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Detention and Alternatives to Detention

Study by the German National Contact Point for the European Migration Network (EMN)

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The European Migration Network

The European Migration Network (EMN) was established in 2003 by the European Commission on the initiative of the European Council to meet the need for a regular exchange of reliable information in the field of migration and asylum at European level. Since 2008, Council Decision 2008/381/EC has provided the permanent legal basis for the EMN and National Contact Points have been established in the Member States of the European Union (with the exception of Denmark, which has observer status) and in Norway.

The mission of the EMN is to provide the European Union (EU) institutions, national institutions and authorities as well as the public with up-to-date, objective, reliable and comparable information on migration and asylum with a view to supporting policy in this area. EMN Germany is based at the Federal Office for Migration and Refugees (BAMF) in Nuremberg. Its main tasks include the implementation of the annual EMN work programme. This includes the preparation of the annual policy report "Migration, Integration, Asylum", the preparation of up to four topic-specific studies, the response to ad hoc requests sent to the network as well as the dissemination of information in various forums, e.g. by organising their own conferences and participating in conferences in Germany and abroad. In addition, the National Contact Points each establish national networks of organisations, institutions and individuals active in the field of migration and asylum.

As a rule, no primary research is conducted within the framework of the EMN, but rather existing data and information are processed and analysed; only if necessary are these supplemented by independent collection of data and information. EMN studies are prepared according to uniform specifications in order to achieve comparable results within the European Union and Norway. In order to also ensure conceptual comparability, a glossary has been compiled, which is accessible via the national and international EMN websites.

After the completion of the national reports, a synthesis report is produced that summarises the most important results of the individual national reports and thus allows for a European overview. In addition, there are topic-specific information sheets (EMN-Informs), which present selected topics in a concise and precise manner. The EMN Bulletin provides quarterly information on current developments in the EU and its Member States. With the 2014 work programme, the Return Expert Group (REG) was also established. It deals with aspects of voluntary return, reintegration and forced return.

All EMN publications are available on the website of the European Commission's Directorate-General for Migration and Home Affairs. The national studies of EMN Germany as well as the synthesis reports, informs and the glossary can also be found on the national website: www.emn-deutschland.de.

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Summary

This study is the German contribution to the EMN study 'Detention and Alternatives to Detention in International Protection and Return Procedures'. It explores the topic of detention and detention alternatives in the asylum procedure as well as in the context of return. Due to the legal framework in Germany, detention pending removal and alternatives to detention pending removal are primarily described. A particular focus is on the question of what challenges and advantages are associated with alternatives to detention pending removal in practice. The study is being conducted in all participating EU Member States and Norway according to common guidelines. The results of the national studies are subsequently incorporated into a comparative synthesis report that provides a pan-European comparative overview of the application, disposition and effectiveness of alternatives to detention pending removal.

Political and legal framework

Foreign nationals may be placed in detention to secure their removal. The order of detention pending removal is considered ultima ratio: it is only permissible if the purpose of detention cannot be achieved by a milder means and must be ordered by a judge. Alternatives to detention pending removal are equally suitable milder measures for monitoring and/or restricting the freedom of movement of persons that can be ordered instead of detention. The Länder are responsible for ordering detention or alternatives. In the past five years, the ordering of detention pending removal has been the subject of various legislative procedures. For example, the so-called Ausreisegewahrsam (detention pending departure) was created. In the area of alternatives to detention, there have been no changes in recent years.

Organisation and procedural structure

In order for a person to be taken into detention pending removal in Germany, the competent administrative authority, usually the foreigners authority, must first file a corresponding application for detention with the competent district court. Like all other measures involving deprivation of liberty, detention pending removal must be ordered by a judge. Since detention may only be ordered if milder means are not appropriate, it must be examined in each case whether alternatives are available. In Germany, there are various measures that can be considered as alternatives to detention, including reporting requirements, compulsory residence (e.g. in a departure facility) and spatial residence restrictions. From the point of view of the Länder, the greatest challenge is to find effective alternatives that could also prevent the persons concerned from absconding. Some Länder see an advantage in the fact that alternatives to detention pending removal are associated with lower costs and personnel expenditure. The repeated violation of the conditions can be assessed by the authorities as an indication for the existence of the reason for detention 'risk of absconding'.

