carrying out the execution of a removal order. Detention has been applied to persons found to be illegally present on the territory of Latvia who have not applied for international protection and are not (yet) subject to a return decision.[426] The average time period from apprehending an irregular migrant until the issue of a return decision was 9 days in 2013.[427] The return order is adopted soon after detention if a foreigner's identity is established; however, other foreigners, whose personal data should be further clarified, receive the return/removal order later, as the return decision can be taken only for a person with established identity.[428] Decisions on detention in **Latvia** reveal the most frequently used ground – a foreigner cannot indicate a place of residence during removal procedure, often in combination with other grounds. In practice, the application of detention grounds has often been insufficiently analysed, as confirmed by the case law.[429] It also confirms that some decisions carry a reference to the provision on illegal stay, or undetermined identity as an additional justification for detention, although it is not listed as such among the grounds of detention in the law.[430]

Detention in statistics

Analysis of data on detention of TCNs in the three countries demonstrates that after transposition of the Directive, the numbers of detained persons generally decreased in **Latvia** and **Slovakia**, while Lithuania represents a totally different trend – of increasing number of detention. The trends are affected by the legislative changes made in these countries (e.g. in Slovakia) as well as increasing number of foreigners. The highest numbers for 2014 are reported in Slovakia, the lowest – in Latvia.

In 2014, the number of detained foreigners in **Latvia** has considerably increased as compared to 2013 due to the significant increase of cases of illegal border crossing, above all of Vietnamese citizens (169 in 2014, 97 – in 2013).[431] The analysis of the number of detained migrants for 2008-2014 in **Slovakia s**hows the decrease in numbers from 2007 to 2012, and then an increase in 2013-2014, which is partially due to changes in legislation enabling detention of asylum seekers since January 2014.[432]

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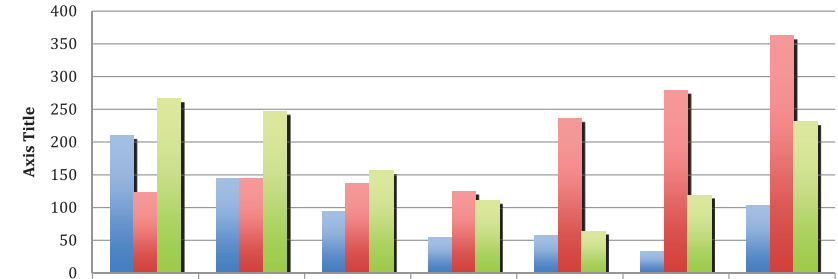
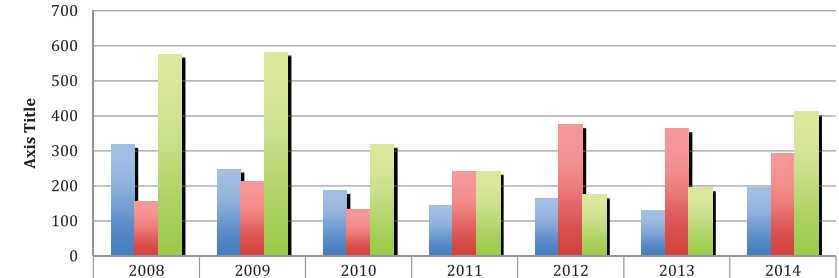
426 EMN, *The use of detention and alternatives to detention*, pp. 12-13.
427 *Ibid*, p.30.
428 Latvian report, Chapter 2.7.1.
429 Decisions of the Daugavpils Court: No. 12-028212 of 27.04.2012; No. KPL 12-000613 of 04.01.2013; No. 12-038512 of 08.06.2012; decision of the Latgale Regional Court No. 12-028112 of 21.06.2012.
430 E.g., the decisions of the Daugavpils Court: No. KPL12-093013/12 of 26.11.2013; No. 12-028112 of 27.04.2012; No. KPL 12-059712 of 13.09.2012; No. 12-087113 of 25.02.2014.
431 Latvian report, Chapter 2.7.1.
432 Slovak report, Chapter 2.8.2.

Figure 6. Removed migrants in Latvia, Lithuania and Slovakia 2008-2014



	2008	2009	2010	2011	2012	2013	2014
Latvia	210	145	94	54	57	33	103
Lithuania	123	144	137	125	236	279	362
Slovakia	266	247	156	111	64	119	231

Figure 7. Detained migrants in the removal procedure in Latvia, Lithuania and Slovakia 2008-2014



	2008	2009	2010	2011	2012	2013	2014
Latvia	319	248	187	144	163	131	196
Lithuania	157	212	132	241	375	363	292
Slovakia	576	582	319	242	175	195	411

Figure 8. Data on detention in 2014 in Slovakia according to the ground of detention

Return directive related grounds of detention	Number of decisions
Total	302
enforcement of administrative expulsion	114
enforcement of judicial expulsion	25
Dublin transfer implementation	117
return based on readmission agreement	46
in the context of asylum procedure	112

Duration and termination of detention

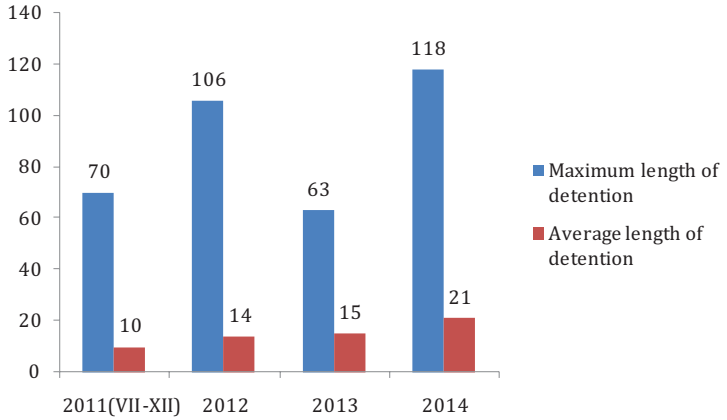
Return Directive Art. 15 (5) and (6)
5. Detention shall be maintained for as long a period as the conditions laid down in paragraph 1 are fulfilled and it is necessary to ensure successful removal. Each Member State shall set a limited period of detention, which may not exceed six months.
6. Member States 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) the lack of cooperation by the third-country national concerned, or
(b) the delay in obtaining the necessary documentation from third countries.

In **Latvia** and **Lithuania**, by virtue of transposition of the Directive, periods were introduced. In **Latvia** and **Slovakia**, national laws do not contain a clause that detention should be as short as possible and only maintained as long as removal arrangements are in progress, as required by the Directive.[433] However, the provision was appended to the Immigration Law in **Latvia** in 2011**.** It determines that the judge deciding on detention takes into consideration circumstances clarified during the return procedure, as well as the existence of circumstances, which serve as grounds of detention.[434] Another clause provides for release of a foreigner if the circumstances serving as grounds of his detention do not exist anymore, or there is no possibility to obtain documents, which are necessary to carry out the return procedure.[435] There are cases when foreigners were kept in detention because their removal was not possible, and no place of residence was available to them. However, in 2014, one person granted the status of a stateless person was released. Another person was released because there was no possibility to obtain necessary documents.[436] The maximum term of detention in Latvia has been reduced from 20 to 6 months, with a possibility for extension up to 12 months ("in case a foreigner refuses to cooperate, or obtaining documents from the third states is delayed").[437] In practice, the maximum term of detention has not reached six months, and the average term of detention has been less than a month, although it has increased over the last years (See Figure 9).

Lithuania implemented the requirement of the Directive to end the detention when circumstances laid down in Article 15(1) cease to exist. Termination of detention is possible on two grounds:[438] a) when grounds for detention disappear, and b) when detention period expires. In any of these situations the TCN shall be released without delay, but the disappearance of grounds should be confirmed by the

[433] Latvian report, Chapter 2.7.2.a).
[434] Immigration Law, Section 54^1 (1).
[435] *Ibid*, Section 59^4 (3).
[436] Latvian report, Chapter 2.7.2.a).
[437] Immigration Law, Section 54 (7).
[438] Article 119 of the Aliens' Law.

Figure 9. Maximum and average length of detention in the return procedure (in days) in Latvia



Source: Data of SBG. Note: the maximum length of detention of asylum seekers has been longer as compared to foreigners in the return procedure (maximum length of detention in 2014 – 271 days, average length of detention – 17 days).

court's decision.[439] Previously, the legislation in Lithuania did not require detention to last as short as possible, and to release the TCN if it is found out that no reasonable likelihood to remove him exists due to legal or other reasons. As of 1 March 2015, the Aliens' Law was supplemented to provide that detention of the foreigner should last for as short period as possible and not longer than it is necessary to take a decision to return to a foreign country, expel from Lithuania, etc.[440] Also, if for legal and other objective reasons there is no reasonable probability to expel the foreigner from Lithuania, institution, responsible for detained foreigner, shall immediately apply to the court asking to reconsider detention decision.[441] Currently, detention of TCNs is fixed at a period up to 6 months.[442] In line with the Directive, the period may be extended for 12 months when the TCN does not cooperate in removal procedures, or the documents necessary for removal are not received. Although the period was established as part of transposition of the Directive, this detention period is applicable to all detention grounds. Therefore, if the TCN was initially detained on other grounds, the total duration of detention may not exceed the period laid down in

[439] *Ibid,* Article 118 (3).
[440] Article 114 (5).
[441] Article 118 (1^1).
[442] Article 114 (4).

the law. Thus, as provisions of the legislation and the case-law shows, the maximum detention period for a third-country national is 18 months.[443]

Case law example
Supreme Administrative Court of Lithuania on maximum detention period
Human freedom is a fundamental value of a democratic state, an innate human right, […]. Because of this reason, the legal norms related with grounds for detention of a person have to be interpreted strictly. <…> the detention periods laid down in Art. 114 (4) of the law must include not only the duration of detention imposed or extended by the court decision, but also the duration of detention applied by a decision of an official of the police or other law enforcement authority (up to 48 hours […]). <…> the maximum period of detention of six months […] may be applicable to a TCN <…> also in the case where he has submitted an application for granting asylum. Under the applicable regulation, this period of 6 months may be extended for a period not exceeding 12 months only in the case where procedures in relation to removal of a TCN are pending, and/or a decision to remove him has been adopted […], as the grounds for extending detention […] are specifically related with the aim to remove the third-country national.[444]

In **Slovakia,** legislation contains a provision that police shall release a TCN from detention if the purpose of detention (return decision or removal) has ceased to exist. However, it does not specifically refer to the reasonable prospect of removal – this is established only in jurisprudence. On the other hand, detention may last for a maximum of 6 months. If despite all efforts to enforce foreigner's administrative expulsion it is expected that enforcement will take longer than originally envisaged, due to lack of sufficient cooperation of TCN or fact that the embassy of his country did not issue him with a supplementary travel document, police authority may decide to extend the duration of detention. Police is authorized to extend duration of detention repeatedly, with a provision that overall time of prolonged duration of detention does not exceed 12 months. Detention is calculated from the day of issuance of decision on detention.[445] It is similar in Latvia, where the length of detention in cases of return is generally shorter than in cases of asylum detention. Due to the courts' practice, police authority now always reason the length of detention and must collect evidence for justifying the length of it (estimated time for acquiring travel documents from a particular embassy, etc.).[446] Detention is lawful only if grounds for detention are valid throughout the entire period of detention and the authorities have an obligation to examine the duration of grounds of detention through its entire period.[447] If detention grounds ceased to exist, police shall order immediate release, while detention centre is obliged to do so based on valid decision of the court.[448]

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443 Lithuanian report, Chapter 2.7.
444 Decision of Supreme Administrative Court of Lithuania in administrative case No. 858-90/2014 of 15.09.2014.
445 Section 88 (4) of the ASF.
446 Slovak report, Chapter 2.8.3.
447 Section 90 (1) let. d) and Section 90 (2) let. d) of the ASF.
448 Slovak report, Chapter 2.8.3.

Safeguards against arbitrary detention

Return Directive, Article 15 (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 detention to be decided on as speedily as possible from the beginning of detention;
(b) or grant the TCN 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 MSs shall immediately inform the TCN concerned about the possibility of taking such proceedings.
The third-country national concerned shall be released immediately if the detention is not lawful.

The principle of proportionality and necessity is recognized in legislation and the case law in **Lithuania** and **Slovakia**. In **Slovakia,** legislation lacks its explicit regulation, but it was developed in jurisprudence of courts. In **Latvia**, the Immigration Law does not refer to the necessity and proportionality test and does not include a list of criteria for balancing the interest of the state, and in **Lithuania** and **Slovakia** – the individual.[449] Detention seems to be automatic in case of a lack of proved identity. It contradicts the principle of necessity and proportionality of detention in each individual case. However, few court decisions refer to these principles in the case law[450]. **Lithuanian** legislation has established the principle of necessity. The case law of the Supreme Administrative Court emphasizes it. It states that detention may be applicable as a last resort[451] and only in case where detention is necessary in order to adopt or enforce the decision concerned.[452] The case law gives guidance on circumstances which must be taken into account in determining whether detention is necessary for adoption or enforcement of return (removal) decision (e.g., the person illegally departed before adopting decision on his legal status). According to the court, these circumstances substantiate both the risk of absconding and the need to prevent attempts to impede organizing the removal.[453] The requirement of proportionality is not part of legislation, but stems from the case law.

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[449] FRA, *Detention of Third-Country Nationals in Return Procedures*, p. 25.

[450] Judgment of Administrative Regional Court, No. A420520811 of 15.08.2014, "*The SBG has to indicate in the detention protocol not only the factual circumstances of the case and legal norms but also the justification of the necessity and proportionality of detention; whereas the risk of absconding shall be justified with specific circumstances of the case".*

[451] Decision of the Supreme Administrative Court of Lithuania in administrative case No. N575-11/2013 of 14.01.2013.

[452] Decision of the Supreme Administrative Court of Lithuania in administrative case No. N575-1342/2012 of 21.12.2012.

[453] Decisions of the Supreme Administrative Court of Lithuania in administrative cases: No. N[575]-43/2013, of 25.03.2013; No. N[575]-20/2013 of 05.02.2013.

Case Law example
"[…] *Detention of a TCN is justifiable where in accordance with the circumstances of the situation detention of a person may be* ***recognised a proportionate measure and when a person's removal from the country is carried out within reasonable terms*** *[…].*[454]
Supreme Administrative Court of Lithuania

Thus, detention of a person may be recognized as proportional measure in case where his removal from the country is carried out within reasonable terms, and failure to exercise effective measures by the public authorities in order to enforce the removal decision constitute grounds for releasing the person from detention, which in essence complies with the requirements of the Directive.

The three countries establish other safeguards against arbitrary detention either in legislation, or the case law. Detention is ordered by the police. It is followed by court decision. The possibility of appeal exists. In **Latvia**, an official of the SBG has the right to detain a foreigner for more than 10 days pursuant to a decision of a judge. However, the term of the initial (pre-court) detention still raises concerns as being too long if compared to criminal cases where detention is possible for 48 hours, and not ensuring the right to a speedy judicial review.[455] At the moment of detention, the Immigration Law obliges the authorities to inform the detainees on the foreigner's right to appeal, contact the consular institution and to receive legal assistance. The detained foreigner has also the right to become acquainted with the materials related to his detention; the right to communicate in the language he understands, or which is reasonably expected to understand if necessary by utilizing the services of an interpreter.[456] In practice, the right to challenge the decisions on detention is not observed. There have been just a few cases, when the court has refused to detain foreigners and disagreed with the SBG and the overall the number of appeals is low. The first instance court reviews detention cases in oral proceedings, where detained foreigner always participate, but the appeal is decided in a written procedure. In practice, it limits the right to be heard, although there is a possibility to submit additional information or opinion.[457] In **Lithuania** TCN may be detained by police or another law enforcement authority up to 48 hours.[458] The court's decision on detention or alternative measure shall be immediately notified in the language that the TCN can understand indicating the reasons for it. In addition, the decision should specify the grounds and period of

[454] Decision of the Supreme Administrative Court of Lithuania in administrative case No. N[575]-1021/2012 of 25.01.2012; also Decision of the District Court of Švenčionys Region in administrative case No. A-453-617/2012 of 15.03.2012.
[455] Latvian report, Chapter 2.7.1.
[456] Immigration Law, Section 56 (1-3).
[457] Latvian report, 2.7.2.d).
[458] Article 114 (1).

detention.[459] A TCN can be detained for a longer period only by the court's decision and the participation of the TCN in the hearing of the case is obligatory.[460] In **Slovakia**, one of the most important safeguards is that detention may only take place based on individual decision, which is grounded on evaluation of all circumstances of the case. Decision is taken by a police authority, and is governed by general rules applicable in administrative procedure. Then police authority is obliged to ensure information[461] about detention, its grounds and possibility of submitting appeal, information about the rights and obligations (contact embassy, inform lawyer, etc.), possibility to apply for AVR, contact NGOs, etc., in the language he understands or is reasonably expected to understand. Detention centre, in addition, informs a foreigner about the internal rules of the centre and about rights and duties applicable to him in the detention regime.[462] In **Slovakia**, detention and procedural lawfulness can be reviewed by the court[463] within 15 days from the delivery of the decision. Judicial review is initiated by submission of an appeal through the body, which issued detention decision. The police authority forwards the appeal to the regional court together with the case documentation and its written position on the appeal.[464] Submission of an appeal does not suspend the execution of the decision. Therefore, a foreigner remains in detention during judicial review procedure. The concept of judicial review of administrative decisions is built on cassation principle in Slovenia. Regional court therefore can only confirm the decision or abolish it and return the case to the police. If court decides to abolish decision on detention, it shall also order immediate release.[465] Further appeal to the Supreme Court is possible within 7 days from delivery of decision, and the decision on appeal is taken within 7 days. If the ordered decision releases the foreigner from detention, police authority must act immediately and release him. A practical problem is that police authorities tend to wait for delivery of a written judgment and only then release the TCN. It cannot be considered as immediately. The law provides for another safeguard to ensure that detention is not arbitrary – authority of the prosecutor, who is obliged to regularly control and monitor every detention place in Slovakia and may order immediate release if detention is arbitrary. Consequently, anyone who assumes that detention of an individual is not in line with the law, may request responsible prosecutor to investigate the case and order immediate release.[466]

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459 *Ibid,* Article 116 (3) and (4).
460 *Ibid,* Article 116 (1).
461 Section 90 (1) of the ASF.
462 Slovak report, Chapter 2.8.3.
463 Section 250 sa of the Act No. 99/1963 Coll. – Civil Procedures Code.
464 Section 88 (7) of the ASF.
465 Section 250sa (7) of the Civil Procedures Code.
466 Slovak report, Chapter 2.8.3.

Return Directive Article 15 (3)
In every case, detention shall be reviewed at reasonable intervals of time either on application by the TCN concerned or ex officio. In the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority.

