

EMN INFORM

The use of detention and alternatives to detention in the context of immigration policies

1. INTRODUCTION

This EMN Inform summarises the main findings of the EMN Focussed Study on “*The Use of Detention and Alternatives to Detention on the Context of Immigration Policies*”. The Study represents a synthesis of findings presented in 26 National Reports¹ following a common template and developed in collaboration with the European Commission, EMN National Contact Points and the EMN Service Provider.

2. KEY POINTS TO NOTE

- ★ Immigration detention is a non-punitive administrative measure applied by the state to restrict the movement of an individual through confinement in order for an immigration procedure to be implemented.² Recognising the severity of the measure against the right to liberty, a number of **procedural safeguards** are in place in international law and the EU *acquis*, including the principles of necessity, proportionality, brevity, non-arbitrariness, lawfulness, access to legal aid and judicial review.
- ★ **Legal instruments of the EU asylum and migration *acquis***, most notably, Directive 2008/115/EC (‘Return Directive’) and Directive 2003/9/EC and its recast 2013/33/EU (‘Reception Conditions Directive’) stipulate that immigration detention is justified only for a set of specific grounds applied in specific situations, such as preventing unauthorised entry into the territory of a Member State, preventing absconding in return

procedures and under certain conditions within the asylum procedure. (See Section 2)

- ★ National legal frameworks do show **variations across (Member) States** with regard to the categories of third-country nationals that can be placed in detention and the corresponding grounds for detention. The most common grounds for detention are ‘**risk of absconding**’ (in force in 25 (Member) States of the 26 participating in this study); ‘**establishing identity of the third-country national**’ (in the national legislation of 22 (Member) States) followed by ‘**threat to national security and public order**’; ‘**non-compliance with the alternatives to detention**’; ‘**presenting destroyed or forged documents**’ and ‘**reasonable grounds to believe that the person will commit an offence**’.
- ★ In the vast majority of Member States, **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 either explicitly prohibited or possible **only in exceptional circumstances**.
- ★ Comprehensive and robust **assessment procedures** for placing third-country nationals in detention are essential for ensuring non-arbitrariness, necessity and proportionality. Some form of individual assessment to determine the appropriateness of detention exists in **all** (Member) States, although it is foreseen in national legislation in 21 (Member) States, while in a number of other (Member) States the assessment is not set out in legislation but implemented in practice. Challenges associated

¹ Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, United Kingdom and Norway

² See further EMN Glossary 3.0

with implementing assessment procedures in (Member) States include a lack of clear assessment criteria and/or indicators; complex legal framework; the ‘automatic’ placement of particular categories of third-country nationals in detention; challenges related to extending the period in detention; and lack of judicial review on the appropriateness of a detention measure.

- ★ While differences exist across (Member) States in the **types of detention facilities** and the **basic material conditions** provided to detainees, some common patterns are also discernible, notably related to the provision of basic services such as medical care, legal aid, language support and the right to have contact with the outside world.
- ★ The majority of (Member) States (24 in total) have developed **alternatives to detention**, which can include: reporting obligations; residence requirements; the obligation to surrender identity or a travel document; release on bail; electronic monitoring; provision of a guarantor; and release to care workers or under a care plan. The study has shown that community management programmes³ are not currently available in any of the 26 (Member) States participating in this study.
- ★ The **impact of placing third-country nationals in detention or in alternatives to detention** on the effectiveness of (Member) States’ return policies and international protection procedures is difficult to measure. Very little data appear to be available to evaluate this question, especially in so far as the impacts of alternatives to detention are concerned.

3. AIMS OF THE STUDY

What did the study aim to achieve?

The study aimed to identify similarities, differences and best practices with regard to the use of detention and alternatives to detention in the context of (Member) States’ immigration policies. More specifically it aims to:

- ★ Provide information on the **scale of detention and alternatives to detention** in each Member State by collecting statistics available on the number of third-country nationals (by category) that are subject to these measures;
- ★ Identify the **categories of third-country nationals** that can be subject to detention and/or provided an alternative to detention;

³ Community management or supervision arrangements could include a wide range of practices in which individuals live independently in the community and are attached to a case manager, who follows their case and helps them to seek resolution. (UNHCR 2012 Revised Guidelines on Detention); see also Alice Edwards (2011), Measures of First Resort: Alternatives to Immigration Detention in Comparative Perspective”, The Equal Rights Review, vol. 7.

- ★ Compare and contrast the **grounds** for placing third-country nationals in detention and/or providing alternatives to detention outlined in national legal frameworks, as well as the assessment procedures and criteria used to reach decisions on detention in individual cases;
- ★ Identify and describe the different **types of detention facilities** and **alternatives to detention** available and used in (Member) States;
- ★ Collect any evidence of the way detention and alternatives to detention contribute to the **effectiveness of return policies and international protection procedures**.

