

DETENTION AND ALTERNATIVES TO DETENTION IN INTERNATIONAL PROTECTION AND RETURN



SPAIN 2020



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Detention and alternatives to detention in international protection and return procedures

The European Migration Network (EMN) is an initiative of the European Commission. The EMN has been established via Council Decision 2008/38/EC and is cofinancially supported by the European Union.

Its objective is to meet the information needs of EU institutions and of Member States' authorities and institutions by providing up-to-date, objective, reliable and comparable information on migration and asylum, with a view to supporting policymaking in the European Union in these areas. The EMN also serves to provide the general public with such information.

To that end, the EMN has a network of National Contact Points (NCPs).

The Spanish NCP is composed by experts from the Ministry of Inclusion, Migration and Social Security, Ministry of the Interior, Ministry of Foreign Affairs, European Union and Cooperation, and Ministry of Justice and the General Prosecutor's Office, It is coordinated by the Deputy General Directorate for Legal Affairs of the Secretariat of State for Migration.

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Common Template for EMN Study 2020

Fina Version, 4 January 2020

1 BACKGROUND AND RATIONALE FOR THE STUDY

In the context of migration, detention is a *non-punitive administrative measure applied by the state to restrict the movement through the confinement of an individual for another immigration procedure to be implemented*.¹ EU legislation regulates in detail the detention of migrants within the context of international protection and return procedures, setting the grounds on which an individual can be deprived of liberty and the relevant principles governing the matter. At both European and International levels, legal sources agree on the fact that detention should be used as a "last resort" and encourages the use of alternatives to detention, as an application of the principles of necessity and proportionality in order to avoid arbitrary deprivation of liberty.²

Although there is no common legal definition of alternatives to detention, they can be defined as *non-custodial measures used to monitor and/or limit the movement of third-country nationals during the period needed to resolve migration/asylum status and/or while awaiting removal from the territory*.³ These measures, having an impact on the person's rights,⁴ are subject to human rights standards and have to be imposed, on a case-by-case basis, by taking into consideration individual factors. Examples of such alternative measures include the obligation of regular reporting to the authorities, the deposit of an adequate financial guarantee, an obligation to stay at an assigned place, etc.⁵ Alternatives to detention measures could entail duties that imply different levels of coerciveness, and they are mainly aimed at mitigating the risk factors identified by the authorities who considered that the particular individual was liable to detention.⁶ As a general principle, it is essential to clarify that the consideration of alternatives is only relevant and legal when there are legitimate grounds to detain.

Both international and EU law guarantee and protect the **right to liberty and security** as a core component of an individual's fundamental rights. The European Convention of Human Rights (ECHR) in its Article 5(1) states the principle that "Everyone has the right to liberty" while Article 9 of the International Covenant on Civil and

¹ EMN Glossary

² Articles 6, 52(3) and 53 of the EU Charter. Articles 8 and 11 of the Reception Directive (recast). Recital 16 and Article 8(1) Return Directive.

³ EMN Glossary

⁴ These rights include: the right to family life (Article 2 ECHR; Article 9 CFREU; Article 12(2) 1951 Refugee Convention), the right to privacy (Article 8 ECHR), prohibition of torture (Article 3 ECHR) the prohibition on inhuman or degrading treatment (Article 3 ECHR).

⁵ Article 8(4) of the Reception conditions directive (recast)

⁶ Detention of applicants for international protection in the context of the Common European Asylum System, EASO 2019

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Political Rights (ICCPR) 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 procedure as are established by law". In summary, all the measures that might have an impact on the person's human rights should be imposed 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. Nevertheless, it should be noted that the principle of necessity, while applying in EU law in relation to the grounds for detention that must be justified, is not taken into consideration by the ECHR. Also, the principles of **non-arbitrariness** and legality provide that detention should be based on grounds for detention established by law.⁷ Moreover, as the European Court of Human Rights has underscored in several judgments (see section 5 below), in practice, domestic authorities shall **effectively verify** and provide with **evidence** whether an alternative measure less coercive than detention is possible.⁸ In this sense, the administrative detention of individuals can take place only in those cases where there are no alternatives.

Despite the legal obligation to consider the use of alternatives to detention, in practice, the widespread use of alternatives is hampered by the scarce availability of tools and for alternatives to detention that could achieve the same goal of detention especially in the context of return procedures – notably to ensure compliance with the migration procedures and prevent absconding. Alternatives to detention are considered to bring **effective advantages compared to detention**, specifically considering their reduced costs as compared to detention, the reduced interference with fundamental rights, and the fact that they can significantly relieve the pressure on national detention systems. Nevertheless, among Member States alternatives to detention remain often unused, and the findings of different actors in the field - the Council of Europe,⁹ the UN¹⁰ and the EU¹¹ – while confirming this trend, identified different reasons for this.

The lack of **empirical research** on the practical applicability of alternative measures and which takes into account all related costs, has been identified as one of the main challenges for their implementation. In fact, there are several alternative measures, and some information is available on which measures work better than others. However, there is lack of clear evidence-based information on the effectiveness of these measures in achieving compliance with migration procedures and in particular to prevent **absconding**. In this sense, improving the overall quality of the assessment procedures, while boosting a greater legal clarity and objectivity in terms of criteria for assessing such risks could be crucial to ensure the most accurate decision on an appropriate alternative. Another issue identified is linked to the availability of alternatives that correctly match the individual circumstances because they are limited in scale or because the individual concerned cannot meet the requirements, for instance, this is the case of using bail where the lack of financial resources constitutes a limit in applying this scheme.

⁷ The use of detention and alternatives to detention in the context of immigration policies, EMN 2014.

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

⁸ A.B. and Others v. France, No. 11593/12, 12 July 2016, § 124

⁹ 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; Commissioner for Human Rights, Human Rights Comment, High time for states to invest in alternatives to migrant detention, 31/01/2017; Parliamentary Assembly, Resolution 2020 (2014), § 8.

¹⁰ 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.

¹¹ European Commission, Communication from the Commission to the Council and the European Parliament on EU Return Policy, COM(2014) 199 final, Brussels, 28.3.2014, p. 15.

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2 STUDY AIMS AND OBJECTIVES

The 2020 EMN study on detention and alternatives aims to identify similarities, differences, practical challenges and best practices concerning the use of detention and alternatives used by Member States and Norway in the framework of international protection and return procedures.

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

- Provide a comparative overview of the scale of detention and available alternatives to detention in each Member State in the context of international protection and return procedures and challenges Member States face to implement the alternatives to detention in practice;
- Give a comparative overview of the process and criteria used by national authorities to assess whether placing a third-country national in detention or instead applying an alternative to detention, in the context of international protection and return procedures;
- Assess 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 fundamental rights; iii) improve the cost-effectiveness of migration management.¹²

Categories of third-country nationals considered in the study will include international protection applicants and individuals who have been issued a return decision. The study will focus on detention for asylum/return purposes only and will not include in its scope detention of third-country nationals who have committed a criminal offence. The study will give special attention to the possibility of detaining and/or providing alternatives to detention to vulnerable persons such as minors, families with children, pregnant women and persons with special needs.

The study will consider legal and practical approaches related to provision of detention and alternatives **available during the reporting period January 2015- December 2020.**

MAIN RESEARCH QUESTIONS

The study seeks to address two primary questions:

- *To what extent are different options for alternatives to detention available and used across Member States and Norway?*
 - What type of alternatives are currently available and in use across Member States and Norway?
 - What are the challenges and advantages in the use and implementation of alternatives to detention?
 - What processes and criteria are used to assess the opportunity to use an alternative instead of detention (provided that grounds for detention exist)?
- *What evidence exists about 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 alternatives, when considering:

¹² Effective Alternatives to the Detention of Migrants, International Conference organised jointly by the Council of Europe, the European Commission and the European Migration Network, 2019. Cost-effectiveness is intended as the financial costs of alternatives to detention as compared with the costs of detention, taking into consideration their outcomes (effects). For instance, reducing the length of time a migrant is detained is a factor that might reduce the costs associated with detention.