Another measure established in the Directive in order to ensure that persons are not detained unreasonably is the obligation to revise detention decision *ex officio* in reasonable periods of time or at the request of the TCN.[467] All three countries have a number of elements of periodic review procedure for removal detention, but it is not firmly established in legislation and practice yet. In **Latvia**, there is only a general appeal to challenge the lawfulness of detention and an obligation of the SBG to apply to the court if a foreigner was not removed during the term fixed by the court; and the court has an obligation to review such an application. In **Lithuania**, detention decisions are in practice usually reviewed every 3 months because TCNs are often detained for up to 3 months[468] on the basis of initiative of detention institution or the detainee, but not by the court *ex officio*. However, this practice is unequivocal and there are cases when they are detained for a period of six months at once[469] or the detention institution does not initiate review before the end of the period of detention. There is no period established for review of detention in the law, it only states that upon the disappearance of grounds for detention he is entitled to, whereas the detention institution should immediately apply to the regional court with a request for review.[470] Current legislation in **Slovakia** does not contain an explicit regulation of periodic judicial review of lawfulness of detention. Legal regulation of such review will be built upon the judicial review, which as of 2016 shall be governed by the Administrative Judicial Code.[471] Therefore, periodic review of the lawfulness of detention by courts can be only implemented under the Civil Procedures Code, which regulates procedures challenging the inactivity of the administrative body and on protection against unlawful interventions by the public authorities.[472] The judgment of the Constitutional Court of 18 April 2014,[473] however stated that the right for periodic review of lawfulness of detention is explicitly regulated in the Foreigners' Act.[474] Therefore, it is not only an obligation of courts to review lawfulness, but also of the relevant police authority.

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[467] Article 15 (3) of the Return Directive.
[468] Decisions of the District Court of Švenčionys Region in administrative cases: No. A-135-763/2014 of 28.01.2014; No. A-134-763/2014 of 28.01.2014; No. A-1476-763/2013 of 18.12.2013; No. A-1332-763/2013 of 07.11.2013; No. A-1320-763/2013 of 07.11.2013; No. A-1218-763/2013 of 15.10.2013.
[469] Decisions of the District Court of Švenčionys Region in administrative cases: No. A-1215-763/2013 of 15.11.2013; No. A-1216-763/2013 of 15.10.2013.
[470] Article 118 of the Aliens' Law.
[471] Slovak report, Chapter 2.8.3.
[472] Forth Head of the Fifth Chapter of the Act No. 99/1963 Coll. Civil Procedure Code.
[473] Judgment of the Constitutional Court No. II.US 557/2012-39 of 18.04.2013.
[474] Section 90 (2) let. d)

Following this judgment, police started issuing regular individual decisions as a response to requests of detainees for release since September 2014. Previously, police authority would reply in a form of a simple letter, which could not be considered a decision and thus could not lead to a possibility of appeal.[475]

Alternative measures to detention

> **Return Directive, Article 15 (1)**
> Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a TCN who is the subject of return procedures in order to prepare the return and/or carry out the removal process [...].

All three countries have legislation and practice on alternatives to detention in the context of return. In **Latvia,** the 2011 Immigration Law amendments introduced a possibility for the SBG when deciding on detention of the foreigner take a decision to apply alternative means of detention, but it is limited to reasons of humanitarian nature.[476] **Lithuanian** legislation does not explicitly provide the obligation to examine alternatives first, but establishes such measures in the Aliens' Law.[477] The case law also confirms that "*detention is an ultima ratio measure and may be applicable only in the cases where the aims determined by the legislation cannot be achieved by other methods.*"[478] Therefore, when the issue of detention of a TCN is considered, and there are grounds established by the law allowing detention of the TCN, first of all, it is necessary to check, whether there is no possibility to apply the measure alternative to detention.[479] In **Slovakia**, alternatives to detention were introduced in January 2012 as transposition of the mandatory provisions of the Directive. When considering the necessity of detention, police authority is always obliged to take into account primarily less restrictive alternative measures irrespective of the ground of detention, however, no explicit obligation of the prior consideration of the less restrictive measures is embedded in the legislation.[480] However, the application of alternatives is limited due to the fact that a foreigner cannot request for it, and reporting obligation can only be imposed before ordering detention, but not after detention decision has been taken.[481] In the decision imposing a reporting obligation or obligation to provide a financial

[475] Slovak report, Chapter 2.8.3.
[476] Immigration Law, Section 51(3).
[477] Article 115 of the Aliens' Law.
[478] Decision of the Supreme Administrative Court of Lithuania in administrative case No. N[575]-52/2013 of 15.05.2013.
[479] Lithuanian report, Chapter 2.7.
[480] Section 88 of the ASF (immigration detention) compared to Section 88a of the ASF (asylum detention), which contains explicit obligation to primary consideration of less restrictive measures.
[481] Slovak report, Chapter 2.8.5.

bail, police authority specifies conditions under which the alternative measure shall be applied.

The list of alternatives is not long in Latvia and Slovakia, while Lithuania offers a slightly wider choice.

A choice of alternative measures to detention in Latvia:

1. Regular registration at the specified unit of the SBG
2. Depositing a travel document and other personal identification documents at the disposal of the foreigner to an official of the SBG

A choice of alternative measures to detention in Slovakia:

1. Reporting obligation
2. Financial bail

A choice of alternative measures to detention in Lithuania:[482]

1. Requiring that TCN regularly at the fixed time reports at the appropriate territorial police agency
2. Requiring that TCN communicates his whereabouts at the fixed time by communication means to the appropriate territorial police agency
3. Entrusting the care of an UAM third-country national to a relevant social agency
4. Entrusting the care of the TCN, pending the resolution of the issue of his detention, to a citizen of Lithuania or a TCN legally resident in Lithuania who has relationship with TCN, provided that the person undertakes to take care of and to support the TCN
5. Accommodating the TCN at the Foreigners' Registration Centre without subjecting him to restriction of freedom of movement (applicable to asylum seekers only).

There are some conditions for the use of alternatives in the countries analysed, which limits access to it. In **Latvia** establishment of reasons of humanitarian nature in the case is required; the court may grant a measure alternative to detention in **Lithuania** only if: (a) the identity of the TCN is established, (b) he constitutes no threat to public security and public policy, (c) provides assistance to the court in determining his legal status in Lithuania and other circumstances.[483] In **Slovakia**, alternatives can be granted only if practical issues are resolved, such as ensuring accommodation and financial coverage of the costs of stay of TCN during application of alternative measure. Financial coverage is rather a significant requirement, it equals to 56 EUR per day, the

[482] Article 115 (2) of the Aliens' Law.
[483] *Ibid,* Article 115 (1).

amount of legal requirement for daily coverage of expenses in case of application for residence or visa. Another condition is that a TCN has accommodation where he would be obliged to stay; any change of address should be notified.[484]

There are several important aspects concerning the application of alternatives to detention in **Lithuania** that were developed by practice of courts. Firstly, the issue of granting or refusal to grant an alternative measure belongs to the discretion of the court, even if the authorities do not ask for it.[485] Secondly, application of alternatives is possible only where apart from the requirements raised for application of such measures the requirements for detention are met: if no grounds for detention of a TCN are ascertained the TCN may neither be subject to detention, nor to alternative measures.[486] Thirdly, the analysis of jurisprudence allows pointing out certain circumstances that justify the application of alternative measures. They are as follows: guarantees of a relative to provide accommodation for a TCN,[487] availability of funds for subsistence,[488] young age of children who may not be detained and have to live with their mother,[489] duration of residence in Lithuania and elderly age,[490] failure to exercise measures by the authorities in order to enforce the removal decision.[491] In addition, it should be noted that the district courts in Lithuania pay much attention to social relations and possession of accommodation and subsistence. Therefore, in practice, the possibility of exercising alternatives essentially depends on possession of income and accommodation.[492] Given that TCNs whose return or removal is considered usually have no funds for subsistence and no residence in Lithuania, in principle the alternatives may not be applicable to them.[493] Similar concerns exist in the other two countries, where also place of residence and financial means are essential for access to alternatives.

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484 Slovak report, Chapter 2.8.5.

485 Decision of the Supreme Administrative Court of Lithuania in administrative case No. N^{143}-3565/2008 of 21.07.2008.

486 Decision of the Supreme Administrative Court of Lithuania in administrative case No. N^{575}-56/2013 of 09.05.2013.

487 Decisions of the Supreme Administrative Court of Lithuania in administrative cases: No. N^{575}-52/2013 of 15.05.2013; No. N^{575}-1317/2012 of 22.11.2012.

488 Decision of the Supreme Administrative Court of Lithuania in administrative case No. N^{575}-1246/2012 of 08.08.2012; decisions of the District Court of Švenčionys Region in administrative cases: No. A-319-665/2012 of 10.02.2012; No. A-810-617/2012 of 22.06.2012; No. A-156-617/2013 of 18.01.2013.

489 Decisions of the District Court of Švenčionys Region in administrative cases: No. A-453-617/2012 of 15.03.2012; No. A-624-617/2012 of 27.04.2012.

490 Decision of the Supreme Administrative Court of Lithuania in administrative case No. N^{575}-1337/2012 of 14.12.2012.

491 Decision of the Supreme Administrative Court of Lithuania in administrative case No. N^{575}-1021/2012 of 25.01.2012; decision of the District Court of Švenčionys Region in administrative case No. A-453-617/2012 of 15.03.2012.

492 Decisions of the District Court of Švenčionys Region in administrative cases No. A-1603-665/2012 of 14.12.2012; No. A-1119-665/2012 of 07.09.2012.

493 Lithuanian report, Chapter 2.7.

Among other concerns with regard to alternatives to detention in **all three countries** is a lack of explicit obligation in the laws for the authorities first to consider the alternatives to detention. The **Latvian** laws do not provide for detailed rules governing the application of alternatives and no guidelines or criteria governing each of them exist. Possibility of appealing the decision on alternatives to the court is also lacking (may only be appealed in accordance with the Administrative Procedure Law).[494] Foreigners who are imposed alternatives to detention are not granted any state support, such as food, accommodation and medical care.[495] The analysis of jurisprudence on detention in **Latvia** also reveals that the SBG does not assess the possibilities to apply alternatives to detention or such an assessment is not reviewed in the courts' decisions in practice.[496] In judicial practice, sometimes there is a lack of in-depth analysis of alternatives or alternatives are not overviewed at all,[497] but there are also decisions when detention is considered as unlawful due to applied alternatives.

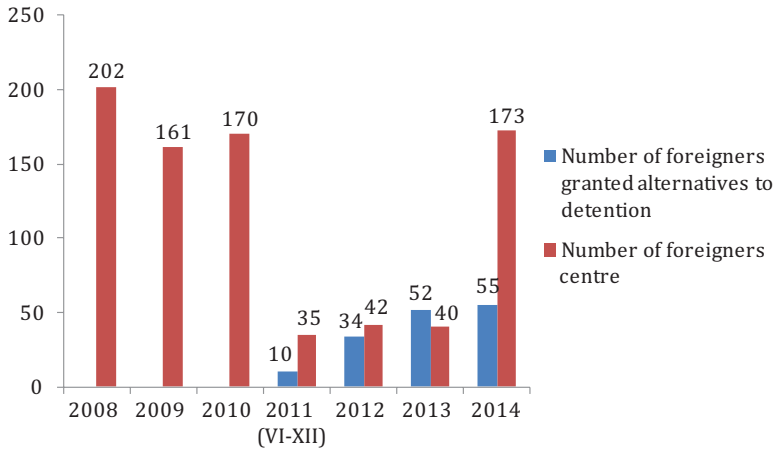
Example of case-law
The Daugavpils Court refused to detain a foreigner because the SBG had not assessed an opportunity to apply alternatives to detention due to the reasons of humanitarian nature: *„The SBG as the state authority has not observed the pre-court procedure, as the possibility to apply alternatives to detention for the individual concerned has not been discussed. Besides the ground of detention, which was mentioned by the SBG „[the foreigner] cannot present the sum of money that would be sufficient for booking a hotel until his removal" has been disproved by the objective information of the individual concerned. Therefore, the state authority has the possibility to apply alternatives to detention for the foreigner."*[498]

In **Slovakia**, the use of alternative measures is undermined by the formulation, which presents the alternative measures as an authorization of the police body. Police authority shall take into account the personality of TCN, the circumstances and the level of endangering fulfilment of the purpose of detention. In practice, decisions on alternatives are poorly reasoned and cannot be appealed, meaning that conditions of alternative imposed in an individual case cannot be challenged.[499] Another concern is that reporting obligation cannot be applied after a decision on detention has already been taken. As well, application of alternatives instead of decision on extension of detention is not possible.[500] However, in the second half of 2014 the Supreme Court

494 Latvian report, Chapter 2.7.2.b).
495 EMN, *The use of detention and alternatives to detention,* p. 31.
496 Decisions of the Daugavpils Court: No. 12-028112 of 27.04.2012, No. 12-028212 of 27.04.2012.
497 Decision of the Daugavpils Court No. 12-028112 of 31.05.2012; Decision of the Daugavpils Court No. KPL 12-041012 of 19.06.2012; Decision of the Daugavpils Court No. 12-054813 of 26.07.2013.
498 Decision of the Daugavpils Court No. KPL 12-025214/12 of 07.03.2012.
499 Slovak report, Chapter 2.8.5.
500 EMN, Frkáňová, A., Kubovičová, K.: *Detention and Alternatives to Detention in the Context of Migration Policy in the Slovak Republic*, April 2014, p. 46.

of Slovakia ordered the police authority to always evaluate a possibility of application of less restrictive measures for achieving the purpose of detention, also in situation when police authority decides about extension of duration or change the ground of detention.[501] The practice of application of alternative measures in **Slovakia** also reveals the following: b) when police authority considers application of alternatives to detention, it usually concludes that a foreigner does not have sufficient financial means; b) when interviewing the TCN before decision is taken, the police does not inform him about the possibility of application of less coercive measure, does not question him about his possibility to obtain financial means for this purpose. Police authority only states in the detention decision that the foreigner does not have any accommodation secured in Slovakia, has no relatives or acquaintances in Slovakia, does not command Slovak language and therefore is unable to secure accommodation. It can be concluded that the legal regulation, lack of methodology and distrust of public authorities lead to rather narrow application of alternatives to detention in Slovakia.[502]

Figure 10. Alternatives to detention in Latvia



Source: Data provided by the SBG.[503]

[501] Slovak report, Chapter 2.8.5.

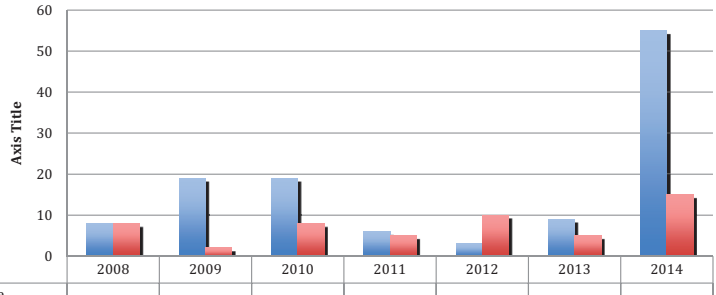
[502] *Ibid.*

[503] Statistics in this does not include asylum seekers whose numbers in detention centre has increased. The alternatives to detention for asylum seekers were established by the Asylum Law amendments (in force since 21.11.2013) and were applied for 20 persons in 2014, Latvian report, Chapter 2.7.2. b).

In **Latvia** and **Lithuania**, there is an increasing awareness of a need for alternative places of residence besides the detention centre during the return procedure, in particular, for vulnerable groups (families with children, etc.); such places could be provided in the accommodation centre for asylum seekers, by municipalities or NGO.[504] In June 2014, amendments to the Immigration Law were initiated in Latvia[505] in response to a situation when a family with several small children could not be accommodated in another place than the detention centre.[506] These amendments will guarantee accommodation and alimentation to foreigners with a return decision/ removal decision who are not detained.[507]

In practice, alternatives have been increasingly applied in **Latvia** (see Figure 10 above), they have been usually granted due to the health condition or family reasons of the foreigner concerned. Available data shows that the rate of absconding of persons for whom alternatives were used, was about 4% as compared to 1% of foreigners in detention in 2011 – 2013.[508]

Figure 11. Foreigners subject to alternative measures to detention in Lithuania, 2008-2014[509]



	2008	2009	2010	2011	2012	2013	2014
Subject to alternative measures to detention, except accommodation in FRC	8	19	19	6	3	9	55
Alternative measure to detention – accommodation in FRC	8	2	8	5	10	5	15

In **Slovakia**, according to official statistics alternatives to detention have been applied in 7 cases in 3 years, altogether 10 decisions on granting alternative were issued (all reporting obligations, none of financial bail as alternative to detention).[510]

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504 Latvian report, Chapter 2.7.2. b).
505 Draft Law "Amendment to the Immigration Law", 26.06.2014.
506 Annotation to the Draft Law "Amendment to the Immigration Law", 26.06.2014.
507 Draft Law "Amendment to the Immigration Law", 26.06.2014.
508 EMN, *The use of detention and alternatives to detention,* p.37.
509 Migration Department. *Migration Yearbooks for 2008 – 2013*
510 Slovak report, Chapter 2.8.5.

Detention conditions

Return Directive, Article 16 (1), (3) and (5)
1. Detention shall take place as a rule in specialised detention facilities. Where a Member State cannot provide accommodation in a specialised detention facility and is obliged to resort to prison accommodation, the third-country nationals in detention shall be kept separated from ordinary prisoners.
3. Particular attention shall be paid to the situation of vulnerable persons. Emergency health care and essential treatment of illness shall be provided.
5. Third-country nationals kept in detention shall be systematically provided with information, which explains, the rules applied in the facility and sets out their rights and obligations. Such information shall include information on their entitlement under national law to contact the organisations and bodies referred to in paragraph 4.

Specialised detention centres

Location: Daugavpils, second largest Latvian city after Riga, about 230 km to the South-East from Riga nearby the Belarus and Lithuanian border

Capacity: 70 detainees

Inhabitants: asylum seekers and irregular migrants

Opened in: 2011

All three countries have specialised detention centres, which are managed by the border guard authorities in **Latvia** and **Lithuania** and by the police in **Slovakia**. Thus generally it corresponds to the requirement that detention shall take place in specialised detention facilities.[511] Temporary detention facilities (like airports, border guard premises at the border, etc.) are also used. However, the centres in two of the countries are subject to criticism because of poor conditions, lack of regulation of suppressive measures and other concerns. **Latvia** has a detention centre "Daugavpils". Asylum seekers and irregular migrants are hosted separately there. There are separate blocks for women, men and families with children.[512]

Location: Pabrade, about 45 km to from Vilnius nearby the Belarus-Lithuanian border

Capacity: 164 beds: 88 in the condominium of asylum applicants, and 76 in the condominium of detained TCNs

Inhabitants: asylum seekers and irregular migrants

Opened in: 1997

[511] Latvian report, Chapter 2.7.4. b).
[512] LCHR, *Detention of asylum seekers and alternatives to detention in Latvia*, Riga, 2011, pp. 51-54

Lithuania maintains the Foreigners' Registration Centre, run by the SBGS. TCNs are detained for a period of over 48 hours there.[513] This Centre is an agency intended for keeping the TCNs detained by a court decision or accommodated by a decision of the Migration Department, as well as for accommodating asylum applicants, carrying out investigation as regards personal identity of TCNs, the circumstances of their entry into Lithuania, managing record-keeping of TCNs, carrying out their removal from Lithuania.[514]

The FRC is divided into two sections – one for asylum applicants and another one – for detained TCNs.