Effectiveness of detention and alternatives to detention

Since statistics on detention pending removal are only systematically collected in individual Länder in Germany and data on the use of alternatives to detention are not available at all, the measures cannot be analysed in terms of their prevalence and effectiveness. Furthermore, there is a lack of studies on this topic.

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1 Introduction

This study is the German contribution to the EMN study 'Detention and Alternatives to Detention in International Protection and Return Procedures'. The EMN's common guidelines provide for a special focus on alternatives to detention for persons in the asylum procedure and in the context of return. Since the legal instrument of detention in Germany is mostly limited to return processes, this study mainly describes the framework conditions for detention pending removal and alternatives to detention. Specifically, it looks at legal developments in recent years, application and decision-making practice regarding detention alternatives in the Länder, challenges and advantages of detention alternatives from a Länder perspective and available statistics. Detention is the "restriction of a person's freedom of movement by means of non-punitive compulsory accommodation ordered by (an) administrative or judicial authority/authorities so that further proceedings can be carried out" (EMN/KOM 2018: 15). In the European Union, persons can be detained in different migration procedures: 1) in the context of an asylum application, 2) to prevent an irregular entry, and 3) in the return context. As a rule, applicants in ongoing asylum procedures are not detained in Germany. Exceptions to this rule are regulations governing detentions during transfers of asylum seekers to the Member States responsible as per the Dublin III Regulation[1] (Dublin transfers), the filing of asylum applications from detention pending removal, and the detention of persons who violate an entry and residence ban and pose a threat to the internal security of the Federal Republic of Germany. Overall, the detention of migrants in Germany is predominantly conducted in the context of return procedures. Detention is always considered ultima ratio and requires a court order. In Germany, the Länder are responsible for the implementation of detention pending removal and its alternatives.

Alternatives to detention are understood to include all "non-custodial measures to monitor and/or restrict the movement of third-country nationals prior to a forced return or decision on the person's right to remain in the [Member State of the European Union (EU)], such as reporting requirements, the deposit of a financial guarantee or travel documents and electronic surveillance" (EMN/KOM 2018: 25). A measure can only be considered an alternative to detention pending removal if the conditions for detention are met in the case in question (Bloomfield/Tsourdi/Pétin 2015: 62). While detention pending removal in Germany must always be ordered by a judge, alternatives to detention can be ordered by the foreigners authority itself.

In the following, in accordance with the specifications for this study, the legal framework of detention in the context of the asylum and return procedures, relevant legal and political developments of the last five years in this area as well as the definitions of terms used are first described (Chapter 2). Chapter 3 then goes into more detail regarding the application of alternatives to detention and the associated advantages and challenges from the point of view of the Länder. Chapter 4 outlines the decision-making practice on detention and its alternatives by foreigners authorities and district courts. Finally questions on the effectiveness of alternatives to detention pending removal are addressed – to the extent deemed possible in view of the lack of data and studies (Chapter 5).

Since this study primarily documents legal requirements, the relevant legal texts and related literature were primarily used as sources. Reference was made to Bundestag documents and press articles to shed light on the discussion of individual measures. This study is largely based on publicly accessible sources, but for individual parts contributions from the Ministries of the Interior and Integration of the Länder were also requested. In line with the study's focus on alternatives to detention pending removal, questions to the Länder related to the application and effectiveness of alternatives to detention as well as statistics on the application of detention and its alternatives. Of the Länder requested, 12 provided feedback (Baden-Württemberg, Bavaria, Berlin, Brandenburg, Hamburg, Mecklenburg-Vorpommern, North Rhine-Westphalia, Rhineland-Palatinate, Saarland, Saxony-Anhalt, Schleswig-Holstein, Thuringia) (see table in the appendix). The terminology used in this study is mostly based on the EMN Glossary (EMN/KOM 2018). Terms that relate specifically to the legal situation in Germany are explained within the text or in footnotes.

