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Detention and alternatives to detention in international protection and return procedures

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The study was part of the 2021 Work Programme for the EMN.

Explanatory note

The study was prepared on the basis of national contributions from 25 EMN NCPs (AT, BE, BG, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, SE, SI, SK) collected via a common template developed by the EMN NCPs to ensure, to the extent possible, comparability. National contributions were largely based on desk analysis of existing legislation and policy documents, reports, academic literature, internet resources and reports and information from national authorities rather than primary research. The listing of EU Member States in the study following the presentation of information indicates the availability of relevant material provided by those Member States in their national contributions, where more detailed information may be found and it is strongly recommended that these are consulted as well.

Statistics were sourced from Eurostat, national authorities and other (national) databases.

It is important to note that the information contained in this study refers to the situation in the above mentioned countries up to April 2021 and specifically the contributions from their EMN National Contact Points.

EMN NCPs from other Member States could not, for various reasons, participate on this occasion in this study, but have done so for other EMN activities and reports.

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GLOSSARY OF TERMS

The following key terms are used in the Common Template. The definitions are taken from the EMN Glossary v6.0¹ unless specified otherwise in footnotes.

'Absconding' refers to action by which a person seeks to avoid administrative measures and/or legal proceedings by not remaining available to the relevant authorities or to the court.

'Alternatives to detention', for the purposes of this study, is defined as non-custodial measures used to monitor and/or limit the movement of third-country nationals to ensure compliance with asylum and return procedures.

'Applicant for international protection' is a third-country national or stateless person who has made an application for international protection in respect of which a final decision has yet to be taken.

'Application for international protection' is defined as a request made by a third-country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection, outside the scope of Directive 2011/95/EU (Recast Qualification Directive), that can be applied for separately.

'Asylum procedure' - see definition for 'Procedure for international protection'.

'Beneficiary of international protection' is a person who has been granted refugee status or subsidiary protection status.

'Country of origin' is the country or countries of nationality or, for stateless persons, of former habitual residence.

'Degrading treatment or punishment' refers to treatment that humiliates or debases an individual, showing a lack of respect for, or diminishing, their human dignity, or when it arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance.

'Detention', in the context of this study, is referred to as in the EU context, namely: pursuant to Article 2(h) of Recast Reception Conditions Directive 2013/33/EU and Article 26 of Recast Asylum Procedures Directive 2013/32/EU, detention is defined as confinement of an applicant for international protection by a Member State within a particular place, where the applicant is deprived of their freedom of movement. Although Return Directive 2008/115/EC does not give a definition for detention, it sets grounds for detention and states that detention for the purpose of removal should be limited and subject to the principle of proportionality and that third-country nationals 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.

'Detention facility' is a specialised facility used for the detention of third-country nationals in accordance with national law.

'Dublin procedure' is the process for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Article 1 Regulation 604/2013).

'Examination of an asylum application' - see definition for 'Examination of an application for international protection'.

'Examination of an application for international protection' is any examination of, or decision or ruling concerning an application for international protection by the competent authorities in accordance with Directive 2013/32/EU (Recast Asylum Procedures Directive) and Directive 2011/95/EU (Recast Qualification Directive) except for procedures for determining the EU Member State responsible in accordance with Regulation (EU) No 604/2013 (Dublin III Regulation).

'Forced return' for the purpose of this study is intended as for general use in the EU context as synonymous with 'removal' – i.e. the '*enforcement of the obligation to return, namely the physical transportation out of the Member State*'²

'Fundamental rights' are universal legal guarantees without which individuals and groups cannot secure their fundamental freedoms and human dignity and which apply equally to every human being regardless of nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status as per the legal system of a country.

'International protection' in the global context is "the actions by the international community on the basis of international law, aimed at protecting the fundamental rights of a specific category of persons outside their countries of origin, who lack the national protection of their own countries" and in the EU context as "protection that encompasses refugee status and subsidiary protection status".

'Irregular migrant' in the global context, refers to a person who, owing to irregular entry, breach of a condition of entry or the expiry of their legal basis for entering and residing, lacks legal status in a transit or host country. In the EU context, it refers to a third-country national present on the territory of a Schengen State who does not fulfil, or no longer fulfils, the conditions of entry as set out in the Regulation (EU) 2016/399 (Schengen Borders Code), or other conditions for entry.

1 EMN Glossary v6.0: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/docs/interactive_glossary_6.0_final_version.pdf, last accessed on 31 January 2021.

2 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 (Return Directive), Recital 16 and Articles 15, 16 and 17, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:348:0098:0107:en:PDF>, last accessed on 12 July 2021.

'Irregular or illegal stay' refers to the presence on the territory of an EU Member State of a third-country national who does not fulfil, or no longer fulfils, the conditions of entry as set out in Article 5 of Regulation (EU) 2016/399 (Schengen Borders Code) or other conditions for entry, stay or residence in that EU Member State.

'Procedure for international protection' refers to the set of measures described in Directive 2013/32/EU (Re-cast Asylum Procedures Directive), which encompasses all necessary steps for granting and withdrawing international protection, from making an application for international protection to the final decision in appeals procedures.

'Return' In the context of this study is defined as for the Return Directive, as the 'process of a third-country national going back — whether in voluntary compliance with an obligation to return, or enforced, to: his or 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 third-country national concerned voluntarily decides to return and in which he or she will be accepted.

'Return decision' is an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return.

'Voluntary return' is the assisted or independent return to the country of origin, transit or third country, without necessarily having received a return decision.

'Voluntary departure' means compliance with the obligation to return within the time-limit fixed for that purpose in the return decision.

EXECUTIVE SUMMARY

KEY POINTS

- Since 2015, several Member States have introduced legislative changes in their international protection and return procedures. These included expanding the types of alternatives to detention, prioritising alternative measures over detention, and lowering the minimum age for the compulsory application of alternatives to detention. Others enhanced the safeguards for vulnerable persons, and introduced new rules whereby minors and families with minor children could not be detained in detention centres.
- The most frequently used alternatives to detention are: reporting obligations; the requirement to reside at a designated location; the obligation to surrender a passport or identity document; the requirement to communicate an address; and release on bail. Other alternatives used include financial guarantees, community management programmes, and compulsory return counselling. In practice, Member States do not have all of these alternatives available in their national system and do not use every alternative that is legally available to them.
- Several alternatives to detention, such as residence requirements, release on bail, surrender of document or compulsory stay in reception facilities, can be difficult to apply in practice, for example because of the limited financial means of third-country nationals, the absence of valid identity or travel documents, and the limited availability of places in dedicated reception facilities.
- When grounds for detention exist, the possibility of providing alternatives to detention is considered the preferred option across all Member States' international protection and return procedures. In most Member States, the assessment whether to impose detention or an alternative to detention is undertaken simultaneously with the consideration of the existence of grounds for detention. Several criteria, such as the level of risk of absconding, vulnerability, and the suitability of available alternatives, are considered when deciding whether to apply detention or an alternative to detention.
- Limited data are available to measure the impact of detention or alternatives to detention on the effectiveness of Member States' return policies and international protection procedures. Based on the information available, detention appears to have a bigger impact on reducing absconding and implementing returns, while alternatives to detention are more often associated with shorter status determination processes and higher appeal rates. Reporting in three Member States indicates that albeit alternatives to detention are less costly, they are also somewhat less effective to ensure compliance with return and asylum procedures.

BACKGROUND, AIM AND SCOPE OF THE STUDY

In the context of migration, detention is defined as a "non-punitive administrative measure ordered by an administrative or judicial authority to restrict the liberty of a person through confinement so that another procedure may be implemented".³ Recognising the severity of the measure against the right to liberty, the legal instruments of the European Union (EU) asylum and migration acquis (notably the Reception Conditions Directive 2013/33/EU and Return Directive 2008/115/EC) set out each the specific grounds based on which an individual can be

deprived of liberty, as well as the key legal principles and safeguards in the context of international protection and return procedures, including upholding the principles of necessity and proportionality.⁴ These instruments stipulate that detention is a measure of last resort, which may only be applied if a less coercive measure cannot be applied effectively. These directives thus encourage the use of alternatives to detention, citing the principles of necessity and proportionality to avoid arbitrary deprivation of liberty.

³ EMN Glossary: https://ec.europa.eu/home-affairs/pages/glossary/detention_en, last accessed on 9 July 2021.

⁴ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (Reception Conditions Directive (recast)), Recitals 15, 16, 17, 18, 19, and 20, Articles 8, 10 and 11, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex-3A32013L0033>, last accessed on 5 July 2021; 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 (Return Directive), Recital 16 and Articles 15, 16 and 17, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:348:0098:0107:en:PDF>, last accessed on 12 July 2021.

Although there is no common legal definition for alternatives to detention, for the purposes of this study they are defined as non-custodial measures used to monitor and/or limit the movement of third-country nationals in order to ensure compliance with asylum and return procedures. Alternatives to detention are applied on a case-by-case basis where grounds for ordering detention exist, taking into consideration individual factors.

Aim and scope of the study

This study aimed to identify similarities, differences, practical challenges, and best practices in the use

of detention and alternatives to detention in the Member States within the framework of both international protection and return procedures. Categories of third-country nationals considered include: (i) international protection applicants and (ii) third-country nationals who have been issued a return decision. The study paid special attention to the use of detention and alternatives to detention in relation to vulnerable persons such as minors, families with children, pregnant women, and people with special needs.



NATIONAL POLICY AND LEGAL FRAMEWORK: DEVELOPMENTS SINCE 2015

Since 2015,⁵ most Member States have introduced legislative changes to detention in the context of international protection and return procedures. These changes largely related to the need to implement EU legislation,⁶ further define the scope and criteria for detention,⁷ and change the length of time for detention.⁸ In addition, several Member States introduced policy and legal changes to expand the types of alternatives to

detention,⁹ and/or to prioritise alternative measures over detention,¹⁰ in the context of international protection and return procedures.

Legislative changes also related to vulnerable groups. Some Member States introduced new rules whereby minors and families with minor children could no longer be detained in detention centres.¹¹



AVAILABILITY AND PRACTICAL ORGANISATION OF ALTERNATIVES TO DETENTION

Available alternatives to detention for third-country nationals in EU Member States

All Member States participating in the study have different types of alternatives to detention available as part of their national laws on immigration and/or asylum, which are decided through a case-by-case examination. Although EU Member States report to use alternatives to detention in practice, they do not necessarily use all alternatives at their disposal. Some of the measures can also be applied as procedural measures, or as requirements during the asylum or return procedure. This is the case for the requirement to communicate an address to authorities, for example, which is often considered a prerequisite for the application of another alternative (e.g. obligation to reside).

The authorities responsible for alternatives to detention for third-country nationals in the Member States include the police,¹² immigration and asylum authorities,¹³ and border guards,¹⁴ depending on the national administrative system and the level of coerciveness of the alternative.

Other parties such as non-governmental organisations (NGOs), social services, and other government actors are also involved in the implementation of alternatives to detention in several Member States,¹⁵ including the International Organization for Migration (IOM), national branches of the Red Cross, and national civil society organisations.¹⁶

Practical organisation of alternatives to detention

Frequently available - and used - alternatives to detention are reporting obligations, the requirement to reside at a designated place, the obligation to surrender a passport or identity document, the requirement to communicate an address, and release on bail.

Reporting obligations are established by law in all Member States (25)¹⁷ and are used by most (24).¹⁸ This alternative requires third-country nationals to report to a competent authority at regular intervals, ranging from every 24 hours (in most Member States using this alternative), to once a week,¹⁹ to every four to five weeks in

5 The previous EMN study on detention and alternatives to detention was published in 2014.

6 AT, CY, DE, EL, FI, FR, HR, IE, LU, NL.

7 AT, BE, BG, DE, EE, FI, FR, IE, LU, NL, SK.

8 AT (Act Amending the Aliens Law 2017), DE, FR, LU.

9 BG, CY, CZ, EE, FR, HR, LT, LU, LV.

10 EL, FI, FR, LU, LV.

11 For example, BE.

12 AT, BG, CZ, DE, EL, ES, FI, FR, HR, HU, IE, IT, NL, SK.

13 AT, BE, BG, CY, CZ, DE, EE, EL, HR, HU, IE, LT, LU, NL.

14 FI, IE, LT, NL.

15 AT, BE, CY, EE, FR, HU, NL.

16 BE, CY, EE, FR, HU, NL.

17 AT, BE, BG, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, SE, SI (only in return procedures), SK.

18 AT, BG, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, SE, SI, SK.

19 CZ, DE, EE.

some return procedures in Ireland. Failure to report to the authorities can lead to detention in all reporting Member States, decided on a case-by-case basis.

The **requirement to reside at a designated place** is established by law in 20 Member States²⁰ and used in practice in 17.²¹ This alternative requires third-country nationals to stay at a designated place, appointed by the authorities, which can range from their private residence, to a shelter or reception centre. In three Member States, this alternative corresponds to house arrest or home custody.²²

Both alternatives are considered to be generally less resource-intensive than detaining a third-country national, as well as less intrusive for the individual, who maintains greater freedom of movement.²³ The practical challenges associated with these alternatives stem mostly from the administrative burden and availability of staff,²⁴ and from the limited financial means of third-country nationals, who may struggle to afford private accommodation.²⁵

The **obligation to surrender a passport, travel document or identity document** to the authorities is legally available in 17 Member States²⁶ and used in 14.²⁷ While this alternative is considered advantageous overall, as it requires fewer staff and less supervision,²⁸ several Member States indicated challenges with the availability of valid travel documents, for example when third-country nationals are undocumented, or if there is a risk that their travel documents may have been fraudulently acquired, tampered with, or falsified.²⁹

The **requirement to communicate an address to authorities** is legally available in 15 Member States³⁰ and used in eight.³¹ In most Member States, third-country nationals are obliged to report their address and any change to the police as soon as possible and no later than the next working day.³² Non-compliance can lead to detention, determined on a case-by-case basis.

Similar to the obligation to surrender a passport or travel document, this alternative requires fewer resources from the authorities. However, it also reportedly presents challenges, as third-country nationals often do not have a fixed place of residence and may need to change their residence often, making it difficult for authorities to check and monitor compliance.

Release on bail (with or without sureties) is available as an alternative to detention in nine Member States,³³ with four using it in practice.³⁴ It consists of releasing a third-country national from custody, or without the payment of a sum of money from an independent surety to guarantee their appearance in court. The amount requested typically depends on the individual circumstances of the third-country national concerned and is decided on a case-by-case basis.

Several Member States also have other alternatives in place, some of which have been introduced since 2015. These include a deposit or financial guarantee,³⁵ community management programmes,³⁶ and return counselling.³⁷



ASSESSMENT PROCEDURES AND CRITERIA FOR PLACING THIRD-COUNTRY NATIONALS IN DETENTION OR PROVIDING ALTERNATIVES TO DETENTION

Overview of procedures used to place a person in detention or providing an alternative to detention

All Member States participating in the study allow for detention in both procedures. However, in the context of international protection, France and Spain only allow detention for the purpose of transfers under Article 28 of Regulation 604/2013/EU when a significant risk of absconding exists.³⁸

The possibility of providing alternatives to detention when a ground for detention exists is systematically considered in most Member States as part of their international protection procedure,³⁹ and return procedure,⁴⁰ with some exceptions.⁴¹

In most Member States,⁴² an assessment of whether to impose detention or an alternative to detention is undertaken simultaneously with the consideration of the existence of grounds for detention. However, by law and

²⁰ AT, BE, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE, IT, LT, LU, MT, NL, PL, PT, SI.

²¹ AT, BE, CZ, DE, EE, EL, FI, FR, HR, HU, IE, IT, LT, LU, NL, PT, SI.

²² FR, HU, LU.

²³ AT, BE, CZ, FR, IE, LT, NL, PT.

²⁴ For example, CY, CZ, EL.

²⁵ CZ, IE, LT, LU, LV, SK.

²⁶ BG, CY, EE, EL, ES, FI, FR, HR, HU, IE, IT, LU, LV, MT, NL, PL, SE.

²⁷ BG, CY, EE, ES, FI, FR, HR, IE, IT, LU, LV, NL, SE.

²⁸ IE, NL.

²⁹ FI, IT, MT, NL, PL.

³⁰ CZ, EE, EL, FI, FR, HR, HU, IE, IT, LU, MT, PT, SE, SK (as an obligation within both existing alternatives to detention).

³¹ CY, CZ, EE, FI, FR, HR, IE, PT, SK.

³² CY, CZ, EE, FR, HR, LU, IT, MT, SE, SK.

³³ AT, BG, CY, CZ, EL, HU, IE, PL, SK.

³⁴ AT, HU, IE (sometimes used in *habeas corpus* cases), PL.

³⁵ BG, CY, DE, FI, HR, HU, LU, NL.

³⁶ BE, CY, SE.

³⁷ BE, EE.

³⁸ Regulation 604/2013/EU of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A32013R0604>, last accessed on 5 July 2021.

³⁹ AT, BE, BG, CY, CZ, DE, EE, EL, FI, FR, HR, HU, IE, IT, LT, LU, LV, MT, NL, PL, SE, SI, SK.