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- Compliance with relevant migration procedures
- Respect for fundamental rights
- The cost-effectiveness *ratio*?
- Which factors (e.g. personal characteristics such as gender, origin or age; design of the ATD) are found to increase the impact of detention or alternatives to detention?

3 OVERVIEW OF THE EU ACQUIS

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

The Reception Conditions Directive (recast)¹³ requires Member States to consider alternatives to detention before subjecting asylum seekers to detention. Recital 15 provides that "applicants [for international protection] may be detained only under very **clearly defined exceptional circumstances** laid down in the Directive and subject to the principles of **necessity** and **proportionality** concerning both to the manner and the purpose of such detention". Under this 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.¹⁴

The Reception Conditions Directive foresees a list of six grounds that may **justify the detention** of asylum seekers:

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 seeker'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 it 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.

Moreover, according to Article 18 of the Asylum Procedures Directive,¹⁵ it is not lawful to detain a person solely for the reason that s/he has lodged an asylum application.

To guarantee the **non-arbitrariness** of detention and the respect of fundamental rights of applicants for international protection, the the list above is exhaustive. (Article 8). Several procedural guarantees were also put in place, such as the principles of brevity, due diligence and judicial review (Article 9). Further, the recast of the Directive regulates the conditions in detention facilities, such as access to fresh air and communication with lawyers, NGOs and family members (Article 10). Furthermore, according to the Dublin Regulation (Article 28),¹⁶ "when there is a significant risk of absconding, Member States may detain the person concerned to secure transfer procedures following this Regulation, based on an individual assessment and

¹³ 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

¹⁴ Article 8(2) of the Reception conditions directive (recast)

¹⁵ COUNCIL DIRECTIVE 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status and its recast 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

¹⁶ Regulation (EU) No 604/2013 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.

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only in so far as detention is proportional and other less coercive alternative measures cannot be applied effectively."

Detention and alternatives to detention in the context of return proceedings

The Return Directive¹⁷ allows Member States to detain a migrant only to **prepare his/her return** and/or carry out the **removal process** if the application of less coercive measures is not sufficient. Article 15(4) specifies that detention is only justified as long as there is a **reasonable prospect for removal**. Furthermore, according to Article 15(5), 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 difficulties in obtaining documents from a third country.

Recital 16 of the Return Directive 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".¹⁸

However, the Return Directive does not impose explicitly Member States to establish national rules concerning alternative schemes, nor does it provide a list of examples of such alternative measures. Nevertheless, Article 7, within the context of voluntary return, 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, a deposit of a financial guarantee, submission of documents or the obligation to stay at a specific place. However, these measures cannot be considered alternatives to detention as there is no ground for detention within the context of voluntary return.

4 RELEVANT CASE LAW FROM THE COURT OF JUSTICE OF THE EU AND ECHR

Obligation to consider alternatives to detention

Given the fact that the detention is an exceptional measure of last resort, States have to examine first alternative measures and resort to detention only if such alternatives are considered as not adequate to achieve the result pursued. The legal obligation to consider alternatives to detention has also been reaffirmed by the Court of Justice of the European Union (CJEU). Specifically, in the case of *El Dridi* the Court stated that removal should be carried out using a gradation of measures which goes from the measure which allows the person concerned the most liberty, namely granting a period for his voluntary departure, to measures which restrict that liberty the most, namely detention in a specialised facility. Only if, in the light of an assessment of each specific situation, the enforcement of the return decision risks being compromised by the conduct of the person concerned, Member States may deprive that person of his/her liberty and detain him/her.

Risk of absconding

Case C-528/15 *Al Chodor* relates to the interpretation of Article 28 of the Dublin III Regulation on the conditions of the detention of asylum seekers pending a transfer to another Member State. The Court affirmed that, some of the provisions of this Regulation necessitate the adoption of measures by national authorities for their implementation. In that sense, Article 2(n) of the Dublin III Regulation requires the criteria to establish a 'risk of absconding' to be 'defined by law'. The CJEU concluded that Article 2(n) and Article 28(2) of the Dublin III Regulation must be interpreted as requiring Member States to establish, in a binding provision of general application, **objective criteria** underlying the reasons for believing that an applicant who is subject to a transfer procedure may abscond. In the absence of that, Article 28(2) is inapplicable, and detention on this ground is unlawful. The Court also noted that the meaning of Article 6 of

¹⁷ 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.

¹⁸ C-61/11 relates to the interpretation of Articles 15 and 16 of Directive 2008/115. The court specifically concluded that such Articles must be interpreted as precluding a Member State's legislation which provides for a sentence of imprisonment to be imposed on an illegally staying third-country national on the sole ground that he remains, without valid grounds, on the territory of that State, contrary to an order to leave that territory within a given period.

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the Charter of Fundamental Rights should be defined in light of the established case-law of the ECtHR, which requires any measure on deprivation of liberty to be accessible, precise and foreseeable.

5 RELEVANT SOURCES AND LITERATURE

EMN Studies and Ad-hoc Queries

- EMN synthesis report of the EMN study "The Use of Detention and Alternatives to Detention in the Context of Immigration Policies", 2014
- EMN synthesis report on the EMN study "The effectiveness of Return in EU Member States", 2017
- EMN Ad-Hoc Query on Asylum Proceedings and Detention, Requested by HU EMN NCP on 31 July 2012
- EMN Ad-Hoc Query on detention of asylum seekers, Requested by HU EMN NCP on 30 January 2013.
- EMN Ad-Hoc Query on detention and removal of minors Compilation produced on 19 January 2015
- EMN Ad-Hoc Query on detention and material detention conditions Requested by FR EMN NCP on 21 February 2018
- The AHQ 2020.59 on detention of minors requested by BE EMN NCP on 26 August 2020

Other relevant sources

- British Institute of International and Comparative Law, "Immigration Detention and the Rule of Law: Safeguarding Principles", 2013
- Council of Europe, Twenty Guidelines on Forced Return, 2005
- Council of Europe, "Legal and practical aspects of effective alternatives to detention in the context of migration", 2017
- Council of Europe, "Practical Guidance on Alternatives to Immigration Detention: Fostering Effective Results", 2019
- Council of Europe, European Commission and the European Migration Network, conclusion from the Conference "Effective Alternatives to the Detention of Migrants", April 2019
- European Asylum Support Office (EASO), Detention of applicants for international protection in the context of the Common European Asylum System, 2019
- European Commission, Return Handbook, C(2017) 6505, 2017
- European Law Institute, Detention of Asylum Seekers and Irregular Migrants and the Rule of Law: Checklists and European Standards, 2017.
- European Union Agency for Fundamental Rights, Detention of third-country nationals in return procedures, 2013
- European Union Agency for Fundamental Rights, Alternatives to detention for asylum seekers and people in return procedures, 2015
- Odysseus Academic Network, Alternatives to Immigration and Asylum Detention in the EU: Time for Implementation, 2015.
- UNHCR and the Office of the High Commissioner for Human Rights (OHCHR), Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons: Summary Conclusions, 2011.
- UNHCR, Option Paper no 1: Options for governments on care arrangements and alternatives to detention for children and families, 2015.
- UNHCR, Compilation of International Human Rights Law and Standards on Immigration Detention, 2018

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- UNHCR, Beyond Detention - A Global Strategy to support governments to end the detention of asylum-seekers and refugees – 2014-2019, 2019

6 DEFINITIONS

The following key terms are used in the Common Template. The definitions are taken from the EMN Glossary v6.0¹⁹ 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' refers to non-custodial measures used to monitor and/or limit the movement of third-country nationals in advance of forced return or deciding on the individual's right to remain in the Member State, such as regular reporting, the surrender of a financial guarantee or travel documents, electronic monitoring. In the EU context, pursuant Art. 2(h) of Directive 2013/33/EU (Recast Reception Conditions Directive) and Art. 26 of Directive 2013/32/EU (Recast Asylum Procedures Directive), detention is defined as confinement (i.e. deprivation of liberty) of an applicant for international protection by a Member State within a particular place, where the applicant is deprived of their personal liberty.

