**A comparative overview of similarities, differences, practical challenges, and best practices in the use of detention and alternatives to detention in Member States in the framework of both international protection and return procedures.**

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**INFORMATION LEAFLET
DETENTION AND ALTERNATIVES TO DETENTION IN INTERNATIONAL PROTECTION AND RETURN PROCEDURES**

*The European Migration Network has published a Synthesis Report of the EMN Study Detention and Alternatives to detention in international protection and return procedures based on the national contributions of the 25 EMN NCPs.[[1]](#footnote-1) Study focuses on the developments in detention and alternatives to detention after 2015, as the Study* *follows up the 2014 EMN Study on „The Use of Detention and Alternatives to Detention in the Context of Immigration Policies“, and the scope of the Study does not encompasses the period after April 2021. The aim of the Study is to identify similarities, differences, practical challenges, and best practices in the following categories of third-country nationals: international protection applicants in ordinary procedures, Dublin procedure, and border procedure, as well as third-country nationals who have been issued a return decision. In the course of the development of the Study the special emphasis was put on the possibility of detaining or providing alternatives to detention for vulnerable persons such as minors, families with children, pregnant women and people with special needs.*

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

*DISCLAIMER*

*This Information is produced exclusively by EMN NCP Croatia in order to highlight the most important findings in the Study and to provide a comparative overview of developments and use of detention and alternatives to detention in the Republic of Croatia in connection to the EU Member States.*

**National policy and legal frameworks: developments since 2015**

The majority of Member States, including Croatia, introduced legislative changes since 2015 regarding detention and alternatives to detention. These changes primarily relate to implementation of EU legislation,[[2]](#footnote-2) and further defining scope and content of detention and criteria used to determine whether detention should be applied. Changes to the scope, definitions and criteria were noted in regards to criteria of a risk of absconding, criteria of proportionality or criteria of placing third-country nationals in detention. In several Member States changes were made in relation to the length of time for detention, while three Member States noted increasing of the detention length,[[3]](#footnote-3) one Member State reported decreasing of the detention period in the international protection procedure.[[4]](#footnote-4) Several Member States reported prioritisation of alternative measures over detention,[[5]](#footnote-5) while also most of these Member States and six others, including Croatia, introduced changes to expand the types of alternatives to detention.[[6]](#footnote-6) It is worthwhile noting that four Member States introduced new alternatives to detention,[[7]](#footnote-7) and other four reported legislative changes in order to prioritise the use of alternatives to detention.[[8]](#footnote-8)

**Availability and practical organisation of alternatives to detention**

Most Member States have different types of alternatives to detention prescribed by their national legislation, however in practice not all of them are implemented. Alternatives to detention are explored in this Study through their practical organisation in terms of the authorities and organisations responsible for implementing the alternatives, the conditions to be met by a third-country national for application of alternative to detention, and mechanisms in place to monitor third-country national’s compliance.

All of the Member States apply alternatives to detention depending on the individual circumstances of the third-country national. It is necessary to emphasize that the authorities responsible for alternatives to detention vary in relation to national administrative system, type of the procedure, and the level of coerciveness of the alternative. The authorities responsible in the Member States include the police,[[9]](#footnote-9) immigration and asylum authorities,[[10]](#footnote-10) border guards,[[11]](#footnote-11) and it is worth noting that other parties such as NGOs, social services and other government actors may play a role in the implementation of alternatives in several Member States.[[12]](#footnote-12)

Reporting obligations are established by law in all of the Member States participating in the Study, and are not used in practice only in one.[[13]](#footnote-13) The requirement to reside at a designated place is established by law in 20 Member States,[[14]](#footnote-14) and is not operated in practice by three Member States.[[15]](#footnote-15) Obligation to surrender a passport, travel or identity document is established by law in 17 Member States,[[16]](#footnote-16) and is not used in practice in three Member States.[[17]](#footnote-17) Although legally available in 15 Member States,[[18]](#footnote-18) the requirement to communicate an address to authorities is only used by eight Member States.[[19]](#footnote-19) Even though the release on bail is established by law in nine Member States,[[20]](#footnote-20) it is only used in practice by five of them.[[21]](#footnote-21) Similarly, deposit or financial guarantee is legally available in eight Member States,[[22]](#footnote-22) however is used only in five Member States.[[23]](#footnote-23) Other reported alternatives to detention which are implemented in minority of Member States include accommodation in return and asylum facilities, community management programme, electronic monitoring, return counselling, released to a guardian, release to a care worker and restriction of movement at border.

In Croatia four out of five most frequently available alternatives are established in the law, and all of them are also used in practice. Those
available alternatives to detention in Croatia are: reporting obligations, requirement to reside at a designated place, obligation to surrender a passport, travel document or identity document and obligation to communicate address to authorities. Even though release on bail, as the fifth most commonly used alternative, is not legally available, deposit or financial guarantee is established by the law, however, this measure is not used in practice.