⁴⁰ AT, BE, BG, CY, CZ, DE, EE, EL, FI, FR, HR, HU, IE (does not participate in Return Directive 2008/115/EC; non-custodial measures are typically applied before detention is considered in deportation procedures, and systematically considered in refusal of leave to land cases), IT, LT, LU, LV, MT, NL, PL, PT, SE, SK.

⁴¹ BE, LU, SI.

⁴² AT, BE, BG, CY, CZ, EE, FI, FR, HR, HU, IT, LT, LU, LV (applies only to return procedures), MT, NL, PL, SK, SE.

practice in both asylum and return procedures in Slovenia, authorities first issue a detention decision and then consider the opportunity to apply an alternative to detention.

In most Member States, the same national authorities are responsible for deciding on the placement of a third-country national in detention or the use of an alternative to detention. Depending on the institutional framework, the competent authorities involved are the police,⁴³ immigration and asylum authorities,⁴⁴ border guards,⁴⁵ and judicial authorities.⁴⁶

Grounds and criteria used to assess whether or not to impose an alternative to detention and legal remedies against a decision

In all Member States, alternatives to detention are examined and decided on following a case-by-case basis. These individual assessments include an appraisal of whether the legal grounds for detention have been fulfilled. Following the grounds set out respectively in the Reception Conditions Directive 2013/33/EU and the Return Directive 2008/115/EC, the most common ground for detention in international protection procedure is determining or verifying identity,⁴⁷ whereas in the context

of the return procedure, it is the existence of a risk of absconding.⁴⁸

Vulnerability considerations are taken into account in most Member States in the international protection⁴⁹ and return procedures⁵⁰ when deciding to apply an alternative to detention. Considerations include whether the person has special needs, whether minor children are present, and the health and psychological status of the individuals concerned. In some Member States, the detention of vulnerable persons, including unaccompanied minors, accompanied minors and families with children, pregnant women, and victims of trafficking in human beings and torture, is explicitly prohibited by national legislation,⁵¹ or is allowed only in exceptional situations.⁵²

Legal remedies against a decision imposing detention are available to third-country nationals in all responding Member States and take the form of appeals or complaints in both the international protection,⁵³ and return procedures.⁵⁴ In all Member States, the procedure to challenge a detention decision involves either a judicial⁵⁵ or an administrative review.⁵⁶ In all Member States except Finland, the procedure starts with the receipt of a claim by the third-country national or their legal representative.



IMPACT OF DETENTION AND ALTERNATIVES TO DETENTION ON THE EFFECTIVENESS OF INTERNATIONAL PROTECTION AND RETURN PROCEDURES

Very little information is available to compare the impact of detention with the impact of alternatives to detention on the effectiveness of Member States' international protection and return procedures. This is particularly true in respect of measuring the impacts of alternatives to detention. The data that exist are often not reliable, based on very small samples, and gathered from sources that are not readily comparable.

Data gathered for the purposes of this study found that:

- In the international protection procedure, data provided by five Member States suggests that⁵⁷ detention has a bigger impact on reducing absconding rates, while alternatives to detention are more often associated with shorter status determination processes and higher appeal rates.
- In the return procedure, evidence from three Member States indicates that return procedures may be more efficient when using detention compared to alternative measures.⁵⁸
- All Member States provide the same level of fundamental rights safeguards in respect of detention and available alternatives. However, certain services are only provided by national authorities to those in detention, such as access to legal support.⁵⁹
- Based on evidence in two Member States,⁶⁰ implementing alternatives to detention is less costly than placing third-country nationals in detention centres.

⁴³ CZ, EL, ES, FI, HR, HU, IE, IT (police involved in both international protection and return procedures), NL, SE, SI, SK (foreign police).

⁴⁴ AT, BE, BG, CY, CZ, EE (Police and Border Guard Board), HR, IE, LU (Minister for Immigration and Asylum involved in both international protection and return procedures), MT (Principal Immigration Officer is involved in both international protection and return procedures), NL, SE, SI.

⁴⁵ FI, IE, LV, NL, PL.

⁴⁶ EE, FR, IE, LT, PT.

⁴⁷ For example, AT, BG, CZ, EE, EL, FI, HR, HU, IT, LT, LU, LV, NL, PL, SI, NL.

⁴⁸ For example, AT, BG, CY, EE, EL, FI, HR, HU, IE, IT, LT, LU, LV, PL, SI.

⁴⁹ AT, BE, BG, CY, CZ, DE, EE, EL, FI, HR, HU, IT, LT, LU, LV, MT, NL, PL, SE, SI, SK.

⁵⁰ AT, BE, BG, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IT, LT, LU, LV, MT, NL, PL, PT, SE, SI, SK.

⁵¹ CY, CZ, FR (only unaccompanied minors), IE (only children), LT, PL, PT (only unaccompanied minors and victims of torture and ill-treatment), SK (only unaccompanied minors and victims of trafficking).

⁵² CZ (detention of these vulnerable categories is prohibited in all cases but allowed in exceptional cases during return procedures to ensure adequate reception conditions), DE, EE, EL, FI, FR (for other categories), LT, LU, NL, SK (for other categories).

⁵³ AT, BG, CY, CZ, DE, EE, EL, FI, HR, HU, IE, IT, LT, LU, LV, MT, NL, PL, SE, SI, SK.

⁵⁴ AT, BE, BG, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE, IT, LT, LU, LV, MT, NL, PL, SE, SK.

⁵⁵ AT, BE, CY, CZ, DE, EE, ES, FI, FR, HR, HU, IE, IT, LT, PL, SE, SI, SK.

⁵⁶ EL, LU, NL.

⁵⁷ BG, HR, LU, LV, SI.

⁵⁸ BG, LV, SL.

⁵⁹ DE, FR, EL, IT.

⁶⁰ BE, NL.

1. INTRODUCTION



1.1. BACKGROUND AND RATIONALE FOR THE STUDY

In the context of migration, detention is defined as a “non-punitive administrative measure ordered by an administrative or judicial authority in order to restrict the liberty of a person through confinement so that another procedure may be implemented”.⁶¹ European Union (EU) legislation regulates the detention of migrants in the context of international protection and return procedures, setting out the grounds on which an individual can be deprived of liberty and the relevant principles governing the matter. Legal sources at European and international level agree that detention should be used as a last resort. They encourage the use of alternatives to detention, citing the principles of necessity and proportionality and avoiding arbitrary deprivation of liberty.⁶²

Although there is no common legal definition for alternatives to detention, for the purposes of this report, they are defined as non-custodial measures used to monitor and/or limit the movement of third-country nationals in order to ensure compliance with asylum and return procedures.⁶³ As with detention, human rights standards apply to alternatives to detention, including the right to family life, the right to privacy, and the prohibition on torture and inhuman or degrading treatment or punishment.⁶⁴ Alternatives to detention must be imposed on a case-by-case basis where grounds for detention exist, taking into consideration individual factors.

Examples of alternative measures include the obligation to report regularly to the authorities, the deposit of an adequate financial guarantee, or an obligation to stay at an assigned place.⁶⁵ They can entail different levels of coerciveness and the consideration of alternatives is only relevant and legal where there are legitimate grounds to detain an individual.

International and EU laws guarantee and protect the **right to liberty and security** as a core component of an individual's fundamental rights. Article 5(1) of the European Convention of Human Rights (ECHR) sets out the principle that “Everyone has the right to liberty and security of person”, while Article 9 of the International Covenant on Civil and Political Rights (ICCPR) similarly stipulates that: “[...] Everyone has the right to liberty and security of person. No one shall be subjected to **arbitrary** arrest or detention. No one shall be deprived of his liberty except on such grounds and following such procedures as are established by law”. All measures that might have an impact on a person's human rights should be considered on a **case-by-case basis**.

The principles of **necessity** and **proportionality** should be observed as a core part of the decision to detain a third-country national under EU law. Unlike EU law, the European Court of Human Rights (ECtHR) has held that the necessity test does not apply to immigration-related detention, whether in the framework of return or in preventing unauthorised entry.⁶⁶ However, if national law establishes a necessity requirement for such detention and this is not upheld, the Court will find detention to be arbitrary and in violation of the ECHR.⁶⁷

The principles of **non-arbitrariness** and **legality** provide that detention should be based on the grounds for detention established by law.⁶⁸ As the ECtHR has underlined in several judgments, domestic authorities shall be required to **effectively verify** and provide **evidence** on whether an alternative, less coercive measure can be applied (see section 4).⁶⁹ The administrative detention of individuals can therefore take place only in those cases where there are no available alternatives that can achieve the same objective.

⁶¹ EMN Glossary: https://ec.europa.eu/home-affairs/pages/glossary/detention_en, last accessed on 9 July 2021.

⁶² Charter of Fundamental Rights of the European Union (EU Charter), 2012/C 326/02, Articles 6, 52(3) and 53, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX-12012P/TXT>, last accessed on 12 July 2021; Reception Conditions Directive (recast); Article 15 Return Directive, Articles 8 and 11; International Covenant on Civil and Political Rights (ICCPR), Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, Article 9(1).

⁶³ EMN Glossary: https://ec.europa.eu/home-affairs/pages/glossary/alternative-detention_en, last accessed on 9 July 2021.

⁶⁴ Council of Europe, ‘European Convention on Human Rights’, 2013, https://www.echr.coe.int/documents/convention_eng.pdf, last accessed on 12 July 2021. These rights include: the right to family life (ECHR, Article 2; EU Charter, Article 9; 1951 Refugee Convention, Article 12(2)), the right to family life (ECHR, Article 8), prohibition of torture (and of inhuman or degrading treatment) (ECHR, Article 3).

⁶⁵ Reception Conditions Directive (recast), Article 8(4).

⁶⁶ ECtHR 15 November 1996, *Chahal v the United Kingdom* (GC), App No 22414/93; See also ECtHR 29 January 2008, *Saadi v United Kingdom*, App No 13229/03.

⁶⁷ ECtHR 2 October 2008, *Rusu v Austria*, App No 34082/02.

⁶⁸ The principles of non-arbitrariness and of legality are laid down in the following international law instruments: Article 9 Universal Declaration of Human Rights (1948), Article 9(1) ICCPR (1966), Article 16(4) International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, (1990), Parliamentary Assembly of the Council of Europe (PACE), Resolution 1707(2010), 10 Guiding Principles on detention of asylum seekers and irregular migrants, §9.1.5.

⁶⁹ ECtHR, *A.B. and Others v. France*, No. 11593/12, 12 July 2016, § 124, [https://hudoc.echr.coe.int/eng#/%22itemid%22:\[%22001-164678%22\]](https://hudoc.echr.coe.int/eng#/%22itemid%22:[%22001-164678%22]), last accessed on 12 July 2021.

Despite the legal obligation to consider their use, several actors in the field – including the Council of Europe,⁷⁰ the United Nations (UN)⁷¹ and the EU⁷² – have noted that alternatives to detention remain widely underused. This is primarily due to the lack of readily available alternatives that can achieve the same goal, especially in the context of return procedures (i.e. to ensure compliance with the migration procedure and to prevent absconding).

In the joint conference ‘Effective Alternatives to the Detention of Migrants’ organised by the European Migration

Network (EMN) and the Council of Europe in April 2019,⁷³ the lack of **empirical research** on the practical applicability of alternative measures, including all related costs, was identified as one of the main implementation challenges. At the time, several alternative measures existed, with some information available on their efficacy. However, there was a lack of clear evidence-based information on their effectiveness in achieving compliance with migration procedures, in particular preventing absconding.



1.2. OVERVIEW OF THE EU ACQUIS

Detention and alternatives to detention in the context of the international protection procedure

Before subjecting asylum applicants to detention, Reception Conditions Directive 2013/33/EU (recast) requires Member States to consider alternatives. Recital 15 provides that “applicants [for international protection] may be detained only under very **clearly defined exceptional circumstances** laid down in this Directive and subject to the principles of **necessity** and **proportionality** with regard both to the manner and the purpose of such detention”. Under the Directive, Member States may detain an applicant only if other less coercive alternative measures cannot be effectively applied, based on a case-by-case evaluation.⁷⁴

Reception Conditions Directive 2013/33/EU establishes six grounds on which the detention of asylum applicants can be justified:

1. To determine the identity or nationality of the person;
2. To determine the elements of the asylum application that could not be obtained in the absence of detention (in particular, if there is a risk of absconding);
3. To decide, in the context of a procedure, on the asylum applicant’s right to enter the territory;
4. In the framework of a return procedure, when the Member State concerned can substantiate, on the basis of objective criteria, that there are reasonable grounds to believe that the person tries to delay or frustrate that return by introducing an asylum application;
5. For the protection of national security or public order;
6. In the framework of a procedure for the determination of the Member State responsible for the asylum

application (Article 28 Regulation 604/2013), when there is a significant risk of absconding and in order to secure the transfer procedure.

According to Article 26 of Asylum Procedures Directive 2013/32/EU (recast),⁷⁵ it is not lawful to detain a person solely for the reason that they have lodged an asylum application. In order to guarantee the **non-arbitrariness** of detention and the respect of fundamental rights of applicants for international protection, the list above is deemed exhaustive.⁷⁶ Several procedural guarantees are established under Article 9 of the recast Reception Conditions Directive 2013/33/EU. These include: that an applicant shall be detained for as short a period as possible and only for so long as one of the above listed grounds for detention applies; the provision of a speedy judicial review of the lawfulness of detention; that an applicant shall be informed in writing in a language they understand, or can be reasonably presumed to understand, of the reasons for their detention, procedures for challenging their detention, and the possibility to request free legal representation. Article 9 also establishes a right to access legal representation and provides for the regular review of that detention at reasonable time periods. The recast Reception Conditions Directive 2013/33/EU regulates the conditions in detention facilities, such as access to fresh air and communication with lawyers, non-governmental organisations (NGOs) and family members.⁷⁷

In cases where the responsibility for a person’s asylum application is found to lie with another Member State, the person can be issued with a transfer decision pursuant to Regulation 604/2013/EU (referred to as a ‘Dublin’ transfer). Under this Regulation, a person may be detained for the purpose of facilitating their transfer from the Member State where they present a “significant risk of absconding”.⁷⁸ Article 28 states that “Member States may detain the person concerned to secure transfer procedures

⁷⁰ Council of Europe, ‘Legal and practical aspects of effective alternatives to detention in the context of migration’, Analysis of the Steering Committee for Human Rights (CDDH), 7 December 2017, <https://rm.coe.int/legal-and-practical-aspects-of-effective-alternatives-to-detention-in-/16808bf699f>, last accessed on 12 July 2021; Commissioner for Human Rights, ‘Human Rights Comment, High time for states to invest in alternatives to migrant detention’, 31 January 2017, <https://www.coe.int/en/web/commissioner/-/high-time-for-states-to-invest-in-alternatives-to-migrant-detention>, last accessed on 12 July 2021; PACE, ‘The alternatives to immigration detention of children’, Resolution 2020 (2014), final version, § 8, <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21295&lang=en>, last accessed on 12 July 2021.

⁷¹ UN, ‘Report of the Special Rapporteur on the human rights of migrants, François Crépeau Regional study: management of the external borders of the European Union and its impact on the human rights of migrants’, A/HRC/23/46, 24 April 2013, § 48, https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/23/46, last accessed on 12 July 2021.

⁷² Communication on EU Return Policy, COM(2014) 199 final, p. 15, [https://ec.europa.eu/transparency/documents-register/detail?ref=COM\(2014\)199&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=COM(2014)199&lang=en), last accessed on 12 July 2021.

⁷³ EMN and Council of Europe, Effective Alternatives to the Detention of Migrants, conference report, 4 April 2019, <https://rm.coe.int/coe-eu-emn-conference-4-april-2019-conference-report/168097e8ef>, last accessed on 4 October 2021.

⁷⁴ Reception Conditions Directive (recast), Article 8.

⁷⁵ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (Asylum Procedures Directive (recast)), <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex%3A32013L0032>, last accessed on 12 July 2021.

⁷⁶ Reception Conditions Directive (recast), Article 8 (3).

⁷⁷ Reception Conditions Directive (recast), Article 10.

⁷⁸ Regulation 604/2013/EU, Article 28.

following this Regulation, based on an individual assessment and only in so far as detention is proportional and other less coercive alternative measures cannot be applied effectively".⁷⁹ The Regulation also states that Member States shall not hold a person in detention for the sole reason that they are subject to a Dublin transfer procedure.⁸⁰

In the case of *Al Chodor* (C-528/15), the Court of Justice of the European Union (CJEU) clarified the meaning of "significant risk of absconding" under Article 28(2) of Regulation (EU) 604/2013/EU, requiring Member States to lay down "objective criteria" to assess the reasons to believe a person may abscond.⁸¹

Detention and alternatives to detention in the context of the return procedure

Return Directive 2008/115/EC lays down common standards and procedures for the return of irregularly staying third-country nationals.⁸² It allows Member States to detain a migrant who has been issued with a return decision, in order to **prepare their return** and/or carry out the **removal process**, where the application of less coercive measures is not sufficient. Article 15(4) of the Directive specifies that detention is only justified where there is a **reasonable prospect for removal**, when there is a risk of absconding, or the third-country national concerned avoids or hinders the preparation of the return or removal process. In its proposal for a recast Return Directive 2008/115/EC, the Commission proposed a list of criteria to assess the risk of absconding.⁸³ These include, lack of identity documentation, fixed residence, or financial resources, as well as illegal entry into the territory of the Member State or unauthorised movement to another Member State. Other criteria include non-compliance or explicit expression of intent of non-compliance with return, being issued with a return decision by another Member State, and not fulfilling the obligation to

cooperate with the competent authorities of the Member States involved, being convicted of a criminal offence or part of ongoing criminal investigations and proceedings, using false or forged identity documents, destroying existing documents or refusing to provide fingerprints, and opposing or failing to comply with an entry ban or with measures to prevent the risk of absconding are also among the criteria proposed.