'Applicant for international protection' is defined as third-country national or a stateless person who has made an application for international protection in respect of which a final decision has not yet been 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 defined as 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' is defined as a non-punitive administrative measure ordered by an administrative or judicial authority(ies) in order to restrict the liberty of a person through confinement so that another procedure may be implemented (Source: EMN Glossary 3.0).²⁰

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

'Dublin procedure' is defined as 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. (Source: Article 1 of the Regulation 604/2013).

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

¹⁹ Available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/docs/interactive_glossary_6.0_final_version.pdf

²⁰ For the purpose of this study, the criminal detention, which is the deprivation of liberty which applies to a citizen or non-citizen due to criminal charges or convictions, is excluded. The administrative detention which is here considered is an administrative or civil decision taken by (usually) immigration authorities that operates separately to the powers given to the police and criminal courts.

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'Examination of an application for international protection': 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' in the global context refers to compulsory return of an individual to the country of origin, transit or third country (i.e. country of return), based on an administrative or judicial act. In the EU context, refers to the process of going back – whether in voluntary or enforced compliance with an obligation to return to: one's country of origin; or a country of transit in accordance with EU 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 they will be accepted.

'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 without any conditions.

'International protection' is defined in the global context as "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, 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.

'Procedure for international protection': Set of measures described in the Directive 2013/32/EU (Recast Asylum Procedures Directive) which encompasses all necessary steps for granting and withdrawing international protection starting with making an application for international protection to the final decision in appeals procedures.

'Return' is the movement of a person going from a host country back to a country of origin, country of nationality or habitual residence usually after spending a significant period of time in the host country whether voluntary or forced, assisted or spontaneous.

'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, based on the free will of the returnee.

7 ADVISORY GROUP

An 'Advisory Group' (AG) has been established within the context of this Study for the purpose of (i) developing the (common) specifications for the study, (ii) providing support to EMN NCPs during the development of the national contributions to the Study, as well as (iii) providing support to the drafting of the Synthesis Report. In addition to COM (DG HOME) and the EMN Service Provider (ICF-Odyssseus), the members of the AG for the Study include EMN NCPs from BE, DE, FR, EE, LU, LT, LV, PL, SE, SI.

Advisory Group

- COM (Alexander Smits, DG HOME)
- COM (Ioana Pellin, DG HOME)
- COM (Martina Belmonte, DG JRC)

Detention and alternatives to detention in international protection and return procedures

- COM (Simon McMahon, DG JRC)
- FRA (Julia Behrens)
- BE NCP (Isabelle Raes)
- DE NCP (Friederike Haberstroh, and Janne Grote)
- FR NCP (Anne-Cécile Jarasse, and Christelle Caporali-Petit)
- EE NCP
- LU NCP (Adolfo Sommaribas)
- LT NCP
- LV NCP
- PL NCP (Joanna Sosnowska)
- SE NCP – AG lead (Marie Bengtsson)
- SI NCP (Luka Žigante)
- Odysseus network expert (Lilian Tsourdi, Philippe DE BRUYCKER)
- IC/ EMN Service Provider (Sara Bagnato, Roberta Vasile, Martina Griffo)

8 TIMETABLE

The following timetable is proposed for the next steps of the Study:

| Date | Action |
|-----------------------------|---|
| Study specifications | |
| 27 February | First AG meeting |
| 20 April | Circulation of the first draft to the AG |
| w/c 5 October | Circulation of the second draft to the AG (one-week deadline for review) |
| 12 October 2020 | Second AG meeting |
| w/c 22 October | Circulation of the third draft to NCPs (two weeks deadline for review) |
| w/c 4 January 2021 | Launch of the study |
| Synthesis report | |
| 5 April 2021 | <u>Submission of national reports</u> by EMN NCPs |
| 7 May 2021 | First synthesis report (SR) to COM & AG members (1 week to provide comments) |
| 14 May | Deadline for comments (1 week to address comment and finalise) |
| 28 May | Circulation of the first SR to all NCPs (2 weeks to comment) |
| 14 June | Deadline for comments |
| 28 June | Circulation of the second draft to all NCPs (2 weeks to comment) |
| 12 July | Deadline for comments |
| 26 July | Circulation of the third (final) draft to all NCPs (2 weeks to comment) |

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| Date | Action |
|--|---|
| 9 August (tbc, depending on holidays period) | Deadline for comments |
| 4 September | Finalisation of the synthesis report, publication and dissemination |

9 TEMPLATE FOR NATIONAL CONTRIBUTIONS

The template provided below outlines the information that should be included in the National Contributions of EMN NCPs and Norway to this Study. The indicative number of pages to be covered by each section is provided in the guidance note. For national reports, the total number of pages should ideally not exceed **50 pages** (excluding the Annex). A limit of **25 pages** (excluding the Annex) will also apply to the synthesis report, in order to ensure that it remains concise and accessible.

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Common Template of EMN Study 2020**National Contribution from [Spain]**

Disclaimer: The following information has been provided primarily for the purpose of contributing to a synthesis report for this EMN study. The EMN NCP has provided information that is, to the best of its knowledge, up-to-date, objective and reliable within the context and confines of this study. The information may thus not provide a complete description and may not represent the entirety of the official policy of the EMN NCPs' Member State.

Top-line factsheet [max. 2 pages]

The top-line factsheet will serve as an overview of the **national reports** introducing the study and drawing out key facts and figures from across all sections, with a particular emphasis on elements that will be of relevance to (national) policy-makers.

Please provide a concise summary of the main findings of Sections 1-4:

Asylum seekers are not placed in detention simply because they are asylum seekers. Hence, our legislative framework does not provide for alternative measures to detention for asylum applicants either.

However, there are asylum seekers who are detained or deprived of freedom of movement when they make, register or formalise their application for international protection. Moreover, they continue to be so while their application is examined for reasons other than the good end of the asylum procedure. This happens when applicants without valid travel documents apply for asylum at a border post, where they are not allowed to enter the country and, at airports and ports, kept at closed premises until their application is decided upon. Asylum seekers are also confined during the examination of their application if they file it after their internment in an immigration detention centre to secure their removal of the country. In both cases, a border procedure is applied so that the decision on their application can be taken swiftly.

In Spain, the alternatives to detention in **return procedures** are:

- Regular reporting.
- Residence at a certain place.
- Submission of passport or other identity documents.
- Arrest (maximum 72 hours) prior to detention, at police premises.
- Any other measure the judge deems adequate and sufficient.

Out of these, regular reporting and submission of passport or other identity documents are the most commonly used measures, although no statistics are available. Non-compliance with them may be interpreted as a clear indicator of risk of absconding, and justify detention when newly apprehended.