Special attention was given to detention and/or alternatives to detention in respect of vulnerable persons such as minors, families with children, pregnant women and persons with special needs. The study focuses on detention for immigration/asylum purposes only and does not include in its scope detention of third-country nationals who have committed a criminal offence.⁴

4. SCALE OF IMMIGRATION DETENTION AND ALTERNATIVES TO DETENTION

What is the scale of immigration detention and alternatives to detention in the EU?

Statistics collected for the period 2009-2013 show that on average in the 24 (Member) States that provided data, the total number of third-country nationals in detention has decreased by some 5% per annum – from 116,401 in 2009 to 92,575 in 2013.⁵

Statistics on the total number of third-country nationals granted alternatives to detention for the period 2009-2013 are available in 13 Member States. In 2013, the largest number of third-country nationals provided with an alternative to detention was in **France** (1,258), followed by **Austria** (771), **Belgium** (590) and **Sweden** (405).

Disaggregated statistics of number of persons in detention and granted alternatives to detention by categories of third-country nationals were not available in most (Member) States and only available for some categories in 10 countries for third-country nationals in detention and 6 countries for third-country nationals granted alternatives to detention. (See *Annex 4*)

⁴ Detention in the immigration framework is not a criminal punishment. However, criminal detention is possible under the same factual circumstances if illegal entry or stay is criminalised under national law. For more details, see European Union Agency for Fundamental Rights’ publication: “Criminalisation of migrants in an irregular situation and of persons engaging with them”, Available at: http://fra.europa.eu/sites/default/files/fra-2014-criminalisation-of-migrants-0_en_0.pdf

⁵ Statistics on the total number of TCNs in detention is not available for Latvia for 2011; Portugal for 2009 and 2013; and Norway for 2009, 2010, 2011 and 2012.

Statistics on the average length of detention for the period 2009-2013 are available in 17 (Member) States. The average length of detention for 2013 across these (Member) States was around 40 days. The highest average detention period in 2013 was recorded in **Malta** (180 days) and **Estonia** (58 days), while the lowest average number of days was observed in **Sweden** (5 days) and **Finland** (11.8 days) and in metropolitan⁶ **France** (11.9 days).

5. CATEGORIES OF THIRD-COUNTRY NATIONALS AND LEGAL GROUNDS

Which categories of third-country nationals can be detained and what are the legal grounds for detention for these categories?

National legal frameworks do show variations across (Member) States with regard to the categories of third-country nationals that can be placed in detention, following the four broad categories: (i) international protection applicants; (ii) third-country nationals who have been issued a return decision; (iii) persons detained to prevent irregular entry and (iv) persons detained for reasons of irregular stay.

Most notably, **detention of applicants for international protection** is regulated by separate national legal provisions from detention of other categories of third-country nationals (such as persons subject to detention in the context of illegal entry, illegal stay or return) in all (Member) States, except in **Finland, Sweden, United Kingdom** and **Norway**, where the same national provisions equally apply for all categories of third-country nationals.

The most common ground for detention, in force in 25 (Member) States, is 'risk of absconding' which is applied mainly in the context of return. Another ground prescribed in the national legislation of 23 (Member) States is 'establishing identity' of the third-country national, applied mostly in the context of international protection. Further grounds applicable to all categories of third-country nationals are 'threat to national security and public order'; 'non-compliance with the alternatives to detention'; 'presenting destroyed or forged documents' and 'reasonable grounds to believe that the person will commit an offence'.

Can vulnerable persons including unaccompanied minors be detained?

In the vast majority of (Member) States, **detention of vulnerable persons**, including *unaccompanied minors (UAMs); accompanied minors and families with children; pregnant women; and victims of trafficking in human beings and torture*, is either explicitly

prohibited or possible **only in exceptional circumstances**.

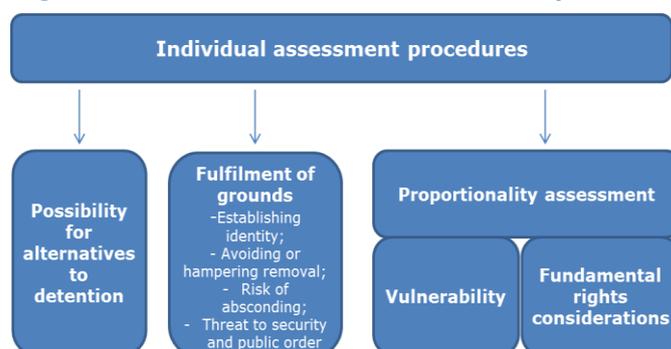
Detention of UAMs below a certain age is either explicitly prohibited in national legislation (**AT, BE, BG, CZ, ES, FR, HU, IE, LV, PL, SI, SK**) or applied only in "exceptional circumstances" (**CY, DE, EE, EL, FI, HR, LT, MT, NL, PT, SE, UK, NO**).