According to Article 15(5) of the recast Return Directive 2008/115/EC, each Member State shall set a limited period of detention, which may not exceed **six months**. Article 15(6) also allows Member States to **extend detention** for an additional 12 months, based on either a lack of cooperation by the person concerned or delays in obtaining documents from their country or origin or the country where they are to be returned.

Recital 16 of the Return Directive 2008/115/EC states that "detention for the purpose of removal should be limited and subject to the principle of proportionality concerning the means used and objectives pursued. Detention is justified only [...] if the application of less coercive measures would not be sufficient".⁸⁴ The Return Directive 2008/115/EC obliges Member States to establish national rules on alternatives to detention, although it does not provide examples of specific alternative measures. Article 7(3) of the Directive 2008/115/EC, lists specific measures that could be imposed on a third-country national benefiting from a period of voluntary departure to avoid the **risk of absconding**, such as regular reporting to the authorities, deposit of a financial guarantee, submission of documents, or the obligation to stay at a specific location. Although these measures are not alternatives to detention in the context of the Directive as there is no ground for detention in the context of voluntary departure, they mirror the most commonly available and used alternatives to detention.



1.3. STUDY AIMS AND OBJECTIVES

This study aims to identify similarities, differences, practical challenges and best practices in the use of detention and alternatives used by Member States in the framework of international protection and return procedures.

The study follows the 2014 publication of the EMN study on 'The Use of Detention and Alternatives to Detention in the Context of Immigration Policies'. It aims to:

- Provide a comparative overview of the use of detention and available alternatives to detention in each Member State in the context of international protection and return procedures, together with the challenges they face in implementing alternatives to detention.

- Give a comparative overview of the process and criteria used by national authorities to assess whether to place a third-country national in detention or apply an alternative to detention, in the context of international protection and return procedures.
- Assess the availability of information on the impact of placing third-country nationals in detention or in alternatives to detention on the effectiveness of Member States' international protection and return procedures. This impact is assessed against three key indicators, namely the extent to which measures: i) ensure compliance with migration procedures (including prompt and fair case resolution, facilitating voluntary and forced returns, reducing absconding); ii) uphold

⁷⁹ Regulation 604/2013/EU, Article 28(2).

⁸⁰ Regulation 604/2013/EU, Article 28(1).

⁸¹ Case C-528/15, *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v Salah Al Chodor, Ajlin Al Chodor, Ajvar Al Chodor*, 15 March 2017.

⁸² IE does not participate in Return Directive 2008/115/EC.

⁸³ 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 (recast), Article 6, contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%63A2018%3A06349%3AFIN>, last accessed on 12 August 2021.

⁸⁴ CJEU C-61/11 PPU - El Dridi relates to the interpretation of Articles 15 and 16 of Return Directive 2008/115/EC. The Court concluded that Articles 15 and 16 must be interpreted as precluding Member State legislation that provides for a sentence of imprisonment to be imposed on an illegally staying third-country national on the sole ground that they remain without valid grounds on the territory of that State, contrary to an order to leave that territory within a given period.

fundamental rights; and iii) improve the cost-effectiveness of migration management.⁸⁵

Categories of third-country nationals considered in the study include: (i) international protection applicants in ordinary procedures, Dublin procedures, and border procedures; (ii) third-country nationals who have been issued a return decision. The study focuses on detention for asylum/return purposes only and does not cover detention

of third-country nationals who have committed a criminal offence. The study pays special attention to the issue of detaining and/or providing alternatives to detention for vulnerable persons such as minors, families with children, pregnant women, and people with special needs. The study considers the legal and practical approaches to detention and alternatives to detention that were available during the reporting period January 2015 - April 2021.



1.4. MAIN RESEARCH QUESTIONS

The study addresses two primary questions:

- *To what extent are different options for alternatives to detention available and used across the Member States?*
 - What types of alternatives are currently available and in use across the Member States?
 - What are the challenges and advantages in the use and implementation of alternatives to detention?
 - What criteria and processes are used to assess the opportunity to use an alternative instead of detention (provided that grounds for detention exist)?
- *What evidence exists on the impact of different types of coercive measures on the effectiveness of return policies and international protection procedures?*
 - What are the different impacts of detention and its alternatives, considering:
 - Compliance with relevant migration procedures;
 - Respect for fundamental rights;
 - Cost-effectiveness ratio.
 - What factors (e.g. personal characteristics such as gender, origin or age; design of the alternative to detention) increase the impact of detention or alternatives to detention?



1.5. STRUCTURE OF THE REPORT

The study report is structured as follows:

- Section 1: Introduction.
- Section 2: National policy and legal framework: developments since 2015.
- Section 3: Availability and practical organisation of alternatives to detention.
- Section 4: Assessment procedures and criteria for placing third-country nationals in detention or providing alternatives to detention.
- Section 5: Impact of detention and alternatives to detention on the effectiveness of return and international protection procedures.
- Section 6: Conclusions.

⁸⁵ Council of Europe, European Commission and EMN, 'Effective Alternatives to the Detention of Migrants', international conference, 2019; Cost-effectiveness is understood as the financial costs of alternatives to detention compared to the costs of detention, taking into account their outcomes (effects). For instance, reducing the length of time a migrant is detained might reduce the costs associated with detention.

2. NATIONAL POLICY AND LEGAL FRAMEWORKS: DEVELOPMENTS SINCE 2015



2.1. CHANGES IN THE NATIONAL LEGAL AND POLICY FRAMEWORKS ON DETENTION IN THE CONTEXT OF INTERNATIONAL PROTECTION AND RETURN PROCEDURES SINCE 2015

Since 2015, the majority of Member States have introduced legislative changes in respect of detention in the context of both international protection and return procedures. These changes relate primarily to the need to implement EU legislation⁸⁶ and to further define the scope and content of administrative detention in the context of migration management, including the criteria used to determine whether or not detention should be applied.⁸⁷

Some Member States made **changes in order to implement EU legislation**. Greece introduced a new law providing that a third-country national or stateless person applying for international protection may, if necessary, be detained as an exception,⁸⁸ following an individual assessment and provided that there are specific reasons why alternative measures cannot be applied. In 2018, Ireland opted into the recast Reception Conditions Directive 2013/33/EU, thus implementing new national standards on detention for international protection applicants. In the Netherlands, a new border procedure was introduced in a separate regulatory framework in 2015, providing that a third-country national can be detained at the border, in the context of international protection procedures.

Several Member States made **changes to their scope, definitions and criteria**. Austria, for example, introduced

more specific criteria for imposing detention. Similarly, Luxembourg and Germany specified the criteria and extended the cases under which an applicant for international protection can be placed in detention. Germany also introduced new grounds for detention within the context of the return procedure, for example for third-country nationals posing a threat to national security.⁸⁹ Belgium amended the Belgian Immigration Act to broaden the scope where detention could be applied, with the aim of tackling perceived abuses of the asylum procedure. Since 2018, as part of Italy's international protection procedure, third-country nationals can also be detained to determine or verify their identity. This was in response to frequent refusals of examination and attempts to abscond from the so-called hotspots (the points where third-country nationals disembark when arriving from the Mediterranean).

Several Member States changed the **length of time for detention**. Austria,⁹⁰ Bulgaria and France all increased the maximum length of detention. In Latvia, a new Asylum Law entered into force in 2016, which includes a comprehensive framework of conditions and procedures for the application of restrictive measures in the asylum procedure and reduces the period of detention of an asylum applicant from seven to six days.



2.2. LEGAL AND POLICY CHANGES ON THE USE OF ALTERNATIVES TO DETENTION IN INTERNATIONAL PROTECTION AND RETURN PROCEDURES SINCE 2015

In the context of both international protection and return procedures, several Member States introduced changes to expand the types of alternatives to detention⁹¹

and/or to prioritise alternative measures over detention.⁹² Several Member States reported an increase in the use of

⁸⁶ AT, CY, DE, EL, FI, FR, HR, IE, LU, NL.

⁸⁷ AT, BE, BG, DE, EE, FR, IE, LU, NL, SK.

⁸⁸ Law 4636/2019 as amended by Law 4686/2020.

⁸⁹ In December 2020, supplementary preparatory custody (*ergänzende Vorbereitungshaft*) came into effect (Residence Act (*Aufenthaltsgesetz*), Section 62c.)

⁹⁰ Act Amending the Aliens Law 2017.

⁹¹ BG, CY, CZ, EE, FR, HR, LT, LU, LV.

⁹² EL, FR, LV.

a financial guarantee as an alternative to detention since 2014.⁹³

Five Member States **introduced new alternatives to detention** in both international protection and return procedures.⁹⁴ In Cyprus, the Refugee Law was amended in 2016 to introduce a set of new alternatives to detention, such as reporting to the authorities, obligation to stay at an assigned place (including a reception centre) and probation. Czech Republic amended its Asylum Act in 2015 to introduce new alternatives to detention for asylum seekers. Those changes consisted of the obligation to reside in the accommodation centre, and regular self-reporting to the Ministry of the Interior. In 2020, in Lithuania, the list of alternatives to detention was supplemented by the accommodation of the foreigner at the State Border Guard Service, with the right of movement only within the accommodation facility. This alternative to detention came into force on 1 March 2021 and is available only for asylum applicants and foreigners who have received a decision on their applications for asylum and who are to be returned to a foreign State. In Luxembourg, legislative amendments extended alternatives to detention in both the international protection and return procedures to include a financial guarantee and the obligation to report regularly to the authorities. An important development was the establishment of the Emergency

Housing Structure of Kirchberg (SHUK), which serves as a semi-open return facility for asylum applicants whose fingerprints are already registered in Eurodac by another Member State and who are therefore likely to be transferred to that Member State. In 2020, Estonia adopted a new alternative to detention – appearing for counselling – which applies to both applicants for international protection and those in the return procedure.

Several Member States introduced **legislative changes to prioritise the use of alternatives to detention**.⁹⁵

France strengthened and thoroughly reformed the legal framework in 2015, partly to reinforce the use of alternatives to detention across all migration procedures. More recently, explicit priority has been given to certain alternatives to detention, such as house arrest in both the international protection and return processes. Poland and the Netherlands now allow detention measures to be used only where no alternatives could be applied. The Netherlands also reported that a new regulatory framework will be introduced for detention in immigration procedures, which will incorporate alternatives to detention. Finally, several Member States increased the use of financial guarantees. For example, Bulgaria introduced the surrender of a pledge document as a new alternative to detention in return procedures.



2.3. VULNERABLE GROUPS WITHIN THE NATIONAL LEGAL FRAMEWORK

All Member States allow for detention (in exceptional cases) or alternatives to detention of vulnerable groups. Austria introduced legislative changes to lower the minimum age for the compulsory application of an alternative to detention, while in Finland, a new legislative amendment prohibited the detention of unaccompanied minors below the age of 15. Unaccompanied minors between the ages of 15 and 18 can be detained only for the purposes of ensuring their return. In addition, a residence obligation was added to the range of alternative to detention, for those above the age of 15.

Other Member States introduced **new rules whereby minors and families with minor children could not be detained in detention centres**.⁹⁶ In Austria, a provision was introduced requiring the Federal Office for Immigration and Asylum to always apply alternatives to detention for minors aged 14 and over, except where there is a reasonable assumption that such alternatives would not achieve the purpose of detention. An April 2019 judgment in Belgium partially suspended the implementation of a national law allowing irregularly staying families with minor children to be detained, thus they are no longer detained in the family units at the closed detention centre '127bis' at Steenokkerzeel. In Luxembourg, legislation allows vulnerable groups to be detained but this is not common practice. Based on a recommendation of the Schengen acquis evaluation, the detention period for families with children was extended from 72 hours to seven days in 2017 only for the purposes of ensuring

their return. In practice, however, this maximum duration of seven days has never been reached. Finally, in 2016, the Netherlands opened a Secure Family Facility in Zeist for families with minor children and unaccompanied minors. An amendment in the policy in 2020 extended the period for which a newly detected unaccompanied minor can be placed in the Secure Family Facility. Their return must be possible within four weeks, therefore the period was extended from two to four weeks to prevent absconding.

⁹³ BG, CY.

⁹⁴ CY, CZ, EE, LT, LU.

⁹⁵ BG, FR, NL, PL.

⁹⁶ AT, BE, LU, NL.

3. AVAILABILITY AND PRACTICAL ORGANISATION OF ALTERNATIVES TO DETENTION

This section explores the availability of various types of alternatives to detention for different categories of third-country nationals. It explores the practical organisation of those alternatives generally available in the Member States:

- Authorities and organisations responsible for implementing the alternatives;
- Conditions to be met by third-country nationals to be applied as an alternative to detention;
- Mechanisms in place to monitor third-country nations' compliance with these conditions.

3.1. AVAILABLE ALTERNATIVES TO DETENTION FOR THIRD-COUNTRY NATIONALS

Most Member States have different types of alternatives to detention available under their national laws. In practice, however, they do not necessarily use each alternative (see Table 1). Some of the measures can also be applied as procedural requirements during the asylum or return procedure. The analysis here focuses only on the use of such measures as alternatives to detention, unless explicitly stated otherwise.

Reporting obligations (e.g. reporting to the police or immigration authorities at regular intervals) are established by law and used in the majority (25) of Member States. The requirement to reside at a designated place (e.g. a facility or specific location) is established by law in 20 Member States and used in practice in 17 Member States.

Although legally available in 17 Member States, the obligation to surrender a passport, travel document or identity document is only used in 14 Member States. Similarly, the requirement to communicate an address to authorities (including requesting permission for absences and address changes) is legally available in 15 Member States but is used in only eight Member States.

Other alternatives to detention include the use of a financial guarantee, which is available in law in eight Member States, five of which use this alternative in practice. Three Member States formally established community management programmes (where individuals live independently in the community and are attached to a case manager, also referred as 'case management systems'). Five Member States use accommodation in return and asylum facilities as a specific type of alternative to detention.

Table 1 Alternatives to detention for third-country nationals across the Member States

Alternative to detention	Established in law or administrative regulations	Used in practice
Reporting obligations (e.g. reporting to the police or immigration authorities at regular intervals)	AT, BE, BG, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, SE, SI, ⁹⁷ SK	AT, BE, ⁹⁸ BG, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, SE, SI, SK
Requirement to reside at a designated place (e.g. a facility or specific region) ⁹⁹	AT, BE, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE, IT, LT, LU, MT, NL, ¹⁰⁰ PL, SI	AT, BE, CZ, DE, EE, EL, FI, FR, HR, HU, IE, IT, LT, LU, NL, PT, SI

⁹⁷ Only in return procedures. Not a standalone alternative but included in the requirement to reside at a designated place.

⁹⁸ In BE, it is not a standalone practice but is part of the SEFOR procedure. However, its use has been limited, with further research being carried out to optimise its use.

⁹⁹ Often used in cases of particularly vulnerable people, including families, unaccompanied minors and individuals with disabilities.

¹⁰⁰ In NL, this measure is also applied as an alternative at the international airport when a third-country national is refused entry at the border.

Alternative to detention	Established in law or administrative regulations	Used in practice
Obligation to surrender a passport, travel document or identity document	BG, CY, EE, EL, ES, FI, FR, HR, HU, IE, IT, LU, ¹⁰¹ LV, MT, NL, PL, SE	BG, CY, EE, ES, ES, FI, FR, ¹⁰² HR, IE, IT, LU, LV, NL, SE
Obligation to communicate address to authorities (including requesting permission for absences/changing address)	CZ, EE, EL, FI, FR, HR, HU, IE, IT, LU, ¹⁰³ MT, PT, SE	CY, CZ, EE, FI, FR, HR, IE, PT
Release on bail (with or without surety)	AT, BG, CY, CZ, EL, HU, IE, PL, SK	AT, HU, IE, PL
Deposit or financial guarantee	BG, CY, DE, FI, HR, HU, LU, NL	BG, FI, HU, LU, NL
Accommodation in return and asylum facilities	BE, CY, DE, FR, SI	BE, DE, FR, SI
Community management programme	BE, SE	BE, CY, SE
Electronic monitoring (e.g. tagging)	DE, HU, LU, ¹⁰⁴ PT	HU, PT
Return counselling, coaching or awareness-raising initiatives	BE, ¹⁰⁵ EE	EE (in return context)
Release to a guardian/guarantor	DE, LT	LT
Release to a care worker	IE (children only)	IE (children only)

All Member States **apply alternatives to detention on a case-by-case basis**. Generally, the decision depends on the individual circumstances of the third-country national in question. For example, those with a home address and low risk of absconding and/or committing a criminal offence, and who are not the subject of an entry ban to the Schengen area, are usually granted reporting obligations that require them to present themselves to the police or immigration authorities at regular intervals. This approach is preferred across all Member States, as it requires minimal resources from the authorities compared to detention or to other alternatives.