Location: Secovce and Medvedov

Capacity: 176 and 152
Inhabitants: asylum seekers and irregular migrants

Opened in: 2000 and 1997

Slovakia has two special police centres for detention of foreigners in Secovce and in Medvedov, where asylum seekers and irregular TCNs are accommodated separately. Families with children are placed in Secovce, which is adjusted for their accommodation, provides for family rooms in separate sector. Women and men are accommodated separately. Detention centres fall within the competence of the MOI unlike prisons that are within the competence of the Ministry of Justice. The status of prisoners is regulated by criminal law, while the status of the detainees is governed exclusively by the Foreigners' Act and internal rules of the detention centres. Besides these centres, the foreigners may be placed in temporary detention accommodation.[515] This placement usually involves police department near the border neighbouring the country to which readmission is applicable. In vast majority of cases it concerns Ukraine. Departments of border control alongside the border with Ukraine have been adjusted for temporary detention of foreigners. If readmission does not take place within 7 days from the day of detention, a foreigner must be transferred to a detention centre in Medvedov or Secovce.[516] According to the law,[517] detention centre shall correspond to the purpose for which it was established, shall be sanitary and equipped to avoid a threat to life or damage of health. Detention centre contains accommodation rooms including social, cultural and visiting room as well as other

[513] Article 114 (2).
[514] Article 79 (4) of the Aliens's Law.
[515] Section 88 (6) of the ASF.
[516] Slovak report, Chapter 2.8.6.
[517] Section 92 of the ASF.

spaces where TCNs may move freely during determined time. Special rooms are detached with separate regime of detention.

The Ombudsmen institutions expressed concern about detention conditions in **Latvia** and **Lithuania**. In **Latvia**, short-term detention places are not suitable for detention for more than a few hours, due to poor conditions.[518] However, there are no time limits set by the law for holding a person in the temporary detention rooms of the SBG.[519] Although only a small number of foreigners have been placed in the short-term detention places and normally only for a few hours, the number of detainees in such places could be higher due to potential increase of the number of the TCNs and insufficient number of places in the detention centre.[520] Some remarks were shared with Latvia also during the visit of the CPT in 2011 that recommended the staff of the Centre to not openly carry truncheons in detention areas, as *„this is clearly not conducive to the development of positive relations between staff and inmates"*.[521] Although the SBG did not receive any complaints on the use of restraint measures from the detainees, the use of isolation cells, has raised concerns with regard to asylum seekers, due to a lack of regulation of the procedures and safeguards as well as a lack of guidelines on managing hunger strikes.[522] According to the SBG, the decision on putting a person into an isolation cell includes the information on contesting the decision, although such a provision is not explicitly provided by the legal acts regulating immigration detention.[523] The detainees can place letters and complaints addressed to the head of the centre into a special box at the informational desk; the complaints are registered in a special register, but the procedure of submission and examination of complaints is not regulated by special legal acts, with the exception of the Law on Submissions.[524] The material detention conditions were assessed as very good by the CPT, but extending a range of activities for foreigners held for prolonged periods in detention centre was called for.[525] The interviewed foreigners also pointed to a lack of useful activities during prolonged residence in detention centre.[526]

In **Lithuania**, the report of the Parliamentary Ombudsmen's Office in 2014 in response to complaints received from the detained TCNs, highlighted that housing conditions in the FRC were unsatisfactory, the requirements of hygiene norms

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[518] Ombudsman of the Republic of Latvia, *Report of the Year 2012*, p. 72; See also: LCHR, SBG, UNHCR, *Access to the Territory and the Asylum Procedure in Latvia*, 2011.

[519] Latvian report, Chapter 2.7.4. a).

[520] EMN, *The use of detention and alternatives to detention*, p. 18.

[521] Report to the Latvian Government on the visit to Latvia carried out by the CPT from 5 to 15 September 2011, p. 19.

[522] LCHR, SBG, UNHCR, *Access to the Territory and the Asylum Procedure in Latvia*, pp. 31-34

[523] The Regulations of the Cabinet of Ministers on internal rules of the detention centre Nr. 742.

[524] Latvian report, Chapter 2.7.4. b).

[525] Report to the Latvian Government on the visit to Latvia carried out by the CPT, p. 19-20.

[526] Latvian report, Chapter 2.7.4. b).

were not met, and although TCNs were provided with clean bedding and personal hygiene products, the conditions for taking care of hygiene were not good. As the report states, the premises suffered from insufficient heating, the windows were not airtight, the residential premises of TCNs and other premises were not cleaned and were untidy, and the premises of the second floor were not inspected at all because of particularly bad smell.[527] In addition, it was established that the FRC does not comply with the requirements of the minimal space for one person,[528] in the condominium for TCNs (which during the inspection accommodated 95 persons), some persons had 3.8, 2.1, 2 or 1.5 sq. m. per person, which is not in line even with national legal requirements.[529] Among the positive developments, on 31 January 2014, amendments of the Procedure for Accommodation in the FRC were adopted to state that if a person accommodated in the centre refuses eating a certain foodstuff, this product should be replaced by another one (other ones) in compliance with the approved physiological nutritional standards. However, the report of the Ombudsmen states that the FRC does not ensure catering in accordance with cultural and/or religious beliefs and dietary nutrition, while the conditions for preparing food in the condominium of detained TCNs are unsatisfactory. In addition, detained TCNs do not have possibilities to carry out their devotions.[530] Currently, housing conditions of detained TCNs are being improved under a project financed by the European Return Fund. In addition, the Ombudsmen concludes that the FRC has insufficient means for the protection of safety. The condominium of detained TCNs does not have an electronic safety system, which would help to respond promptly to security issues. Persons who are in conflict, i.e., of conflicting nations, religions, homosexuals and the people who are intolerant to them, as well as single women and single men, families with children, mentally traumatized persons or the ones who use intoxicants are accommodated side by side, which may cause conflict situations. Meanwhile, although there is an official on duty, it is not always possible to ensure operative resolution of a situation.[531]

Treatment of vulnerable groups

The treatment of vulnerable persons does not meet the standards of the Directive in **Latvia** and **Lithuania**. Medical treatment is provided in detention centres or ensured outside the centres. The provisions on detention of the Immigration Law of **Latvia** do not include any reference to "vulnerable groups". The legal norms

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527 Report of Ombudsmen of the Seimas, Points 9-11.

528 Order No V-836 of the Minister of Health of the Republic of Lithuania of 28 October 2005 "On the approval of a Lithuanian hygiene norm HN 61:2005 *The Foreigners Registration Centre. Hygiene Norms and Regulations*", point 27 determines the norm of *5 sq. m.*

529 Report of Ombudsmen of the Seimas, Point 10.

530 *Ibid*, pp. 13, 22.

531 Report of Ombudsmen of the Seimas, point 5.

provide for daily nutrition norms for minors, infants, pregnant women, women after childbirth and breastfeeding as well as persons, who are sick with tuberculosis, AIDS, malnutrition of a moderate or severe stage and other diseases and receiving outpatient treatment.[532] The Ombudsman's Office has had several concerns with regard to the situation of vulnerable groups.[533] At the same time, the national law guarantees emergency health care and essential treatment of illness in line with the Directive.[534] Two medical practitioners are working in the detention centre. Primary health care is provided in the centre; if necessary, a person is sent to the hospital or outpatient clinics. Medical examination of each foreigner is conducted upon arrival to the centre and before departure; the medical personnel give a reference on the health condition to the escort team. Although a doctor's assistant speaks four languages, there is sometimes a need to invite a translator; SBG's or other detainees have been used. However, the latter practice should be prevented to ensure privacy and confidentiality in medical examination.[535]

In **Lithuania**, the FRC is not adjusted to accommodation of vulnerable persons, since it is not a social institution and the environment is similar to a prison. Persons accommodated in the centre are ensured primary personal healthcare services and necessary healthcare assistance including the possibility to get vaccines, the persons who were tortured or raped, minors, single mothers, elderly persons and other persons who need it are provided with psychological assistance.[536] Residents of the FRC shall be provided with ambulatory personal healthcare services, and when the services provided in the centre are insufficient, the person should be issued a referral and should be taken by the FRC to healthcare institutions for consultations of professionals or inpatient treatment.[537] The report of the Ombudsmen indicates that primary ambulatory healthcare services are available to TCNs accommodated in the FRC: they are provided consultations of a family doctor, examinations are made, if necessary, treatment is prescribed and referrals to consultations of professionals are issued. During the daytime a family doctor's services are available, while at night,

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[532] The Regulations of the Cabinet of Ministers No. 434 "Regarding the Residence Norms of Third-country Nationals Placed in an Accommodation Centre, as well as the Amount and Procedures for Receipt of Guaranteed Health Care Services".

[533] E.g. there is no requirement for identification of many diseases. Although the detention centre is equipped with an elevator for ensuring the movement of persons with disability, the Ombudsman's Office expressed its concerns that persons in wheelchair had difficulties to enter the catering unit. Ombudsman of the Republic of Latvia, *Report of the Year 2013*, pp. 98 – 99.

[534] Immigration Law, Section 59^2 (7). The Regulations of the Cabinet of Ministers No. 434, Section 15 – 20.

[535] Latvian report, Chapter 2.7.4. b).

[536] Points 17.4, 19 and 31 of the Procedure for Accommodation in the FRC.

[537] Point 43 of the hygiene norm HN 61:2005, Order No V-836 of the Minister of Health of the Republic of Lithuania of 28 October 2005 'On the approval of a Lithuanian hygiene norm HN 61:2005 "The Foreigners Registration Centre. Hygiene Norms and Regulations".

in case of necessity, the guard of the centre calls an ambulance.[538] In **Slovakia**, when placing a foreigner into detention centre, police authority shall take into account the TCN's age, health condition, family relationships and religious, ethnical or national particularities. Detention centre in Secovce is adjusted for accommodation of vulnerable persons including families with children, which enables their placement together in the family rooms. Families are always placed together. Detention centre decides about separation of family members only if the consequences of the separation would be proportionate to the reasons of such a measure. Otherwise men and women are accommodated separately, with exception when they are related. UAMs are not detained. TCN shall undergo a health check in the scope determined by a physician including necessary diagnostic and laboratory inspections, vaccination and preventive measures ordered by health protection authority; special attention shall be given to vulnerable persons.[539] Where the health condition of a TCN requires health care, which is not available in detention centre, it shall be provided in the health facility outside. Detained foreigners receive healthcare based on their participation in the general system of public health insurance, which is obligatorily paid on their behalf by the MOI.[540]

Information in detention centres

While information in detention is available in **Latvia** and **Slovakia**, this obligation is not appropriately ensured in **Lithuania**. In **Latvia**, the information on the applicable rules, including the rights and obligations of the detained foreigners – The Regulations of the Cabinet of Ministers on internal rules of the detention centre, are available in English only, while the Immigration Law is available in English and Russian in the detention centre; the information on the regime and leaflets on the asylum procedure are available in several languages. The contact information of UNHCR, the Ombudsman's Office and the LCHR is available.[541] In **Lithuania**, the provisions regarding informing the TCNs detained in the FRC lay down that the persons accommodated there shall be familiarized with their rights, obligations and internal regulations of the centre in the language they can understand by confirming this by signature.[542] The wording of the regulations effective until 21 March 2014 also stated that this information is provided to TCNs systematically during the entire period of their stay in the centre, at least once per month, which was in compliance with Art. 16 (5) of the Directive. However, the Ombudsmen reports that in practice, the FRC does not properly ensure the right of individuals to receive information. During the inspection, neither the information boards of condominiums of asylum-seekers

[538] Report of Ombudsmen of the Seimas, Point 17.
[539] Section 95 of the ASF.
[540] Slovak report, Chapter 2.8.6.
[541] Latvian report, Chapter 2.7.4.b).
[542] Procedure for Accommodation in the FRC, para. 16.

nor of detained TCNs contained information on internal regulations of the Centre, rights and obligations of TCNs (with translations to foreign languages). Also, in some floors information boards have not been found at all, and if they have been found, they contained minimal information, for instance, about general management in the Centre, about celebrations, training carried out in the FRC, obligatory maintenance schedule for the persons kept in the Centre.[543] In **Slovakia,** the director of the facility issues an internal order where he provides for details on rights and duties of TCN located in a facility and in practice this information is accessible in several most frequent languages used by detainees.[544]

Return Directive, Article 16 (2) and (4)
2. Third-country nationals in detention shall be allowed – on request – to establish in due time contact with legal representatives, family members and competent consular authorities.
4. Relevant and competent national, international and nongovernmental organisations and bodies shall have the possibility to visit detention facilities, as referred to in paragraph 1, to the extent that they are being used for detaining third-country nationals in accordance with this Chapter. Such visits may be subject to authorisation.

In **Latvia**, the Immigration Law provides for the right of the detainees to communicate with consulates, family members, kin or other persons regarding his whereabouts and with his means, to receive legal assistance, to meet with family members or kin, as well as with representatives of IOs and NGOs. The Ombudsman's Office is authorised to visit detention facilities for the purpose of monitoring forced return. However, the location of the detention centre far from Riga has been a significant barrier for legal aid providers to visit the centre on a regular basis. The detainees' communication with the outside world is rather poor due to limited access to telephone.[545] However, the staff of detention centre normally assist the detainees to send letters by fax and to print necessary documents upon request. In **Lithuania**, requirements of the Directive on access to legal representatives, family members and consular authorities and organizations are partially implemented in the legislation. The TCNs have the right to use the paid telephone that is available in the residential territory, contact the competent public authorities and bodies, IOs and NGOs, meet visitors in the territory of the centre subject to authorisation of the head of the centre.[546] However, the procedure of these visits and the procedure for issuing authorisations is regulated by the internal act of the FRC and is not publicly available. In addition, under the currently applicable procedure, if a TCN wants to see a visitor,

[543] Report of Ombudsmen of the Seimas, Para. 19.
[544] Slovak report, Chapter 2.8.6.
[545] Latvian report, Chapter 2.7.4.b).
[546] Para. 17.10, 17.14 and 17.17 of the Procedure for Accommodation in the FRC.

he has to submit an application requesting an authorisation for the meeting.[547] As the possibility to meet the lawyer is concerned, the right of TCNs to hire an attorney at law at their own cost exists,[548] while the right to meet the lawyer is not established in the bylaws regulating accommodation at the FRC. In practice, lawyers faced difficulties while trying to meet the represented TCNs in the FRC when they or their assistants were not allowed to the Centre.[549] Requirements of the Directive on access to national, international and non-governmental organisations (bodies) are implemented in the bylaws of Lithuania and such access is subject to authorization by the head of the FRC.[550] No authorisation for visits is necessary if cooperation agreements between the centre and the organisations have been signed or when the visits are made by the FRC's invitation.[551]

In **Slovakia**, a police authority shall communicate to the consulate without any delay where a TCN requests for notification of embassy of the country of his citizenship, if there is no embassy of this country, police authority notifies the MFA. TCN who is in detention shall have a right to notify close persons and his attorney about his detention.[552] Provision of food for a detained TCN is secured taking into account age, health status and religion.[553] Expenses for provision of food shall be borne by a TCN provided that he has sufficient funds, otherwise it is covered by the state. TCN can receive visits at the detention centre.[554] Legal representatives can visit their clients without any limitation.

Detention of Minors and Families

Return Directive, Article 17
1. Unaccompanied minors and families with minors shall only be detained as a measure of last resort and for the shortest appropriate period of time.
2. Families detained pending removal shall be provided with separate accommodation guaranteeing adequate privacy.
3. Minors in detention shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age, and shall have, depending on the length of their stay, access to education.
4. Unaccompanied minors shall as far as possible be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age.
5. The best interests of the child shall be a primary consideration in the context of the detention of minors pending removal.

[547] Lithuanian report, Chapter 2.7.
[548] Para. 17.9 of the Procedure for Accommodation in the FRC
[549] Lithuanian report, Chapter 2.7.
[550] Chapter X of the Procedure for Accommodation in the FRC.
[551] Paras. 51 -59 of the Procedure for Accommodation in the FRC.
[552] Slovak report, Chapter 2.8.6.
[553] Section 91 of the ASF.
[554] Section 98 of the ASF.

Detention of children is allowed in **Latvia** (including UAMs, above the age of 14)[555] and **Lithuania**, while **Slovakia** explicitly prohibits it. Legislation in **Lithuania** contains safeguards that vulnerable persons and families, which include minor TCNs may be detained only in special cases (previously "as a measure of last resort") taking into account the best interests of the child and vulnerable persons. Considering that the law provides guarantees not only to UAMs and families with minors, but also to other vulnerable persons, the national standard can be considered as more favourable in this respect. The legislation provides for families to be accommodated separately, ensuring the corresponding privacy, which complies with the standard of the Directive. In practice, the FRC has no suitable conditions for accommodating families separately and generally this centre is not suitable for vulnerable persons.[556] In **Slovakia**, detention of UAMs is prohibited by the Foreigners' Act,[557] but due to defective age assessment procedures, some UAMs cannot enjoy this guarantee.[558] Families with children are not exempted from detention in **Slovakia**, however, the law provides that detention shall be applied only if it is inevitable. No alternative measures are available specifically for families with children.[559] In practice, detention decision of a parent contains a sentence about detention of a parent and about placement of his minor child into the detention centre together with a parent. However, there is no sentence about detention of a child. Therefore children are *de iure* not detained. Families in the detention centre in Secovce are placed together[560] and have private room in family spaces, the right for family unity is observed.[561] Other vulnerable persons can only be detained if it is inevitable and for the shortest time possible. This implies that for detention of vulnerable persons police authorities must apply higher standard of necessity and their detention has to be shorter than in other cases. Duration of detention cannot be prolonged, if it concerns family with children or a vulnerable person,[562] thus detention of vulnerable persons and detention of families with children can last 6 months as a maximum.[563]

The Immigration Law in **Latvia** does not include a guarantee of Art. 17 (1) of the Directive or the principle of best interest of the child in the context of immigration detention (Art. 17 (5)). Minors may sometimes be detained because of lack of identity, contrary to the CJEU case law in *Mahdi.* 18 minors were detained during removal

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555 Immigration Law, Section 51 (1).
556 Lithuanian report, Chapter 2.7.
557 Section 88 (9) of the ASF.
558 Human Rights League, Fajnorová K., Števulová Z., Guráň P.: *Child or adult? Protection of rights of foreigners in procedures on age determination and in detention procedures.* March 2013.
559 Slovak report, Chapter 2.8.4.
560 According to Section 94 (3) of the ASF families are accommodated in detention centre together.
561 Slovak report, Chapter 2.8.4.
562 Section 88 (4) of the ASF.
563 Slovak report, Chapter 2.8.4.

procedure from mid-2011 to end-2014.[564] In case of detention of UAM, the SBG should immediately inform the Consular Department, the state police and the custody court.[565] UAMs may be detained in the relevant state police structural units and if the identity of the minor is not established within certain time, UAM is accommodated in a child care institution."[566] However, another legal act[567] allows detention of minors at the temporary SBG units, with poor conditions and not equipped for the minors' needs.[568] There are concerns of compliance with the principles in Art. 17 (4) of the Directive and ECtHR jurisprudence, because insecurity and hostile environment in detention centres have harmful consequences for them.[569] In **Lithuania**, the interests of children are taken into account in the case law while solving issues related to detention of children and their parents.