**Assessment procedures and criteria for placing third-country nationals in detention or providing alternatives to detention**

Member States use a variety of assessment processes and criteria in making a decision on detention and alternative to detention of a third-country national. All Member States allow for detention in both procedures, however the Study concluded on the ground of both Return Directive 2008/115/EU and Reception Conditions Directive 2013/33/EU, that a third-county national should only be detained when the available alternatives are not appropriate given the circumstances of the person concerned.

It is possible to distinguish four main factors included in the assessment procedure of applying the detention or alternative to detention: possibility for applying an alternative to detention, fulfilment of specified conditions or grounds (identity establishment, risk of absconding, threat to security and public order), respect for the proportionality principle, and vulnerability and fundamental rights considerations.

In all of the Member States possibility of providing alternatives to detention when a ground for detention exists is systematically taken into consideration either as a part of the return[[24]](#footnote-24) or international protection procedure.[[25]](#footnote-25) However, in most of Member States is considered in both of those procedures, and Croatia belongs to majority of those Member States. Also it is worth noting that in most Member States the assessment decision for detention or alternative to detention is undertaken simultaneously with the consideration of the existence of grounds for detention.[[26]](#footnote-26) In most of the Member States criteria on placing a third-country national in detention or alternative to detention do not depend on the legal status of the third-country national or country of origin.

In all Member States, as in case of detention, alternatives to detention are decided on a case-by-case basis including appraisal of whether the legal grounds for detention have been fulfilled. The most common criteria that is used by Member States in making a decision of placing a third-country national in detention or provide an alternative to detention are level of risk of absconding, vulnerability, suitability of the alternative to the needs of the individual case and implementation of less invasive measures impacting on human rights.

Indicators for the risk of absconding point out to the existence of circumstances that make it reasonable to assume that the individual will seek to avoid or impede either of the procedures, use of false identity documents or false statements,[[27]](#footnote-27) violation of the obligation to cooperate,[[28]](#footnote-28) and non-compliance with an entry ban[[29]](#footnote-29) are the main indicators reported by the Member States. Criterion of level of risk of absconding is used in international protection procedure in 22 Member States,[[30]](#footnote-30) and in return procedure it is implemented in all of the Member States participating in the Study.

Vulnerability criterion in international protection procedure is also used by 22 Member States,[[31]](#footnote-31) and by all of the Member States participating in the study during the return procedure. The main authorities involved in vulnerability assessments include immigration and asylum offices,[[32]](#footnote-32) police and border guards,[[33]](#footnote-33) ministries,[[34]](#footnote-34) and social workers.[[35]](#footnote-35)

Criterion of suitability of the alternative to the needs of the individual case is used by 20 Member States in international protection procedure,[[36]](#footnote-36) and by 22 Member States in return procedure.[[37]](#footnote-37)

Less invasive measures impacting on human rights are taken into consideration during the international protection procedure in 17 Member States,[[38]](#footnote-38) and in return procedure in 22 Member States.[[39]](#footnote-39)

Croatia reported using all of the four aforementioned criteria in both international protection and return procedure. Other reported criterion used by minority of Member States included nationality or country of origin or return,[[40]](#footnote-40) cost-effectiveness,[[41]](#footnote-41) and other.[[42]](#footnote-42)

In all Member States the procedure to challenge a detention decision is available to the third-country nationals either in a form of appeal or complaint in both international protection[[43]](#footnote-43) or return procedure.[[44]](#footnote-44) It worth noting that most Member States provide different forms of support to third-country nationals during the decision process on application of detention or an alternative to detention. Basic health care is available in international protection procedure in 18 Member States,[[45]](#footnote-45) and in 16 Member States during the return procedure.[[46]](#footnote-46) Support in the form of a legal aid is available in 20 Member States during the international protection procedure,[[47]](#footnote-47) and in 21 Member States in the return procedure.[[48]](#footnote-48) While social support is available in nine Member States in the international protection procedure,[[49]](#footnote-49) it is only available in five Member States during the return procedure.[[50]](#footnote-50) Psychological support is available in 12 Member States during the international protection procedure,[[51]](#footnote-51) and in ten Member States in the return procedure.[[52]](#footnote-52) Interpretation or translation support is available in 14 Member States,[[53]](#footnote-53) and in 15 Member States during the return procedure.[[54]](#footnote-54) Information services as a form of support are available in seven Member States during the international protection procedure,[[55]](#footnote-55) and in eight Member States in return procedure.[[56]](#footnote-56) However, counselling is only available in four Member States during the international protection procedure,[[57]](#footnote-57) and in five Member States in return procedure.[[58]](#footnote-58)

It is possible to conclude that in Croatia support is provided to the third-country nationals during the waiting period pending a detention decision in form of basic healthcare, legal aid, social support and psychological support. Support is provided in both international protection ad return procedure, with the exception of social support which is only given during the international protection procedure.