Member State authorities responsible for alternatives to detention for third-country nationals include the police,¹⁰⁶ immigration and asylum authorities,¹⁰⁷ and border guards¹⁰⁸, depending on the national administrative system, the type of procedure, and the level of coerciveness of the alternative. Other parties such as NGOs, social services, private entities and other government actors are also involved in the implementation of alternatives to detention in several Member States,¹⁰⁹ and include the International Organization for Migration (IOM), national branches of the Red Cross, and national civil society organisations supporting refugees.



3.2. PRACTICAL ORGANISATION OF ALTERNATIVES TO DETENTION

This section presents the practical organisation of the five most frequently available alternatives to detention in EU Member States, as well as other types of alternatives. It highlights key features, such as legal basis, authorities and partners involved, obligations attached to the granting of the alternative, and monitoring mechanisms in place. The challenges and advantages of these alternatives are also presented.

Reporting obligations

Imposing reporting obligations on third-country nationals is used as an alternative to detention in 25 Member States. Seventeen apply this alternative on a regular basis,¹¹⁰ while eight¹¹¹ apply it rarely, if ever.

Only three Member States have collected statistics on the use of this alternative. Of those, between 2016 and 2020, the obligation to report was applied 56 times in Lithuania and at least 1 624 times in Finland.¹¹² In Poland, this was the most widely used alternative to detention, being

¹⁰¹ Not a standalone alternative but included in reporting obligations.

¹⁰² Applied in the context of house arrest.

¹⁰³ Not a standalone alternative but a necessary prerequisite in order to be awarded an alternative to detention.

¹⁰⁴ Not a standalone alternative but included in the requirement to reside at a designated place (not yet used in practice).

¹⁰⁵ Not a standalone alternative.

¹⁰⁶ AT, BG, CZ, DE, EL, ES, FI, FR, HR, HU, IE, IT, NL, SK.

¹⁰⁷ AT, BE, BG, CY, CZ, DE, EE, EL, HR, HU, IE, LT, LU, NL, PT.

¹⁰⁸ FI, IE, LT, NL.

¹⁰⁹ BE, CY, EE, FR, HU, NL.

¹¹⁰ AT, CY, CZ, DE, EE, EL, ES, FI, FR (in the framework of house arrest), HR, IE (most used for people with deportation orders or subject to a Dublin transfer decision), IT, LT, NL, PT, SE, SI (in the framework of alternative "requirement to reside at a designated place" in return procedure).

¹¹¹ BE, BG, HU, LU, LV, MT, PL, SK.

¹¹² In Finland, the Border Guard alone reported 1 624 cases where the obligation to report was applied. Figures from the police are not available.

applied a total of 5 535 times between 2016 and 2020. In the Netherlands, data were available on this measure but it was not possible to determine its application as an alternative to detention versus to prevent absconding.

This alternative to detention requires individuals to report to officials at regular intervals, ranging from every 24 hours (most Member States), to once a week,¹¹³ to every four to five weeks for some return procedures in Ireland. The Netherlands and Belgium have no set frequency, with intervals ranging from daily to monthly depending on the case. The national authorities responsible for administering this alternative are often the police in the return procedure, and departments for asylum and migration/ministries of the interior in the international protection procedure. In most Member States, third-country nationals are required to report their presence to the police,¹¹⁴ while 12 require them to report to the migration and asylum authorities.¹¹⁵

Failure to report to the authorities can lead to detention in all reporting Member States, again decided on a case-by-case basis. In Italy, non-compliance can be sanctioned with a fine from EUR 3 000 to EUR 18 000 and may lead to forced and immediate accompaniment to the border, with the possibility of ordering detention in the Repatriation Centre. In the Netherlands, if a third-country national has not complied on two consecutive occasions, they will be asked to explain their failure to report. If the individual does not comply, they are deemed to have withdrawn from supervision or left the country. As previous withdrawal from supervision is one of the detention criteria, non-compliance could thus lead to detention in the future, although not automatically.

In most Member States,¹¹⁶ the duration of the alternative is determined on a case-by-case basis and depends on the evolution of the case. The alternative usually remains in place until it has been established that the person meets the conditions for entry or stay in the country, until a decision on removal from the country has been enforced, or the procedure has otherwise ended.¹¹⁷

The legal basis for reporting obligations is most often found in Member States' aliens acts, although some use different legal bases, depending on whether the alternative forms part of the international protection procedure or return procedure.¹¹⁸

NGOs, social services, private entities and other governmental actors are rarely involved in implementing this alternative to detention, except in France.

Only the Netherlands has evaluated the effectiveness of the obligation to report. Nevertheless, most Member States were able to identify the main advantages and challenges of using this alternative.¹¹⁹ Firstly, it is cost-efficient, being far less resource-intensive than detaining

a person and covering their accommodation and subsistence costs.¹²⁰ Secondly, using this alternative is less intrusive for the individual, who enjoys greater freedom of movement and has more opportunities to integrate into the community.¹²¹

The practical challenges associated with this alternative stem from the administrative burden and/or availability of staff,¹²² as migration or police officers have to be accessible almost all the time, including weekends. In addition, third-country nationals may have limited financial means and may struggle to support themselves or to afford private accommodation, which means that they cannot benefit from this alternative in practice.¹²³

In response to some of the administrative challenges, Lithuania implemented a new electronic communications system to monitor compliance of third-country nationals with reporting obligations (see Box 2).

Box 2: Lithuania: Reporting obligations by means of electronic communications

In Lithuania, the reporting obligation as an alternative to detention is administered by the Migration Department or the State Border Guard Service.

A court determines how often (e.g. twice a week) the third-country nationals must inform the Migration Department or the State Border Guard Service of their whereabouts, at a fixed time and by means of electronic communication. The following means of electronic communication can be used to report to the authorities: special mobile phone applications; electronic surveillance devices; and an email with the possibility to identify the sender. If the person is unwilling or cannot use such electronic means, then it is not possible to determine their whereabouts and this alternative to detention cannot be used. Between 2015 and 2020, this alternative was used in 28 cases.

In the event of non-compliance with the reporting obligation, the State Border Guard Service refers the case to the court, with a motion to detain the foreigner.

Requirement to reside at a designated place

The obligation to reside at a designated place exists in 20 Member States¹²⁴ and is used in practice in 17 Member States.¹²⁵ This alternative requires third-country nationals to stay at a designated place, appointed by the authorities, which can range from their private residence to a shelter or reception centre. In France and Luxembourg, this alternative corresponds to house arrest or home custody.¹²⁶

¹¹³ CZ, DE, EE.

¹¹⁴ AT, BG, CY, CZ, DE, EL, ES, FI, FR, HR, HU, IE, IT, NL, SK.

¹¹⁵ AT, BE, BG, CY, CZ, DE, EE, EL, FI, HR, HU, IE, LT, LU.

¹¹⁶ AT, BE, BG, CY, CZ, EE, EL, ES, FI, FR, HR, HU, IE, IT, LT (foreigners obliged to report to Migration Department or State Border Guard Service), LU, LV, MT, NL, PL, PT, SE, SK.
¹¹⁷ AT, BE, BG, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE, IT, LT, LU, LV, MT, NL, PL, SE, SK.

¹¹⁸ BG, CY, EE, HR, IE, LU.

¹¹⁹ AT, CY, CZ, DE, ES, FI, FR, IE, LU, NL, PL, SK.

¹²⁰ AT, CZ, DE, ES, FI, FR, IE, NL, PL, PT, SK.

¹²¹ DE, IE, LV, NL.

¹²² For example, AT, CY, CZ, EL.

¹²³ CZ, IE, LT, LU, LV, SK.

¹²⁴ AT, BE, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE, IT, LT (accommodation at the State Border Guard Service is applied only for asylum applicants), LU, MT, NL, PL, SI.

¹²⁵ AT, BE, CZ, DE, EE, EL, FI, FR, HR, HU, IE, IT, LT, LU, NL, PT, SI.

¹²⁶ FR, LU.

Statistics on uptake were provided by several Member States.¹²⁷ In France, house arrest was imposed on 40 000 third-country nationals between 2015 and 2020. In Hungary, the obligation to stay within a geographical location at an assigned place (private accommodation, reception centre, community hostel, or within a geographical location) was ordered for 12 092 people in 2015, 949 people in 2016, 388 people in 2017 and 486 people in 2018.¹²⁸ In Luxembourg, this alternative was used a total of 1 599 times between 2017 and 2019, specifically in the case of applicants for international protection who were likely to be transferred to another Member State in accordance with the Dublin III Regulation.¹²⁹ In the Netherlands, the period 2015–2020 saw between 450 and 2 890 persons each year subject to the alternative to reside at the Freedom Restricted Location in the return procedure.

The legal basis for this alternative is typically set out in Member States' aliens acts,¹³⁰ although some use different legal bases depending on whether it is part of the international protection procedure or return procedure.¹³¹ The national implementing authorities are the police and departments for asylum, migration and return.

In most cases, this alternative has no set duration and can last until the procedures for international protection or return are completed.¹³² The only exceptions are France and Luxembourg: in France, a short-term house arrest measure can be imposed for a maximum of 45 days and can be renewed once; in Luxembourg, while the Asylum Law does not set a maximum duration in the international protection procedure, in practice it lasts for three months. The measure may be renewed for another period of three months if the grounds for detention still apply, but the total period may not exceed 12 months. The return procedure is under Immigration Law and foresees a maximum duration of six months.

Mechanisms to monitor compliance exist in just under half of the countries implementing this alternative.¹³³ In Estonia, Hungary and Poland, the immigration authorities may carry out inspections at the place of residence of third-country nationals.

This alternative is sometimes used together with other alternatives to detention. For example, in the Netherlands, residence at the Freedom Restricted Location is often combined with a reporting requirement. In Hungary and Luxembourg, it can be combined with electronic monitoring where necessary, as shown in Box 3.

Box 3: Luxembourg and Hungary – requirement to reside at a designated place, combined with electronic monitoring

In Luxembourg, applicants for international protection and irregularly staying third-country nationals who are in the 'Dublin' transfers procedure are automatically placed in the SHUK while the Refugees Department (Dublin Unit) makes its transfer decision.

House custody can be combined with electronic monitoring where necessary, in both Hungary and Luxembourg. However, while its use is established in law, electronic monitoring has not yet been used in practice in Luxembourg. It would not be used for applicants for international protection assigned to the SHUK, who are free to leave the facility during the day. Electronic monitoring prohibits foreigners from leaving a set perimeter. The law stipulates that enforcement is monitored by remote detection of the presence/absence of the foreigner within the predefined area and for the full period of home custody. However, implementation of electronic monitoring must guarantee respect for the dignity, integrity and privacy of the individual.

NGOs and social services play an important role in this alternative in some Member States.¹³⁴ In Austria, for example, Regional Police Directorates are authorised to place third-country nationals in designated facilities, but those individuals can also be required to reside at private dwellings or facilities operated by NGOs.

The availability of facilities for this alternative to detention was identified as a **challenge** by a number of Member States.¹³⁵ The limited availability of places can make it impossible at times to offer this alternative, with third-country nationals instead having to be detained, in particular where other alternatives are also lacking.¹³⁶

Authorities' note that the main **advantages** of this alternative are that it requires fewer staff and less supervision than detention facilities,¹³⁷ and gives more time to conduct return counselling.¹³⁸ It is also perceived as less intrusive for third-country nationals, who can move freely within the State or within a designated region/area.¹³⁹

Obligation to surrender an identity or national travel document

This alternative to detention requires third-country nationals to surrender their identity or national travel documents to the authorities. A key condition is thus that the third-country national must have a valid document. The alternative exists in 17 Member States¹⁴⁰ and is used regularly in 14 of those.¹⁴¹

¹²⁷ BE, FR, HU, LT, LU, NL.

¹²⁸ More recent data not available.

¹²⁹ These applicants are assigned to SHUK (see Box 3).

¹³⁰ AT, BE, CY, CZ, EE, EL, ES, FI, FR, HR, HU, IE, IT, LT, LU, MT, NL, PL, PT.

¹³¹ EE, HR, IE, LU.

¹³² AT, BE, CY, CZ, DE, EE, EL, ES, FI, HR, HU, IE, IT, LU, MT, NL, PL, PT.

¹³³ AT, BE, CZ, DE, EE, FI, FR, HR, HU, LU, NL, PL, PT.

¹³⁴ AT, FR.

¹³⁵ CY, DE, EL, FR, LT, MT, NL.

¹³⁶ CY, DE, EL, FR, MT.

¹³⁷ CZ, IE, FR, PT.

¹³⁸ NL.

¹³⁹ BE, IE, LT.

¹⁴⁰ BG, CY, EE, EL, ES, FI, FR, HR, HU, IE, IT, LU (not a standalone alternative but included in reporting obligations), LV, MT, NL, PL, SE.

¹⁴¹ BG, CY, EE, ES, FI, FR (house arrest procedures), HR, IE, IT, LV, NL, SE.

Data are available only for Finland and Poland: in Finland, this alternative was used at least 1 733 times between 2016 and 2020,¹⁴² whereas in Poland it was used 198 times between 2016 and 2020.

Similar to the reporting obligations described above, the legal basis for this alternative is typically laid down in Member States' aliens acts,¹⁴³ although some use different legal bases, depending on whether it is part of the international protection procedure or return procedure.¹⁴⁴

National authorities responsible for administering this alternative include the police,¹⁴⁵ border guards,¹⁴⁶ departments of asylum and migration policy,¹⁴⁷ and ministries of the interior.¹⁴⁸ No other stakeholders, such as civil society organisations, are involved in its implementation.

In Estonia, this alternative is applied to third-country nationals in the international protection procedure and forced returns, in Ireland it is used in the return procedure, and in the Netherlands in both procedures. In Ireland, it is used both for those issued with a deportation order¹⁴⁹ and those who are refused permission to enter the country at a port of entry. It can be issued jointly with other alternatives to detention.¹⁵⁰

No Member State has a fixed duration in place and this alternative typically remains in force until the third-country national meets the conditions for entry or stay in the country,¹⁵¹ until a removal decision has been enforced, or the procedure has otherwise ended.¹⁵² Most of the **challenges** identified relate to the availability of valid travel documents,¹⁵³ particularly for third-country nationals who are undocumented, or whose travel documents may have been fraudulently acquired, tampered with, or falsified.

Some Member States identified several specific **advantages** of this alternative. Ireland noted that the approach requires fewer staff and less supervision than using prisons or police stations for detention, thereby reducing administrative costs. In the Dutch return procedure, the authorities can use a surrendered passport to book a flight for the return of the third-country national, which was considered a further advantage.

Obligation to communicate address to authorities

The requirement to communicate an address to authorities (including requesting permission for absences and address changes) is legally available in 13 Member States,¹⁵⁴ and is used in eight of those.¹⁵⁵ No statistics on uptake were reported by any Member State.

In most of the Member States, third-country nationals found to be residing illegally on the territory and subject to this alternative to detention are obliged to report their address and any change to the police as soon as possible and no later than the next working day.¹⁵⁶ Non-compliance may lead to detention, but it is determined on a case-by-case basis. None of the Member States operate a fixed duration for this alternative. For example, in Czech Republic, the duration is determined on a case-by-case basis, taking into account the proportionality of the obligation.

The authorities responsible for implementing this alternative are usually the police or border authorities, as is the case in Cyprus, Czech Republic, Estonia and Malta.

In some Member States, the obligation for a person to communicate their address is not an alternative to detention but, rather, a general procedural obligation that is applied to all cases.¹⁵⁷ In Poland, for example, every applicant for international protection is obliged to provide their address. In Luxembourg, this is not a standalone alternative but a necessary prerequisite to apply an alternative to detention. Ireland often applies this obligation to people together with other alternatives to detention, such as reporting obligations.

Mechanisms to monitor third-country nationals' compliance with this alternative exist only in Estonia and Luxembourg. In Estonia, the Minister for Immigration and Asylum can order specific checks to verify the address and therefore monitor whether (or not) the measure has been respected.

Challenges arise where third-country nationals do not have a fixed place of residence to communicate or where they need to change their residence often, complicating monitoring by authorities. Czech Republic and Malta reported that this placed an additional burden on police staff.

Czech Republic noted that this alternative requires less capacity from the police authorities, as it can be monitored more easily and with fewer resources. It also means that the authorities do not have to provide accommodation to these third-country nationals in reception facilities.

Release on bail (with or without surety)

This alternative was available in nine Member States,¹⁵⁸ but used in practice in only four of those.¹⁵⁹ This alternative consists of releasing a third-country national from custody, either through the payment of a sum of money from an independent surety to guarantee their appearance in court, or without surety. This alternative differs from the issue of a financial deposit by persons who

¹⁴² The Border Guard alone reported 1 733 cases where this alternative was applied. Figures from the police are not available.

¹⁴³ BG, EE, ES, FI, HR, IE, IT.

¹⁴⁴ EE, HR, IE, LU.

¹⁴⁵ BG, CY, ES, FI, HR, IE, IT, NL.

¹⁴⁶ FI, IE, NL.

¹⁴⁷ LU, IE (Migration and Asylum-related Sections within the Department of Justice).

¹⁴⁸ CY, EE, HR, HU, HU.

¹⁴⁹ A deportation order is an order issued to a person whose application for international protection has been refused, or a person who does not hold permission to reside in the State. Ireland does not participate in Return Directive 2008/115/EC.