The average duration of detention is between 20 and 30 days, out of a maximum of 60 days established by law.

Arrest at police premises, much more widely available than detention centres, is often a good option to enforce return when someone is apprehended for whom a return decision has already been issued.

While alternatives to detention are ordered by the case manager, detention is ordered by a judge. Vulnerable people are not placed in detention; this needs a case by case assessment.

Detention and alternatives to detention in international protection and return procedures

Effectiveness of detention is on the increase and lies now well above 50%. No data are available for alternatives, although experience shows that they only work with returnees with a minimum level of cooperation.

Section 1: National policy and legal framework: development since 2015²¹

This section aims at providing an update about the legal and policy framework on detention and the use of alternatives to detention since 2015 and until December 2020. Questions from 1 to 4 relate to both migration procedures, namely asylum and return procedures. As such, it gives an overview of the main legal and policy changes since 2015 and until Decemberr 2020, as well as an overview of the categories of third-country nationals that can be placed in detention in Member States and Norway according to national law and practice.

Q1. Please report any changes on the legal and policy framework on detention concerning both international protection and return procedures since 2015.

Please provide a short description of national provisions, grounds for detention or different typologies of detention, from 2015 onwards and the rationale for any changes introduced. Please elaborate on any type of detention available to specific groups e.g. women or families.

There has not been any new developments in the asylum legislation in Spain since 2015. The situation as far as detention or alternatives to detention remains as described the “top-line factsheet” above.

No changes have happened since 2015 for return related detention.

Detention is allowed for up to 60 days and must be ordered by a judge. Minors can, according to the law, also be kept in detention centres as part of the family unit, but this possibility is not being used in practice.

Q2. Please report on any legal and policy changes regarding the use of alternatives to detention concerning both international protection and return procedures since the last EMN study on detention and alternatives to detention (2014)

No changes since 2014.

Q3. Please complete the table below with regard to the categories of third-country nationals that can be detained in your (Member) State. You can refer to the same information reported in the 2014 EMN study on Detention and Alternatives. Please highlight any changes since then.

Note: Children and other vulnerable groups are not included in this table as they are a cross-cutting category; instead, they are dealt with in a separate question (Q5) after the table.

Table 1. Categories of third-country nationals that can be detained

²¹ The latest EMN study on detention and alternatives to detention was published in 2014, therefore the study will cover the period between 2015-2020. https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/emn_study_detention_alternatives_to_detention_synthesis_report_en.pdf

Detention and alternatives to detention in international protection and return procedures

| | Categories of third-country nationals | Can third-country nationals under this category be detained? Yes/No | If yes, what is the legal basis for detention? <i>List the ground for detention</i> | Which alternatives to detention are available for this category? <i>List in bullet point the alternatives to detention available for each category. Further details on each measure will be collected in section 2.</i> | What are the (judicial and non-judicial) authorities involved in the decision about placing the person in detention or instead using an alternative to detention? |
|---------------------------------|---|--|--|---|---|
| <i>International Protection</i> | Applicants for international protection in ordinary procedures | No | | | |
| | Applicants for international protection in border procedures | No (they are already detained) | | | |
| <i>Return procedures</i> | Irregular migrants detected in the territory | Yes | Alien Law (Organic Law 4/2000 on the rights and freedoms of aliens and their social integration) | <ul style="list-style-type: none"> - Regular reporting. - Residence at a certain place. - Submission of passport or other identity documents. - Arrest (maximum 72 hours) prior to detention. At police premises. - Any other measure the judge deems adequate and sufficient. | The investigating judge decides on detention. Alternatives can be imposed also by the case manager (a police officer) |
| | Persons who have been issued a return decision | Yes | Idem | Idem | Idem |
| | Irregular migrants detected at the border | Yes | Idem | Idem | Idem |

Q4. Is it possible, within the national legal framework of your (Member) State, to detain (or to impose an alternative to detention to) persons belonging to **vulnerable groups**, including minors, families with children, pregnant women or persons with special needs? Please indicate whether persons belonging to these vulnerable groups are exempt from detention, or whether they can be detained in certain circumstances.

Detention and alternatives to detention in international protection and return procedures

Yes/ No

If yes, under which conditions can vulnerable persons be detained?

| | International protection procedures <i>Please indicate if the persons belonging to these vulnerable groups can be detained and under which circumstances. Please also indicate whether alternatives to detention are provided</i> | Return procedures <i>Please indicate here if the persons belonging to these vulnerable groups can be detained and under which circumstances. Please also indicate whether alternatives to detention are provided</i> |
|---|---|--|
| Unaccompanied Minors | No | No. They are hosted in public minor protection entites. |
| Disabled people | No | The individual case is assessed. |
| Elderly people | No | The individual case is assessed. |
| Families with children and single parents with minor | No | Yes (not used in practice). |
| Persons with serious illnesses and persons with mental disorders | No | Resulting from the individual assessment, they would not be detained. |
| victims of human trafficking | No | In principle, they are referred to the appropriate institutions. |
| Pregnant women | No | The individual case is assessed. |
| Other vulnerable persons | No | The individual case is assessed. |
| | | |

Section 2: Availability and practical organisation of alternatives to detention

This section explores the availability of different types of alternatives to detention for different categories of third-country nationals. For each, it explores the practical organisation of the alternative, including information on the authorities/organisations responsible for managing the implementation of the alternatives; the conditions that must be met by the third-country national to benefit from an alternative to detention; and information on the mechanisms in place in order to monitor the third-country national's compliance with these conditions.

EMN NCPs are further requested to provide information on the challenges associated with the implementation of the alternatives, and any examples of good practice in their (Member) State that they may wish to share.

Q5. Please indicate whether any **alternatives to detention for third-country nationals are available in your (Member) State** and provide information on the practical organisation of each alternative (including any mechanisms that exist to monitor compliance with/progress of the alternative to detention) by completing the table below.

The answer as regards international protection is “No”, according to the “top-line factsheet”. Nonetheless, the applicant must communicate an address to competent authorities and any change thereof in order to facilitate communication with him or her during the process and notification of its final decision.

Table 2. 1 Available alternatives to detention for third-country nationals

| | Alternatives to detention | Yes/No |
|----|--|--------|
| A1 | Reporting obligations (e.g. reporting to the police or immigration authorities at regular intervals) <i>Please provide information on how often and to which authority persons subject to this measure should report</i> Reporting before the competent authority (National Police). The periodicity is decided by the case manager. | Yes |
| A2 | Obligation to surrender a passport, travel document or identity document | Yes |
| A3 | Requirement to communicate the address to authorities (including requesting permission for absences/changing the address) | No |
| A4 | Requirement to reside at a designated place (e.g. a facility or specific region). Please specify if you also consider house arrest as an ATD. House arrest would not be included. | Yes |
| A5 | Release on bail (with or without sureties) <i>Please provide information on how the amount is determined; whether this can be paid by a third person/entity r (e.g. family member, NGO or community group); and at what point the money is returned</i> | No |
| A6 | Electronic monitoring (e.g. tagging) | No |

Detention and alternatives to detention in international protection and return procedures

| | | |
|-----|--|-----|
| A7 | Release to a guardian/guarantor Please provide information on who could be appointed as a guarantor/guardian (e.g. family member, NGO or community group) | |
| A8 | Release to care worker or under a care plan | No |
| A9 | Community management programme (i.e. programmes where individuals live independently in the community and are attached to a case manager) or Case management- based programme (where participants are provided with individualised tailored support) | No |
| A10 | | |
| | Other alternative measure available in your (Member) State. Please specify. The judge, according to the law, can impose any other measure considered adequate and sufficient. | Yes |

Q5.1 Amongst the alternatives above indicated, please could you indicate which ones (amongst those defined by law) are the **most used and why**? Please indicate as relevant the specific time frame

The most used alternatives are regular reporting and submission of travel and identity documents, since they prevent travel abroad and are easy to control.