**Impact of detention and alternatives to detention on the effectiveness of return and international protection procedures**

Effectiveness of international protection and return procedures in line with the criteria identified in Council of Europe guidance is considered against three key indicators: ensure the compliance with migration procedures, uphold fundamental rights and improve the cost-effectiveness of migration management.

Ensuring the compliance with migration procedures assumes that detention and alternatives to detention should reduce the rate of absconding of asylum applicants and returnees and encourage their collaboration and improve the effectiveness of the procedures. However, study found that no direct causation can be established between detention and alternatives and compliance with migration procedures as it may be influenced by several factors. It is worth noting that three Member States use detention on a much wider scale in the international protection procedure,[[59]](#footnote-59) while only two Member States use alternatives to detention more frequently.[[60]](#footnote-60)

Data provided suggests that detention may have a bigger impact on reducing absconding rates, while alternatives to detention are often associated with shorter status determination and higher appeal rates. It was noted by few Member States that return procedures may be more efficient when using detention in comparison to alternative measures.[[61]](#footnote-61)

Upholding fundamental rights in the context of detention and alternatives to detention assures effectiveness if fundamental rights are protected and appropriate safeguards are offered. All of the Member States participating in the study offer right to healthcare in the detention, with minor differences between detention and alternatives to detention. Emergency healthcare is provided in all of the Member States, while some Member States offer basic healthcare or even access to more specialised care.

Right to legal aid, as well as the right to be heard, is offered in all of the Member States on a mandatory basis in detention, but not in alternatives to detention. Legal aid is guaranteed in alternatives to detention in 21 Member States,[[62]](#footnote-62) while right to be heard is offered in 23 Member States.[[63]](#footnote-63)

Legal aid is provided free of charge in some of the Member States, while in Croatia this only applies to detention during the international protection procedure, and in return procedure in cases prescribed by the law. It is also worth noting that Croatia and several other Member States have the explicit obligation to inform the migrants of their right to legal aid.[[64]](#footnote-64)

Right to be heard is guaranteed in 22 Member States by ensuring access to a court hearing, giving third-country nationals a possibility to present their opinion and objections through formal interviews,[[65]](#footnote-65) in 14 Member States right is guaranteed by ensuring the possibility to communicate without impediment with external parties,[[66]](#footnote-66) and in 12 Member States is guaranteed by ensuring access to information.[[67]](#footnote-67) Some of the Member States reported additional services offered to third-country nationals correlated to the condition of detention including the right to external visitation,[[68]](#footnote-68) the right to send and receive mail correspondence,[[69]](#footnote-69) and the right to social and psychological counselling.[[70]](#footnote-70)

Third indicator on the cost-effectiveness of migration management is based on three independent researches which generally found that detention is more effective in regards to compliance with migration procedures, however most of them concluded that detention is costlier then the alternatives to detention.

**Conclusions**

Overall it is possible to conclude that all of the Member States have available different types of alternative to detention established in their national legal framework. It is important to emphasize that if the grounds for detention exist, alternatives to detention are always imposed on the basis of individual

circumstances. Member States have several assessment procedures in place in order to determine the feasibility of detention, both in international protection and return procedure. It was established by the Study that some of the evidence suggests that alternatives to detention present a higher risk of absconding compared to detention.