¹⁵⁰ In IE, the requirement to surrender a passport or travel document also exists in international protection legislation but is not used in practice.

¹⁵¹ BG, EL, HU, HR, IE.

¹⁵² CY, EE, ES, FI, HR, HU, IE, IT, LU, NL, PL, PT, SE.

¹⁵³ FI, IT, MT, NL, PL.

¹⁵⁴ CZ, EE, EL, FI, FR (house arrest procedures), HR, HU, IE, IT, LU, MT, PL, PT, SE.

¹⁵⁵ CY, CZ, EE, FI, FR, HR, IE, PT.

¹⁵⁶ CY, CZ, EE (obligation to report absence from place of residence for a period longer than three days), FR, HR, LU, IT, MT, PT, SK.

¹⁵⁷ HR, LU, NL, PL, SK.

¹⁵⁸ AT, BG, CY, CZ, EL, HU, IE, PL, SK.

¹⁵⁹ AT, HU, IE, PL.

are not yet detained, which can be ordered to mitigate the risk of absconding, for example (see next section).

Statistics on the uptake of this alternative were available from Poland and Hungary. In Poland, it is one of the least used alternatives, having been applied only 12 times between 2016 and 2020. In Hungary, release on bail was ordered in 264 cases in 2015, 284 cases in 2016 and two cases in 2017. No deposits were ordered between 2018 and 2020.

Similar to the other alternatives, release on bail is usually regulated by the aliens acts¹⁶⁰ and overseen by the police¹⁶¹ or border guards.¹⁶² Member States do not foresee a set amount of surety in their legislation, as it depends on the individual circumstances of the third-country nationals concerned and is decided on a case-by-case basis. In Poland, the amount cannot be less than double the minimum wage provided under national regulations. In Hungary, the amount can range from EUR 500 to EUR 5 000, and is determined by the Asylum Authority, taking into consideration the personal and financial circumstances of the person in question.

The limited uptake is explained by the most frequently identified challenge, namely the difficulty in determining whether an applicant has sufficient funds to cover the bail, as authorities often lack the staff to prepare and verify the appropriate financial documentation. Austria also highlighted a challenge in administering the sureties that are deposited, especially when refunding by transfer.

Other types of alternatives to detention

In addition to the alternatives to detention available in most Member States and described above, several others have been introduced since 2015.¹⁶³

In some Member States,¹⁶⁴ third-country nationals can provide a **deposit or financial guarantee** to ensure that they can remain on the territory of the country. In Hungary, the maximum amount that can be required is the equivalent of the individual's total travel and residence expenses. In Luxembourg, the financial guarantee is set by law at EUR 5 000, which can be paid by the third-country national themselves or by a third party. The financial guarantee shall be returned if the grounds for detention are no longer applicable (international protection procedure) or in the event of voluntary return (international protection and return procedure). In the Netherlands, the maximum amount is EUR 1 500 and is set by the Repatriation and Departure Service. The measure is available only in the return procedure, where it is used on average once per month.

Community management programmes or case workers are used as alternatives to detention in three Member States.¹⁶⁵ This measure features programmes where individuals live independently in the community with a designated case manager. Residence can be either in dedicated facilities (e.g. Belgium) or in private houses (Cyprus, Sweden). In Belgium, families with minor children who are staying in the country irregularly are housed in open community-based family units, consisting of individual houses and apartments, as well as in private houses. Residents enjoy freedom of movement, albeit with certain restrictions and rules. Case managers provide

guidance, including discussing and planning the possibility of voluntary return.

Release to a care worker is used in Ireland for children only, as detention of children for immigration-related purposes is prohibited and no alternative to detention applies. For unaccompanied migrant children, an immigration officer or police officer contacts the Child and Family Agency (Tusla), which assesses the situation and places the child into care for the duration of the return or international protection procedure. Where the parent of a child is detained, the child can also be placed in the care of Tusla.

Return counselling is widely used across all Member States to facilitate the return process, but was recently introduced in Estonia specifically as an alternative to detention. Following an assessment of the existence of grounds for detention, a third-country national may be required to attend compulsory counselling sessions. In Belgium, several forms of coaching/counselling or information activities have been established and are used following the issuance of a return decision or in the context of voluntary return (see Box 4). These practices are not alternatives to detention according to the legal definition adopted in this study, as they are not based on an assessment of the grounds for detention. The Belgian authorities consider them alternatives to detention, however, and they may offer examples of measures that could potentially be used as alternatives. Similarly, in the Netherlands, return counselling is not applied as an alternative to detention, but is provided alongside alternatives in the return procedure, where caseworkers have a decision-making role in applying detention or alternatives. According to caseworkers, alternatives to detention are beneficial in that they provide more time to guide individuals towards voluntary departure and reintegration, without the use of force.

Box 4: Counselling and coaching to prevent absconding and encourage return in Belgium

Several coaching, counselling and information measures are used in Belgium in the context of voluntary departure or voluntary assisted return. These measures seek to mitigate the risk of absconding and to encourage return, thus making detention unnecessary. They are not alternatives to detention *stricto sensu*, but could point to new types of alternatives to detention where ground for detention exist.

Some coaching measures are implemented by the **Immigration Office** after the issuance of a return decision:

The Sefor procedure (www.sefor.be) has been implemented by the Immigration Office since 2011 to closely monitor the effective return of migrants. The procedure aims to better inform third-country nationals about the decision and its consequences, as well as about the organisation and support for their return. This takes place during the period of voluntary departure and includes progress on

¹⁶⁰ AT, BG, CZ, EL, HU, PL, SK.

¹⁶¹ BG, CZ, EL, HU, SK.

¹⁶² PL.

¹⁶³ BE, BG, EE, ES, FI, FR, HR, HU, IT, LU, NL, SE.

¹⁶⁴ BG, CY, DE, FI, HR, HU, LU.

¹⁶⁵ BE, CY, SE.

preparations for voluntary departure. The Immigration Office may also impose complementary measures, such as taking fingerprints or requiring copies of travel documents. The information sessions and follow-up are carried out by municipalities. Where the person concerned does not comply with the request for regular follow-up, forced return may be initiated.

Return coaching at home for families with under-age children residing at a private address: tailored coaching sessions are agreed between the authorities and families with children. Coaching sessions are held in municipal offices or private addresses to discuss voluntary departure.

Return counselling is also offered by the **Federal Agency for the reception of asylum seekers (Fedasil)**:

Coaching in Open Return Places: During the period of voluntary departure, those whose applications for international protection have been rejected, third-country nationals subject to transfers under Article 28 of Regulation 604/13/EU, as well as irregularly residing families, are assigned to an Open Return Place, where they must attend weekly counselling sessions provided by Fedasil and the Immigration Office. The Immigration Office's monitoring found that the measure had limited results in terms of encouraging return and preventing absconding.

Accommodation in return and asylum facilities has been used by several Member States as an alternative to detention when a third-country national does not have access to a private residence or other form of accommodation.¹⁶⁶ Since 2015, France has piloted the obligation to communicate address to the authorities for reception facilities (DPARs) in several regions. The 'National plan for the reception of asylum seekers and the integration of refugees' was published on 17 December 2020 for the period 2021–2023 and refers to the forthcoming opening of 1 300 new places within the DPARs for use as alternatives to detention and to facilitate the return of foreign nationals in an irregular situation. The DPARs are based on two pillars: accommodation in group or individual facilities, managed by an NGO that has signed an agreement with the State; and personalised administrative support provided by the Office for Immigration and Integration. In Luxembourg, in addition to the alternatives to detention laid down in the Asylum Law and Immigration Law, rejected applicants for international protection can stay in reception facilities instead of detention, if they agree to cooperate with voluntary return. This practice is used where applicants for international protection do not have accommodation after the rejection of their application.

¹⁶⁶ BE, FR, LU (not an alternative to detention as no assignment to home custody is ordered), SI (to use asylum facilities as an alternative to detention from 2021).

4. ASSESSMENT PROCEDURES AND CRITERIA FOR PLACING THIRD-COUNTRY NATIONALS IN DETENTION OR PROVIDING ALTERNATIVES TO DETENTION

When deciding whether to place a third-country national in detention or provide an alternative to detention,¹⁶⁷ Member States use a variety of assessment processes and criteria. This section analyses how these

decision processes work at national level, the factors considered in assessing the individual case, the authorities involved, and the procedural safeguards and supports made available to third-country nationals.



4.1. OVERVIEW OF PROCEDURES TO IMPOSE AN ALTERNATIVE TO DETENTION

For persons subject to a return procedure, Recital 16 and Article 15 of Return Directive 2008/115/EC provide that detention shall only be used where less coercive measures cannot be applied effectively.¹⁶⁸ Similarly, for international protection applicants, Article 8(2) of the recast Receptions Conditions Directive provides that detention shall only be used where less coercive alternative measures “cannot be applied effectively”, while Article 8(4) provides that Member States shall “ensure that the rules concerning alternatives to detention, such as regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place, are laid down in national law”. In principle, a third-country national should only be detained when the available alternatives are not effective given the circumstances of their case. Detention should be based on a specific assessment of the circumstances of the person concerned.

All Member States allow for detention in both procedures. However, the international protection procedures in France and Spain only allow detention for transfers under Article 28 of Regulation 604/2013/EU when significant risk of absconding exists.

In line with the EU legal framework, the possibility of providing alternatives to detention is considered the preferred option by all Member States in their international protection¹⁶⁹ and return procedures.¹⁷⁰ However, in Belgium, if a migrant is already in detention to organise their return when applying for international protection, they usually remain in detention and the possibility to

offer an alternative is not considered. If the third-country national is under a return procedure and did not comply with a previous order to leave the Belgian territory, a detention decision can be taken without considering any alternatives. In Luxembourg, although a decision to detain should always be motivated, return procedures carry a legal presumption of a risk of absconding. Third-country nationals are therefore placed in detention *relatively regularly*, especially in cases where they have no valid identity, travel or residence documents.

In most Member States,¹⁷¹ **the assessment of detention or alternatives to detention is undertaken simultaneously with consideration of the existence of grounds for detention**. Only in Slovenia both by law and practice, a detention decision is issued first, with the opportunity to apply an alternative considered afterwards *ex officio* or at the request of the foreigner – both in asylum and return procedures. In Ireland, for persons issued with return or Dublin transfer decisions, alternatives to detention are typically used in the first instance. In practice, for those refused permission to enter the State, the option to apply an alternative to detention is considered at the same time as the option to detain a person.

In all Member States, the procedures used to place a person in detention or to instead apply an alternative to detention do not depend on the legal status of the third-country national (e.g. whether they are irregularly staying, have applied for asylum) nor on predetermined categories (e.g. nationality, country of origin).

¹⁶⁷ In BE, the assessment if not done when a third-country national is assigned to an Open Return Centre, as that decision is not linked to a detention decision.

¹⁶⁸ IE does not participate in Return Directive 2008/115/EC.

¹⁶⁹ AT, BE, BG, CY, CZ, DE, EE, EL, FI, HR, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, SE, SI, SK.

¹⁷⁰ AT, BE, BG, CY, CZ, DE, EE, EL, FI, FR, HR, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, SE, SK.

¹⁷¹ AT, BE, BG, DE, CY, CZ, EE, ES, FI, FR, HR, HU, IT, LT, LU, LV (return procedures only), MT, NL, PT, SK, SE.

Authorities involved in the procedure to APPLY an alternative to detention

In most Member States, the same national authorities are responsible for deciding on the placement of a third-country national in detention or the use of an alternative to detention. Depending on the institutional framework, the competent authorities involved are the police,¹⁷² immigration, asylum and return authorities,¹⁷³ border guards¹⁷⁴ and judicial authorities.¹⁷⁵ In Germany, the Foreigners Authority is the sole authority responsible for applying an alternative to detention, with detention decided by the local court, usually at the request of the Foreigners Authority. In Ireland, the authorities responsible

differ depending on whether the alternative to detention or detention is applied in the context of the international protection procedure, refusals of entry at the border, or the deportation procedure.

In some Member States, the police are exclusively involved in the decision-making process of the return procedure,¹⁷⁶ while the immigration offices in Bulgaria, Cyprus, and Czech Republic are the sole responsible authorities for the international protection procedure. The border guard services in Lithuania, Estonia and Portugal refer decisions on detention to the courts, which take decisions on all measures exceeding 48 hours.

4.2. GROUNDS AND CRITERIA TO ASSESS WHETHER OR NOT TO APPLY AN ALTERNATIVE TO DETENTION

In all Member States, alternatives to detention are examined and decided on a case-by-case basis. That individual assessment includes an appraisal of whether the legal grounds for detention have been fulfilled.¹⁷⁷ In international protection procedure, the most common grounds for detention are to determine or verify identity,¹⁷⁸ followed by the presence of reasonable grounds to believe that a third-country national subject to a return procedure submits an asylum request merely in order to delay or frustrate the return.¹⁷⁹ In the context of the return procedure, the existence of a risk of absconding,¹⁸⁰

and failure to collaborate on the good implementation of the return process,¹⁸¹ are the two most common grounds for detention. Additional grounds applicable in both procedures include constituting a threat to national security and public order,¹⁸² and non-compliance with the alternatives to detention.¹⁸³ Table 2 shows that case-by-case examinations consider a variety of elements in determining whether to place a third-country national in detention or provide an alternative to detention (where there are grounds for authorising the detention) in both the international protection and return procedures.

Table 2 Criteria used by Member States to decide whether to place a third-country national in detention or provide an alternative to detention

Criterion	International protection procedure ¹⁸⁴	Return procedure
Level of risk of absconding	AT, BG, CY, CZ, DE, EE, EL, FI, FR, HR, HU, IE, ¹⁸⁵ IT, LT, LU, LV, MT, NL, PL, SE, SI, SK	AT, ¹⁸⁶ BE, BG, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, SE, SI, SK
Vulnerability	AT, BE, BG, CY, CZ, DE, EE, EL, FI, HR, HU, IT, LT, LU, LV, MT, NL, PL, SE, SI, SK	AT, BE, BG, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IT, LT, LU, LV, MT, NL, PL, PT, SE, SI, SK
Suitability of the alternative to the needs of the individual case	BG, BE, CY, CZ, DE, EE, EL, FI, HR, HU, IT, LT, LU, LV, MT, NL, PL, SE, SI, SK	BE, BG, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IT, LT, LU, LV, MT, NL, PL, PT, SE, SI, SK
Less invasive measures impacting on human rights.	AT, BE, CY, CZ, DE, EE, EL, FI, HR, IT, LT, LU, MT, NL, SE, SI, SK	AT, BE, BG, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IT, LT, LU, MT, NL, PL, PT, SE, SI, SK
Nationality or country of origin/ return	MT, NL, ¹⁸⁷ SE	BE, DE, ES, IT, MT, NL, SE

¹⁷² CZ, EL, ES, FI, HR, HU, IE, IT (police involved in both international protection and return procedure), NL, SE, SI, SK (foreign police).

¹⁷³ AT, BE, BG, CY, CZ, EE, HR, IE, LU (Minister for Immigration and Asylum involved in both international protection and return procedure), MT (Principal Immigration Officer involved in both international protection and return procedure), NL, SE, SI.

¹⁷⁴ FI, IE, LV, NL, PL.

¹⁷⁵ EE, FR, IE, LT, PT.

¹⁷⁶ CZ, ES, SI.

¹⁷⁷ A detailed analysis of the grounds for detention exceeds the scope of this study. Please for additional details refer to the EMN National Contact Points contributions for this study.

¹⁷⁸ For example, AT, BG, CZ, EE, EL, FI, HR, HU, IT, LT, LU, LV, NL, PL, SI, NL.

¹⁷⁹ For example, DE, CY, CZ, EE, EL, FI, HR, HU, IT, LT, LU, LV, NL, PL, SI, SK.

¹⁸⁰ For example, AT, BG, CY, EE, EL, FI, HR, HU, IE, IT, LT, LU, LV, PL, SI.

¹⁸¹ For example, DE, CY, CZ, EE, EL, FI, HR, HU, IE, LU, SK.

¹⁸² For example, in international protection procedure: AT, DE, CY, CZ, EE, EL, FI, HR, HU, IE, IT, LT, LU, LV, NL, PL, SI, SK; in return procedure: AT, DE, CZ, EL, HU, IE, IT, LT, LU, LV, NL, PL.

¹⁸³ For example, in international protection procedure: DE, LU; in return procedure: EE, LU, LV, PL.

¹⁸⁴ FR and ES do not allow detention in international protection procedures, except in the context of transfers under Regulation 604/2013/EU when a risk of absconding exists.

¹⁸⁵ Applies in transfers under Regulation 604/2013/EU.

¹⁸⁶ Certain criteria used to determine the risk of absconding are applicable only to certain groups of individuals or categories of cases, such as asylum seekers.

¹⁸⁷ In the Netherlands, in specific circumstances the law provides the possibility to take into account whether the country of origin is safe when deciding whether or not to detain, although this factor is not considered in practice.