Examples of court practice on best interests of the child in the context of detention:
"*A third-country national has a minor son born on 28/02/2011 who may not be detained and must live with his mother*";[570] "*a third-country national has 3 minor children who have to live with their mother. [...] The spouse of the third-country national D. B. has declared his residence at (sensitive data), therefore the court is of the opinion that in this case it is possible and necessary to grant a measure alternative to detention*".[571]

There are some measures in the three countries to ensure educational, leisure and recreational activities for minors in detention. There is a playroom and a walking area for children in the family block of the detention centre "Daugavpils". In 2014, three minors went to a local school and also to outdoor activities.[572] However, there was no a possibility to ensure education for Vietnamese minors due to the language barrier.[573] While the legal regulation in **Lithuania**[574] only partially ensures the possibility for

[564] Latvian report, Chapter 2.7.3.
[565] Immigration Law, Section 54 (6).
[566] *Ibid*, Section 59[5] (1) and (2).
[567] Cabinet of Ministers Regulation No.707 „Procedures by which Alien Minors Enter and Reside in the Republic of Latvia Unaccompanied by Parents or Guardians" of 16.12.2003.
[568] Siļčenko J. *„Conditions at the SBG' s short-term detention facilities"*, presentation at the seminar "Elaboration of the system of monitoring forced return", organized by the Ombudsman's Office on 18.07.2014.
[569] ECtHR, Popov v. France, Application 39472/07, 39474/07, Judgment of 19 January 2012, para. 93-96.
[570] Decision of the District Court of Švenčionys Region in administrative case No. A-453-617/2012 of 15.05.2012.
[571] Decision of the District Court of Švenčionys Region in administrative case No. A-624-617/2012 of 27.04.2012.
[572] Information obtained during the LCHR monitoring visit to the detention centre „Daugavpils", 11.06.2014.
[573] Latvian report, Chapter 2.4.4.
[574] Neither the Aliens' Law, nor the Procedure for Accommodation in the FRC provides that vulnerable persons should receive particular attention (Art. 16 (3) of the Directive).

minors to engage in leisure activities. Its implementation depends on the initiative of international and public organisations and does not include all forms of leisure activities. In the FRC, social, medical, psychological services are provided, however this assistance does not include all possible forms of assistance that can be provided to vulnerable persons, and the premises of the FRC are not suitable for the disabled. Therefore this standard of the Directive has not been duly met. In practice, children are usually allowed to attend the local school.[575] In **Slovakia**, families with children are placed in detention centre in Secovce, where one separate corridor is adjusted for their accommodation. However, in case of larger influx of families with children, as witnessed in the beginning of 2015, detention centre is unable to ensure adjustment to special needs. In the yard outside the building, there is a playing area for children. Children do not attend schools outside of the centre. The organisation of the leisure, social, recreational and education activities depends on NGOs.

Conclusions

Grounds for detention

- The grounds for detention in two of the countries reflect the safeguards provided for in Art. 15 (1) of the Directive: relate detention for removal to the situations mentioned in the Directive, however, grounds of detention in **Lithuania** and **Latvia** (e.g. persons irregularly in the territory but without a return decision yet) extend beyond the permissible ones either in law or in practice. Legal regulation in Slovakia does not contain a sufficient framework to limit authorization of detention, as no specific criteria to guide it for the purpose of enforcing expulsion exist. This affects negatively the preference of voluntary departure, because it would be granted by police only if no reasons for detention exist.
- **Latvia** and **Lithuania** (from 1 March 2015) introduced in the legislation the list of criteria to determine the risk of absconding or hampering return procedures, while criteria that exist on the basis of national legislation in **Slovakia** are rather vague and not closely related to risk of absconding. Although in practice more criteria are used in order to establish risk of absconding, their explicit legal regulation is lacking. Considerations of national security, public order or safety and criminal offence in **Latvia** and **Lithuania** are problematic in view of the requirements of the Directive and the CJEU interpretation in *Kadzoev* and *El Dridi*.

[575] Lithuanian report, Chapter 2.7.

Duration of Detention

- All **three countries** comply with the time limits for detention established by the Directive. In **Latvia** and **Lithuania**, the time periods were introduced by virtue of transposition of the Directive. There is a more favourable standard in **Slovakia** where extension of detention period is not possible in case of families with minors or other vulnerable persons.
- The requirement that: a) detention should last as short as possible and no longer than necessary to take a return or removal decision or execute it; and b) that foreigner's detention should be reviewed when no legal or other objective reasons for reasonable probability to expel him exist; is still not part of the **Latvian** law, while in **Slovakia** it stems from limited legislative basis and judicial practice. **Lithuania** introduced this requirement from 1 March 2015 and before that it was applied in the case law, which held that detention may be considered proportionate only if expulsion is executed during reasonable terms.
- Detention is calculated from the day of actual detention in **Slovakia** and **Lithuania**. In **Latvia**, the term of pre-court detention (10 days) is excessively long and is normally applied in cases when a person's identity is not ascertained; such a practice may raise concerns of arbitrariness and may limit the possibility of a speedy judicial review.

Safeguards against arbitrary detention

- The principle of proportionality and necessity is recognised in **Lithuania** and **Slovakia** either in legislation or case law, but the Immigration Laws does not refer to it in **Latvia**. Detention seems to be automatic in case of a lack of identity, which contradicts the principle of necessity and proportionality of detention in each individual case and the outcomes of CJEU judgement in *Mahdi*.
- In all the **three countries** detention is ordered by the police or the border guard and followed by a court decision, in **Slovakia** based on submission of an appeal. The obligation to inform about detention decision and possibilities of appeal do exist in line with Art. 15 (2) of the Directive.
- Practical concerns exist in view of the right to challenge detention in **Latvia** (e.g., written procedures of appeals), release without delay in **Slovakia** (when police authorities wait for delivery of a written judgment and only then release), and access to appeals (tendency that TCNs give up their right of appeal in Slovak language in some police departments). In **Lithuania,** Art. 15 (2) of the Directive is not fully implemented in the law, as there is o lack of access to free legal aid.
- All of the three countries have a number of elements of periodic review of lawfulness of detention as required by the Directive, but it is not yet firmly established in legislation or practice.

- In **Latvia**, only the general appeal to challenge the lawfulness of detention exists and in **Slovakia** judicial periodic review takes place on the basis of the Constitutional Court decision only. Although **Lithuanian** laws establish detention review procedure**,** it is conditioned with the disappearance of grounds for detention and does not state the periods for review. Detention decisions are in practice reviewed every 3 months, as detention is often authorised for this period, but not by the court *ex officio*.

Alternatives to detention

- Alternatives to detention were introduced as a result of transposition and the choice is still very limited in **Latvia** and **Slovakia**. The legislation in **all three countries** does not explicitly provide for the obligation to examine alternatives first, but establishes measures alternative to detention in the law, while the case law in both **Slovakia** and **Lithuania** establishes preference of these measures to detention.
- Despite increased use of alternatives, they are still largely unutilized. A number of conditions imposed reduce the effectiveness of access to it in the **three countries**, including a lack of accommodation, social relations and financial resources. In **Slovakia** alternatives are the discretion of the police and cannot be appealed. In **Latvia**, the application of alternatives is limited to humanitarian reasons only, no detailed rules governing their application and possibility of appeal exist.
- Among other concerns on application of alternatives in **Slovakia** is poor reasoning of decisions and limitations on alternatives after decision on detention has been already taken. This is partially remedied by the practice of the Supreme Court since 2014 obliging to evaluate possibility of application of less restrictive measures, also in situations when the court decides on extension or a change of ground of detention.

Detention Conditions

- All **three countries** in principle comply with the requirements of the Directive that TCNs detained for immigration purposes are kept separately from other detained persons, but in **Lithuania,** the housing conditions in the FRC are unsatisfactory and do not ensure dignified and humane living, as minimal space requirements are not met, hygiene conditions are inappropriate, and there are no sufficient measures for safety. In **Latvia**, there is a lack of useful activities during prolonged residence in detention centre and the use of special suppression measures is not sufficiently regulated.
- The treatment of vulnerable persons does not meet the standards of the Directive in **Latvia** and **Lithuania**. The provisions on detention of the Immigration Law of **Latvia** do not include any reference to "vulnerable

groups". In **Lithuania**, the FRC is not adjusted to accommodation of vulnerable persons, since it is not a social institution and the environment is similar to a prison harmful for children and other vulnerable detainees. The conditions in **Slovakia** comply with this requirement only partially. Directive's provisions on medical services have been implemented in all countries.

- While information in detention is available in **Latvia** and **Slovakia**, the obligation of Art. 16 (5) is not appropriately ensured in **Lithuania** where a duty to systematically provide information to the detainees does not exist and in practice information is hardly available at the FRC.
- The obligation to allow contacts for detained TCNs is complied with in the three countries at legislative level, but constrained in practice by a lack of access to lawyers (**Latvia** and **Lithuania**), limited access to means of communication (**Latvia**) and other constrains. In **Slovakia** and **Lithuania** the right to meet visitors is established in legislation. In **Lithuania**, though, it is not fully implemented in practice and the legal regulation on possibility to obtain authorisation for visits is not publicly available.

Detention of children and families with children

- Special rules with regard to detention of children and families with children exist in all **three countries**, while Lithuania provides for a more favourable standard also covering families and all other vulnerable persons. However in practice, the treatment of vulnerable persons is not fully guaranteed as required by Art. 17 (1): there are cases of automatic detention in case of lacking identity in **Latvia**; age assessment is of concern in **Slovakia**; conditions do not respect the international and European standards in the FRC for families with children in **Lithuania**; right to leisure and recreational activities for children is not fully guaranteed in **Lithuania,** while education in **Latvia.**

CHAPTER IX.
The system of effective monitoring forced return

International and European standards

There is an increasing attention to monitoring forced returns in Europe. The Return Directive refers to the establishment of effective forced-return monitoring system (Art. 8 (6)). According to the FRA, the system is effective if: a) the monitoring process covers all stages of removal, including pre-departure period, departure and reception in the destination country; b) the organisation conducting monitoring is independent from the authorities enforcing return; monitoring is carried out on on-going (not project) basis.[576] The Twenty Guidelines in addition require that the forced return operation is fully documented, in particular with respect to any significant incidents that occur or any means of restraint used in the course of the operation. Special attention shall be given to the protection of medical data. If the returnee lodges a complaint against any alleged ill treatment that took place during the operation, it should lead to an effective and independent investigation within a reasonable time.[577] The methodologies of monitoring vary to a large extent among the EU MSs and it is considered that one-third of them still needs to put in place an effective monitoring system.[578]

Implementation

Return Directive, Art. 8 (6)
Member States shall provide for an effective forced-return monitoring system.

All countries have legal provisions in legislation on monitoring forced return. However, detailed regulation is lacking. Thus the scope, stages of removal and other procedural aspects depend on the possibility to find an agreement with the institution carrying out the removal. In **Lithuania** it does not ensure the efficiency of the removal monitoring system.[579] In **Latvia**, both legislation and practice of monitoring

[576] FRA, *Fundamental rights: challenges and achievements in 2013*, Annual Report 2013, 2014, p. 45.
[577] Guideline No. 20.
[578] FRA, *Fundamental rights: challenges and achievements in 2013*, p. 45.
[579] Lithuanian report, Chapter 2.9.

have been introduced, although the monitoring is a new function and the monitoring system has not been developed yet, as acknowledged by the Ombudsman's Office.[580] In **Lithuania**, provisions in relation to forced-return monitoring are established by the Aliens' Law[581] and in **Slovakia**, these provisions were transposed in the Foreigners' Act.[582] Before 1 March 2015, the Aliens' Law in **Lithuania** provided that representatives of IOs and NGOs may monitor removal of a TCN from Lithuania. As provision referred to "may monitor", the system was dependent on the initiatives of mentioned organisations. The EC, when evaluating Lithuania's implementation of the Directive, stated that it was not sufficient to establish in the national law that representatives of IOs and NGOs may monitor removal. Such a wording was not consistent with the requirements of the Directive, because the national legal acts have to indicate the scope and nature of the monitoring system.[583] Thus the Aliens' Law was amended to provide that the MOI together with IOs and NGOs carries out monitoring of removal of TCNs in accordance with the procedure laid down by the MOI and the Minister of Social Security and Labour.[584] At the time of writing this Report these procedures have not been adopted yet, but the draft order of MOI on monitoring the removals was pending.

The **bodies** that carry out monitoring differ in the three countries. They range from independent bodies, like NGOs in **Lithuania**, Ombudsmen institutions in **Latvia,** which can involve NGOs[585] and a complex of bodies, involving internal monitoring bodies (MOI), general bodies, like the Office of the Prosecution and the Office of Public Defender of Rights (Ombudsmen), and NGOs in **Slovakia**.

The functions of monitors also differ and include the surveying the foreigners about information on removal, counselling and informing them (**Latvia, Lithuania**), visiting pre-removal places (**Slovakia**), monitoring familiarization with the return decision, escorting and interview with the official before removal takes place (**Lithuania**). Monitoring in all three countries covered all stages of return, including the actual expulsion, but this is not ensured all the time and depends on projects.[586] More specifically, **Latvia** started monitoring in June 2011 and until late 2013 focused on survey of foreigners and monitoring detention conditions, but not the actual removals. In 2012, a questionnaire for foreigners was elaborated.[587] It includes: information, provided to the foreigner on the removal decision and the right of appeal; interpretation of the decision; possible cases of ill-treatment; the implementation of the *non-*

[580] Latvian report, Chapter 2.8.1.
[581] Art. 126 (2) of the Aliens' Law.
[582] Section 84 (8) and (9) of the ASF.
[583] Lithuanian report, Chapter 2.9.
[584] Art. 126 (2) of the Aliens' Law.
[585] Immigration Law, Section 50.[7]
[586] Latvian report, Chapter 2.8.2.; Slovak report, Chapter 3.
[587] Ombudsman of the Republic of Latvia, *Report of the Year 2013*, p. 94.

refoulement principle; detention conditions, access to health care, possible humanitarian circumstances, etc.[588] The Ombudsman's Office conducts a survey (either in person or by telephone) of each foreigner in the removal procedure, upon receiving the information on the removal decision from the SGB and the OCMA. In the period from 1 July 2011 until August 2014, almost all foreigners in the removal procedure were surveyed (see Figure 12 below).[589] In some cases, because the information on the removal order was delayed or interpreters were not available at short notice, the interviews could not be made.[590] The foreigners are normally interviewed shortly before departure in Riga or Jurmala; the information from the interviews is kept in a special database. There are plans to complete the elaboration of the methodology (guidelines) of monitoring the detention conditions and actual removals.[591] In **Latvia**, the Ombudsman's Office has monitored the detention conditions in the detention centre, temporary detention rooms in the premises of the SBG Riga Board and detention rooms at 12 border control points and other temporary detention facilities. There were concerns with regard to the availability of translation and conditions in short-term detention places. Monitoring of actual removals has started at the end of 2013.[592] Until March 2015, monitoring of nine actual removals, including seven removals by aircraft and two – through border control.[593] The long destination flights have not been monitored so far, as the SBG normally escorts the returnees to the transit country, due to security reasons and because it is considered that no special control is needed after transit.

The process of monitoring of forced return in Latvia
1) visiting the foreigners in places of detention in order to evaluate detention conditions, including the provision of medical assistance and meeting other needs;
2) survey the foreigners in order to determine awareness of the progress of the removal process, his rights and the possibility for implementation thereof;
3) observation of return of the personal property of the detained person seized at the time of detention, transportation from the detention centre to the departure point, handing-over and registration of luggage;
4) participation in the actual implementation of the forced removal process in order to evaluate the observance of human rights of the foreigner to be removed.

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588 Latvian report, Chapter 2.8.2.

589 However, only about a half were actually reached in second half of 2011, due to fact that many removal decisions, adopted before the Immigration Law amendments, were not received by the Ombudsman's Office and also because several foreigners applied for asylum. Latvian report, Chapter 2.8.2.

590 Ombudsman of the Republic of Latvia, *Report of the Year 2012*, p. 72.

591 The project "Elaborating the mechanism of monitoring forced return", implemented by the Ombudsman's Office during the time period from on July 2013 until July 2015, Latvian report, Chapter 2.8.2.

592 Latvian report, Chapter 2.8.2.

593 Piļāne I., „*Monitoring of immigration detention and forced return*", presentation in the seminar "Practical aspects of monitoring immigration detention and forced return", organized by the LCHR on 31.03.2015.

In 2014, an agreement between the SBG and the Ombudsman's Office was signed and details the practical aspects (responsible officials, the order for booking flight tickets, etc.) of cooperation in monitoring forced return.[594] In **Lithuania**, in the period of 2010 – 30 June 2014, removal monitoring was carried out by independent lawyers of the Lithuanian Red Cross Society under projects funded by the ERF.