1 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 (recast).

2 National policy and legal framework: Development since 2015

2.1 Detention in the asylum and return procedure

EU legal framework on detention

The detention of persons in asylum and return procedures is regulated at EU level in the Reception Conditions Directive (RL 2013/33/EU)[2] and the Return Directive (RL 2008/115/EG).[3] Pursuant to Art. 8 of the Reception Conditions Directive, persons may not be detained solely because they have submitted an asylum application. However, based on a case-by-case assessment, Member States may, where necessary, detain persons in this group if less coercive measures cannot be effectively applied. Asylum applicants may only be detained in the following cases (Art. 8 para. 3 Reception Conditions Directive):

- to establish or verify identity or nationality,
- to secure evidence in connection with the asylum procedure if this could not be obtained without detention, in particular if there is a risk of absconding,
- for a decision in proceedings on the right of entry,
- if the person is in detention based on a return procedure and it can be assumed on the basis of objective criteria that the person has only made the asylum application to delay or prevent the enforcement of the return decision,[4]
- if it is necessary for reasons of national security or public order,
- and for the purpose of transfer pursuant to Article 28 of the Dublin III Regulation (Regulation (EU) No. 604/2013).[5]

In doing so, Member States must ensure that national legislation contains provisions on alternatives to detention. These include, for example, reporting requirements, the deposit of a financial guarantee or the obligation to stay in an assigned place (Art. 8 para. 4 Reception Conditions Directive). In addition, the Reception Directive provides for guarantees for applicants in detention (Art. 9 Reception Directive), conditions of detention (Art. 10 Reception Directive) and detention of vulnerable groups (Art. 11 Reception Directive).

With regard to detention in the context of the return procedure, Member States may only detain a person if in the individual case "no other sufficient but less intensive coercive measures can be effectively applied" (i.e. alternatives to detention) and the purpose of detention is to prepare for return, and in particular if 1) there is a risk of absconding or 2) the person concerned circumvents or obstructs the preparation of return or the removal procedure (Art. 15 para. 1 sentence 1 Return Directive). The period of detention must be as short as possible and may only extend to the duration of the ongoing removal arrangements, provided these are carried out with due diligence (acceleration requirement) (Art. 15 para. 1 sentence 2 Return Directive). In addition, the Return Directive provides guidelines on detention conditions and the detention of minors and families (Art. 16 and 17 Return Directive).

2 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast).

3 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.

4 A return decision is an administrative or judicial decision or measure by which the irregular stay of third-country nationals is established and an obligation to return is imposed or established (Art. 3 para. 4 Return Directive). In Germany, for example, this is the threat of removal pursuant to Section 34 of the Asylum Act (German: Asylgesetz, AsylG), the removal order pursuant to Section 53 of the Residence Act (German: Aufenthaltsgesetz, AufenthG), the removal order pursuant to Section 58a of the Residence Act and the threat of removal pursuant to Section 59 of the Residence Act.

5 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 (recast).

National regulations for detention in the asylum procedure

In Germany, the implementation of the EU regulations is found in the Asylum Act (German: Asylgesetz, AsylG) and the Residence Act (German: Aufenthaltsgesetz, AufenthG). During the asylum procedure, Germany provides fewer possibilities for detention than would be possible under the Reception Conditions Directive. Any deprivation of liberty requires a court order (Article 104 para. 2 of the Basic Law (German: Grundgesetz, GG)). The court can only order detention at the request of the competent administrative authority (Section 417 subs. 1 of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (FamFG)[6]). Overall, it can be observed that the possibilities of detention in the asylum procedure are largely limited to those cases in which return or transfer is being prepared in parallel to the asylum procedure, for example, in the case of detention in the context of Dublin transfers or the filing of an asylum application from detention pending removal. Infobox 1 describes types of detention that can be applied in the asylum procedure in Germany.