Q5.2 Please briefly describe each of the alternatives indicated above. Copy paste the table below as many times as necessary.

Table 2.2 Description of available alternatives to detention for third-country nationals

| Name of alternatives (as reported in table 2 above) Regular reporting | |
|--|---|
| <i>In what it consists, and maximum duration</i> | Appearing at a certain/ any police office at regular intervals to be established. |
| <i>Legal basis (law, soft law, other guidance). Please provide reference to the original sources</i> | Alien Law. |
| <i>Is it used in practice? Please provide any available data for the period 2016-2020</i> | Yes. No statistics are available. |
| <i>National authorities responsible to administer the alternative</i> | National Police. |
| <i>Any partner involved (i.e. NGO, social services, private entities, other governmental actors, etc.)</i> | No. |
| <i>Obligations attached to the granting of the alternative (if relevant)</i> | |

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| | |
|---|--|
| | |
| <i>Consequences of non-compliance with the alternative (i.e. does non-compliance with an ATD automatically leads to detention, or is this determined on a case-by-case basis?)</i> | If not complied with, this is a clear proof of risk of absconding. Consequently, if the person is found again, there are reasons to apply detention. |
| <i>Mechanisms in place in order to monitor the third-country national's compliance with these conditions (if relevant)</i> | |
| <i>Mechanisms in place in order to monitor the conditions of the alternative and the treatment of third-country nationals.</i> | |
| <i>Was an evaluation conducted (at the national level) to assess the effectiveness of this alternatives to detention? Provide any available online sources/ references/ available information. Please specify how "effectiveness" was defined/which aspects were assessed</i> | No evaluation has been conducted at national level of the effectiveness of alternatives to detention. |

| Name of alternatives (as reported in table 2 above) Residence at a certain place | |
|--|------------------------------|
| <i>In what it consists, and maximum duration</i> | This "place" is not defined. |
| <i>Legal basis (law, soft law, other guidance). Please provide reference to the original sources</i> | Alien Law. |
| <i>Is it used in practice? Please provide any available data for the period 2015-2020</i> | No. |
| <i>National authorities responsible to administer the alternative</i> | National Police. |
| <i>Any partner involved (i.e. NGO, social services, private entities, other governmental actors, etc.)</i> | No. |
| <i>Obligations attached to the granting of the alternative (if relevant)</i> | |
| <i>Consequences of non-compliance with the alternative (i.e. does non-compliance with an ATD automatically</i> | |

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| | |
|---|--|
| <i>leads to detention, or is this determined on a case-by-case basis?)</i> | |
| <i>Mechanisms in place in order to monitor the third-country national's compliance with these conditions (if relevant)</i> | |
| <i>Mechanisms in place in order to monitor the conditions of the alternative and the treatment of third-country nationals.</i> | |
| <i>Was an evaluation conducted (at the national level) to assess the effectiveness of this alternatives to detention? Provide any available online sources/ references/ available information. Please specify how "effectiveness" was defined/which aspects were assessed</i> | |

| Name of alternatives (as reported in table 2 above) Submission of travel or identity documents | |
|--|--|
| <i>In what it consists, and maximum duration</i> | These documents are kept at the police station and a certificate is given to the person. |
| <i>Legal basis (law, soft law, other guidance). Please provide reference to the original sources</i> | Alien Law. |
| <i>Is it used in practice? Please provide any available data for the period 2015-2020</i> | Yes. No data available. |
| <i>National authorities responsible to administer the alternative</i> | National Police. |
| <i>Any partner involved (i.e. NGO, social services, private entities, other governmental actors, etc.)</i> | No. |
| <i>Obligations attached to the granting of the alternative (if relevant)</i> | |
| <i>Consequences of non-compliance with the alternative (i.e. does non-compliance with an ATD automatically leads to detention, or is this determined on a case-by-case basis?)</i> | |

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| | |
|---|--|
| | |
| <i>Mechanisms in place in order to monitor the third-country national's compliance with these conditions (if relevant)</i> | |
| <i>Mechanisms in place in order to monitor the conditions of the alternative and the treatment of third-country nationals.</i> | |
| <i>Was an evaluation conducted (at the national level) to assess the effectiveness of this alternatives to detention? Provide any available online sources/ references/ available information. Please specify how "effectiveness" was defined/which aspects were assessed</i> | |

| Name of alternatives (as reported in table 2 above) Arrest at police premises | |
|--|--|
| <i>In what it consists, and maximum duration</i> | Arrest at police premises for a maximum of 72 hours. Police premises are available at a larger variety of places than detention centres. They can be used if the return order has already been issued and only needs to be notified, and if the removal can be organized in that short period of time. |
| <i>Legal basis (law, soft law, other guidance). Please provide reference to the original sources</i> | Alien Law. |
| <i>Is it used in practice? Please provide any available data for the period 2015-2020</i> | Yes. |
| <i>National authorities responsible to administer the alternative</i> | National Police. |
| <i>Any partner involved (i.e. NGO, social services, private entities, other governmental actors, etc.)</i> | No. |
| <i>Obligations attached to the granting of the alternative (if relevant)</i> | |
| <i>Consequences of non-compliance with the alternative (i.e. does non-compliance with an ATD automatically leads to detention, or is this determined on a case-by-case basis?)</i> | |

Detention and alternatives to detention in international protection and return procedures

| | |
|---|---|
| | |
| <i>Mechanisms in place in order to monitor the third-country national's compliance with these conditions (if relevant)</i> | |
| <i>Mechanisms in place in order to monitor the conditions of the alternative and the treatment of third-country nationals.</i> | Judge, Public Prosecutor, Ombudsperson. |
| <i>Was an evaluation conducted (at the national level) to assess the effectiveness of this alternatives to detention? Provide any available online sources/ references/ available information. Please specify how "effectiveness" was defined/which aspects were assessed</i> | |

Q6. Please identify any **practical challenges associated with the implementation of each alternative** to detention available in your (Member) State, based on existing studies or evaluations or information received from competent authorities, specifically in relation to (add more column as needed). Please elaborate your answer by providing a short description. Please cover here the same alternatives reported in Q8.

| Challenge | Regular reporting | Residence at a certain place | Submission of documents | Arrest |
|--|-----------------------------|--|-------------------------|--------|
| Availability of facilities related to accommodation (i.e. beds) | No | No | No | Yes |
| Availability of staffing and supervision | No | No | No | Yes |
| Administrative costs | No | No | No | Yes |
| Mechanisms to control movements of the person | No | No | No | Yes |
| Legislative obstacles | No | Yes. Although foreseen by law how tight restrictions can be i uncertain. | No | Yes |
| Aspects related to the situation of third-country nationals (e.g. limited financial resources, no stable address or community support) | Yes. Non compliance i easy. | Yes. Non compliance is easy. | No | No |
| Other challenges | | | | |

Detention and alternatives to detention in international protection and return procedures

Q7. Please identify any **practical advantage associated with the implementation of each alternative** to detention available in your (Member) State in comparison with detention, based on existing studies or evaluations or information received from competent authorities specifically in relation to (add more column as needed). Please elaborate your answer by providing a short description. Please cover here the same alternatives reported in Q7:

| Advantage | Regular reporting | Residence at a certain place | Submission of documents | Arrest |
|--|--|------------------------------|-------------------------|---|
| Availability of facilities related to accommodation (i.e. beds) | Not needed | Not needed | Not needed | Available at police stations, but capacity is limited |
| Availability of staffing and supervision | Yes (but if massivel used it could be a challenge) | Not used | Yes | Yes |
| Administrative costs | Yes: they are low | | Yes: they are low | High, but effective |
| Mechanisms to control movements of the person | Not needed | | Not needed | Needed |
| Legislative obstacles | | | | |
| Aspects related to the situation of third-country nationals (e.g. limited financial resources, no stable address or communi support) | | | | |
| Other advantages | | | | |

Section 3: Assessment procedures and criteria used for the placement of third-country nationals in detention or alternatives to detention

This section examines the assessment procedures and criteria/benchmarks that are used by Member States and Norway in order to decide whether placing the third country national in detention or to instead use an alternative. The section will also explore how authorities decide which alternative to detention is most suitable to an individual case.