1. 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. [↑](#footnote-ref-1)
2. AT, CY, DE, EL, FI, FR, HR, IE, NL. [↑](#footnote-ref-2)
3. AT, BG, FR. [↑](#footnote-ref-3)
4. LV. [↑](#footnote-ref-4)
5. EL, FR, LU, LV. [↑](#footnote-ref-5)
6. BG, CY, CZ, EE, FR, HR, LT, LU, LV. [↑](#footnote-ref-6)
7. CY, CZ, EE, LU. [↑](#footnote-ref-7)
8. BG, FR, NL, PL. [↑](#footnote-ref-8)
9. AT, BG, CZ, DE, EL, ES, FI, FR, HR, HU, IE, IT, NL, SK. [↑](#footnote-ref-9)
10. AT, BE, BG, CY, CZ, DE, EE, EL, HR, HU, IE, LT, LU, NL, PT. [↑](#footnote-ref-10)
11. FI, IE, LT, NL. [↑](#footnote-ref-11)
12. AT, BE, CY, EE, FR, HU, NL. [↑](#footnote-ref-12)
13. BE. [↑](#footnote-ref-13)
14. AT, BE, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE, IT, LT, LU, MT, NL, PL, SI. [↑](#footnote-ref-14)
15. CY, ES, MT. [↑](#footnote-ref-15)
16. BG, CY, EE, EL, ES, FI, FR, HR, HU, IE, IT, LU, LV, MT, NL, PL, SE. [↑](#footnote-ref-16)
17. EL, HU, MT. [↑](#footnote-ref-17)
18. CZ, EE, EL, FI, FR, HR, HU, IE, IT, LU , MT, PT, SE, SI, SK. [↑](#footnote-ref-18)
19. CY, CZ, EE, FR, HR, IE, PT, SK. [↑](#footnote-ref-19)
20. AT, BG, CY, CZ, EL, HU, IE, PL, SK. [↑](#footnote-ref-20)
21. AT, HU, IE, NL, PL. [↑](#footnote-ref-21)
22. BG, CY, DE, FI, HR, HU, LU, NL. [↑](#footnote-ref-22)
23. BG, FI, HU, LU, NL. [↑](#footnote-ref-23)
24. AT, BE, BG, CY, CZ, DE, EE, EL, FI, HR, HU, IE, IT, LU, LV, MT, NL, PL, PT, SE, SI, SK. [↑](#footnote-ref-24)
25. AT, BE, BG, CY, CZ, DE, EE, EL, FI, FR, HR, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, SE, SK. [↑](#footnote-ref-25)
26. AT, BE, BG, CY, CZ, EE, FI, FR, HR, HU, IT, LT, LU, LV, MT, NL, PT. [↑](#footnote-ref-26)
27. AT, CZ, DE, EE, ES, FI, HR, IE, IT, LV, LT, SI, SK. [↑](#footnote-ref-27)
28. AT, CZ, EE, FI, HR, IE, SI, SK. [↑](#footnote-ref-28)
29. CZ, FI, HR, SL. [↑](#footnote-ref-29)
30. AT, BG, CY, CZ, DE, EE, EL, FI, FR, HR, HU, IE, IT, LT, LU, LV, MT, NL, PL, SE, SI, SK. [↑](#footnote-ref-30)
31. AT, BE, BG, CY, CZ, DE, EE, EL, FI, HR, HU, IE, IT, LT, LU, LV, MT, NL, PL, SE, SI, SK. [↑](#footnote-ref-31)
32. AT, BE, BG, CY, DE, EE, EL, FR, HR, NL, LU, LV, PT, SE, SK. [↑](#footnote-ref-32)
33. CZ, EE, EL, ES, FI, HR, IT, LV, NL, PL, SE, SI, SK. [↑](#footnote-ref-33)
34. CZ, HR, SI. [↑](#footnote-ref-34)
35. HR, LU, MT. [↑](#footnote-ref-35)
36. BG, BE, CY, CZ, DE, EE, EL, FI, HR, HU, IT, LT, LU, LV, MT, NL, PL, SE, SI, SK. [↑](#footnote-ref-36)
37. BE, BG, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IT, LT, LU, LV, MT, NL, PL, PT, SE, SI, SK. [↑](#footnote-ref-37)
38. AT, BE, CY, CZ, DE, EE, EL, FI, HR, IT, LT, LU, MT, NL, SE, SI, SK. [↑](#footnote-ref-38)
39. AT, BE, BG, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IT, LT, LU, MT, NL, PT, SE, SI, SK. [↑](#footnote-ref-39)
40. BE, DE, ES, IT, MT, NL, SE. [↑](#footnote-ref-40)
41. BE, HU, ES, IT. [↑](#footnote-ref-41)
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43. AT, BE, BG, CY, CZ, DE, EE, EL, FI, HR, HU, IE, IT, LT, LU, LV, MT, NL, PL, SE, SI, SK. [↑](#footnote-ref-43)
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50. BG, DE, ES, FR PT. [↑](#footnote-ref-50)
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52. AT, CY, CZ, HR, EE, ES, FI, FR, PT, SE. [↑](#footnote-ref-52)
53. BE, BG, CY, CZ, DE, EE, FI, IE, LT, NL, PT, SE, SI, SK. [↑](#footnote-ref-53)
54. BG, CY, CZ, DE, EE, EL, FI, FR, HU, IE, NL , PT, SE, SI, SK. [↑](#footnote-ref-54)
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56. CZ, DE, EE, EL, FI, PT, SE, SI. [↑](#footnote-ref-56)
57. AT, EE, PT, SE. [↑](#footnote-ref-57)
58. EE, FR, PT, SE, SI. [↑](#footnote-ref-58)
59. HR, LT, SI. [↑](#footnote-ref-59)
60. BG, LU. [↑](#footnote-ref-60)
61. BE, BG, LV, SL. [↑](#footnote-ref-61)
62. AT, BE, BG, CY, CZ, EE, ES, FI, FR, HR, HU, IE, LT, LU, LV, MT, NL, PL, PT, SI, SK. [↑](#footnote-ref-62)
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70. CY, CZ, EE, FR, HR, NL, PT, SI, SK. [↑](#footnote-ref-70)