Lithuanian monitoring projects		
2010-2011	Actual monitoring of the removal process from the FRC to the state border or the airport [595]	8 cases
2011-2012	Monitoring by escorting persons to the state border of Lithuania or the airport, providing information and counselling few days before removal[596]	30 TCNs
2012-2013	Monitoring by escorting to the border of Lithuania or the airport or to the country or origin. As a result of this project, a cooperation platform of the state authorities and NGOs involved in return and removal of TCNs was developed and continued during the next project as well[597]	20 TCNs
2013-2014	Monitoring by escorting to the border or the airport, or to the country of origin, familiarization of foreigners with their removal decisions[598]	42 TCNs

The scope and activities of the monitoring in Lithuania depended on the activities provided for in the annual projects and agreements with the institution that carried out the removal. Monitoring of removal under projects mentioned essentially included actual monitoring of removal process. Only one of the four projects carried out included counselling of persons subject to removal in order to ascertain whether they had been informed of their rights and if due preparation for the journey had been made. While in all other cases the monitor could not question or counsel the person before removal took place. In the mentioned cases before the implementation

[594] Latvian report, Chapter 2.8.2.
[595] Lithuanian report, Chapter 2.9.
[596] As a result of this project, a "Study on Evaluation of Lithuanian Practice in Carrying out Return and Removal of TCNs" was prepared, Lithuanian report, Chapter 2.9.
[597] As a result of this project, a "Study on Evaluation of Lithuanian Practice in Carrying out Return and Removal of TCNs" was prepared, Lithuanian report, Chapter 2.9.
[598] As a result of this project, a "Study on Evaluation of Lithuanian Practice in Carrying out Return and Removal of TCNs" was prepared, Lithuanian report, Chapter 2.9.

of removal the monitor would meet the official carrying out the removal and would ask him questions related to preparation for the removal, i.e., of informing the person, his vulnerability, baggage, catering, etc. In addition, the project of the last years included monitoring of familiarization with the removal decisions. However, in order to ascertain whether due preparation for removal has been made, whether the fundamental rights of the person have been ensured, a conversation with the official carrying out the removal and monitoring of removal is not sufficient.[599] As monitoring was not governed by any legislation, informing monitors of removals carried out depended on agreement with the implementing institutions. Usually monitors were informed three days in advance of the planned removal by specifying the country of origin of the removed person. When the TCN was removed with an escort, an earlier notice was given (1-2 weeks in advance). The gender, age or vulnerability of TCNs was indicated in rare cases. In addition, there were cases in practice where monitors were not informed of the removed person at all.[600] In **Slovakia**, the MOI controls the enforcement of decision on administrative expulsion and enforcement of punishment by expulsion. In this context it cooperates with NGOs. As of 1 May 2013 the Office of UNHCR intervened in legislative process and negotiated that this provision referred also to cooperation of MOI with UNHCR. UNHCR cooperates with the MOI in monitoring the administrative expulsion proceedings with foreigners, primarily at the external border. UNHCR monitors the execution of administrative expulsion in order to offer a minimum of procedural guarantees for a foreigner. This is offered in the form of the right to proceedings in a language he understands, the right to be aware of his rights and duties within the proceeding, including the right to seek asylum in **Slovakia**, the right to legal assistance and effective appeals that allows foreigner to express his will leading to an application for international protection.[601] As of 1 January 2014 the legislation contains a new provision, which regulates the content of monitoring of execution of forced return.[602] It states that the control of execution of decision on administrative expulsion and execution of judicial punishment of expulsion (understood as removal in this context) consists mainly of monitoring of:[603]

1. observance of rights and obligations of TCNs placed in detention centres
2. observance of duties of police authorities and of detention centre in connection with detention of TCN
3. during preparation and in the course of removal
4. after finalization of removal in the country of removal

[599] *Ibid.*
[600] *Ibid.*
[601] Slovak report, Chapter 3.
[602] Section 84 (9) of the ASF.
[603] Slovak report, Chapter 3.

There is no publicly available information about the practical implementation of these legislative provisions. According to the official position of Bureau of Alien and Border Police of Presidium of Police Force in Slovakia (hereafter – BBAP) monitoring of enforcement of decision on administrative expulsion is implemented by the MOI control bodies, in cooperation with IOs and NGOs active in the field of protection of human rights and freedoms, such as IOM, Slovak Humanitarian Council, Marginal. The authorities also mention the role of the Office of Prosecution and the Office of Public Defender of Rights (Ombudsman) as bodies taking part in monitoring of forced return.

In **Latvia** and **Lithuania** the monitors cannot interfere in the removal process and remain as observers, while in **Slovakia** the actual content of the monitoring in practice is not known because monitoring as per legislation is yet to become operational. However, in **Latvia**, the monitors should inform the SBG on information at their disposal regarding circumstances, which may influence the organisation or implementation of the forced removal process, as well as threaten personal safety or health. The monitor has a right to obtain information from the relevant state institution, invite specialists (for example, lawyers, medical practitioners, interpreters) for provision of necessary consultations to the foreigner subject to forced removal; organise assistance for improving living conditions, pastoral care, provision of other support. A monitor is obliged to inform without delay the official of the SBG, who is implementing the forced removal process, regarding the planned activities in writing.[604] Although the recommendations of the Ombudsman's Office are not binding, the monitor is authorised to ask the SBG to check information obtained during monitoring (e.g. alleged ill-treatment or the opinion of a medical practitioner, etc.) and to give its opinion.[605] After monitoring of forced removal process, the monitor is requested to prepare a report on the shortcomings identified and recommendations for improvements to the MOI.[606] In **Lithuania,** the role of the monitor was passive and only the officials' actions were monitored. The monitor could not review the documents of the removed person, pose questions to the TCN or to the official exercising the removal. Even in the case where a violation of the person's rights was noticed, the monitor could not make any comments. The monitor drew an internal report every time after the completion of removal monitoring, which described the procedure of removal and the defects and good practice observed, also recommendation were provided. The report was presented to the official carrying out the removal and the head of the institution. However such a procedure for presenting reports was laid down only during the last project.[607] In **Slovakia**, according to the NGOs, Slovak Humanitarian Coun-

[604] Immigration Law, Section 50^7 (4-7).
[605] Latvian report, Chapter 2.8.3.
[606] Immigration Law, Section 50^7(8).
[607] Lithuanian report, Chapter 2.9.

cil (hereafter – SHC) participates in monitoring of observance of human rights of the detainees during detention. Primarily through their social workers who are present on full time basis, SHC monitors the needs and rights of clients in detention centres. Psychologist, teacher and other contact persons who are employed in the detention centre assist in monitoring the situation in detention centres. One of their tasks is to monitor also observance of duties of the police officers and other governmental authorities. NGO Marginal does not consider its participation in monitoring of forced return to be "active". Neither they participate in monitoring of removal, nor of the post removal phase in the country of return. Marginal draws attention of detention centre authorities to the rights and needs of detainees and monitors observance of duties by the police officers in the centre. Marginal provides legal counselling and representation in procedures challenging decisions and actions of the police authorities before the judicial bodies; still it cannot be understood as a control of enforcement of administrative expulsion decisions. It can be therefore concluded that NGOs take part in the monitoring of forced return, but only to a limited scope. It is not clear, if monitoring of preparation of implementation of removal as well as monitoring of situation after removal in the country of return indeed takes place in practice, as NGOs do not seem to play this role.[608] In **Slovakia,** for the scope of monitoring established by law, the office of prosecution and the office of ombudsman seem to have been equipped with sufficient competencies, allowing them independent access to foreigners, places of detention, access to documentation and case files, authority to request explanation or information. Legal regulation gives them also authority to request follow up to the findings reported by them, and equips them with legal tools how to achieve follow up in practice. Prosecutor, for example, has a special authority to order release from detention centre. On the other hand, Office of Ombudsmen usually acts on the basis of external information about allegation on breach of human rights or on its own initiative. In its competencies the public defender of human rights is authorized to enter any premises and buildings of the bodies of public administration, ask questions from employees of such a body, speak with persons restricted or deprived of their personal freedom without the presence of other persons, require necessary documentation, as well as explanations from the relevant authorities. Public authorities are obliged to cooperate with public defender. However, the competence for monitoring observance of human rights of these institutions does not seem to extend to situations of removal implemented by an escort team, neither to situations of post-removal reintegration process.[609]

Among the major obstacles to monitoring in **Latvia** is limited funding, as monitoring is conducted in the framework of the ERF projects. Additionally, long periods for obtaining visas to some countries (above all, Russia) has made the

[608] Slovak report, Chapter 3.
[609] *Ibid.*

presence of the Ombudsman's Office's staff on board of the aircraft impossible in several removals; there is also a lack of interpreters specializing in rare languages. So far, the selection of cases for monitoring actual expulsion has been determined by the feasibility of travel (availability of visa, funding) as well as prioritising the removal of vulnerable groups (disabled persons, families with minors, etc.) and the situation of potential conflicts (a probability of aggressive behaviour of a foreigner).[610] In **Lithuania**, the monitoring project for the year 2013/2014 was the last one as the MOI did not include the removal monitoring activity among the priorities of the national annual programme of the ERF. Therefore no removal monitoring has been carried out since then, as projects of NGOs are not financed by the fund's resources, while the state monitoring system does not exist. The practice whereby monitors cannot make any comments in the process in Lithuania could be considered as defective. It would be more appropriate for the monitor to point out the violations to the officials so that the violation be terminated, and not simply state the fact that has already occurred after the violation can no longer be corrected.[611] Limited budget resources of the Office of the Ombudsmen in **Slovakia** does not enable it to establish regular monitoring of forced return, it monitors observation of human rights on its own initiative in the limited number of selected themes each year. Monitoring of forced returns has not been the theme yet; on the other hand, *ad hoc* monitoring would not satisfy the requirements of the Directive. The same applies to the Office of Prosecution although it monitors regularly all places where deprivation or restriction of liberty is applied. Legislation does not recognize their special role in monitoring of forced return, nor does it impose any special requirements of frequency. Statistics shows that monitoring in the two countries covers only a small part of removals, while in **Slovakia** there is no data on the number of cases of forced return, which have been monitored. This means that there is no monitoring of the phase of enforcement of expulsions.[612] Monitoring is still a project-based or *ad hoc* activity, its sustainability is doubtful, as Lithuanian experience showed.[613]

[610] Latvian report, Chapter 2.8.2.
[611] Lithuanian report, Chapter 2.9.
[612] Slovak report, Chapter 3.
[613] No removal monitoring has been carried out since min-2014, as projects of NGOs are not financed by state resources, while the state monitoring system is not developed yet. Previously, monitoring was implemented under ERF funded projects. Lithuanian report, Chapter 2.9.

Figure 12. Statistics on foreigners' survey in Latvia

	Removal decisions obtained	Foreigners surveyed
2011 (VII – XII)	22	12
2012	58	49
2013	33	29
2014 (I – VIII)	29	20

Source: Ombudsman's Office.

Figure 13. Forced Return Monitoring statistics, 2010-2014, Lithuania

Year	Number of removals (persons)	Number of monitored removals (persons)
2010	137	0
2011	125	8
2012	236	32
2013	279	18
2014	362	22

Conclusions

- All three countries establish the basis for forced-return monitoring in legislation, but the implementing legislation in **Lithuania** is lacking. Monitoring is carried out by independent bodies in **Latvia** and **Lithuania**, while the **Slovak** system is mixed. The monitoring process in all the countries does not cover all stages of removal.
- In practice, implementation of monitoring of forced return is constrained either because the procedure of monitoring is not regulated and there is no state monitoring system apart from project-based monitoring, which is dependent on availability of funds (**Lithuania**), or capacities due to it being a new function are limited (**Latvia**), or funding is insufficient (**all countries**), or practice is unclear despite legal regulation because the operational system is lacking (**Slovakia**).
- None of the countries has professional training for return monitors and passive role of the monitor in **Latvia** and **Lithuania** also impacts on the effectiveness of monitoring.

RECOMMENDATIONS

Voluntary return

- Countries shall prioritize voluntary return in order to achieve full compliance with the Directive and foster the motivation of foreigners to depart voluntarily. This could be achieved through legislative amendments eliminating obstacles to voluntary departure: limiting detention to the period preceding the return; applying voluntary departure also for persons who come irregularly or are detained; ensuring that sufficient period is assigned for voluntary return based on individual circumstances (Lithuania, Slovakia) and regulating the granting of voluntary return period as a mandatory part of the decision (Slovakia).
- Mobilizing financial support for voluntary return programmes by prioritizing them in national EU funds' programming and ensuring that there are no interruptions in-between is key to effective implementation of the principle that voluntary return shall prevail as proclaimed by the Directive.

Exceptions to return

- Legal and practical obstacles to granting of residence permit in case of non-return need to be addressed through legislative changes. The requirements of legal residence, travel documents or resources, which serve as barriers to regularisation when no removal is possible, and the minimum social guarantees (health care, access to the labour market, education in particular) for persons who cannot be returned, shall be ensured;
- All three countries need to establish the mechanism for identification of vulnerable persons and guarantees corresponding to their needs during the process of return (removal).
- Establishment of requirements of the best interest of the child and family protection as concerns return procedures in legislation on foreigners is needed, but also implementing guidelines to make these principles operational in practice in the three countries.

Removal and postponement of removal

- Criminal prosecution for illegal entry and imposition of sanctions (Lithuania) should not serve as an obstacle to return and shall be terminated in case of return (removal) procedure to ensure compatibility with the objectives of the Directive and the CJEU case-law to guarantee speedy return.
- Safeguards of necessity, proportionality and the use of coercive measures as a last resort need to be included in foreigners' legislation in all three countries,

while provisions of the Directive on the use of coercive measures need to be fully transposed in Latvia.

- Procedures for postponement of removal in case of health issues, non-refoulement and victims of trafficking shall be regulated in the legislation to ensure full implementation of the Directive (Lithuania), while a lack of suspensive effect and its exceptions at the border shall be addressed in the other two countries.

Return and Removal of Children

- Age assessment procedures need to be formally established in the legislation in the context of removal (Latvia and Lithuania). In all three countries it needs to include the guarantee that age assessment may be undertaken only as a last resort, while a presumption of minority shall prevail until rebutted. These procedures should provide for mandatory involvement of legal representatives, the requirements need to be set out in the legislation for the use of complex methods that allow the assessment of psychical, social and psychological maturity of the person, and for professionals with appropriate expertise and familiarity with the child's ethnic and cultural background.

Entry bans

- Criteria for determining the duration of entry bans and limits on this duration in line with the Directive need to be established in Latvia, while stricter requirements on application of entry bans in case of state security or public policy shall be established in Lithuania.
- In view of full implementation of the Directive's provisions withdrawal, suspension and shortening of entry bans need to be clearly regulated in all three countries to ensure that they are imperative, criteria for decision making and grounds for withdrawal (suspension) are established and appeal possibilities exist. Lithuania needs to transpose the requirement of the Directive to withdraw or shorten an entry ban period when a person is able to show that he has departed in full compliance with a return decision.

Procedural Guarantees

- Effectiveness of appeals needs to be improved by providing appropriate time between the decision and return in Latvia, assigning an independent body of appeal in Slovakia, providing linguistic assistance at the stage of preparing an appeal in Lithuania, and eliminating the exceptions to suspensive effect of appeal in compliance with the Directive and international standards.
- The implementation of the provisions on legal aid shall be improved in all three countries through inclusion of requirements for state guaranteed legal aid in the context of return in Lithuanian legislation and eliminating the obstacles to its' practical accessibility in Latvia and Slovakia (context of readmission).

Detention and alternatives to detention

- The criteria for risk of absconding need to be clarified and guidelines for authorising detention in case of return need to be developed in Slovakia. Grounds of detention based on national security, public order or safety and criminal offense need to be eliminated from legislation on foreigners of the other two countries as incompatible with the Directive and the CJEU case-law.
- Time limits for pre-court detention shall be reduced in Latvia to comply with international and European standards. Legislative safeguards need to be introduced in Latvia in line with the Directive and the CJEU case-law, including the test of necessity and proportionality, in particular when identification is lacking. Review possibility when no reasonable probability to expel exists is needed.
- Legislation in the three countries would benefit from introduction of clear rules on application of periodic review of detention, including the periods for review. The right to challenge detention would be made more effective if access to it is improved though longer periods for appeal in Latvia and guarantees of free legal aid in Latvia and Lithuania.
- Mandatory priority of the alternatives to detention shall be established in legislation of all countries and limiting conditions for their application eliminated. Systems of alternatives in the context of return to be developed with NGOs and funding from the AMIF.
- Detention conditions should be improved to ensure minimal space, appropriate hygiene and living conditions in Lithuania, while accommodation that responds to the needs of vulnerable individuals has to be guaranteed to meet the standards of the Directive in all three countries.

The system of effective monitoring forced return

- All three countries need to make their monitoring systems operational and properly regulated in legislation. They shall ensure sustainable funding for monitoring forced return, it shall not be dependent on project funding. Monitors shall be appropriately trained and monitoring shall involve all stages of removal, while monitors' role shall focus on advising the removal authorities in order to prevent violations from taking place.

PART II:

PROJECT EVENTS AND GOOD PRACTICES

The focus of the Project was on good practices of monitoring forced return, alternatives to detention and various issues of identification and protection of vulnerable persons. Thus the events reflected in this part of the Report concentrate on issues under discussion at national level in Project countries and the experiences of other EU MSs states, which could be useful for advancing implementation of the Directive in Latvia, Lithuania and Slovakia. Project events included: national seminars in all three countries, two study visits, a final conference and advocacy events. This part of the Report relies on information supplied by the partners of the Project, thus no separate references are being made to their reports.

PROJECT EVENTS

National seminars

Latvia

On 31 March 2015, the Latvian Centre for Human Rights (hereafter – LCHR) organised a seminar **„Practical aspects of monitoring immigration detention and forced return"** under the Project. The purpose of the seminar was to promote exchange of experience on monitoring immigration detention and forced return among the national authorities and NGOs. Additionally, the seminar aimed at raising awareness on the standards of monitoring immigration detention and the alternatives to detention. The seminar brought together 29 participants, including representatives from SBG, OCMA, MOI, Ministry of Welfare, MOJ, and the Ombudsman's Office, the State Legal Aid Administration, the Riga City Council, judges and lawyers.

During the first part of the seminar, the representatives from the national preventive mechanisms (hereafter – NPMs), established in accordance with the Optional Protocol to the Convention Against Torture (hereafter – OPCAT), from Switzerland and the UK as well as the Ombudsman of Latvia presented their experience. The Vice President of the Swiss National Commission for the Prevention of Torture presented the **Swiss experience on immigration detention and forced return monitoring**. The mandate of the Swiss National Commission for the Prevention of Torture is quite broad – it examines the situation of detainees and regularly visits all places where persons are deprived of their liberty. The Commission addresses recommendations to the competent authorities with the aim to prevent any form of torture, cruel, inhuman or degrading treatment or punishment and to improve the treatment of persons deprived of their liberty. The Commission is composed of twelve members appointed for a term of four years. Members have extensive experience and the necessary pro-

fessional and technical skills and expertise in the fields of medicine, psychiatry, law and intercultural relations. The Commission has unrestricted access to all kinds of data and information, which it needs to accomplish its mandate. The Commission can access all places of detention and interview detainees and all other persons who might give valuable information. The main method of monitoring is confidential interviews with officials, including medical staff, police officers and detainees. A draft report, including all recommendations, is discussed with the officials. After reports are published on the Internet and in the media, institutions may also come up with a written statement in response to the report, which will be published, together with the report on the website of the Commission. A very important aspect is a dialogue with cantonal officials, judicial officials, as well as politicians. Since 2012 the priorities of the Commission are: 1) to ensure appropriate detention conditions for persons detained awaiting repatriation and 2) monitoring repatriation flights. Special attention is paid to the vulnerabilities: poor knowledge of language, poor knowledge of the legal system, few contacts in the country of stay, health status often unknown, identity unclear, etc.