6 German: Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit of 17 December 2008 (BGBl. I pp. 2586, 2587).

Infobox 1: Types of detention in the asylum procedure

Parallel preparation of return

Filing an asylum application from detention (Section 14 subs. 3 of the Asylum Act): If the person is in pre-trial detention, penal imprisonment, preparatory detention, preventive detention to secure removal, detention for cooperation or in detention pending departure at the time of filing the asylum application, the filing of the asylum application does not preclude the ordering or maintaining of detention pending removal. Detention pending removal ends with the delivery of the decision of the Federal Office for Migration and Refugees, but no later than four weeks after receipt of the asylum application, unless a request to take charge or take back has been sent to another Member State or the asylum application has been rejected as inadmissible or manifestly unfounded (corresponds to grounds for detention Art. 8 para. 3 letter d Reception Conditions Directive).

Ordering detention in case of subsequent and second applications (Sections 71 subs. 8, 71a subs. 2 sentence 3 Asylum Act): Subsequent and second applications do not preclude the ordering of detention pending removal, unless another asylum procedure is conducted (corresponds to grounds for detention Art. 8 para. 3 letter d Reception Conditions Directive).

Supplementary preparatory detention (Section 62c Residence Act): If a person applies for asylum in Germany although they are subject to an entry and residence ban (Section 11 subs. 1 sentence 2 Residence Act), have not been granted an entry permit (Section 11 subs. 8 Residence Act) and pose a threat to internal security, they may be detained to prepare for the removal warning pursuant to Section 34 of the Asylum Act (corresponds to grounds for detention Article 8 para. 3 letter e Reception Conditions Directive).

Detention pending transfer (Art. 28 para. 2 Dublin III Regulation in conjunction with Section 2 subs. 14 Residence Act in conjunction with Section 62 subs. 3a and 3b Residence Act): Persons for whom the responsibility of another Member State for examining the asylum application has been established under the Dublin procedure and who have been found to be at significant risk of absconding in connection with their transfer to that Member State may be detained in order to secure their transfer after an individual examination has been carried out, if the detention is proportionate and less restrictive measures cannot be applied effectively (corresponds to grounds for detention Art. 8 para. 3 letter f Reception Conditions Directive).

Detention for reasons of public order

Custody to enforce the spatial restriction ('obligation to leave') (Section 59 subs. 2 Asylum Act in conjunction with Section 12 subs. 3 Residence Act): The residence authorisation of persons in the asylum procedure is spatially restricted to the district of the foreigners authority in which the competent reception centre is located. If a person stays outside the prescribed district without the permission of the foreigners authority, they are obliged to leave the area to which the residence permit does not apply (so-called obligation to leave). If the person does not leave the area voluntarily and the enforcement of the obligation to leave would thereby be significantly impeded or endangered, the person is to be detained by court order. However, detention cannot be ordered preventively, even if it can be assumed that the person will violate the spatial restriction again in the future (Grotkopp 2020: 94f.). In Germany, custody to enforce the obligation to leave is an exception because, as a rule, persons are immediately transported to the district of their residence authorisation using direct coercion (Selders 2009: 35; see also Federal Constitutional Court, ruling of 2 July 2008, margin no. 20[7]; corresponds to grounds for detention Art. 8 para. 3 letter e Reception Conditions Directive).