Criterion	International protection procedure ¹⁸⁴	Return procedure
Cost-effectiveness	BE, HU	BE, ES, IT
Other criteria	AT, CY, EE, LT, LU, NL, SE	AT, CY, EE, LT, LU, NL, SE

Risk of absconding

In most Member States, the risk of absconding is the main determining criterion for deciding whether to place a third-country national in detention or provide an alternative to detention, in both international protection and return procedures. The only exception is Portugal, where the risk of absconding is taken under consideration only in the return procedure. In assessing the risk of absconding, authorities generally consider the existence of any circumstances that make it reasonable to assume that an individual will seek to avoid and/or impede the international protection procedure or their removal, based on criteria stipulated in national legislation. Indicators range from the use of false identity documents or false statements,¹⁸⁸ to the violation of the obligation to cooperate,¹⁸⁹ as well as the non-compliance with an entry ban.¹⁹⁰ In Estonia, one of the indicators to determine the risk of absconding is confirmation by the third-country national that they do not wish to comply with the obligation to leave.

Suitability of the alternative to the needs of the individual case

In all Member States except Ireland, the case-by-case assessment on the decision to place a person in detention or provide an alternative to detention is made on the basis of the type of alternative **best suited to the individual circumstances**. In Lithuania, an analysis of case-law showed that in circumstances where migrants did not have a fixed abode or had limited financial resources, the court was more likely not to grant some specific types of alternatives to detention, such as reporting obligations or the guardianship programme.

Less invasive measures impacting fundamental rights

Member States usually interpret this criterion as linked to the requirement for authorities to consider the principle of proportionality when deciding between detention or an alternative. When circumstances allow, the authorities consider the existence and opportunity of applying less invasive measures, in 17 of 23 Member States allowing detention in the international protection procedure, and 21 of 25 Member States allowing detention in the return procedure (see Table 2).

In Austria and Germany, these considerations imply that relevant authorities also determine whether the public interest in ensuring a given procedure justifies interfering with an individual's constitutional right to personal freedom.

Nationality or country of origin/return

The nationality or country of origin of a third-country national is not usually considered by Member States when deciding whether to use detention or an alternative (see Table 2).

However, in the international protection procedures in Malta and the Netherlands, authorities can also check whether the country of origin is considered safe or is likely to collaborate on readmission, although in the Netherlands this is not done in practice. Similarly, in seven Member States, that criterion is assessed in return procedures (see Table 2). In the Netherlands, if the assessment of the individual's country of origin rules out forced return, detention is not applied, and a less-coercive measure may instead be imposed.

Cost-effectiveness

Cost-effectiveness is used as a criterion to assess whether to use an alternative instead of detention in four Member States (see Table 2). In Italy and Spain, this criterion is used only in the return procedure, whereas Hungary applies it only to individual assessments of the existence of grounds for detaining those seeking international protection.

In Belgium, cost-effectiveness is assessed in terms of availability of places in detention facilities. When capacity is limited, places are reserved for those in the removal process who have high potential for return. Similarly in Spain, "cost-effectiveness" is considered the cost of detention in relation to the likelihood of return.

Other criteria in International Protection and Return Procedures

Several Member States reported applying other criteria to determine whether a third-country national should be detained or offered an alternative (see Table 2).

Within the international protection procedure, Austria and Estonia consider whether a third-country national poses a threat to national security and public order. In Lithuania, a court may provide an alternative to detention only when: (i) the foreigner's identity has been determined; ii) they represent no threat to national security and public policy; and iii) they assisted the court in determining their legal status. In Luxembourg, applicants who have applied for international protection in another Member State (as identified in the Eurodac system) are systematically placed under home custody at the SHUK, even before a decision for a transfer under Regulation 604/2013/EU is taken. Estonia and the Netherlands also take the existence of criminal records into account in their assessments.

Germany, Estonia and the Netherlands consider the degree to which an individual is likely to cooperate.¹⁹¹

¹⁸⁸ AT, BE, CZ, DE, EE, ES, FI, HR, IE, IT, LV, LT, SI, SK.

¹⁸⁹ AT, BE, CZ, EE, FI, HR, IE, LT, SI, SK.

¹⁹⁰ BE, CZ, FI, HR, LT, SI.

¹⁹¹ Similar considerations for return procedures.

For instance, in Estonia's return procedure, failure to cooperate with the authorities (including cooperating to acquire the documents necessary for return) can lead to a decision to detain.

Vulnerability considerations during individual assessment procedures

vulnerability considerations are taken into account by all Member States in their international protection and return procedures (see Table 2). These include assessing whether the person has special needs, whether minor children are present, and the health and psychological status of the individuals concerned.

In some Member States, the detention of vulnerable people, including unaccompanied minors, accompanied minors and families with children, pregnant women, or victims of trafficking in human beings and torture, is explicitly prohibited by national legislation,¹⁹² or is allowed only in exceptional situations.¹⁹³ In Latvia, for example, whenever an unaccompanied minor is involved, the State Border Guard should immediately contact the Orphans and Custody Court, and all procedural activities must take place in the presence of that minor's representative. Similarly, five Member States,¹⁹⁴ designate legal guardians immediately after identifying an unaccompanied minor to represent their interests at all stages of the procedure.

Vulnerability considerations, including assessments of special needs, are conducted on a case-by-case basis across the international protection and return procedures in all Member States. In Malta, the assessment is based on predefined categories/groups. In four Member States,¹⁹⁵ systematic assessment of migrants' vulnerability (or vulnerability elements) is done in practice. In Austria, these individual assessments usually take place, and the competent authorities periodically review cases to evaluate the adequacy and proportionality of that first decision. A similar review system exists in Cyprus, where monthly reassessments of the personal circumstances of the third-country national are used to evaluate (possible/new) vulnerability elements. Despite the absence of a formal vulnerability assessment procedure before placing a person in detention, the authorities in Luxembourg take vulnerabilities into account and generally do not place vulnerable individuals in detention. Where they do, the law stipulates that special attention must be paid to their situation. Vulnerable applicants for international protection, in particular women and families with children, are not assigned to home custody in the SHUK. Ireland sets no criteria in law to assess vulnerability in the decision-making process. In practice, however, vulnerable people are not typically detained, nor can children be detained for immigration-related purposes by law.

The most **common elements of vulnerability considered** by the national authorities in assessing the suitability of alternatives to detention include whether the person is a minor or elderly, if the person has a disability or any medical conditions (including pregnancy), if they are single-parent families with underage children, and whether they may be victims of human trafficking, torture, rape or other forms of psychological, physical or sexual violence.

Vulnerability assessments for the purposes of administrative detention are undertaken in different ways. Some Member States¹⁹⁶ assess vulnerability through an interview with specialised personnel. In Italy, the evaluation is adopted by the Chief of Police based on a specific investigation conducted with the support of specialised personnel. In four Member States,¹⁹⁷ special medical attention is granted during the assessment for specific vulnerable groups, including minors, pregnant women, people with disabilities, and individuals who have been subject to torture, rape or other forms of psychological, physical or sexual violence.

The main authorities involved in vulnerability assessments are the immigration and asylum offices,¹⁹⁸ police and border guards,¹⁹⁹ ministries,²⁰⁰ and social workers.²⁰¹ In Latvia, vulnerability is assessed by the courts. Where these authorities undertake the assessment but are not formally responsible for the detention/alternative to detention decision, they will make a recommendation to the authority responsible for that decision.

Box 5: Vulnerability assessment team in Malta

Table A1.1: In 2020, the Agency for the Welfare of Asylum Seekers, in coordination with the European Asylum Support Office (EASO), introduced a new Vulnerability Assessment Team: to identify potential vulnerable persons at the Initial Reception Centre and in closed and open centres, to decide on their transfer from a closed centre to an open centre and to refer them for specialised support.

Table A1.2: A Special Needs Vulnerability Assessment Tool was also developed, consisting of: i) initial observations, ii) an analysis of the background information of the person referred, including medical/health conditions and well-being, psychological conditions, indication of vulnerability linked to the journey (e.g. torture, violence due to armed conflict, chronic health concerns); iii) use of a 'level of urgency' scale by the evaluator at the end of the assessment going from 1 to 4, whereby Urgent 1 indicates that the individual might be at risk of harming themselves or other people, and Urgent 4 is low priority.

¹⁹² BE (unaccompanied minors) CY, CZ, FR (unaccompanied minors), IE (children), LT (unaccompanied minors), PL, PT, (unaccompanied minors, victims of torture and ill-treatment), SK (unaccompanied minors, victims of trafficking).

¹⁹³ CZ (detention is prohibited in all cases but allowed in exceptional cases during return procedure in order to ensure adequate reception conditions), DE, EE, EL, FI, FR (other categories), LT, LU, NL, SK (other categories).

¹⁹⁴ EE, FI, HR, NL, SI.

¹⁹⁵ AT, IE, LU, SI.

¹⁹⁶ BG, CY, HU.

¹⁹⁷ EE, LV, LU, MT.

¹⁹⁸ International protection and return procedures: AT, BE, BG, CY, DE, EE, EL, NL (competent receiving authority), LU (National Reception Office or Directorate of Immigration), PT, SE (Swedish Migration Agency), SK; International protection procedure only: HR, LV, SE; Return procedure only: FR.

¹⁹⁹ International protection and return procedures: FI, HR, IT, LV, NL, PL, SK; Return procedure only: CZ, EL, ES, SE, SI.

²⁰⁰ International protection and return procedures: HR; International protection procedure only: CZ, SI.

²⁰¹ EE, HR, LU, MT.



4.3. LEGAL REMEDIES AND SUPPORTS AVAILABLE TO THIRD-COUNTRY NATIONALS TO APPEAL A DECISION TO IMPOSE DETENTION INSTEAD OF AN ALTERNATIVE

Legal remedies against a decision to impose detention are available to third-country nationals in all responding Member States and take the form of appeals or complaints in both the international protection,²⁰² and return²⁰³ procedures. In all Member States, the procedure to challenge a detention decision involves either a judicial,²⁰⁴ or administrative review,²⁰⁵ generally following receipt of a claim by the third-country national or their legal representative. In the international protection procedure, the period available to third-country nationals to lodge an appeal against a decision to detain varies from 48 hours in Latvia to 15 days in Cyprus and Italy. Similarly, in return procedures, terms for appeals range from 24 hours in Belgium,²⁰⁶ to one month in Luxembourg, and 75 days in Cyprus. In Portugal and Sweden, a detention decision can be appealed without any time limitation.

Many Member States provide different forms of support for third-country nationals **during the decision-making process on detention or an alternative to detention**.²⁰⁷ Some Member States have no waiting time,²⁰⁸ and access to rights and services depends on the individual legal situation.²⁰⁹ Similarly, in Austria, access to medical and legal aid services is not linked to the decision-making process on detention but depends on the residence status of the individual. Overall, basic medical assistance and legal aid are the most widely available type of support in both the international protection and return procedures and are offered in a large majority of Member States (see Table 3). In addition, around one-quarter of Member States provide social support, while 12 offer psychological support during the international protection procedure.

Table 3 Support available to third-country nationals waiting for a detention decision

Supports provided to third-country nationals	International protection procedure	Return procedure
Basic healthcare	AT, BE, BG, CY, CZ, DE, EE, EL, FI, HR, HU, IE, LT, LV, ²¹⁰ NL, PT, SE, ²¹¹ SI, SK	AT, ²¹² CY, CZ, DE, EE, EL, ES, FI, FR, HR, IE, ²¹³ LT, LV, ²¹⁴ NL, PT, SE, SK ²¹⁵
Legal aid	AT, ²¹⁶ BE, BG, CY, CZ, DE, EE, FI, HR, HU, IE, LT, LU, MT, NL, PL, PT, SE, SI, SK	AT, ²¹⁷ BE, BG, CZ, DE, EE, EL, ES, FI, FR, HR, HU, LT, LU, MT, NL, PL, PT, SE, SI, SK
Social support	AT, BE, BG, CZ, HR, HU, LV, PT, SI	AT, ²¹⁸ BG, ES, FR PT
Psychological support	AT, CY, CZ, EE, EL, ²¹⁹ FI, HR, HU, LV, PT, SE, SI	AT, ²²⁰ BE, CY, CZ, HR, EE, ES, FI, FR, PT, SE
Interpretation/translation support	BE, BG, CY, CZ, DE, EE, FI, IE, LT, NL, PT, SE, SI, SK	BE, BG, CY, CZ, DE, EE, EL, FI, FR, HU, IE, ²²¹ NL , PT, SE, SI, SK
Information services	CZ, DE, EE, FI, LT, PT, SI, SE	BE, CZ, DE, EE, EL, FI, LT, PT, SE, SI
Counselling	AT, EE, PT, SE	BE, EE, FR, PT, SE, SI

Of the countries providing support in return procedures, France, Latvia and Slovenia only provide medical care to third-country nationals if they are detained. This is also the case for legal aid in France, and social and

psychological support in Slovenia. In Luxembourg, no specific support is foreseen while the assessment is being undertaken, although third-country nationals benefit from legal aid.

202 AT, BE, BG, CY, CZ, DE, EE, EL, FI, HR, HU, IE, IT, LT, LU, LV, MT, NL, PL, SE, SI, SK.

203 AT, BE, BG, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE, IT, LT, LU, LV, MT, NL, PL, SE, SK.

204 AT, BE, CY, CZ, DE, EE, ES, FI, FR, HR, HU, IE, IT, LT, PL, SE, SI, SK.

205 EL, LU, NL.

206 The 24-hour appeal procedure in Belgium is a special procedure against which a subsequent appeal is also possible. An appeal can be lodged against the decision of the First Instance Tribunal before the Indictment Chamber at the Court of Appeal (*Chambre des mises en accusation* (French) or *Kamer van Inbeschuldigingstelling* (Dutch)) within 24 hours. A purely judicial appeal against this final decision can be brought before the Court of Cassation.

207 Of note, the Reception Conditions Directive 2013/33/EU set out guarantees that needs to be ensured as from the making of the application, including during a decision-making process on detention or an alternative. Please also refer to section 5.3 below.

208 For example, FI, IE, SE.

209 In IE there is no waiting period for a decision on detention in the context of deportation orders. During the decision-making process at ports of entry, persons who are refused entry can receive medical treatment from paramedics on site.

210 If an asylum seeker is accommodated in a centre for asylum seekers.

211 Applicants are only entitled to medical/dental care that cannot be postponed/emergency care.

212 Access to healthcare depends on residence status. Access to emergency medical treatment is provided regardless of residence status.

213 IE: no waiting period for a decision on detention in the context of deportation orders. During the decision-making process at ports of entry, persons who are refused entry can receive medical treatment from paramedics on site.

214 While the State Border Guard official evaluates the circumstances of the case to decide on detention/alternative and the person is accommodated in the centre for detained third-country nationals, they have the right to receive State-paid healthcare services.

215 Emergency medical care.

216 Foreign persons may be granted free legal advice in the open procedure before the Federal Office for Immigration and Asylum according to the factual possibilities.

217 Foreign persons may be granted free legal advice in the open procedure before the Federal Office for Immigration and Asylum according to the factual possibilities.

218 Depending on residence status.

219 Support reserved for vulnerable individuals, such as victims of torture, rape or other serious acts of violence certified by public/military hospitals.

220 Depending on residence status.

221 IE: no waiting period for a decision on detention in the context of deportation orders. During the decision-making process at ports of entry, persons who are refused entry can be provided with interpretation services.

5. IMPACT OF DETENTION AND ALTERNATIVES TO DETENTION ON THE EFFECTIVENESS OF INTERNATIONAL PROTECTION AND RETURN PROCEDURES

The study explored how detention and alternatives to detention impacted the effectiveness of international protection and return procedures.

In line with the criteria identified in the Council of Europe guidance and widely accepted across EU institutions and Member States,²²² effectiveness is considered against three key indicators.²²³ This is the extent to which measures:

- Ensure compliance with migration procedures (including prompt and fair case resolution, facilitating voluntary and forced returns, reducing absconding);
- Uphold fundamental rights;
- Improve the cost-effectiveness of migration management.

The following sub-sections will discuss effectiveness, as embodied by these three measures, in the different Member States.

5.1. ENSURING COMPLIANCE WITH MIGRATION PROCEDURES

The first indicator is based on the underlying assumption that detention and alternatives to detention should reduce the rate at which asylum applicants and returnees abscond, thereby reducing the length of migration procedures and improving their effectiveness.

The study collected various statistics to understand whether asylum seekers or returnees are more likely to abscond when placed in detention or when alternatives to detention are used, and whether the length of the procedure is affected by their stay in detention or in an alternative. Only limited data were available, and these are described below. No direct causation could be established between detention and alternatives to detention and compliance with migration procedures, with the latter likely to be influenced by several factors.

In the **international protection procedure**, Croatia, Latvia and Slovenia use detention far more widely than alternatives to detention,²²⁴ while Luxembourg and

Bulgaria use alternatives to detention more frequently.²²⁵ Data provided by these five Member States suggests that, overall, detention appears to have a bigger impact on reducing absconding rates, while alternatives to detention are more often associated with shorter status determination processes and higher appeal rates.

Luxembourg saw a significant proportion (68%) of applicants in alternatives to detention abscond between 2017 and 2019.²²⁶ Similarly, in Latvia, on average 79% of applicants in alternatives to detention absconded between 2017 and 2019,²²⁷ compared to few cases of absconding in detention.