There is no special mandate for the Commission on monitoring of forced return. Monitoring is based on the OPCAT and the national law. The Commission has monitored only special flights. The Commission does not intervene in a monitoring process. The Commission is conducting monitoring of the whole process from the cell to the country of destination. Interviews with the returnees are usually not performed unless the expulsion fails; the Commission visits the place of detention. Complex situations in relation to forced return are discussed with the authorities. Two times a year there are meetings with all concerned (NGO`s, Swiss Medical Association, executing authorities). Annual reports are publicly available.

The Inspector of Her Majesty`s Inspectorate of Prisons (hereafter – HMIP) from the UK, presented the **British experience of immigration detention and forced return monitoring**. The Inspectorate's role is to ensure independent inspection of detention, to report on conditions and treatment, and promote positive outcomes for those detained and the public. The Inspectorate was established in 1982 by amendments to the 1952 Prison Act. The UK has ratified the OPCAT in 2003. In 2009, the NPM was created; it is made up of 20 existing bodies with powers to inspect and monitor places of detention. One of the members of NPM is a representative of HMIP. In order to monitor detention and prevent torture, the NPM must be able to access all places of detention; speak to detainees and others in private; choose the places to visit and people to talk to; access information on places of detention and on detainees and their treatment and conditions. The HMIP inspects prisons, police custody, immigration detention, military detention, court custody, customs custody facilities and secure training centres for children. The HMIP inspects according to its own set of published standards called "Expectations". There are separate "Expectations" for male prisoners, female prisoners, children and young people, immigration detention, police custody, court custody and armed forces. Monitoring

visits in places of detention are independent, impartial and unannounced. Inspectors have unfettered access, with ability to arrive unannounced, go anywhere and talk to anyone. After about 16 weeks from the visit report is published. Residence conditions are evaluated, taking into account four aspects – safety, respect, purposeful activity and preparation for removal and release. Evidence can be obtained as a result of observation, group discussion with detainees, and individual interviews with detainees and staff, examination of documents, casework analysis, etc. In the UK, there are 11 immigration removal centres, one pre-departure accommodation designed for families with children and 34 short-term holding facilities. The HMIP has inspected enforced removals, including flights, since 2010, following the death of an Angolan detainee during deportation. The main findings for 2014-2015 were that: detainees were transported and arriving at centres too late at night, and some were subject to excessive moves around the state; some of immigration removal centres looked and felt like a prison; some security procedures were disproportionate; detainees were not permitted to access Skype or social networks to maintain contact with family and friends; many detainees had no access to a lawyer to help in their case.

A representative of the Ombudsman's Office of Latvia **shared the experience of monitoring forced return**, which started in July 2011. The information on monitoring returns is provided under Chapter IX of Part I of this Report, thus not repeated here. The representative of LHRC presented the **statistical overview and trends in the context of return**. These trends are already reported under other Chapters of this Report. Furthermore, **situation with application of alternatives to detention** was reported. The following recommendations were proposed: the possibility to apply alternatives to detention should firstly be considered when taking a decision on detention in each individual case; adopt a provision on the possibility to grant open places of residence for foreigners during the return procedure, particularly for families with children and vulnerable persons; assign funding for such places. A representative of the SBG expressed concerns about ensuring human rights for foreigners if alternatives to detention are applied to them, but they do not have sufficient financial means and the crisis centres are not foreseen for them by the law. In such a case, detention is the only opportunity for such persons. According to the LCHR, although the material conditions in the detention centre meet the standards, it is still a place of deprivation of liberty.

During the second part of the seminar, the coordinator of advocacy work at the International Detention Coalition (hereafter – IDC) gave a Skype presentation on alternatives to detention, the role of the community and the good practices. The IDC is a global network of over 300 NGOs, faith – based groups, academics and practitioners in more than 70 countries that advocate for and provide direct services to refugees, asylum seekers and migrants in immigration detention. The IDC, through its international membership has observed two parallel trends occurring globally in

relation to the detention of refugees, asylum seekers and migrants. There has been a dramatic increase in the use of immigration detention by states over the past 10-15 years. The second trend is a more recent shift over the past five years by many states to implement a more human-centred approach to migration management, including the exploration and implementation of alternatives to detention and the use of detention as last resort only. The reasons for this are the following. First, alternatives have been found, on average, to be around 80% cheaper than detention. Second, there has been a growing criticism of immigration detention practices, particularly given the severe and well-known mental and physical health harms that detention has on people – and especially with regard to particularly vulnerable groups such as children, families, asylum seekers, or those who have been exposed to torture, trauma and other abuse either prior to or during their migration. In fact, there is no statistical correlation between an increase in detention practices and a decrease in irregular arrivals.

The IDC defines alternatives to detention as "any law, policy or practice by which persons are able to reside in the community, without being detained for migration-related reasons". This broad approach is based on a 2011 IDC study "There are Alternatives", which looked at the practices of 28 countries around the world. In this study, more than 50 types of alternatives being used effectively across all regions of the world were reported. A number of these are very effective community-based care models.

Good practice – Community based care models as alternatives to detention
By community-based models IDC means all of the strategies, programs, and approaches that governments can take to effectively engage foreigners in migration process so that they do not have to resort to detention. Three of the primary benefits of community-based alternatives are cost, compliance and voluntary return.

IDC found that alternative programs are most successful when: 1) there is a focus on early intervention; 2) individuals are informed and feel that have been through a fair process; 3) they provide holistic case management with a goal of case resolution, not simply removal; 4) any conditions imposed are not overly onerous and 5) individuals are able to meet their basic needs. Below are several examples of good practices.

Good practice – Individualized screening and assessment
These are important tools in reducing unnecessary detention, as authorities can identify and assess levels of risk and vulnerability, as well as the strengths and needs of each person. Critical areas for assessment are the following: legal obligations, identity, health and security checks, vulnerability and individual case factors.

Good practice – Case management
Case management can be understood as "a comprehensive and coordinated service delivery approach widely used in the human services sector to ensure a coordinated response to, and support of, the health and wellbeing of vulnerable people with complex needs". When used properly, case management can contribute to ensuring that the elements of successful alternatives to detention outlined above are in place.

IDC`s findings indicate that overly onerous conditions actually have an adverse effect on compliance and successful case resolution outcomes. While conditions or restrictions might be imposed, they should be only applied when they are absolutely necessary, and when deemed to be proportionate in each individual case.

During the panel discussion, the representative of the SBG mentioned the SBG's initiative to propose alternatives through cooperation with municipalities and their shelters and crisis centres. However, this requires funding. Thus NGOs should be more actively involved in providing assistance in concrete cases as well as conduct studies on the role of NGOs in other states. SGB representative did not agree that alternatives are cheaper than detention, as no calculation of such costs was provided. If a person is granted an alternative, there should be access to medical care, costs for transport, place of residence, etc.; none of such costs are currently envisaged. It was also believed that Latvia is too small country to have a special open centre for foreigners; building of such a centre would be a burden for the state budget. However, it was agreed that although ensuring social assistance to foreigners is outside the SBG's competence, it still has been involved in communication with municipalities, guiding children to school and has already tried to look for solutions.

According to the head of the Division on families with children of the Riga City Council's Welfare Department, a family with many children was released from detention in 2012 and there was a need for solution; no changes have occurred until now. There are a lot of remaining issues, e.g. dealing with situations when foreigners are disabled. The representative of the City Council believed that there is a need to broaden the list of persons for ensuring social services; and integration measures are of particular importance. NGOs and the Ombudsman's Office should more actively involve in search for solutions. Although this is a matter of the whole community, funding for work with foreigners should be secured. There is a need to agree on the place of residence for such foreigners: the crisis centres are neither suitable nor prepared for receiving them, and there is a need for special social services.

The Director of the Legal Department of the MOI pointed to the legal amendments with regard to immigration detention. It is planned to come back to the issue of amendments to the Immigration Law, which have been initiated earlier on and to elaborate a policy-planning document, with the involvement of NGOs.

The Head of the crisis centre for families "Milgravis" shared the centre's experience in working with foreigners, including the family with children who could not be returned. However, it was underlined that such a work is still not a competence

of the centre, as there is a need of special skills to work with various nationalities, ensure translation, etc.

The LCHR representative in the **concluding remarks** of the seminar stressed that the issues discussed are complex and no immediate solutions can be found. The issue of funding is still of high importance, but lack of funding to ensure alternatives should not be a reason for refusal to solve the situation. The opportunities to provide funding by the state should be sought, as detention should be a measure of last resort. The good practices of other states could be very helpful here. The initiative of the SBG to seek further solutions with regard to alternatives can certainly be commended.

Lithuania

On 2 April 2015 the Lithuanian Red Cross Society (hereafter – LRCS) organized a national seminar "**Compliance with the Return Directive: One Step Further"** under the Project. The seminar, which took place in Vilnius, gathered 25 participants from: Vilnius County Police Headquarters Migration Board, SBGS, Police Department, IOM Vilnius Office, Migration Department, MOI, FRC, Mykolas Romeris University, law firms, UNHCR and LRCS.

Three external experts from the Repatriation and Departure Service under the Ministry of Security and Justice of the Netherlands took part in the event. The decision to invite all three experts from the national institution was based on the need to have specialists working in the field and facing the same challenges Lithuanian institutions have, to create a possibility for the representatives of national authorities to share their experiences and to ask for advice. All three experts were invited from the same country due to the need to have comprehensive example of one country, having in mind that two other countries (Belgium and Austria) were visited during the project.

Presentations of external experts focused on the most relevant topics for Lithuania, identified when preparing project national report „Study on Return and Removal of Third Country Nationals". It included free legal aid, which is guaranteed only to those TCNs who are asylum-seekers in Lithuania. Although the Aliens' law provides for free legal aid to UAMs, in practice this right is not guaranteed, and in the process of return (removal) of all other TCNs, free legal aid is not provided at all. Therefore, external expert was invited to speak on the **Dutch experience with regard to legal aid provision to returnees**. As a **good practice** is the access of an advocate to use the case management system in case of detention of returnees, which records all actions carried out during organization of return and removal. If actions are not undertaken, this is a ground for an advocate to apply to the court for release from detention, because it would be considered that the institution does not take appropriate action and detention becomes unjustified and disproportional measure.

Furthermore, „ERIN and EURINT projects" were presented by the Head of EURINT Network. Lithuania has never participated in these projects, although there are many benefits of participation, especially in EURINT project: there is a possibility to

participate in joint missions and operations, to share experiences/good/bad practices during workshops and seminars, possibility to participate in development of joint strategies towards the top eight countries where most of the TCNs are returned. All expenses are covered from the project budget. The possibilities of Lithuanian participation was further discussed during the advocacy meeting at the FRC the next day.

Another important topic – **detention before removal and alternatives to detention** was examined during the seminar. In Lithuania, detention of irregular migrants is very frequent and application of alternative measures for irregular migrants is very rare. In the analysis of measures alternative to detention at the level of district courts, attention is paid to social relations and possession of accommodation and livelihood. Absence of such support may result in court's decision not to impose an alternative measure. Some good practices from the Netherlands have been presented.

Good practice – principles applied by Dutch authorities as regards detention

1. keeping irregular migrants under supervision without resorting to deprivation of liberty;
2. applying alternatives as cost efficient;
3. willingness to return is one of the qualifying criteria for applying alternatives.

The application of these principles can be considered as a good practice, as the numbers of detainees have been decreasing every year in the Netherlands.

Identification of returnees and communication with embassies and identification missions was another important topic covered by the seminar. The FRC faces many difficulties when communicating with certain embassies (for example, Vietnam, as the majority of irregular migrants in Lithuania every year are Vietnamese). Usually it takes several months to receive the answer, confirmation of identity or documents for the TCN. Dutch experiences of working with embassies and/or national authorities of the countries, possible identification missions and other aspects in this area were presented.

Good practice – case management in the Netherlands

The Netherlands apply progressive case management system, when every single step related to one irregular migrant is marked in the case/database, which is available to every institution working with the case, including the lawyer of the irregular migrant.

The seminar also focused on **dealing with specific situations during actual return and proportional use of force.** The representative of the Netherlands has long experience of working as an escort leader. Giving practical examples of specific situations during actual return and discussing them with the participants of the seminar was particularly useful and he also presented the main principles of proportional use of force, as well as measures used by the Dutch escorts.

Besides presentations of the external experts, one of the authors of the national report presented the **findings and challenges of Lithuania's compliance with the Return Directive**. The representative of the MOI presented a newly drafted Order on the Monitoring of Forced Returns as the monitoring conducted by the LRCS had ended in mid-2014 and no monitoring mechanism was operating in Lithuania since then.

Slovakia

On 15 June 2015, a national seminar **on Implementation of Return Directive in Slovakia** took place in Bratislava and gathered participants from different stakeholders: IOM, Ombudsman Office in Slovakia, Ombudsman Office in the Czech Republic, Centre of Legal Aid of MOJ, Commenius University, NGO "Marginal", SHC, Slovak Catholic Charity, law firms and the Human Rights League (hereafter – HRL). As the participants from the Bureau of Alien and Border Police could not attend the seminar for other competing responsibilities, the HRL has shared the presentations with them.

Five external experts were invited to speak at the seminar about the most pressing issues relevant to return policy in Slovakia. Speakers came from the IOM in Slovakia, the International Centre for the Migration Policy Development, the Czech Ombudsman's Office and the Slovak Ombudsman's Office.

At the introduction, the director of the HRL presented the project, activities and its methodology. One of the authors of the national report and a lawyer of HRL presented the **analysis of Slovakia's compliance with the Return Directive** focusing on identified gaps in transposition or implementation and challenges for future. Since the Programme of AVRs in Slovakia remains an important tool of the return policy, the representative of IOM presented the methodology or registration, services, mechanisms of information provision about the AVR, statistics and possible reasons for decrease in numbers of returnees through AVR programme in recent years, advantages of application of AVR, plans for its funding after the closure of projects funded by the ERF, as well as challenges for future.

During the first panel, models and experiences of forced return monitoring were presented. The situation in the Slovak Republic was overviewed. Whereas legislation regulates content of the monitoring broadly for all phases of return, in practice monitoring of removal and post-removal phase is not operational. In the opinion of the MOI the monitoring is taking place in practice through activities of the Ministry itself and NGOs. According to its position also the Office of Ombudsman and Prosecutor's Office have legal competences to conduct monitoring of forced return. In the opinion of NGOs, they monitor the observation of rights of detainees and detention conditions. The Prosecutor's Office stated that they do not monitor forced return, but rather exercise oversight over the places where restrictions to freedom of movement take place, such as detention centres for foreigners. Ombudsman Office mentioned that they do have competences broad enough to engage in monitoring

of any rights and procedures of state bodies, however, their capacity and budget is limited, therefore they monitor prioritized issues for each year. Also, they were not specifically given responsibility to monitor forced return by legislation neither they were consulted on such a possibility. Further on, the representative of the International Centre for the Migration Policy Development spoke about the **FReM project on monitoring of forced returns**, its objectives, guidelines and monitoring tools for monitors, selection of the pool of monitors, training manual and training programme for monitors, pilot monitoring operations and promotion of the European Pool of Forced Return Monitors.

Good practice forced return monitoring in Austria
Forced return monitoring in Austria developed in several steps starting in the early 1990s from the recommendation of the CPT and the establishment of the Human Rights Advisory Board (hereafter – HRAB). Since 2001, an independent human rights monitor from the NGO Verein Menschenrechte Österreich (Austrian Human Rights Association) (hereafter – VMÖ) monitors flights. From 2010 this is done under the return-preparation-counselling-contract with the MOI. Furthermore forced return flights are also subject to control and monitoring by the Austrian Ombudsman Board (hereafter – AOB). Commissions of the AOB also conduct unannounced visits and observations of return flights. In 2003 the VMÖ started a short-term-monitoring project concentrating on the post arrival phase in the country of return. VMÖ asked returnees about the modalities of the flights, the border control upon arrival at the airport of destination, the trip from the airport to the place of residence, the first days/weeks of reintegration and future perspectives of the returnee. Many demonstrable benefits developed as a result of monitoring: mutual trust and constructive collaboration between stakeholder groups and improved practices to ensure the adherence to human rights standards.

More information on return monitoring in Austria is provided under study visits' section of this Report.

Good practice – forced return monitoring in Luxembourg
The responsibility for carrying out forced return operations lies with the police. Returns taking place via Charter flights are monitored by representatives of the Ministry of Foreign Affairs as well as by an independent monitoring body, the Red Cross Luxembourg (hereafter – RCL). The Monitoring System was triggered by political and public demands to overcome the lack of transparency and unlawful administering of medication during removal operations. The RCL played a central role in advocating for the system and is highly involved in the monitoring process. They are notified by the Return Department of the Directorate of Immigration at least 72 hours before the start of the forced return by the Department. The RCL will meet the returnee the day before his return. The observer will accompany the escort, which is composed of agents of the Grand ducal police.

The lawyer from the Czech Office of Ombudsman presented the **mechanism for monitoring forced return applied in the Czech Republic** and included some of his personal experiences as a monitor. Czech system of monitoring includes monitoring of all administrative and judicial detention decisions, monitoring of detention centres and monitoring of expulsion, transfer and transportation of foreigners. The lawyer also presented the methodology of monitoring, including provision of information

about planned expulsions, content of monitoring, monitoring reports and follow up on findings of the monitoring. Main findings from the monitoring of forced return in the Czech Republic were announced.

During the second panel the participants focused on monitoring of detention and alternatives to detention. The lawyer of the Slovak Office of the Ombudsman informed about the results of their research in 2013 on **availability of legal aid to detained TCNs and about most recent monitoring of deprivation of liberty in police detention cells**. Police detention cells are not specific places of detention of foreigners, however, HRL included this topic in the seminar in order to learn about the findings with regard to general practices of police authorities pertaining to police detention. Presentation raised a lot of questions in the discussion at the end of the panel, since it appeared that many of general police practices could be reflected under practices of police detention of TCNs.

The **findings from monitoring of detention centres in the Czech Republic** were shared, as well as recommendations and follow up of their implementation in practice. Legal competence of the Ombudsman Office for monitoring relates to all places of any form of deprivation of liberty and employees of the office have access to all detainees and all case file documentation including medical documentation. In addition, **the system of alternatives to detention in the Czech Republic** was presented, which is in many aspects similar to the Slovak system. The presentation focused on the introduction of legal regulation, application of alternatives in practice, statistics on their application and jurisprudence of courts in the Czech Republic pertaining to the use of alternatives to detention.