7 Bundesverfassungsgericht (BVerfG), ruling of 2 July 2008 – 2 BvR 1073/06.

National regulations for detention to secure return

In addition to the types of detention described above, there is detention in the context of return. The detention of persons to secure their return (detention pending removal) is standardised in Germany in the Residence Act. Here, too, the principle applies that any deprivation of liberty must be ordered by a judge and only at the request of the competent administrative authority. The principle of proportionality must always be observed: detention is only permissible if the purpose of detention cannot be achieved by a milder means (i.e. alternative to detention pending removal) (Section 62 subs. 1 sentence 1 Residence Act). There are a total of six different forms of detention in the context of return. Firstly, there are possibilities of detention that are directly related to an (attempted) unauthorised entry and are intended to secure return in these cases (detention to prevent unauthorised entry and detention to prepare removal following unauthorised entry). Secondly, preparatory detention offers the possibility of detaining persons in preparation for removal or a removal order pursuant to Section 58a of the Residence Act, i.e. before an obligation to leave the country has arisen. Finally, persons can be detained for the purpose of enforcing the obligation to leave the country based on an unauthorised stay (preventive detention, detention for cooperation, detention pending departure).

Infobox 2 explains the various types of detention to secure return. Table 1 provides an overview of the maximum detention period applicable in each case.

Infobox 2: Types of detention in the return context

Detention in connection with (attempted) unauthorised entry

Detention to prevent unauthorised entry (Section 15 subs. 5 Residence Act): Persons who want to enter the country without permission are turned back at the border. If a decision to refuse entry has been issued and cannot be enforced immediately, the person is to be detained to secure the refusal of entry.

Detention to prepare removal after unauthorised entry (Section 57 in conjunction with Section 62 Residence Act): Persons apprehended in connection with an unauthorised entry are to be removed. Persons may be detained to secure their removal. For this purpose, the preparatory or preventive detention pursuant to Section 62 of the Residence Act is applied analogously.

Detention before an obligation to leave the country arises

Preparatory detention (Section 62 subs. 2 Residence Act): To prepare for expulsion or a removal order pursuant to Section 58a of the Residence Act (concerning so-called potential offenders), persons are detained if the expulsion or removal order cannot be decided on immediately and the removal would be significantly impeded or prevented without detention. Expulsion and removal orders pursuant to Section 58a of the Residence Act are specific measures under aliens law that primarily affect persons who must leave Germany, for example, for reasons of public security and order or to avert terrorist threats. Thus, preparatory detention is "by no means available in every situation in which an authority wants to prepare for removal" (Grotkopp 2020: 81).

Detention in connection with unauthorised residence

Preventive detention (Section 62 subs. 3 Residence Act): If there is a risk of absconding, if the person is subject to an enforceable obligation to leave the country due to an unauthorised entry or if a removal order has been issued pursuant to Section 58a of the Residence Act (see above) that cannot be enforced immediately, the person will be detained to secure removal. Detention is inadmissible if it is established that the removal cannot be conducted within the next three months for reasons beyond the control of the person concerned.

Detention for cooperation (Section 62 subs. 6 Residence Act): Persons of foreign nationality are obliged to cooperate in several ways if they are obliged to leave the country. If a person fails to comply with the obligation pursuant to Section 82 subs. 4 of the Residence Act to appear in person at the foreign representation and/or to have a medical examination conducted to determine their fitness to travel, they may be detained. "Detention for cooperation is only permissible to ensure obligations to cooperate, the fulfilment of which is not ensured due to the alien's previous conduct. Detention for other purposes, for example as a sanction, is not permissible. There must also be a sufficient prospect of removal and the purpose of the detention must be achievable" (Deutscher Bundestag 2019a: 43f.; corresponds to grounds for detention Art. 15 para. 1 sentence 1 letter b Return Directive).

Detention pending departure (Section 62b Residence Act): Irrespective of the existence of a risk of absconding, a person of foreign nationality can be detained to secure removal if the obligation to leave the country has expired, removal is possible within the time limit and it is to be expected that removal will be avoided or hampered (corresponds to grounds for detention Art. 15 para. 1 sentence 1 letter b Return Directive).