By contrast, in Latvia, between 2017 and 2019, the average length of time in determining the status of an applicant for international protection was longer when the applicant was held in detention.²²⁸ It also appears that the rate of success of appeals for the original decision

²²² Council of Europe, 'Legal and practical aspects of effective alternatives to detention in the context of migration', 2017; Council of Europe, European Commission and the EMN, conclusion from the Conference 'Effective Alternatives to the Detention of Migrants', April 2019.

²²³ An evaluation of the effectiveness of measures is beyond the scope of this study. An analysis of the effectiveness of alternatives to detention would have to take into account that the group for which alternatives to detention are imposed and the group for which detention is ordered can differ in certain characteristics (probability of risk of absconding, willingness to cooperate with the authorities, etc.), which significantly influences the complexity and conclusions about the effectiveness of the measures. Reliable findings about the effectiveness of the two options should therefore be based on methods of analysis that take into account possible systematic group differences, which cannot be guaranteed by simply comparing return rates.

²²⁴ HR, LV, SI.

²²⁵ BG: 605 in alternatives to detention versus 211 in detention in 2017, 571 in alternatives to detention versus 105 in detention in 2018, 423 in alternatives to detention versus 59 in detention in 2019; LU: relates almost entirely to home custody in the SHUK for applicants likely to be transferred to another Member State in accordance with Regulation 604/2013/EU.

²²⁶ LU: 74% (449) in 2017, 64% (367) in 2018 and 67% (285) in 2019, compared to zero cases of absconding in detention in 2017, 2018 and 2019.

²²⁷ LV: 50% (1) in 2017, 100% (1) in 2018 and 86% (6) in 2019, compared to 3% (2) of those in detention in 2017, and none in 2018 and 2019.

²²⁸ LV: on average, between 2017 and 2019, 121 days in detention, compared to 92 days in alternatives to detention.

is higher when the applicant is held in alternatives to detention.²²⁹

In the return procedure, the few data sources available indicate that forced return procedures may be more efficient when using detention compared to alternative measures.²³⁰ It was not possible to identify the impact of detention or alternatives to detention on the numbers of people who opted to return voluntarily.

The proportion of irregular migrants was higher among those in alternatives to detention than those in detention in Latvia and Slovenia.²³¹ The average length of time from apprehending an irregular migrant to issuing a return decision, and the average length of time from issuing a return decision to the execution of the return, were both generally shorter in detention, with some exceptions. In Latvia, the average length of time from apprehending an irregular migrant to issuing a return decision was generally longer when the migrant was in an alternative to detention. This was true for most years, with the exception of 2017.²³² In addition, the average length of time from issuing a return decision to the execution of the return was longer in alternatives to detention in Latvia²³³ and Slovenia,²³⁴ except for 2019 in both countries.²³⁵

In Bulgaria, many more opted to return voluntarily when in detention than when in alternatives.²³⁶ Finally, migrants in detention in four Member States were much more likely

to go through forced return.²³⁷ In Belgium, 80% of the return procedures for third-country nationals placed in detention was effectively conducted.

Member States collected no information on whether **personal characteristics** (country of origin, family situation, gender or age) play a role in the effectiveness of detention or alternatives. However, the Netherlands observed that the following factors contributed to the effectiveness of return, regardless of whether the person was in detention:

- Personal background;
- How the person was treated during the procedure (return counselling, availability of native counsellors, financial reintegration support);
- Situation in the country of origin;
- Country of origin itself (higher effectiveness with EU-candidate countries and cooperating countries of origin);
- Type of procedure (higher effectiveness with Dublin claimants);
- Duration of the detention (higher effectiveness with return in the first three months of detention).



5.2. GUARANTEEING FUNDAMENTAL RIGHTS AND OFFERING SAFEGUARDS

The second indicator of effectiveness explored the extent to which fundamental rights are guaranteed in the context of detention and alternatives to detention. The underlying assumption is that a greater degree of effectiveness is assured when fundamental rights are protected and appropriate safeguards are offered. Table 4 provides an overview of the rights and safeguards offered by Member States to third-country nationals in detention or in an alternative to detention.

The EU legal framework provides for relevant safeguards in detention in both procedures. The Reception Conditions Directive 2013/33/EU and Return Directive 2008/115/EC enshrine the right of third-country nationals to be informed in writing about the reasons for detention, their rights during detention and the rules applied in detention facilities, in a language they understand or are reasonably presumed to understand.²³⁸ They also grant detainees the right to establish contact and receive visits from legal representatives, family members and

consular authorities.²³⁹ In the international protection procedure, third-country nationals have the right to access free legal assistance and representation in case of a judicial review of the detention order,²⁴⁰ albeit with possible restrictions.²⁴¹ The Return Directive 2008/115/EC mandates Member States to allow visits from relevant and competent national, international NGOs and bodies to third-country nationals in detention.²⁴² Both Directives set out the right to healthcare, including at least emergency care and essential treatment of illnesses and serious mental disorders.²⁴³ The Reception Conditions Directive 2013/33/EU also obliges Member States to provide adequate living standards for applicants, including those placed in detention, which guarantees their subsistence and protects their physical and mental health.²⁴⁴

As illustrated in Table 4, the **right to healthcare** is widely guaranteed among the Member States, with little difference between detention and alternatives to detention. In addition to emergency healthcare offered in all Member

²²⁹ LV: on average, between 2017 and 2019, 50% of appeals resulting in overturned decisions, compared to 5% in detention.

²³⁰ BE, BG, LV, SI.

²³¹ LV, SI: on average, between 2017 and 2019 - in detention 1.5%, in alternatives to detention 77% (SI); 0% in detention, 42% in alternatives to detention (LV); 0.1% in detention.

²³² LV: in alternatives to detention - 2017 - 2; 2018 - 51; 2019 - 38; in detention - 2017 - 10; 2018 - 13; 2019 - 12.

²³³ LV: in alternatives to detention - 2017 - 57; 2018 - 16; 2019 - 9; in detention - 2017 - 12; 2018 - 9; 2019 - 21.

²³⁴ SI: in alternatives to detention - 2017 - 66; 2018 - 590; 2019 - 0; in detention - 2017 - 39.2; 2018 - 32.9; 2019 - 20.

²³⁵ SI: in alternatives to detention - 2017 - 66; 2018 - 590; 2019 - 0; in detention - 2017 - 39.2; 2018 - 32.9; 2019 - 20.

²³⁶ BG: in alternatives to detention - 2017 - 3; 2018 - 6; 2019 - 1; in detention - 2017 - 1 205; 2018 - 378; 2019 - 174.

²³⁷ BG, FR, LV, SI.

²³⁸ Reception Conditions Directive 2013/33/EU, Article 9(4) and Article 10(5); Return Directive 2008/115/EC, Article 16(5).

²³⁹ Reception Conditions Directive 2013/33/EU, Article 10(3) and Article 10(4); Return Directive 2008/115/EC, Article 16(2).

²⁴⁰ Reception Conditions Directive 2013/33/EU, Article 9(6).

²⁴¹ Reception Conditions Directive 2013/33/EU, Article 9(7), indicates that the Member States may provide that free legal assistance and representation are granted only to those who lack sufficient resources and/or through the services provided by legal advisers or other counsellors.

²⁴² Reception Conditions Directive 2013/33/EU, Article 11(1); Return Directive 2008/115/EC, Article 16(4).

²⁴³ Reception Conditions Directive 2013/33/EU, Article 19(1); Return Directive 2008/115/EC, Article 16(3).

²⁴⁴ Reception Conditions Directive 2013/33/EU, Article 17.

States, basic healthcare is guaranteed with no limitations in most countries in both detention and alternatives to detention, while a number of countries also guarantee access to more specialised care.

Certain measures related to the **right to legal aid and the right to be heard during detention (or alternatives)** are only offered by national authorities to those in

detention, and not to those in alternatives to detention. In France, Greece and Italy, legal aid is mandatory only for migrants in detention, while those in alternatives to detention rely on services provided by NGOs. In Ireland, some difficulties in access to legal aid can arise where a person is detained, following a refusal to be granted entry to the State at a port of entry.

Table 4 Fundamental rights safeguards ensured by Member States during detention and alternatives to detention (in law and practice)

Rights and safeguards	Detention	Alternatives to detention
Legal aid	AT, BE, BG, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, SE, SI, SK	AT, BE, BG, CY, CZ, EE, ES, FI, ²⁴⁵ FR, HR, HU, IE, ²⁴⁶ LT, LU, LV, MT, NL, PL, PT, SI, SK
Right to be heard	AT, BE, BG, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE, IT, LT, LU, LV, MT, NL, ²⁴⁷ PL, PT, SE, SI, SK	AT, BE, BG, CY, CZ, DE, EE, ES, FR, HR, HU, IE, IT, LT, LU, LV, MT, NL, ²⁴⁸ PL, PT, SE, SI, SK
Right to healthcare	AT, BE, BG, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, SE, SI, SK	AT, BE, BG, CY, CZ, DE, EE, EL, ES, FI, ²⁴⁹ FR, HR, HU, IE, ²⁵⁰ IT, LT, LU, LV, MT, NL, PL, PT, SE, SI, SK ²⁵¹
Additional safeguards	Right to visits: BE, CY, CZ, DE, EE, FI, FR, HR, IE, LT, LU, NL, PT, SE, SI, SK Right to receive or send correspondence: BE, CY, CZ, DE, EE, FI, FR, HR, IE, IT, LT, LU, NL, PT, SE, SI, SK Social and psychological counselling: BE, CY, CZ, EE, FR, HR, LT, NL, PT, SI, SK	FR

Right to legal aid

In a number of Member States, **legal aid is always provided free of charge** in detention centres and in alternatives to detention.²⁵² In Croatia, this only applies to detention during the international protection procedure, and in the return procedure in cases prescribed by the law. In Ireland, legislation provides for access to civil legal aid for a nominal fee for international protection applicants in detention and in alternatives to detention. In Croatia and Germany, the availability of legal aid free of charge depends on the person's income. Some Member States offer to choose between a free public lawyer or a lawyer of one's choice at their own expense.²⁵³ In the Netherlands, third-country nationals have their own lawyers in detention, whose fees are covered by the State. In Latvia, legal aid is at the individual's own expense, but it

is free at the appeal stage in the return procedure. Some Member States also guarantee the right to legal aid by allowing legal aid staff access to detention facilities.²⁵⁴

In addition to nominally guaranteeing legally aid, several Member States have the **explicit obligation to inform** migrants of their right to legal aid.²⁵⁵ In some Member States, free legal aid is provided by NGOs.²⁵⁶

Right to be heard

Most Member States guarantee the right to be heard by ensuring access to a **court hearing, as well as giving individuals the possibility to present their opinion and objections** during the ongoing migration procedure through formal interviews.²⁵⁷ In the Netherlands, in principle, third-country nationals are

²⁴⁵ In FI, the rights and safeguards available during alternatives to detention depend on the legal situation of the person.

²⁴⁶ In IE, international protection applicants have access to civil legal aid. Those refused leave to land or issued with a deportation order have no express right to legal aid in immigration legislation and it is not possible to access in practice at ports of entry. Some persons may have legal representation upon arrival or as a result of being in the State for some time prior to being issued with a deportation order. Free legal representation can sometimes be accessed from NGOs or on a pro bono basis from law firms.

²⁴⁷ In NL, in principle, third-country nationals are always heard before imposing a detention measure. However, under certain circumstances it is possible to decide to hear the third-country national after deciding on imposing detention.

²⁴⁸ Only with freedom-restricting alternatives to detention.

²⁴⁹ In FI, the rights and safeguards available during alternatives to detention depend on the legal situation of the person.

²⁵⁰ International protection applicants have access to healthcare under the recast Reception Condition Directive 2013/33/EU. For persons issued with deportation orders or refused permission to enter the State at a port of entry, they do not have a right to healthcare, but, in practice, they can access healthcare facilities, following which a bill can be issued.

²⁵¹ Emergency medical care.

²⁵² In detention: AT, BE, CY, CZ, EE, EL, ES, FI, FR, HR, HU, IT, LT, LU, NL, PL, PT, SE, SK; in alternatives to detention: AT, BE, CZ, CY, EE, ES, FI, HR, HU, LT, LU, NL, PL, PT, SK.

²⁵³ In detention: BE, CZ, EL, FR, HR, LT, LV, LU; in alternatives to detention: BE, CZ, FR, LT, LU.

²⁵⁴ In detention: CY, CZ, HR, HU; in alternatives to detention: BE, CY, CZ.

²⁵⁵ AT, BE, CZ, EE, FI, FR, HR, IE (international protection applicants), LU, PT, SK.

²⁵⁶ For instance, AT, BE, BG, CZ, DE, EE, FR, IE (legal advice and legal representation provided by independent law centres), HR.

²⁵⁷ In detention: AT (after initiation of complaint proceedings or investigation), BE, BG, CZ, DE, EE (applied by administrative decision that the person can appeal the decision in court and express their views in court proceedings), EL, ES, FI, FR, HR, IE (via judicial review or a *habeas corpus* application under Article 40(4) of the Irish Constitution, international protection applicants can challenge the detention decision in a District Court), LT, LU, LV, MT, NL, PL, PT, SE, SI, SK. In alternatives to detention: AT (after initiation of complaint proceedings or investigation), BE, BG, CZ, EE (applied by administrative decision that the person can appeal the decision in court and express their views in court proceedings), ES, FR, HR, IE (via judicial review for persons subject to deportation orders or refused permission to enter the State, international protection applicants can challenge the imposed alternative to detention in a District Court), LT, LU, LV, MT, NL, PL, PT, SE, SI, SK.

always heard before imposing a freedom-restricting measure (detention or an alternative). However, under certain circumstances, it is possible to decide to hear the third-country national after deciding on imposing detention. In other Member States, the right to be heard is guaranteed by ensuring the possibility to **communicate with external services and without impediment**, including authorities, NGOs, internal human rights bodies and legal services.²⁵⁸ The right to be heard is also protected by **ensuring access to information** in a language that the individual can be reasonably presumed to understand.²⁵⁹

Right to healthcare

Emergency medical care and basic care

are provided by most Member States, both to those in detention,²⁶⁰ and those in alternatives to detention.²⁶¹ In Estonia and Hungary, migrants in detention will also be provided with specialist care, if assessed as necessary by a doctor. In Italy, Latvia and Slovenia, pregnancy care is provided in alternatives to detention. The right to healthcare in alternatives to detention frequently varies depending on the type of alternative (Czech Republic) or the type of procedure (in Croatia, the right to healthcare is guaranteed in alternatives to detention if the migrant has a return decision).

Additional rights AND safeguards

Some Member States reported additional services offered to third-country nationals in detention and specifically correlated with the condition of detention, including **the right to external visitation**, the **right to send and receive mail correspondence**, and the right to **social and psychological counselling** (see Table 4).

Evaluations and studies on the impact of detention and alternatives to detention on fundamental rights

None of the Member States have conducted official evaluations or studies to assess the impact of detention versus alternatives to detention on the fundamental rights of migrants. In Belgium, an official evaluation on the return trajectory included an assessment of impact on fundamental rights in detention. In Belgium, France, and Luxembourg, reports have been issued by national independent human rights institutions. In France, for instance, the Ombudsperson highlighted a particularly poor level of care for detainees.

Studies on the impact of migration detention on fundamental rights have been carried out by NGOs and independent researchers in several Member States.²⁶² Reports highlighted a number of shortcomings in accessing rights in practice during migration detention. Limitations were

reported in respect of access to legal remedies, including receiving information in a language the person can be reasonably presumed to understand, obtaining legal representation, and not being held incommunicado.²⁶³ In France, according to the 2019 activity report of the General Controller for Detention Facilities, information provided to detainees on their rights and remedies was unsatisfactory and the exercise of rights was carried out expeditiously. In Ireland, prisons are used for the purpose of immigration detention and, while detainees can use prison phones, NGOs raised concerns about immigration detainees not being provided with the contact details of legal representatives and noted that mobile phones are confiscated on admission to prison. In France, an opinion from the General Controller for Detention Facilities found that healthcare provided to foreign nationals in detention centres fell short in terms of access and treatment. Several reports highlighted the negative consequences of detention on the physical and mental health of detainees, especially vulnerable groups, such as victims of trauma.²⁶⁴ One study in the Netherlands specifically focused on the negative impact of isolation, while an academic study in Sweden suggested that detention had a negative impact on the well-being of migrants because of problems with language support and inadequate staffing, although this did not directly pertain to violations of human rights.

Across all Member States, the protection of fundamental rights in detention, including migration detention, is monitored and reported in the context of existing human rights mechanisms – most notably, the periodic review of the UN Human Rights Committee (HRC), the UN Committee Against Torture (CAT), and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).²⁶⁵ In Ireland, the CPT expressed concern about overcrowding in detention and migrants being detained in facilities with remanded prisoners, and the CPT and CAT have repeatedly reported the inappropriateness of prisons for immigration detention. In Luxembourg, the CPT highlighted the inadequacy of services and activities offered to detainees, recommending further improvements such as single occupancy accommodation and ensuring that all medical examinations are carried out outside the interview room.²⁶⁶

²⁵⁸ In detention: CY, CZ, DE, EE, FI, FR, HR, HU, IT, IE, LV, LU, NL, SI; in alternatives to detention: CY, CZ, DE, EE, FR, HU, HR, IT, IE, LV, LU, NL, SI.