The representative of the HRL closed the panel with a presentation on **major findings of the analysis of compliance with Return Directive in the Slovak Republic related to detention and alternatives to detention**. Opportunities for more extensive use of alternatives to detention were elaborated, changes in legislation to come into force in July 2015 (amendment to the Act on Asylum amending also the Foreigners' Act) and in July 2016 (new Administrative Judicial Code), as well as the challenges for future were discussed.

Study visits

Two study visits were carried out during the Project. **Study visit to Belgium took place on 13-15 May 2014** and second – **to Austria on 14 – 16 October 2014.** The visits brought together 11 participants: the national authorities (representatives from the MOI, the border guard/immigration police, the Ombudsman's Offices) and representatives of NGOs from Latvia, Lithuania and Slovakia. The objective of the visits was to learn about the Belgian and Austrian return practices, in particular, monitoring forced return and alternatives to detention (return houses for families with children). Other aspects of the implementation of the Directive, including identification and

protection of vulnerable groups, including UAMs, voluntary return, the situation of non-removable persons and immigration detention were also addressed during the visits. In **Belgium**, the participants visited the Immigration Office, detention centre „Caricole", return houses for families with children in Sint-Gillis-Waas, the Federal Migration Centre and the General Inspectorate of Police services. They also met with the experts from the NGO Jesuit Refugee Service Europe (hereafter – JRS). During all meetings and visits, extensive discussions on various return practices were held. The institutional infrastructure in Belgium related to return of TCNs includes the following organisations:

Belgium Immigration Office

The Belgium Immigration Office employs about 1000 staff dealing with issues of access to the territory and residence as well as control and removals. The Immigration Office deals with registration of asylum seekers and Dublin cases, as well as grants protection status to victims of human trafficking and smuggling.[614]

The Federal Centre for Migration is a public service, which emerged in 2014 as a result of transformation of the Centre for Equal Opportunities and Opposition to Racism.[615] It holds a status of a National Human Rights Institution. The staff of the Centre has access to detention centres, including those located at the border, without any special authorisation; it also deals with individual queries and provides legal advice. Work with the structural issues, raising awareness, providing

[614] See webpage: https://dofi.ibz.be/sites/dvzoe/index.html
[615] See webpage: http://www.diversitybelgium.be/

recommendations and training are among the functions of the Centre. It cooperates with the General Inspectorate of Police services on monitoring forced return.

General Inspectorate of Police services is an Independent oversight body under the authority of the MOI and MOJ.[616] The general mission is to deal with complaints about police work and behaviour, audits, inspections, etc. Since 2012 they have a right of unannounced controls of forced return).

Detention is harmful to health of detainees
In a study on vulnerability in detention,[617] the JRS has concluded on the harmful impact of detention on the health of individuals concerned, independently of the detention conditions. Another study (with a focus on Germany, the UK and Belgium)[618] revealed that alternatives to detention work most successfully when foreigners have access to housing, information, lawyers, medical care and comprehensive support provided to vulnerable groups.

Good practice – information is essential to foster trust
The trust of foreigners in the immigration system is an essential factor reducing the risk of absconding. According to the JRS Europe, there is a need for a transparent system from the beginning with clear information on all possible legal options available to the foreigner concerned. Belgium is considered as a good practice, as information to families on their legal situation and rights is available to them. The role of a proper screening (situation in a country of origin, family situation, vulnerability, previous history of absconding, etc.) and applying possible alternatives to detention instead of automatic detention is highlighted.

Return procedure in Belgium

In 2014, there were 4,193 forced returns (including 748 Dublin returns, 278 bilateral agreements and 3,167 others) and 4,707 voluntary returns in Belgium.[619] The number of voluntary returns has increased due to the transposition of the Directive. Voluntary return normally takes place during 3 months period. The police is obliged to notify the Immigration Office about arrested irregular foreigners. The later makes a decision on the legal status or return; and detention, if needed. If a person is on the territory, a municipality notifies him about the return decision. SEFOR, a specific unit of the Immigration Office, follows-up the implementation of the return decision; it also informs persons about possibilities of return. Forced return is organised by police.

[616] See webpage: http://www.aigpol.be/index.html
[617] http://www.europarl.europa.eu/document/activities/cont/201110/20111014ATT29338/20111014ATT29338EN.pdf
[618] https://jrseurope.org/assets/Sections/Downloads/JRS%20EUR%20ATD%20report_FINAL_13Dec2011.pdf
[619] Information of the Federal Migration Centre, 14.05.2014

Postponement of return and options for the right to stay
Return may be postponed in Belgium on the grounds of non-refoulement, suspensive effect, physical state or mental capacity of the migrant, and technical reasons).[620] Voluntary return can be postponed if it cannot be organised or there are specific circumstances (length of the stay, children at school, etc.). There is a possibility to obtain a residence permit on humanitarian grounds, which are explained on a case-by-case basis. If a person has no passport, but it is still possible to identify him, there is an option to apply for temporary regularisation for a year with a prospect of long-term regularisation afterwards. Another criterion for such a permit is long stay in Belgium (e.g. long asylum procedure or work on a legal basis).[621] Persons, granted a temporary regularisation, are provided with social assistance (EUR 1,100 per month), and they should ensure a place of residence themselves; have also a right to work. It is also possible to apply for legal stay for medical reasons (e.g. if the medical care does not exist, is not accessible and is not affordable).[622]

Good practices – identification and protection of vulnerable groups
In Belgium, UAMs may never be detained and cannot be forcibly removed. Older ones are placed in the open centre, younger ones – in foster families. The tutoring service is available. Age assessment is made in the hospital and the benefit of doubt is always given. There are no special centres for vulnerable groups, but families with children are placed in the return houses. Pregnant women cannot be forcibly removed if pregnancy is more than 24 weeks; only voluntary return is possible then. The victims of human trafficking are identified on the territory by prosecutors and three specialised NGOs, in cooperation with police; the assessment period is 45 days. Similarly, if there is an assumption by a social worker that a detained foreigner is a victim of human trafficking, the Immigration Office is contacted.[623] If a person is ill, he can receive an extension of the order to leave the country; such an assessment is made by doctors and the Immigration Office. Irregular migrants receive only basic medical care (asylum seekers receive full treatment).

Detention and alternatives to detention

There are five administrative detention centres in Belgium, including the transit centre „Caricole" near the Brussels airport. The total capacity of detention places is 628.[624] There were 8,200 persons in detention in 2012, 7,500 – in 2013.[625] A decision on detention may be taken in case of violation of public order, working without a permit and if there is a risk of absconding. The criteria for verifying the risk of absconding are not provided by the law, but the guidelines of the European Commission are applied in practice (e.g. a lack of a fixed address, a criminal offence).[626] The identification of a person takes place during 7 days; if identity is still not established, the person concerned is released from detention. Reporting is applied where there is a risk of absconding only during voluntary return.[627] If a person

620 *Ibid.*
621 Information of the Belgium Immigration Office, 13.05.2014.
622 *Ibid.*
623 *Ibid.*
624 Information of the Federal Migration Centre, 14.05.2014.
625 Information of the Belgium Immigration Office, 13.05.2014.
626 *Ibid.*
627 Information of the Federal Migration Centre, 14.05.2014.

is not removable, the law prescribes for release. Families with children can live for up to 30 days in the state-provided open return centres; if a family is not returned during this time, it is transferred to a return house (a family unit). There is also an open return centre for failed asylum seekers.[628] Since 2012, the law prescribes that families with minor children should not be detained in order to organize the return; such families have the possibility to stay in their own private houses. Families, who do not meet the criteria to remain in private houses, are lodged in the family units. Coaching of families in their houses is an alternative to detention, along with the return houses.[629]

Detention centre „Caricole"

The detention centre was built in 2012 by uniting two detention centres. The capacity is 90 persons. There are three (women's, men's and inadmissible passengers' (hereafter – inads)) sections. The following categories of foreigners are detained: inads, asylum seekers at the border, asylum seekers, including Dublin cases, irregular migrants. In the detention centre, people are mostly free to move on the centre's territory; according to the national observers, such a practice constitutes progressive trends.[630] The staff of the detention centre consists of the director and his 3 assistants, a psychologist, social workers, teachers, medical team, security team. The staff has the following tasks: detaining the aliens accommodated in the Centre who are awaiting, as the case may be, of possible authorization to enter the Kingdom or a removal from the territory; providing them with psychological and social assistance and preparing for possible removal; urging them to comply with a decision of removal that might be taken.[631]

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628 Information of the Belgium Immigration Office, 13.05.2014.
629 Information of the Federal Migration Centre, 14.05.2014.
630 *Ibid.*
631 Information of the Belgium Immigration Office, 13.05.2014.

Good practice – Return houses for families with children

Return houses in Sint-Gillis-Waas

In response to criticism and concerns with regard to detention of families with children, the government of Belgium decided that families with children, who are already present on the Belgian territory, should no longer be detained in closed centres from 1 October 2008.[632] Since 2009, families with children, arriving at the border and who would not be removable within 48 hours after arrival, should also be brought to the family units. In 2014, there were 24 family units; from October 2008 to March 2014, 633 families, with 1224 minor children, stayed in the family units. The average staying period in 2014 was 24,1 days.[633] The families with children staying in the return houses are still formally detained (a matter of concern of NGOs[634]), although have freedom of movement in practice. There are no bars and security staff in the family houses; however, there are video cameras outside. The coaches (supporting offices), who are appointed by the Immigration Office, are in constant close contact with the families: they collect information for identification, inform them about their situation and rights, provide practical support (contact the authorities, lawyers, schools, medical care institutions, etc.) and assist them in preparation for return. The Immigration Office provides the families with vouchers for food and goods of necessity in local shops. The families are allowed to go outside the town, but they should notify the Immigration Office about their absence (one parent should stay in the return house).[635] The return houses belong to the Federal government, and they are funded by the ERF. The Immigration Office established first cooperation with municipalities. According to the Immigration Office, the limited amount of money, limited staff (at average a coach is dealing with 2-3 families at the same time) and the risk absconding (about 35% as for 2014) are the core challenges as concerns the return houses. It is difficult to motivate families to return.[636]

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632 Alternatives to detention for families with minor children – The Belgian approach. Information of the Belgium Immigration Office.

633 *Ibid.*

634 Information of the JRS-Europe, 16.05.2014.

635 Information obtained during a visit to the return houses in Sint-Gillis-Waas on 15.05.2014.

636 Information of the Belgium Immigration Office, 13.05.2014.

Monitoring forced return

The General Inspectorate of Police is conducting monitoring of commercial and special flights. In the framework of ERF projects, monitoring of 108 boarding controls, 15 commercial flights and arrival and all special flights is conducted each year.[637] There are 2 full-time members and 5 members on irregular basis for monitoring forced return at the Inspectorate. The information on commercial flights is provided by the Immigration Office and the Airport Police. The Inspectorate subsequently conducts a risk assessment prior to any forced return (violent persons, mental health problems, pregnant women, families with children, etc.). The arrivals of the Inspectorate are unannounced. In some cases monitoring starts from the detention centre. At the airport, the monitors explain to a foreigner the mission of the General Inspectorate and check his file. They have a right to overrule an order to use the means of restraints (handcuffs or a French belt). The boarding of the foreigner proceeds before the passengers go on the plane. In case of boarding controls, the monitors leave the plane after the passenger's boarding is completed. If a risk of possible violations is high, the monitors go until destination. The General Inspectorate addresses recommendations to the Federal Police and the Immigration Office; the authorities are also asked for a feedback on recommendations. The report is written after each task of a repatriation assignment. The report includes follow-up to the recommendations and is addressed to the MOI, the Secretary of State for Asylum and Migration, the Immigration Office and the Federal Police (Repatriation Unit). There are a number of concerns expressed with regard to the monitoring system: monitoring is conducted by policemen thus independence of the monitoring body is not ensured, limited resources are dedicated by the state, there is a lack of control of non-refoulement operations and a lack of access to activity reports of the General Inspectorate for the Federal Centre for Migration.[638]

In **Austria**, the participants visited the Austrian Human Rights Association, EKO Cobra – special police unit, police detention centre, Terminal 240 (a special terminal for forced returns) and the return house for families with children in *Zinnergasse*. They also met with representatives of the EU Agency for Fundamental Rights (hereafter – FRA), the MOI and the Austrian Ombudsman Board.

The institutional setup for return in Austria involves:

The Federal Agency for Immigration and Asylum (*Bundesamt für Fremdenwesen und Asyl – BFA*)[639] is in charge of return orders and detention in the context of immigration laws in addition to its other functions. Once the necessary investigations

[637] Information of the General Inspectorate of the Police, 16.05.2014.
[638] Information of the Federal Migration Centre, 14.05.2014.
[639] See webpage: http://www.bfa.gv.at/

have been carried out by BFA (e.g. oral hearings, medical examination), it may issue a return decision. The procedure of return is first implemented by the BFA in co-operation with the Police.

The Police Detention Centre (*PAZ – Polizeianhaltezentrum*)[640] is a place where individuals are detained pending deportation. TCNs can be detained if a foreigner is staying in Austria illegally or has been issued a voluntary return decision, but he did not leave the country in certain time.[641] The risk of absconding is a core factor, which is taken into account when taking a decision on detention. During the assessment of a risk of absconding, the following factors are taken into the account: previous history of absconding, lack of family or friends in Austria and criminal background. If there is at least one of the factors neither detention nor lenient measure (staying in the facility *Zinnergasse*) would be applied; if 2-3 factors are identified, lenient measures most probably would be assigned; if many factors are in place, detention may be assigned.[642] Detention for the purpose of removal is, in general, carried out in the detention facilities of the Police Administrations of the Federal Provinces. There are currently 15 facilities in Austria that may be used to detain migrants for the purpose of removal, with a total capacity of almost 1,000 detainees. There is also a special detention facility with provision for families in Vienna.

Good practice – Family Unit *Zinnergasse* is located in the outskirts of Vienna and is established for the purpose of providing an alternative to detention. The capacity is 50 places (12 flats for families, 17 flats for lenient measures), and the intended duration of stay is 1 to 7 days.[643] Those individuals who are provided an alternative to detention (single persons, pregnant women, families with children and UAMs) stay in the first floor of the building and they are free to leave the building at the daytime. These individuals have to report regularly to police that is present at the facility. The police is responsible for checking compliance with the requirements set by the BFA.

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[640] See webpage: http://www.polizei.gv.at/start.aspx

[641] Information obtained during the visit to the police detention centre „Rossauer Lände" on 15.10.2014.

[642] Information of the Ministry of Interior of 17.10.2014.

[643] Information obtained during the visit to the Family Unit Zinnergasse, 16.10.2014.

In a typical case, the BFA, as the authority issuing the decision on alternative to detention, foresees that an individual shall take accommodation at Zinnergasse and regularly report to the police there. Families to be returned soon stay in the second and third floor of the building. They can move freely between the floors, but are not allowed to leave the building, because their accommodation in Zinnergasse is equivalent to detention. The maximum term of detention is 72 hours. The security level at the Family Unit is very low. Only two policemen are on duty 24 hours. There are almost no bars and the support personnel serves in plain clothes (recognisable by lanyards with the inscription "police"). The presence of police at the facility ensures that individuals are protected from outside interference, such as from smugglers.

EKO Cobra (*Einsatzkommando Cobra*) is Austria's primary counter-terrorism special operations tactical unit, which is directly under the control of the Austrian Federal MOI. One of the EKO Cobra tasks is to ensure escort of returnees. Before that a risk assessment is always carried out, as well as an interview and medical review to understand what kind of security measures shall be provided. If the risk assessment shows that returnee is a violent person officials can use body cuff in the safety purpose. The handcuffs are normally not used. The officials have special training sessions regularly to improve their job in the field of forced return procedures, self-defence and use of body cuff and other special measures[644].

[644] Information of the EKO Cobra – special police unit of 14.10.2014.

Federal Administrative Court (*Bundesverwaltungsgericht*)[645] monitors the decisions by the Police and the BFA. It has competence for the entire territory of Austria and is based in Vienna. It decides on pre-deportation detainee's appeals against pre-deportation detention and return decisions. These appeals do not have automatic suspensive effect, but it can be granted by the court (and must be granted in case of serious threat of violating non-refoulement). Appeals against the decisions of this court may be presented to the Constitutional Court, where appeals do not have suspensive effect by law, but may be granted by the court.

Commissions of the Austrian Ombudsman Board (*Kommission der Volksanwaltschaft*, AOB) may visit a detainee during pre-removal detention. It is a National Preventive Mechanism under the OPCAT.[646] The task of the Commission is to monitor the general conditions in detention places. It prepares reports on visits directly to the AOB. The Commission cannot counsel or represent a detainee in legal matters. The Commission is also responsible for monitoring forced return.

Non-Governmental Organisations

Austrian Human Rights Association (VMÖ) or Caritas may counsel or represent detainees in legal matters, visit them in detention in order to prepare them for return. Agents of the Social Service Agency (*Soziale Betreuung*) may translate and explain orders and notifications from the authorities; answer questions about legal points and about proceedings or get information from the authorities; help with problems at Police Detention Centre and mediate between individual and police officers; convey requests to the commanding officer, to the BFA, doctor or other bodies; help with voluntary departure; prepare for release or removal; if necessary, provide with items such as clothing, hygiene articles and news-papers.

Return procedure in Austria

In 2013, the number of registered forced returns was 1903, but the number of registered AVRs was 3512. In 2012 there were about 1853 forced returns and 3209 AVRs registered.[647] In Austria, if a person cannot leave the country on his own for any reason, but still does not want to be removed, he can contact *Caritas* and *VMÖ* for the service of

[645] See webpage: https://www.bvwg.gv.at/
[646] See webpage: http://volksanwaltschaft.gv.at/
[647] Information of the Austrian Human Rights Association of 16.10.2014.

voluntary return („*Rückkehrberatung*"). These organisations provide persons with tickets, some pocket money and the so-called *Heimreisezertifikat*, a kind of one-way passport.

Postponement of return and the right to stay

A tolerated stay can be granted to an individual, whose return is not possible due to *non-refoulement* principle, pregnancy (more than 8 weeks), medical reasons or if a person cannot be returned.[648] A tolerated stay is issued for a maximum of one year with extension possibility or obtaining a residence permit. If return is declared as inadmissible, an individual can apply for a residence permit. A person, who is cooperating with the authorities in the return process, receives accommodation or money to pay for housing and food, health insurance (like any Austrian national) and pocket money of 40 euro. Persons, who are not cooperating, do not get full welfare package and get limited social care regime (emergency health care assistance). Persons with a tolerated stay get a special ID document.[649]

Identification and protection of vulnerable groups

In practice, families with children are not detained. The legislation provides that minors below 14 years shall not be detained. Alternatives shall be applied to minors below 16 years if detention purposes can be achieved otherwise. Furthermore, they may only be detained if age-appropriate accommodation and care is provided. In case of minors older than 14 years, detention shall not exceed two months. Decisions on detention of minors (14-18 years) are reported by the authority to the Federal MOI. This provides them with the opportunity to correct decisions, if necessary.[650] As concerns UAMs, the authorities make an assessment if someone will receive a minor upon return to the country of destination. Minors in the return procedure are normally placed in Zinagasse.