Table 1: Overview detention period

Type of detention	Duration of detention
Detention to prevent unauthorised entry Section 15 subs. 5 Residence Act	■ Usually three months for initial order, but up to six months possible ■ Extension by a maximum of 12 months possible if the removal cannot be conducted for reasons for which the person concerned is responsible ■ Total duration is a maximum of 18 months
Detention to prepare removal after unauthorised entry Section 57 in conjunction with Section 62 Residence Act	■ Usually three months for initial order, but up to six months possible ■ Extension by a maximum of 12 months possible if the removal cannot be conducted for reasons for which the person concerned is responsible ■ Total duration is a maximum of 18 months
Preparatory detention Section 62 subs. 2 Residence Act	■ Maximum six weeks ■ Longer durations in the initial order or extension are only possible in exceptional cases if the issuance of the return decision is delayed for "special, unforeseeable reasons or if exceptional circumstances for which the foreigners authority is not responsible" render a decision on the return decision "impossible within six weeks" (Bavarian Higher Regional Court (Oberstes Landesgericht, OLG Bayern), ruling of 25 November 1993, margin no. 8[8]).
Preventive detention Section 62 subs. 3, 4 Residence Act	■ Usually three months for initial order, but up to six months possible ■ Extension by a maximum of 12 months possible ■ if the removal cannot be executed for reasons for which the person concerned is responsible or ■ if detention has been ordered on the basis of a removal order pursuant to Section 58a of the Residence Act that cannot be executed immediately and the transmission of the documents or papers required for the removal is delayed by the third country obliged to accept or ready to accept the person ■ Total duration maximum of 18 months, whereby, if applicable, the duration of any preceding preparatory detention and/or detention for cooperation shall be counted towards the total duration of preventive detention
Detention for cooperation Section 62 subs. 6 Residence Act	■ Maximum 14 days Extension not possible
Detention pending departure Section 62b Residence Act	■ Maximum 10 days

8 OLG Bayern, ruling of 25 November 1993 – 3 z BR 262/93.

2.2 Detention pending removal: Changes in law and practice

This sub-chapter presents developments regarding detention pending removal in Germany from 2015 to 2020.[9] After legislative measures were already taken in 2015 and 2017 to ensure the return of persons obliged to leave the country, further changes were implemented in 2019. According to the Federal Government, the goal was "stronger enforcement of the law" in the context of return, after the "available legal instruments [...] had not yet proved effective enough" to "ensure sufficient enforcement of the obligation to leave the country" (Deutscher Bundestag 2019a: 1, own translation). Overall, the changes reveal an expansion of detention options as well as the increased intertwining of migration control and security measures.

Reason for detention 'risk of absconding'

The Act on the Redefinition of the Right to Remain and the Termination of Residence,[10] which has been in force since 2015, defines concrete indications for the assumption of a risk of absconding (Section 2 subs. 14, 15 sentence 2 Residence Act in the version of 1 August 2015). Indications of a risk of absconding can be when the person

- has already evaded the authorities in the past by changing their place of residence without notifying the authorities,
- deceives about their identity,
- refuses or fails to comply with the statutory obligations to cooperate in establishing identity and it can be concluded from the individual circumstances that they actively want to counteract a removal,

9 For developments before 2015 see Grote 2014.

10 German: Gesetz zur Neubestimmung des Bleiberechts und der Aufenthaltsbeendigung of 27 July 2015 (BGBl I. p. 1386).

- paid substantial sums of money to smugglers for their unauthorised entry, which are so significant for the person that it can be assumed that they will prevent the removal so that the expenses were not in vain,
- explicitly stated that they wanted to avoid removal,
- to evade removal, has undertaken other similar specific preparatory acts that cannot be overcome by the use of direct coercion (Section 2 subs. 14 Residence Act in the version of 1 August 2015),
- and in connection with Dublin transfers, if the person concerned has left a Member State prior to the conclusion of the Dublin procedure or for the examination of an asylum application and the circumstances of the determination in the Federal territory specifically indicate that they do not intend to return to the responsible Member State in the foreseeable future (Section 2 subs. 15 sentence 2 Residence Act in the version of 1 August 2015).

