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Detention and alternatives to detention in international protection and return procedures

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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".[1] 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.[2] 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.

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,[3] 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,[4] further define the scope and criteria for detention,[5] and change the length of time for detention.[6]

In addition, several Member States introduced policy and legal changes to expand the types of alternatives to detention,[7] and/or to prioritise alternative measures over detention,[8] 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.[9]

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,[10] immigration and asylum authorities,[11] and

1 EMN Glossary: https://ec.europa.eu/home-affairs/pages/glossary/detention_en, last accessed on 9 July 2021.
2 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.
3 The previous EMN study on detention and alternatives to detention was published in 2014.
4 AT, CY, DE, EL, FI, FR, HR, IE, LU, NL.
5 AT, BE, BG, DE, EE, FI, FR, IE, LU, NL, SK.
6 AT (Act Amending the Aliens Law 2017), DE, FR, LU.
7 BG, CY, CZ, EE, FR, HR, LT, LU, LV.
8 EL, FI, FR, LU, LV.
9 For example, BE.
10 AT, BG, CZ, DE, EL, ES, FI, FR, HR, HU, IE, IT, NL, SK.
11 AT, BE, BG, CY, CZ, DE, EE, EL, HR, HU, IE, LT, LU, NL.

border guards,[12] 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,[13] including the International Organization for Migration (IOM), national branches of the Red Cross, and national civil society organisations.[14]

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)[15] and are used by most (24).[16] 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,[17] to every four to five weeks in 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 States[18] and used in practice in 17.[19] 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.[20]

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.[21] The practical challenges associated with these alternatives stem mostly from the administrative burden and availability of staff,[22] and from the limited financial means of third-country nationals, who may struggle to afford private accommodation.[23]

The **obligation to surrender a passport, travel document or identity document** to the authorities is legally available in 17 Member States[24] and used in 14.[25] While this alternative is considered advantageous overall, as it requires fewer staff and less supervision,[26] 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.[27]

The **requirement to communicate an address to authorities** is legally available in 15 Member States[28] and used in eight.[29] 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.[30] 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,[31] with four using it in practice.[32] 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,[33] community management programmes,[34] and return counselling.[35]

12 FI, IE, LT, NL.
13 AT, BE, CY, EE, FR, HU, NL.
14 BE, CY, EE, FR, HU, NL.
15 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.
16 AT, BG, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, SE, SI, SK.
17 CZ, DE, EE.
18 AT, BE, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE, IT, LT, LU, MT, NL, PL, PT, SI.
19 AT, BE, CZ, DE, EE, EL, FI, FR, HR, HU, IE, IT, LT, LU, NL, PT, SI.
20 FR, HU, LU.
21 AT, BE, CZ, FR, IE, LT, NL, PT.
22 For example, CY, CZ, EL.
23 CZ, IE, LT, LU, LV, SK.
24 BG, CY, EE, EL, ES, FI, FR, HR, HU, IE, IT, LU, LV, MT, NL, PL, SE.
25 BG, CY, EE, ES, ES, FI, FR, HR, IE, IT, LU, LV, NL, SE.
26 IE, NL.
27 FI, IT, MT, NL, PL.
28 CZ, EE, EL, FI, FR, HR, HU, IE, IT, LU, MT, PT, SE, SK (as an obligation within both existing alternatives to detention).
29 CY, CZ, EE, FI, FR, HR, IE, PT, SK.
30 CY, CZ, EE, FR, HR, LU, IT, MT, SE, SK.
31 AT, BG, CY, CZ, EL, HU, IE, PL, SK.
32 AT, HU, IE (sometimes used in *habeas corpus* cases), PL.
33 BG, CY, DE, FI, HR, HU, LU, NL.
34 BE, CY, SE.
35 BE, EE.

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.[36]

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,[37] and return procedure,[38] with some exceptions.[39]

In most Member States,[40] 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 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,[41] immigration and asylum authorities,[42] border guards,[43] and judicial authorities.[44]

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. examination. 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,[45] whereas in the context of the return procedure, it is the existence of a risk of absconding.[46]

Vulnerability considerations are taken into account in most Member States in the international protection[47] and return procedures[48] 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,[49] or is allowed only in exceptional situations.[50]

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,[51] and return procedures.[52] In all Member States, the procedure to challenge a detention decision involves either a judicial[53] or an administrative review.[54] In all Member States except Finland, the procedure starts with the receipt of a claim by the third-country national or their legal representative.

36 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.

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

38 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.

39 BE, LU, SI.

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

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

42 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.

43 FI, IE, LV, NL, PL.

44 EE, FR, IE, LT, PT.

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

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

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

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

49 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).

50 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).

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

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

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

54 EL, LU, NL.

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 that[55] 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.[56]
- 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.[57]
- Based on evidence in two Member States,[58] implementing alternatives to detention is less costly than placing third-country nationals in detention centres.

55 BG, HR, LU, LV, SI.
56 BG, LV, SL.
57 DE, FR, EL, IT.
58 BE, NL.

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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

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Hungary www.emnhungary.hu/en

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Italy www.emnitalyncp.it/

Latvia www.emn.lv/en/home/

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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/emnSpain/

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

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Sweden http://www.emnsweden.se/

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

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

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