Good practice – age assessment
It begins with a talk, conduced by an authority with a person concerned. X-ray of the wrists, bounds and teeth is conducted in case of necessity. The use of force is not allowed in the age assessment process. The lowest level of possible age is normally assumed.[651]

Other vulnerable groups are not directly addressed in the legislation as concerns detention. However, if persons have physical weaknesses, a physician is consulted and decides whether the individual concerned can be kept in detention. According to the settled case law of the Administrative High Court, vulnerabilities shall be considered

[648] Information of the Ministry of Interior of 17.10. 2014.
[649] *Ibid.*
[650] *Ibid.*
[651] *Ibid.*

according to the principle of proportionality. If certain circumstances, such as health issues, suggest that the individual concerned will not abscond, alternatives should be preferred.[652]

Detention and alternatives to detention

Detention decision, the arrest leading to detention, and detention itself can be challenged before the Federal Administrative Court. If the individual concerned is still held in detention when the appeal is lodged, the Court has to decide within one week. There has been a steady decrease in detentions since 2010. The reason for this may be a general trend towards less detention decisions in Austria. Other factors, such as limited availability of detention places, high costs of providing places, the case law of the Administrative High Court and institutional changes in 2014, may have also played a role in this trend. As of May 2014, there were only 82 detained persons in the return procedure.[653] In general, detention shall be upheld for as short period as possible and only as long as the ground for its imposition is present and its aim can be achieved. The Federal Agency for Immigration and Asylum has to review the proportionality of detention every four weeks if an appeal is not submitted. Individuals shall be provided with an alternative to detention if detention grounds are present and the purpose of detention can also be achieved by their provision. Alternatives to detention include residing at a particular address determined by the authority, reporting periodically to the police station, lodging a financial deposit with the authority. The authority mainly enforces the requirements to "reside at a particular address" and "report periodically" as alternatives to detention. These two alternatives can also be applied in combination. Lodging a financial deposit is rather new alternative to detention, which is applied less. Decision on alternatives can be challenged before the Federal Administrative Court within two weeks.

Monitoring forced return

According to the Aliens Police Act all kind of return operations must be observed. Forced return is monitored by the AOB[654] and VMÖ.[655] VMÖ participates obligatorily in all charter operations and since 2009 it took around 20 flights a year. The Association is monitoring the entire forced return procedure – the observation starts from contact talk in pre-departure phase, includes monitoring of transfer from detention centre to the plane, boarding and flight and ends with a hand over in the country of destination. During monitoring the FRONTEX standards are applied. The monitors

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652 *Ibid.*

653 Information of the Ministry of Interior, 17.10. 2014.

654 See webpage: http://volksanwaltschaft.gv.at/en/about-us

655 See webpage: http://www.verein-menschenrechte.at/

have a right to talk to returnees, but without intervening into the return process; they can inform the escort leaders on possible problems and ask to verify information.[656] The Association prepares a report after each monitoring operation for the MOI, an escort leader as well as the AOB;[657] however, there have still been concerns with regard to the lack of publicity of the reports.[658]

Since 1 July 2012, the AOB has been responsible for protecting and promoting compliance with human rights as an NPM. Since then, the AOB has been monitoring forced return and all institutions where the liberty is or may be deprived or restricted. The AOB's Commissions are informed about all forced returns and they have a choice to be present during return procedure (in 2013 the AOB has monitored 28 forced returns[659]). The observation includes monitoring of arrest/detention conditions and places, pre-departure phase contact talk, transfer from detention centre to plane and boarding of the flight. The visits of the Commissions of the AOB are normally unannounced. The Commissions include members with diverse professional background (medical doctors, lawyers, social workers, etc.), and they are invited depending on a need. In monitoring, the CPT standards are normally applied. A Commission of the AOB submits a report to the AOB; the latter forwards it to the MOI, which, in its turn, issues a statement on the report. The AOB as an NPM issues its final recommendations upon an agreement of the Commission and three ombudsmen. The recommendations of the AOB are not binding. The report is later presented to the Parliament every year, and some of the recommendations are public.[660] While the AOB has its own budget for forced return monitoring, the *VMÖ* activities are funded by the BFA.[661] According to FRA, more than one organisation should be involved in forced return monitoring; the participation of NGOs is an essential pre-condition to ensure human rights observation.[662] According to

[656] Information of the Austrian Human Rights Association,16.10.2014.
[657] *Ibid.*
[658] Information obtained from a meeting with the FRA on 17.10.2014.
[659] Information of the Austrian Ombudsman Board, 16.10.2014.
[660] *Ibid*.
[661] Information of the Ministry of Interior,17.10.2014.
[662] Information obtained from a meeting with FRA,17.10.2014.

VMÖ, the establishment of trustful relationships with the police has been crucial in conducting monitoring forced return.[663] Representatives from NGOs participate in the Advisory Board of the AOB and also in the AOB's Commissions.[664]

Final conference

The Project final conference took place on 26-27 March 2015 in Riga, Latvia.[665] The conference brought together over 50 participants, including national stakeholders from Latvia, Lithuania and Slovakia as well as international experts and experts from other countries (Austria, Belgium, Czech Republic, Hungary, the Netherlands, Poland and the UK). It aimed at raising awareness on the situation with regard to the implementation of the Return Directive, particularly in Central and Eastern European region, with a focus on three main subjects addressed in the project: independent monitoring of forced return; detention practices and alternatives to detention; identification and treatment of vulnerable groups. The conference also facilitated the exchange of good practices among various EU MSs and disseminated them to states, where such practices have not been developed yet. Three working groups were operating during the conference for the purpose of elaboration of recommendations at the EU level for the development of good practices. The positions of international and European bodies and the practices of some Member States were presented during the conference. The event concluded with some common concerns and a few recommendations in the three areas discussed. These recommendations are included in the final recommendations of the Project (at the end of Part II of this Report). The participants of the conference concluded that:

1. There are certain areas in the framework of return of migrants where further improvements could be made and states could benefit from good practices that exist

[663] Information of the Austrian Human Rights Association, 16.10.2014.
[664] Information of the Austrian Ombudsman Board, 16.10.2014.
[665] Conference materials at: http://cilvektiesibas.org.lv/en/news/conference-the-implementation-of-the-return-direct-332/

and exchanges among them. A number of tools could be used to address the main concerns. The upcoming Handbook on the Return Directive's implementation to be produced by FRA will be particularly timely for this purpose.

2. Detention of migrants continues to be a challenge in many European countries thus this region is not an exception. Detention cannot be considered a routine practice and should only be applied when necessary and proportionate taking into account the objectives of return. Detention should not serve as an obstacle for effective return. The issue of funding is still of high importance, but lack of funding to ensure alternatives should not be a reason for refusal to solve the situation.

3. The main challenges for the region in the area of treatment of vulnerable migrants include identification, age assessment procedures and access to services to address their specific needs (health in particular).

4. Return monitoring is becoming an issue of increased attention and in this context the new monitoring systems in the region still need to be developed and strengthened.

Advocacy activities

Latvia

The LCHR took part in the events organized by the Legal Aid Administration, the Ombudsperson's Office, and the OCMA (EMN's national point in Latvia), as such events were the first ones on return issues in Latvia, where awareness of the topic is very low.

Lithuania

Two advocacy activities were implemented by the LRCS. Firstly, the Draft Order on the Monitoring of Forced Return prepared by the Ministry of Interior was commented. The representative of the MOI presented the draft also during the national seminar. The discussion focused on the following issues: possibility to inform the monitor about all return decisions taken during a week; information about the return decision to be provided within 3 days after decision was taken; if the returnee is escorted to the country of origin, information must be provided to the monitor immediately after the

tickets are bought; right of the monitor to access all places the returnee is being kept; right of the monitor to intervene during monitoring; possibility for the authorities to coordinate monitor's participation during escorted return with the authorities of the transit countries.

Secondly, during a visit to the Foreigners' Registration Centre, „ERIN and EURINT projects" were presented to the representatives of the centre (Deputy Head of the Centre, Head of the Division organizing forced return, specialists organizing forced return, communicating with the embassies and escorting returnees). As Lithuanian authorities have never participated in these projects, they could benefit from discussions with the leaders of both projects explaining projects' benefits. Especially useful for Lithuania would be participation in EURINT project. Having in mind that majority of returns were covered by the ERF and the new AMIF programs have not been launched in Lithuania so far, possibility to participate in joint missions and operations under EURINT project could be an interim solution. The meeting offered the possibilities to discuss Lithuanian participation and later becoming a partner to the project.

Slovakia

Advocacy activities in Slovakia were conducted by the HRL and covered commenting on the legislation, meetings with stakeholders and litigation activities. **Firstly**, comments on policies and legislation were provided. In 2014 HRL commented on draft priorities of the AMIF and suggested to the MOI that national AMIF programme includes a possibility of financing projects promoting more extensive use of alternatives to detention. In September 2014 the Ministry of Justice introduced a new Act regulating Judicial Administrative Code (will replace current provisions on judicial review of administrative decisions and procedures as of 1 July 2016) for public comments. Proposal contained special procedures on review of detention and administrative expulsion decisions. As a result of HRL efforts, a provision allowing for legal representation of foreigners by NGOs in the judicial review proceedings related to asylum, detention and administrative expulsion. HRL comments were welcomed by the authorities and translated to the final version of the Act, mainly on effectiveness of judicial review. Furthermore, HRL commented on the Non-Dispute Judicial Code, which contained the procedure on age assessment, to the Committee established under the MOJ of Slovak Republic in charge of preparing the law. Due to heavy critics of this procedure, it was eliminated from the final version of the law. Both laws will come into force on 1 July 2016, and in 2015 several legal acts including the Foreigners' Act will be amended accordingly. In addition, in November 2014 the MOI introduced amendment to the Act on Asylum amending also the Foreigners' Act. Amendments related to transposition of the EU Recast Directives on Reception Conditions and Asylum Procedures. HRL provided its suggestions for draft amendments related to procedures on detention and administrative expulsion already in September 2014 and was invited to negotiations by the MOI in November. Main comments relate to

the need for more extensive use of alternatives to detention, conditions of recognition of stateless persons, access to persons in detention, administrative expulsion, procedures on abolishment of entry ban, proper transposition of detention grounds according to the Return Directive, periodic review of detention decisions with access to judicial review, effectiveness of judicial remedy against detention decision and age assessment procedures. Several comments were accepted, however, some of the principal concerns remained. HRL also presented its major concerns to the UNHCR as to include them in their comments to the draft amendments of the law. Later in the legislative process, HRL also discussed its comments with the Members of the Parliament and submitted a written summary. The amendments entered into force on 20 July 2015. On 28 May 2015 HRL met with the director of the Department of the Alien Police of BABP and discussed the implementation of alternatives to detention in cases when detention was related to Dublin transfer, which were not applied, as the law presumed their application strictly in the context of administrative expulsion procedures. It was agreed that the practice would be changed in order to ensure compliance with EU law. The mechanism for monitoring of forced return was also discussed. HRL provided information about the Forced Return Monitoring Project implemented by the International Commission for Migration Policy Development, which was working on preparation of methodology for monitoring of forced return and also a pool of trained monitors. HRL invited BABP to participate at the seminar on 16 June 2015 with ICMPD and the Czech Ombudsman Office who is responsible for monitoring in the Czech Republic. BABP representative maintained that monitoring of forced return is taking place in Slovakia, but only for the phase of detention. Monitoring of the last phase has not been operational yet. HRL also raised concerns over the practice whereby the foreigners give up their right to appeal decision on detention immediately at the same time when the decision is served to the foreigner at several police units. A written analysis of this practice was later sent by HRL to the Director of the Department of the Alien Police.

Secondly, advocacy meetings with stakeholders were organized. HRL introduced its interest in return policy and procedures on administrative expulsion to the main stakeholders including the MOI, Ministry of Justice, Bureau of Alien and Border Police, Office of the Ombudsman and NGOs providing services to foreigners in return procedures. The stakeholders were also informed about the results of study visits carried out in the project. Several meeting with stakeholders were organized. On 9 April 2014 the meeting with the Director of the Department of International Affairs and European Union Matters of the MOI took place. During the meeting, the main areas of interest of HRL were introduced and the concerns expressed over a lack of mechanism of monitoring of forced return. The Director acknowledged a gap in implementation of this part of the Return Directive and expressed an interest in learning about different models of monitoring of forced returns in other MSs, thus participation of the MOI representatives in the study visit to Belgium was agreed. Among other issues discussed were: application of alternatives to detention, its' more wide use and

new forms of alternatives. On 29 September 2014 the meeting with the representative of the EMN, working at IOM, and MOI representative was organized. Findings of the study on Detention and Alternatives to Detention[666] were discussed, including the methodology of the analysis. HRL wanted to understand better what the results of the study showed about application practice in Slovakia and why application rate of alternatives to detention is minimal.

Thirdly, during monitoring visits to the detention centres HRL brought up issues of detention conditions, especially of vulnerable persons to the management of the centres. Some of the concerns included proper access to health care including interpretation services, access to means of communication and leisure activities for children in the centres.

Fourthly, HRL maintained close cooperation with the Slovak Office of the Ombudsman. Advocacy mostly focused on security reasons as grounds for rejection or withdrawal of a residence permit or for administrative expulsion. The Office of Ombudsman has initiated a case to the Constitutional Court twice as a result of HRL information about several cases, in which security grounds were used to reject application for residence or as a ground for administrative expulsion. Both submissions were rejected by the Constitutional Court due to alleged lack of competence of the Ombudsman to submit matters in this area to the Constitutional Court. HRL engaged the Office of the Ombudsman also in issues related to implementation of monitoring of forced returns and in application of alternatives to detention, whereas representative of this office participated in the study visits in Belgium and Austria, and the project events in Latvia.

HRL maintained close contact with other NGOs providing legal and social services to foreigners in detention centres. It shared relevant jurisprudence of national courts or ECtHR with lawyers of NGOs and of the Centre for Legal Aid, and attorneys representing foreigners in detention and administrative expulsion cases. On 11 November 2014 a meeting was organised with lawyers in Bratislava and on 4 December 2014 in Kosice. HRL also maintained dialogue with social workers providing services in detention centres and provided them with HRL findings on the shortcomings in detention conditions. Further, HRL engaged NGOs in the dialogue about monitoring of forced return and about more extensive use of alternatives to detention. More proactive approach of social NGOs in initiation of projects on accommodation and other material needs of foreigners under alternatives to detention may significantly contribute to more enhanced role of NGOs. HRL also sees this role in individual coaching of persons subject to alternative measures, motivating their compliance with alternative measure and thus promoting higher trust of authorities in application of alter-

[666] EMN, Frkáňová, A., Kubovičová, K. *Detention and Alternatives to Detention in the Context of Migration Policy in the Slovak Republic*, April 2014.

natives. Social worker of the detention centre in Medvedov, employee of the Slovak Humanitarian Council participated also in the study visit in Austria in October 2014. Last, but not least, the HRL engaged in litigation. In May 2015 HRL submitted a complaint to the ECtHR in case of 19 Afghans who were apprehended having irregularly crossed the external border between Slovakia and Ukraine. They were detained for about 20 hours during which short summary collective interviews took part with the presence of only one interpreter for the whole group. Later they were issued identical administrative expulsion decisions, which also ruled out the suspensive effect of appeal reasoning with the need to protect public order. These decisions on administrative expulsion were immediately enforced by means of application of the EU Treaty on Readmission with Ukraine. HRL claimed the violations of Art. 4 of Protocol No. 4 of ECHR (prohibition of collective expulsion) and Art. 13 in connection with Art. 3 of ECHR and 4 of Protocol No. 4 of ECHR (lack of effective remedy). In September 2014 HRL submitted a request for interim measure in the case of removal of a Pakistani national to Pakistan and violation of the right to family life with his wife and minor daughter, who are citizens of Slovakia. The applicant received a decision on administrative expulsion based on security grounds, which contained no reasons of material grounds substantiating conclusion about a threat to security. Interim measure was granted and complaint submitted. The substance of the dispute is the access to the procedural guarantees ensuring effective remedy, including equality of arms and access to at least the nature of the grounds, for which he is considered a threat to national security. Both cases were pending with ECtHR at the time of preparing this Report.

PROJECT RECOMMENDATIONS

In the area of detention and alternatives to detention:

- Considering that detention is detrimental for human rights and costly, no decision on detention shall be taken before the possibility of alternatives to detention is explored, be it taken by the police, court or another body. Increased use of a wide choice of **alternatives** should be explored, including the commitment by the Government and NGOs to develop new ones, while more extensive use of the existing ones shall also be promoted. At the same time, alternatives have to be viable in view of its practical implementation and fit to ensure the objectives of return;
- In this regard, **increased engagement** of municipalities, communities and NGOs in offering alternatives could help to increase the compliance of returnees with their obligations and diminish the need to abscond;
- **Discussions** at national and European level about the **developing case law** in this area would add value as well;
- **Standards of the CPT** shall further be promoted where detention conditions need substantive improvements and **effective judicial review in detention cases** shall be ensured by entrusting this task to independent bodies with free legal assistance available to detainees.

In the area of identification and treatment of vulnerable migrants:

- **Identification** should take place as early as possible as it may affect the decision, the presumption of minority shall be applied, while age assessment systems should incorporate not only medical, but also complementary methods in order to come to a more reliable solution, and exchange of existing good practices shall be further promoted.
- In this respect, the **guidance from the European Commission** on identification would be of particular assistance, and possibly links to parallel developments under the EU Reception Conditions Directive could be built.

In the area of monitoring forced return:

- Further **sharing of experience and proven good practices** where independent observers are used for monitoring forced return should be encouraged and beneficial for proper implementation of the European commitments;
- **Participation in EURINT project** would be useful for the three countries as an interim solution before the AMIF programmes are launched and later on. This would provide for a possibility to participate in joint missions and operations, share experiences/practices during workshops and seminars,

participate in development of joint strategies towards the top eight countries where most of the TCNs are returned.

- It is necessary to **continue discussions at national level** among the authorities and NGOs or other stakeholders to translate the added value of monitoring to practice, as well as build **capacities** for it (including establishment of training for forced monitors with focus on coercive measures at national level and ensuring that monitors are also on joint flights in order to strengthen the competences of FRONTEX). Use of the ICMPD guidelines for forced monitors and building contacts, exchanging information with experienced monitors shall be encouraged;
- **Building of trust** between the return authorities and the monitors is essential. The benefits of Swiss and UK experience of unlimited access to all detainees and returnees, including without prior announcement, should be evaluated for possible use.
- Forced return monitoring would also benefit from **enhanced engagement of the returnee in the process** in order to increase compliance and address the motivation factors. In this respect, more information, counselling to returnees and their preparation might serve the purpose.

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