²⁵⁹ CZ, DE, EE, FI, HR, HU, FR, LT, LU, LV, NL, PT, SI.

²⁶⁰ Emergency medical care in detention: BG, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE, IT, LT, LU, LV, MT, PT, SE; medical care in detention: AT, BE, BG, CY, CZ, DE, EE, EL, ES, FI, FR, HU, IE (prisons), IT, LT, LU, LV (basic medical care), SE, SK.

²⁶¹ Emergency medical care in alternatives to detention: AT, BE, BG, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE, IT, LT, LU, LV, MT, NL, PT, SE, SK; medical care in alternatives to detention: BG, CY, DE, EE, EL, ES, FR, HU, IT, LT, LU, NL.

²⁶² BE, IE, FR, NL, SE.

²⁶³ For instance, FR, IE.

²⁶⁴ IE, NL.

²⁶⁵ Some EMN National Contact Points (EMN NCPs) reported on relevant reports issued in this context: AT, FR, FI, IE, LU, SE.

²⁶⁶ Double rooms in the detention centre were used as single rooms. Since February 2021, the detention centre is no longer equipped with double rooms.



5.3. IMPROVING THE COST-EFFECTIVENESS OF MIGRATION MANAGEMENT

The final indicator looks at the cost-effectiveness of detention and alternatives to detention in the Member States.

Belgium is the only Member State whose national authorities have attempted to assess the cost-effectiveness of detention and alternatives to detention in the return procedure.²⁶⁷ Costs referred to the financial and human resources deployed to implement detention or alternatives to detention, and effectiveness related to compliance with migration procedures. Based on the analysis of several alternatives, it was found that detention was generally more effective but also more costly.²⁶⁸ The study noted that although compliance with alternatives to detention was high, the outcomes remained low in terms of successful returns.

Independent research in the Netherlands also found detention more effective than alternatives in ensuring

compliance with migration procedures, despite the high material and humanitarian costs.²⁶⁹ Studies showed that the return of third-country nationals was more likely to happen when they were placed in detention rather than in alternatives, with 33% of third-country nationals in alternatives to detention leaving the Netherlands, compared to 67% of third-country nationals in detention.

Independent research on the international protection procedure in Slovenia found that detention and alternatives to detention had similar costs,²⁷⁰ as applicants are accommodated in the same facility in Ljubljana (Asylum Home) or in the Police institution in Postojna (Centre for Foreigners) and have more or less the same scope of cost-sensitive rights inside these facilities. The alternatives to detention were associated with higher absconding rates. However, these schemes are not evaluated systematically or regularly for cost-effectiveness.

²⁶⁷ For detailed reference, please see the national contribution of the EMN National Contact Point Belgium.

²⁶⁸ BE.

²⁶⁹ For detailed reference, please see the national contribution of the EMN National Contact Point Netherlands.

²⁷⁰ For detailed reference, please see the national contribution of the EMN National Contact Point Slovenia.

6. CONCLUSIONS

Member States have made different alternatives to detention available as part of their national laws on immigration and/or asylum. Where grounds for detention exist, alternatives to detention are applied on a case-by-case basis, in light of individual factors. In line with the legal instruments of the EU asylum and migration acquis, Member States have several assessment procedures in place to determine the appropriateness of detention, in both the international protection and return procedures. All Member States allow for detention or alternatives to detention for vulnerable groups only in exceptional cases. Some Member States introduced legislative changes to lower the minimum age for the compulsory application of an alternative to detention,²⁷¹ while others introduced new rules whereby minors and families with minor children could not be detained in detention centres.²⁷²

Although evidence suggests that alternatives to detention present a considerably higher risk of absconding, there is growing recognition of the added value of such alternatives. Firstly, they are often found to be less resource-intensive than detention (which requires covering a person's accommodation and subsistence costs) and more effective at reducing pressure on national detention systems.²⁷³ Secondly, alternatives to detention are less intrusive for the individual, reducing interference with fundamental rights and ensuring greater freedom of movement.²⁷⁴ Indeed, since 2015, several Member States have introduced legal changes to expand the types of alternatives to detention²⁷⁵ or to prioritise alternative measures over detention,²⁷⁶ in the context of their international protection and return procedures.

The most frequently used alternatives to detention are reporting obligations, the requirement to reside at a designated place, the obligation to surrender a passport or identity document, the requirement to communicate an address, and release on bail. In practice, however, Member States do not necessarily use every available alternative. For example, the obligation to reside at a designated place exists in national law in 21 Member States,²⁷⁷ but is used in only 17 Member States.²⁷⁸

Most Member States reported challenges in implementing and using alternatives to detention. These challenges vary depending on the type of alternative, but some patterns can usefully be identified:

- Some alternatives to detention pose a high administrative burden on staff. This is the case for reporting obligations and residence requirements, which require constant staff availability, including at weekends.²⁷⁹
- Other practical challenges associated with some alternatives stem from the limited financial means of the third-country nationals concerned. This is the case for reporting obligations, residence requirements, release on bail, and the requirement to communicate an address to authorities. For example, third-country nationals with limited financial means may struggle to afford private accommodation, which means that in practice they cannot benefit from these alternatives.²⁸⁰
- Other alternatives to detention, such as the obligation to surrender a passport, travel document or identity document, are impossible to apply where these documents are not available. This applies, for example, when third-country nationals are undocumented, or if there is a suspicion that travel documents may have been fraudulently acquired, tampered with, or falsified.²⁸¹
- The limited availability of places in facilities is a challenge where the alternative to detention requires individuals to reside at a particular centre. This may mean that third-country nationals have to be detained instead, in particular where other alternatives are also lacking.²⁸²

The study highlighted the limited data available in the Member States to measure the impact of detention and particularly alternatives to detention on the effectiveness of Member States' international protection and return procedures. Existing data are often based on small samples and gathered from sources that are not readily comparable. Data gathered for the purposes of this study suggest that:

271 AT (in compliance with EU legislation).

272 BE.

273 AT, CZ, DE, EL, ES, FI, FR, IE, NL, PL, SK.

274 AT, BE, DE, EE, EL, FI, FR, IE, LV, NL.

275 CY, CZ, EE, FI, LT, LU.

276 BG, FI, FR, NL, PL.

277 AT, BE, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE, IT, LT, LU, MT, NL, PL, PT, SI.

278 AT, BE, CZ, DE, EE, EL, FI, FR, HR, HU, IE, IT, LT, LU, NL, PL, SI.

279 For example, AT, CY, CZ, EL.

280 CZ, IE, LT, LU, LV, SK.

281 FI, IT, MT, NL, PL.

282 CY, DE, EL, FR, MT.

- In the international protection procedure, data provided by five Member States indicate that detention has a bigger impact on reducing absconding rates, while alternatives to detention are more often associated with shorter status determination processes and higher appeal rates.²⁸³
- In the return procedure, evidence from three Member States indicates that return procedures may be more efficient when using detention, compared to alternative measures.²⁸⁴
- Across all Member States, the same level of fundamental rights safeguards is provided in detention and in alternatives to detention. However, certain services are only provided by national authorities to those in detention, particularly access to legal support.²⁸⁵ The right to emergency healthcare is widely guaranteed by Member States, with little difference between detention and alternatives to detention.²⁸⁶ Overall, however, there is a widespread lack of evidence on the different impacts of detention and alternatives on human rights.
- Based on evidence in two Member States,²⁸⁷ placing people in an alternative to detention is less costly - financially and in terms of impact on well-being and human rights - than placing them in a detention centre, and somewhat less effective to ensure compliance with migration procedure.

²⁸³ BG, HR, LU, LV, SI.

²⁸⁴ BG, LV, SL.

²⁸⁵ DE, FR, EL, IT.

²⁸⁶ AT, BE, BG, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IT, LT, LU, LV, MT, NL, PL, SE, SI, SK.

²⁸⁷ BE, NL.

ANNEX. AVAILABLE NATIONAL FLOW DATA ON ASYLUM SEEKERS AND RETURNEES IN DETENTION AND ALTERNATIVES

Table A2.1 Statistics on the number of asylum seekers absconding from detention and from alternatives to detention during international protection procedure (Question 13)

	No. of people in international protection procedure (including Dublin)		No. of applicants who absconded	
	Detention (absolute figures)	Alternatives to detention (aggregated)	Detention (absolute figures)	Alternatives to detention (aggregated)
BG	2017: 37	2017: 117	N/A	N/A
	2018: 11	2018: 159		
	2019: 33	2019: 161		
EE	2017: 28	N/A	2017: 0	N/A
	2018: 53		2018: 0	
	2019: 19		2019: 0	
HR	2017: 134	2017: 16	N/A	N/A
	2018: 13	2018: 6		
	2019: 48	2019: 3		
LU ²⁸⁸	2017: 211	2017: 605	2017: 0	2017: 449
	2018: 105	2018: 571	2018: 0	2018: 367
	2019: 59	2019: 423	2019: 0	2019: 285
LV	2017: 71	2017: 2	2017: 2	2017: 1
	2018: 37	2018: 1	2018: 0	2018: 1
	2019: 42	2019: 7	2019: 0	2019: 6
SI	2017: 48	2017: 2	N/A	N/A
	2018: 123	2018: 0		
	2019: 22	2019: 0		

²⁸⁸ Data on alternatives to detention only relate to home custody in the SHUK for applicants likely to be transferred to another Member State in accordance with the Dublin III Regulation. No data available for other alternatives to detention because they are so rarely used.

Table A2.2 Statistics on the average length of time needed to determine the status of applicants for international protection (Question 14)

	Average length of time to determine the status of an applicant for international protection*(absolute figures)		No. of decisions appealed and no. that overturned the initial decision*(absolute figures)	
	Detention	Alternatives to detention	Detention	Alternatives to detention
LV	2017: 93 days	2017: 106 days	2017: 20 appealed/ 2 overturned decisions	2017: 2 appealed / 0
	2018: 150 days	2018: 120 days	2018: 12 appealed/ 0	2018: 0/ 0
	2019: 120 days	2019: 50 days	2019: 18 appealed/ 1 overturned decision	2019: 2 appealed/ 2 satisfied applications

Table A2.3 Number of irregular migrants, including failed asylum seekers, absconding from detention and from alternatives to detention during the return procedure (Question 15)

	No. of irregular migrants in return procedures (including pre-removal) (absolute figures)		No. who absconded before removal was implemented (absolute figures)	
	Detention	Alternatives to detention	Detention	Alternatives to detention
BG	2017: 3 735	2017: 16	N/A	2017: 5
	2018: 1 404	2018: 43		2018: 5
	2019: 1 365	2019: 53		2019: 1
BE	N/A	N/A	N/A	N/A
EE	2017: 0	2017: 0	N/A	N/A
	2018: 0	2018: 0		
	2019: 0	2019: 0		
FR	2017: 43 391	2017: 8 781	2017: 74	2017: N/A
	2018: 39 407	2018: 18 302	2018: 65	2018: N/A
	2019: 50 486	2019: 17 390 (aggregated) (including house arrest)	2019: 58	2019: 192
LU	2017: 282	N/A	2017: 1	N/A
	2018: 271		2018: 6	
	2019: 305		2019: 0	
LV	2017: 0	2017: 2	2017: 0	2017: 2
	2018: 0	2018: 4	2018: 0	2018: 1
	2019: 1	2019: 2	2019: 0	2019: 0
NL	2015: 1 750	2015: 450 ²⁸⁹	2017: 720	2017: 890 ²⁹⁰
	2016: 2 140	2016: 2 890	2018: 740	2018: 590
	2017: 2 750	2017: 1 410	2019: 770	2019: 440
	2018: 2 990	2018: 1 120	2020: 680	2020: 380
	2019: 3 240	2019: 990		
	2020: 1 910	2020: 680		
SI	2017: 236	2017: 5	2017: 4	2017: 4
	2018: 1 177	2018: 2	2018: 25	2018: 1
	2019: 1 400	2019: 3	2019: 10	2019: 3

²⁸⁹ NL: data on alternatives refer to the Freedom Restricting Location. In addition, a financial deposit was administered 20 times between 2016 and 2020.²⁹⁰ NL: data on alternatives refer to the Freedom Restricting Location. No data available for the other alternatives to detention.

Proportion of voluntary departures and success rate in the number of departures among people placed in detention and in alternatives to detention (Question 16)

	Average length of time from apprehending an irregular migrant to issuing a return decision (absolute figures)		Average length of time from issuing a return decision to the execution of the return (absolute figures)		Number of voluntary departures (persons who opted to return voluntarily) (absolute figures)		Number of effective forced departures (absolute figures)	
	Alternatives Detention	to detention	Detention	Alternatives to detention	Detention	Alternatives to detention	Detention	Alternatives to detention
BE	N/A	N/A	N/A	N/A	2017: 26 2018: 39 2019: 19	2017: 4 033 2018: 3 126 2019: 25 529 ²⁹¹	2017: 5 741 2018: 4 981 2019: 4 988	N/A
BG	N/A	N/A	N/A	N/A	2017: 1 205 2018: 378 2019: 174	2017: 3 2018: 6 2019: 1	2017: 484 2018: 164 2019: 256	2017: 0 2018: 1 2019: 0
EE	2017: 1 2018: 1 2019: 1	N/A	2017: 27 2018: 21 2019: 14	N/A	N/A	2017: 515 2018: 686 2019: 949	2017: 150 2018: 152 2019: 237	N/A
EL	N/A	N/A	N/A	N/A	2017: 5 567 2018: 4 968 2019: 3 854	N/A	2017: 13 439 2018: 7 796 2019: 4 868	N/A
LU	N/A	N/A	2017: 40.5 2018: 35.5 2019: 42	N/A	2017: 1 2018: 8 2019: 4	N/A	2017: 142 2018: 86 2019: 122	N/A
LV	2017: 10 2018: 13 2019: 12	2017: 2 2018: 51 2019: 38	2017: 12 2018: 9 2019: 21	2017: 57 2018: 16 2019: 9	2017: 24 2018: 17 2019: 18	2017: 14 2018: 17 2019: 4	2017: 174 2018: 88 2019: 69	2017: 1 2018: 4 2019: 0
FI	N/A	N/A	N/A	N/A	2017: 16 ²⁹² 2018: 32 2019: 16	N/A	N/A	N/A
FR	N/A	N/A	N/A	N/A	2017: 3 734 2018: 4 758 2019: 2 512	2019: 2526	2017: 9 836 2018: 11 292 2019: 13 562	2019: 32
NL	N/A	N/A	N/A	N/A	2017: 140 2018: 380 2019: 530 2020: 340	2017: 440 ²⁹³ 2018: 280 2019: 410 2020: 220	2017: 1680 2018: 1640 2019: 1710 2020: 900	N/A
SI	N/A	N/A	2017: 39.2 2018: 32.9 2019: 20	2017: 66 2018: 590 2019: 0	2017: 7 2018: 4 2019: 2	N/A	2017: 8 2018: 5 2019: 13	2017: 0 2018: 1 2019: 0
SK	N/A	N/A	N/A	N/A	2017: 21 2018: 30 2019: 25	N/A	2017: 91 2018: 104 2019: 66	N/A

²⁹¹ BE: Figures do not relate to third-country nationals exclusively. The number of voluntary returns in alternatives to detention concerns those not being detained and covers voluntary return in general. The number of voluntary returns in detention relates solely to third-country nationals.

²⁹² FI: figure for 2017 includes voluntary returns from only one of two detention centres. Figures were not available from the other detention centre. It is thus not comparable with figures from 2018 and 2019.

²⁹³ NL: data on alternatives refer to the Freedom Restricting Location. No data available for the other alternatives to detention.



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EMN National Contact Points

Austria www.emn.at/en/

Belgium www.emnbelgium.be

Bulgaria www.emn-bg.com

Croatia <https://emn.gov.hr/>

Cyprus www.moi.gov.cy/moi/crmd/emnnncpc.nsf/home/home?opendocument

Czechia www.emncz.eu

Denmark www.justitsministeriet.dk/

Estonia www.emn.ee/

Finland www.emn.fi/in_english

France www.immigration.interieur.gouv.fr/Europe-et-International/Le-reseau-europeen-des-migrations-REM3/Le-reseau-europeen-des-migrations-REM2

Germany <https://www.bamf.de/EN/Themen/EMN/emn-node.html>

Greece <http://emn.immigration.gov.gr/en/>

Hungary www.emnhungary.hu/en

Ireland www.emn.ie/

Italy www.emnitalyncp.it/

Latvia www.emn.lv/en/home/

Lithuania www.emn.lt/en/

Luxembourg <https://emnluxembourg.uni.lu/>

Malta <https://emn.gov.mt/>

The Netherlands <https://www.emnnetherlands.nl/>

Poland <https://www.gov.pl/web/europejska-siec-migracyjna>

Portugal <https://rem.sef.pt/>

Romania <https://www.mai.gov.ro/>

Spain <https://extranjeros.inclusion.gob.es/emn-Spain/>

Slovak Republic <https://emn.sk/en/>

Slovenia <https://emm.si/en/>

Sweden <http://www.emnsweden.se/>

Norway <https://www.udi.no/en/statistics-and-analysis/european-migration-network---norway>

Georgia https://migrationcommission.ge/index.php?article_id=1&clang=1

Republic of Moldova <http://bma.gov.md/en>