6. ASSESSMENT PROCEDURES

How are third-country nationals assessed for detention or alternatives to detention available in (Member) States?

Provisions in EU and international legal instruments stipulate that immigration detention should be based on due appraisal of the individual circumstances of the person concerned. Some form of **assessment to determine the appropriateness of detention exists in all (Member) States**. Individual assessment procedures can consist of a number of elements, including (i) the possibility to provide alternatives to detention; (ii) fulfilment of legal grounds for detention and (iii) a proportionality assessment, which consists of vulnerability considerations and fundamental rights considerations.

Figure 1: Elements of individual assessment procedures



In most (Member) States, **the same national authorities which are responsible for deciding on the placement of a third-country national in detention also conduct the individual assessment** of whether the grounds for detention apply. In 9 (Member) States, judicial authorities are involved in the initial detention decision; however, the role of judicial authorities with regard to detention varies significantly across (Member) States.

What types of detention facilities for third-country nationals and basic material detention conditions are provided in (Member) States?

The use of **immigration detention facilities** is a consolidated practice across **all** (Member) States, with the exception of **Ireland** where third-country nationals are detained in prisons. In total **128** detention facilities exist across the participating 26 (Member) States.

⁶ Metropolitan France is the part of France located in Europe. It does not include French overseas territories

The **organisation** of detention facilities varies across (Member) States. Third-country nationals may be detained in the same facility regardless of the circumstances for which they are detained in some Member States. In a few cases, third-country nationals may be detained in specialised facilities depending on their circumstances e.g. in **Hungary**, where applicants for international protection are kept in separate detention centres and in **Cyprus** where there are different types of detention facilities, according to, *inter alia*, the security risk posed by the detainee. These may include specialised facilities or police stations.

The **quality of life** experienced by applicants in detention facilities is affected by their access to basic material conditions. Where the detention of vulnerable groups is permitted, special care and accommodation that takes into account the specific needs of vulnerable groups are provided in a number of (Member) States.

Access to outdoor space is allowed by all (Member) States on a **daily** basis. However, the frequency and the time permitted outdoors can vary significantly.

7. ALTERNATIVES TO DETENTION

What are the alternatives to detention available in (Member) States and what is their practical organisation?

A total of 24 (Member) States provide **alternatives to detention**. In **Malta**, alternatives to detention are not currently provided, while in **Greece** alternatives to detention are provided for under national law but are not applied in practice.

Table 1: Alternatives to detention in (Member) States

Alternatives to detention	No. of (Member) States applying the alternative
Reporting obligations (e.g. reporting to the police or immigration authorities at regular intervals)	23
Residence requirements (e.g. residing at a particular address)	18
Obligation to surrender a passport or a travel document	15
Release on bail (with or without sureties)	13
Electronic monitoring (e.g. tagging)	4
Guarantor requirements	4
Release to care worker or under a care plan	2
Other alternative measures:	
-Voluntary return programmes	2
-Seizure of money for travel documents and tickets	1

-Accommodation in reception centres for asylum seekers	2
-Accommodation in departure facilities	1
-Guardianship of UAMs	1

In **all** (Member) States participating in the study, alternatives to detention are granted on the basis of a **case-by-case examination**. All (Member) States provide that **detention** should apply to third-country nationals **who do not comply** with the required conditions. All alternatives are provided for by legally binding acts on immigration and/or asylum. **Croatia** provides additional guidance in a book of rules.

The **authorities** responsible for deciding whether to grant an alternative to detention to third-country nationals vary across (Member) States; only in a few (Member) States (**DE, LT, PT**), and depending on the form of alternative, do they differ from the authorities responsible for the practical administration of the alternative.

To what extent do detention measures and alternatives impact on the effectiveness of return policies and international protection procedures?

The study has shown that it is difficult to measure the impact of placing third-country nationals in detention or in alternatives to detention on the effectiveness of (Member) States' return policies and international protection procedures. Very little statistics is available to evaluate this question, especially in relation to detention alternatives. Available statistics is often based on very small samples and gathered from sources that are not readily comparable. Overall, the statistics that has been gathered for the purpose of this study suggests however that:

- ★ the impact of detention and alternatives to detention on the ability of (Member) States to reach and execute prompt and fair return decisions may be rather insignificant (with other factors, e.g. whether the person to be returned is in possession of travel documents, playing a much greater role);
- ★ placing persons in an alternative to detention is less costly than placing them in a detention centre, although direct evidence is limited and not available in all Member States;
- ★ the fundamental rights of persons in detention are at greater risk than they are for persons placed in alternatives to detention; and
- ★ the risk of absconding could be greater in case of alternatives to detention, while as a whole this risk is very low or non-existent in the case of detention.

8. FURTHER INFORMATION

You may obtain further details on this EMN Inform and/or on any other aspect of the EMN, from HOME-EMN@ec.europa.eu.

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