The section starts from the assumption that the grounds for detention exists and does not specifically analyse how the existence of such grounds are assessed.

The section begins with an overview of the steps taken to decide to use an alternative instead of placing the individual in detention. Questions then explore the timing of this assessment, whether an individual assessment is conducted, which authorities are involved in the assessment procedure and which criteria are used to determine whether to use detention or an alternative.

Detention and alternatives to detention in international protection and return procedures

The session will assess how vulnerability factors are assessed when taking a decision for detention and when making an assessment to opt for detention or an alternative.

Q8. Please provide an **overview of when and how the decision** about placing a person in an alternative instead of in detention is made. Please respond considering the following elements

- i. Is the assessment between detention or alternatives to detention made at the same time as when the grounds for detention are considered or at a different time?
- ii. In what circumstances are the grounds for detention rejected in favour of an alternative to detention?
- iii. Does the procedure vary depending on the categories of third country nationals or their country of origin (e.g. because of the specific situation in the country)?
- iv. Which authorities are involved in the procedure, please specify the respective role (i.e. consultative, decision maker)?

International protection procedure

As said in the “top-line factsheet”, our legislative framework does not provide for alternative measures to detention for asylum applicants. However, there are asylum seekers who are detained or deprived of freedom of movement when they make, register or formalise their application for international protection. Moreover, they continue to be so while their application is examined for reasons other than the good end of the asylum procedure. This happens when applicants without valid travel documents apply for asylum at a border post, where they are not allowed to enter the country and, at airports and ports, kept at closed premises until their application is decided upon. Asylum seekers are also confined during the examination of their application if they file it after their internment in an immigration detention centre to secure their removal of the country. In both cases, a border procedure is applied so that the decision on their application can be taken swiftly.

Return procedure

- i. *Is the assessment between detention or alternatives to detention made at the same time as when the grounds for detention are considered or at a different time?* Resorting to alternatives or requesting detention from the judge takes place after opening the administrative return procedure.
- ii. *In what circumstances are the grounds for detention rejected in favour of an alternative to detention?* Insufficient detention capacity, reduced prospect of removal, vulnerable persons.
- iii. *Does the procedure vary depending on the categories of third country nationals or their country of origin (e.g. because of the specific situation in the country)?* No.
- iv. *Which authorities are involved in the procedure, please specify the respective role (i.e. consultative, decision maker)?* The case manager (a National Police officer) decides whether to apply alternatives to detention or request detention from the judge).

NOTE: Arrest takes place from the first moment and is replaced by other measures if removal cannot take place within 72 hours.

Other (if indicated on Table I)

Q9. Is the possibility to provide alternatives to detention **systematically considered** in your (Member) State when assessing whether to place a person in detention? Please respond separately for international protection and return procedures.

Detention and alternatives to detention in international protection and return procedures

| |
|---|
| <p><u>International protection procedures:</u></p> <p>See previous answer</p> <p>Yes/No</p> <p>Details:</p> <p><u>Return procedures:</u></p> <p>Yes/No</p> <p>Details: First arrest/detention are considered, since they are the only effective measures. Only afterwards are other alternatives taken into consideration, except for vulnerable persons.</p> |
|---|

Q10. When there are grounds for authorising detention, which **considerations or criteria** are used to decide whether to place the third-country national concerned in detention or instead provide an alternative?

Please, refer to our “top-line factsheet” for international protection.

| Criteria | International protection procedures | Return procedures |
|---|---|---|
| Suitability of the alternative to the needs of the individual case | Yes/No, further explain | Yes/No further explain |
| Cost-effectiveness | Yes/No further explain | Yes/No further explain |
| Nationality or Country of origin/ return (e.g. considerations on the specific situation in the country of origin) | Yes/No further explain | Yes/No further explain |
| Level of the risk of absconding | Yes/No further explain how this is assessed | Yes/No further explain how this is assessed |
| Vulnerability | Yes/No further explain | Yes/No further explain |
| Less-invasive legal measures impacting on human rights | Yes/No further explain | Yes/No further explain |

Detention and alternatives to detention in international protection and return procedures

| Criteria | International protection procedures | Return procedures |
|----------|--|--|
| Other | Yes/No further explain Details: | Yes/No further explain Details: |

- Q.10.1. If **vulnerability** is one of the criteria used to assess whether placing the person under an alternative instead of detention, please **describe how the vulnerability assessment is made** (e.g., the responsible authority and the procedures followed). Please respond separately for international protection and return procedures.

Elements of vulnerability considered (unaccompanied minors, families with children, pregnant women and persons with special needs, victims of violence etc)

- Are vulnerability assessments conducted on a case-by-case basis, or is the assessment based on pre-defined categories/groups?
- Authorities / organisation conduct the assessment?
- Procedures followed

International protection procedures

See answer to question 8.

Return procedures

Elements of vulnerability considered (unaccompanied minors, families with children, pregnant women and persons with special needs, victims of violence etc): older age, pregnancy, physical and mental health, victims.

- Are vulnerability assessments conducted on a case-by-case basis, or is the assessment based on pre-defined categories/groups?* Case by case.
- Authorities / organisation conduct the assessment?* National Police, with the assessment of the relevant services and institutions.
- Procedures followed:* all the relevant information (police reports, medical reports, assessments by other institutions) is taken into consideration. If circumstances change or new information appears at a later stage, decisions may be reverted.

Q11. Which **legal remedies** are available to the third-country national against a decision to opt for detention /instead of an alternative to detention? Please describe. Please respond separately for international protection and return procedures.

International protection procedures:

Detention and alternatives to detention in international protection and return procedures

Guarantees for the asylum seeker are reinforced in border procedures, decisions have to be taken in a few days and in complex cases, the application is deferred for further examination and the applicant set free.

Return procedures: Detention is decided by a judge and can be appealed against in the judicial system.

Q12. What **support (legal, social, psychological)** is available for migrants during the period when a decision is made about placing the individual in detention or to use an alternative to detention?

International protection procedures:

See answer to question 8.

Return procedures: Free legal assistance and interpretation are provided from the beginning. Medical assistance is available for any arrested person. At detention centres, legal, social and psychological assistance are provided.

Section 4: Impact of detention and alternatives to detention on the effectiveness of return and international protection procedures

This section aims at comparing the different impact of detention and alternatives to detention on the effectiveness of international protection and return procedures.

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

Whilst an attempt is made to compare the impact of detention and alternatives to detention on each of these aspects of effectiveness, it is recognised that the type of individuals placed in detention and in alternatives to detention (and their corresponding circumstances) are likely to differ significantly and therefore the comparisons made need to be treated cautiously.

Ensuring compliance with migration procedures

Note: If it is possible please provide separately data related to international protection (Q13, Q14) and for return (Q14, Q16) procedures. If this is not possible, please clarify and respond to Q16 and Q17 covering both procedures.

Q13. Please provide **statistics** available in your country for the latest available year on the **number of asylum seekers** that were placed in detention and in alternatives to detention during the international protection procedures **who absconded**.

If possible, distinguish between the different types of alternatives to detention that are available in your country (add more rows as needed).

Detention and alternatives to detention in international protection and return procedures

| Flow number of third-country nationals in detention or in alternatives to detention in the context of international protection procedures who absconded during the year. Data expressed in absolute figures. Reference years: 2017, 2018, 2019 (Please provide data for each year) | | |
|--|--|-------------------------------|
| | # People in international protection procedures (including Dublin) | # of applicants who absconded |
| Detention (Absolute figures) | | |
| Alternatives to detention 1 (NAME) | | |
| Alternatives to detention 2 (NAME) | | |
| Alternatives to detention 3 (NAME) | | |
| Alternatives to detention 4 (NAME) | | |

If you cannot provide statistics, do you have any other, even qualitative, information on the above (e.g. data on shares, information on possible trends, qualitative observations, etc.)?

| |
|--|
| |
|--|

Q14. Please provide any statistics available in your country on **the average length of time needed to determine the status of applicants for international protection** who are held in detention or are in an alternative to detention. Please also indicate the share of decisions which were appealed and the share of those which overturned the initial decision. Those MS who do not place asylum applicants in detention, shall indicate this at the beginning of the question and skip to the next question.

If the question refers to the length of time the Spanish Office of Asylum takes to grant or deny international protection to individuals placed in custody, that time is the maximum time Article 21 of Act 12/2009, of 30th October, regulating the status of asylum and subsidiary protection allows to adjudicate on applications made at airports, maritime ports and land borders as well as in immigration detention centres. This is 8 calendar days, and in certain circumstances (which rarely occur), 14 days, which is the duration of the border procedure.

If possible, distinguish between the different types of alternatives to detention that are available in your country (add more rows as needed)

| Average length of time needed to determine the status of applicants for international protection who where detained or in alternatives. Reference years: 2017, 2018, 2019 (Please provide data for each year) | | |
|---|---|--|
| | Average length of time in determining the status of an applicant for international protection | Share of decisions which were appealed and of these, the share which overturned the initial decision |
| Detention (Absolute figures) | | |
| Alternatives to detention 1 (NAME) | | |

Detention and alternatives to detention in international protection and return procedures

| | | |
|------------------------------------|--|--|
| Alternatives to detention 2 (NAME) | | |
| Alternatives to detention 3 (NAME) | | |
| Alternatives to detention 4 (NAME) | | |

If you cannot provide statistics, do you have any other, even qualitative, information on the above (e.g. data on shares, information on possible trends, qualitative observations, etc.)?

A fair amount of denials issued in border procedures are appealed. Most of them are upheld by courts. Faults in strictly applying formal procedures are the main reason for overturning decisions taken at first instance.

Q15. Please provide any statistics that may be available in your (Member) State about the number of **irregular migrants** including failed asylum seekers placed in detention and in alternatives to detention during the return procedure, **who absconded**.

If possible, distinguish between the different types of alternatives to detention that are available in your (Member) State.

Flow number of third-country nationals in detention or in alternatives in the context of return procedures who absconded. Data expressed in absolute figures per year. Data expressed in absolute figures. Reference years: 2017, 2018, 2019 (Please provide data for each year)

| | # of irregular migrants in return procedures (including pre-removal) | # who absconded before removal is implemented |
|------------------------------------|--|---|
| Detention (Absolute figures) | | |
| Alternatives to detention 1 (NAME) | | |
| Alternatives to detention 2 (NAME) | | |
| Alternatives to detention 3 (NAME) | | |
| Alternatives to detention 4 (NAME) | | |

If you cannot provide statistics, do you have any other, even qualitative, information on the above (e.g. data on shares, information on possible trends, qualitative observations, etc.)?

Absconding is only prevented with arrest or detention.

Q16. Please provide any statistics that might be available in your country on

- (i) the proportion of voluntary returns and

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- (ii) the success rate in the number of departures among persons that were placed in detention and in alternatives to detention.

If possible, distinguish between the different types of alternatives to detention that are available (add more rows as needed)

Average length of procedures to issue a return decision, and number of voluntary return among third country nationals placed in detention or alternatives. Reference years: 2017, 2018, 2019 (Please provide data for each year)

| | Average length of time from apprehending an irregular migrant to issuing a return decision | Average length of time from issuing a return decision to the execution of the return | Number of voluntary returns (persons who opted to return voluntarily) (absolute figures) | Number of effective forced departures (absolute figures) |
|------------------------------------|--|--|--|--|
| Detention (Absolute figures) | N/A | N/A | N/A | 2017: 36% 2018: 55,8% 2019: 59,8% |
| Alternatives to detention 1 (NAME) | | | | |
| Alternatives to detention 2 (NAME) | | | | |
| Alternatives to detention 3 (NAME) | | | | |
| Alternatives to detention 4 (NAME) | | | | |

If you cannot provide statistics, do you have any other, even qualitative, information on the above (e.g. data on shares, information on possible trends, qualitative observations, etc.)?

The figures above indicate the percentage of irregular migrants detained who were finally removed.

Q17. Have any **evaluations or studies on the rate of absconding and degree of cooperation** of third-country nationals in detention and in alternatives to detention been undertaken in your (Member) State? Please provide details and if possible, distinguish between the international protection and return procedures.

International protection procedures

Yes/**No**

Key findings

Reference

Return procedures

Detention and alternatives to detention in international protection and return procedures

Yes/No

Key findings

Reference

Q18. Is there any evidence, or empirical observation on **whether detention or alternatives to detention have a greater impact on migration procedures**, (e.g. whether they make return procedure more effective), **depending on certain characteristics of migrants** and specifically country of origin, nationality, family situation, gender, age.

Detention has a mixed impact on asylum procedures. On the one hand, it ensures notification of the final decision to the asylum seeker. On the other hand, it hampers free and trusted expression of reasons to ask for protection as well as the collection of evidence in support of the applicant's case. This is why guarantees for the asylum seeker are reinforced in border procedures (e.g. double administrative appeal mechanisms at the disposal of the applicant), decisions have to be taken in a few days and in complex cases, the application is deferred for further examination and the applicant set free.

Discuss separately for each available alternative to detention. If possible, provide examples and statistics.

Please discuss separately for international protection and return procedures

International protection

Detention:

Alternative 1:

Alternative 2:

Alternative 3:

...

Return procedures

Detention: Detention and arrest are the only reliable measures to ensure removal, especially for persons having just entered illegally.

Alternative 1: Regular reporting is only effective for persons willing to cooperate and, thus, complying with this obligation.

Alternative 2: Submission of travel or identity documents is not possible in the most uncooperative cases (they arrive without any documents).

Alternative 3:

.....

Upholding fundamental rights

Q19. What **human rights safeguards** are available in detention and in alternatives to detention?

Detention and alternatives to detention in international protection and return procedures

| Safeguards | Detention | Alternatives to detention | Comparison between safeguards provided in detention and in the alternatives to detention |
|--|---------------------|---------------------------|---|
| <p>Is access to legal aid ensured? If so, how? Please specify.</p> | <p>Details: Yes</p> | <p>Details: Yes</p> | <p>Free legal aid is available from the start in the framework of the administrative return procedure and is not conditioned by the measures imposed.</p> |
| <p>Is the right to be heard ensured during detention/alternatives to detention? If so, how? Please specify.</p> | <p>Details: Yes</p> | <p>Details: Yes</p> | <p>The right to be heard is available in the relevant stages of the administrative return procedure and is not conditioned by the measures imposed.</p> |
| <p>Is the right to health (e.g. access to facilities, monitoring of health and wellbeing of the person) ensured? If so, how? Please specify.</p> | <p>Details: Yes</p> | <p>Details: Yes</p> | <p>Any arrested person has the right to be examined by a doctor.</p> <p>At detention centres, a medical examination is included in the admission procedure, and medical assistance is available afterwards, if needed by taking the returnee to a specialist or to hospital.</p> <p>Any person, independently from the legal migration status, has the right to free medical assistance in Spain.</p> |
| <p>Please add any additional safeguard</p> | | | |

Detention and alternatives to detention in international protection and return procedures

Q20. Have **evaluations or studies** been conducted in your (Member) State on the impact of detention and alternatives to detention on the fundamental rights of the third-country nationals concerned (for example, with regard to the number of complaints of detainees or persons provided alternatives to detention, of mental and physical health)?

Yes/No

Key findings

Reference

Q21. Please provide any statistics available in your country on the **number of complaints regarding violations of human rights²²** and the number of court cases regarding fundamental rights violations in detention as opposed to alternatives to detention (please quote the relevant case law/decision). Please provide the statistics for 2019 or the latest year available and, if possible, distinguish between the different types of alternatives to detention that are available in your country.

International protection procedures

0.

Return procedures

For detention:

- Complaints (complaint forms) in 2019: 3.
- Court cases in 2019: 2.

For alternatives to detention: no information available.

Improving the cost-effectiveness of migration management.

Q22. Have any evaluations or studies in your (Member) State considered the **cost-effectiveness of using detention or alternatives to detention as part of the asylum procedure** (e.g. length of time to determine an international protection status and executing decisions, costs of procedures, etc)?

If Yes, please summarise the main findings here and include a reference to the evaluation or study in an annex to your national report.

Yes/No

Key findings

Reference

Q23. Have any evaluations or studies in your (Member) State considered **cost-effectiveness of using detention and alternatives to detention as part of the return procedures**. (e.g., the length of time that transpires from issuing a return decision to the execution of the removal, the share of voluntary

²² Please consider appeals to a judge but also to a specific administrative commission or ombudsman

Detention and alternatives to detention in international protection and return procedures

returns out of the total number of returns, the total number of removals completed, costs of procedures,)?

If Yes, please summarise the main findings here and include a reference to the evaluation or study in an annex to your national report

| |
|-------------------------------------|
| Yes/No Key findings Reference |
|-------------------------------------|

Conclusions

Please draft a short conclusion based on your responses to the template above, considering the following:

- i. To what extent are alternatives to detention applied in practice in your country?

Alternatives to detention are often applied, but the only effective measure is detention or arrest.

- ii. What are the challenges in the implementation and use of alternatives to detention?

Their limited effectiveness.

- iii. What are the concerns regarding the use of alternatives (if any) compared to detention in international protection and return procedures? In answering this question, please consider each aspect of effectiveness: 1) compliance with migration procedures including reduce the risk of absconding; 2) maximising cost-effectiveness; 3) ensuring respect for fundamental rights;

Risk of absconding is only effectively prevented with detention. Alternatives to detention only work with cooperative returnees. Fundamental rights are only affected, in any of the options, in proportion to the effectiveness sought, and this depends on the risk of absconding in the individual case and the attempts to hamper return.

- iv. What does evidence suggest about main factors identified which contributed to greater or reduced cost-effectiveness (e.g. personal characteristics of the third-country nationals affected, type of alternative provided, etc.)

Costs of detention are high, but results of alternative measures are so limited that their cost-effectiveness is much lower.

Statistical annex

Statistics from EU-harmonised sources, such as Eurostat and the EMN Annual Policy Report, on inter alia the outcome of international protection applications and return, including voluntary return will be used in the Synthesis Report to contextualise the statistics provided in this annex.

Table 1: Statistics on number of third-country nationals in detention and provided alternatives to detention per category

Please provide the cumulative figures (the number of all third-country nationals that have been detained during the year) or please use N/A if data is not available.

Please describe if you are counting persons or numbers of entries (if one person would be counted several times with multiple entries). We would prefer number of persons if both options are possible.

| | 2015 | 2016 | 2017 | 2018 | 2019 | 2020 | Source / further information |
|--|-------|-------|-------|-------|-------|-------|------------------------------|
| Statistics on number of third-country nationals in detention per category | | | | | | | |
| Total number of third-country nationals in detention | | | | | | | |
| Number of applicants for international protection in ordinary procedures in detention (including Dublin) | 0 | 0 | 0 | 0 | 0 | 0 | |
| Number of persons detained to prevent illegal entry at borders (at BCPs) | 5.587 | 6.712 | 7.074 | 7.672 | 8.651 | 3.190 | National Police |
| Number of person detained during return procedures (including pre-removal) | 6.930 | 7.597 | 8.237 | 7.855 | 6.473 | 2.224 | National Police |
| Number of vulnerable persons part of the aforementioned categories of third-country nationals - Please, where possible, disaggregate by type of vulnerable persons (for example, minors, persons with special needs, etc.) | | | | | | | |
| Vulnerable persons specified - minors | | | | | | | |
| Vulnerable persons specified – unaccompanied minors | | | | | | | |
| Number of other third-country nationals placed in immigration detention | | | | | | | |
| Statistics on number of third-country nationals provided alternatives to detention | | | | | | | |
| Total number of third-country nationals in alternatives to detention | | | | | | | |
| Number of applicants for international protection in ordinary procedures in Alternatives to detention (including Dublin) | | | | | | | |
| Number of persons given alternatives to detention to prevent illegal entry at borders | | | | | | | |
| Number of person in alternatives to detention during return procedures (including pre-removal) | | | | | | | |
| Number of vulnerable persons part of the aforementioned categories of third-country nationals - Please, where possible, disaggregate by type of vulnerable persons (for example, minors, persons with special needs, etc.) | | | | | | | |

Detention and Alternatives to Detention

| | | | | | | | |
|---|--|--|--|--|--|--|--|
| Vulnerable persons specified - minors | | | | | | | |
| Vulnerable persons specified – unaccompanied minors | | | | | | | |

Table 2: Average length of time in detention

Please provide information on the methodology used to calculate the average length of time in detention, including whether the mean or the median was used to calculate the average.

| Average length of time in detention | 2015 | 2016 | 2017 | 2018 | 2019 | 2020 | Source / further information |
|---|-------|-------|-------|-------|-------|-------|------------------------------|
| Average length of time in detention of all categories of third-country nationals in detention | | | | | | | |
| Average length of time in detention of applicants for international protection in ordinary procedures | | | | | | | |
| Average length of time in detention of persons detained to prevent illegal entry | | | | | | | |
| Average length of time in detention of persons during return procedures | 24.06 | 24.46 | 26.63 | 27.35 | 29.56 | 23.48 | National Police |
| Average length of time in detention of vulnerable persons part of the aforementioned categories of third-country nationals - Please, where possible, disaggregate by type of vulnerable persons (for example, minors, persons with special needs, etc.) and by category | | | | | | | |



**GOBIERNO
DE ESPAÑA**

MINISTERIO
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Y COOPERACIÓN

MINISTERIO
DE JUSTICIA

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DEL INTERIOR

MINISTERIO
DE INCLUSIÓN, SEGURIDAD SOCIAL
Y MIGRACIONES