According to the explanatory memorandum to the law, the facts now standardised by law are linked to aspects that had previously been used in case law and administrative practice to assume a risk of absconding (Deutscher Bundestag 2015a: 32). However, if one of the above facts applies, this does not mean that there is automatically a presumption of risk of absconding. The extent to which the existence of a risk of absconding can be assumed and the significance of the existence of one of the indications is examined in each individual case (see Chapters 4.1 and 4.2) (Deutscher Bundestag 2015a: 32).

The Act on the Better Enforcement of the Obligation to Leave the Country (German: Gesetz zur besseren Durchsetzung der Ausreisepflicht) extended the definition of risk of absconding by another fact when it came into force on 29 July 2017. The law defined that in the case of persons who pose a considerable danger to the life and limb of third parties or significant legal interests of internal security, there is a concrete indication of the existence of a risk of absconding (Section 2 subs. 14 no. 5a Residence Act in the version of 29 July 2017). In addition, further conditions for ordering detention pending removal were relaxed for this group of persons: detention pending removal can also be ordered in these cases if removal is not possible within three months (Section 62 subs. 3, sentence 4 Residence Act). The background for these changes was the attack by Anis Amri, a perpetrator who was obliged to leave the country, on Breitscheidplatz in Berlin in December 2016 (Deutscher Bundestag 2017a: 22523). The existing risk of absconding of potential offenders is reflected in the fact that these persons usually "exhibit a high degree of mobility and often try to evade measures taken by the authorities" (Deutscher Bundestag 2017b: 17).

With the Second Act to Improve the Enforcement of the Obligation to Leave the Country (Zweites Gesetz zur besseren Durchsetzung der Ausreisepflicht) in 2019, the concept of risk of absconding was further specified. First, the criteria for ordering detention pending transfer were revised (Section 2 subs. 14 Residence Act in the version of 21 August 2019). In addition, certain indications were standardised (e.g. deception of identity; see also Table 2), the fulfilment of which presumes the risk of absconding and does not require individual proof by the authorities (so-called rebuttable presumption; Section 62 subs. 3a Residence Act). The person concerned has the opportunity (for example during the judicial hearing) to rebut this presumption.

In addition to the introduction of rebuttable presumptions, the Second Act to Improve the Enforcement of the Obligation to Leave the Country introduced new concrete indications of a risk of absconding in Section 62 subs. 3b of the Residence Act, such as the commission of criminal offences, violation of the spatial restriction and other requirements, and the lack of a habitual place of residence (see Table 2). Whether there is a risk of absconding in an individual case is assessed by the court based on these indications (Grotkopp 2020: 13f.). Table 2 provides an overview of the legal regulations in force in 2020 in connection with the grounds for detention 'risk of absconding'.

Table 2: Grounds for detention 'risk of absconding'

Concrete indications of a risk of absconding (Section 2 subs. 14 Residence Act in the version of 1 August 2015)	■ Deception of identity in the past in a way that is significant for an obstacle to removal ■ Payment of substantial sums of money to smugglers for unauthorised entry ■ Considerable danger to life and limb of third parties or significant legal interests of internal security ■ The person has repeatedly been convicted of intentional criminal offences and sentenced to at least one custodial sentence by a final court decision. ■ Refusal or omission of legal duties to cooperate ■ Repeated violation of the spatial restriction of residence, of a residence requirement, or of a requirement imposed to secure and enforce the obligation to leave the country (e.g. obligation to register) ■ No habitual place of residence ■ **In the case of detention for the purpose of transfer** ■ The person has left the responsible Member State during an ongoing procedure and circumstances specifically indicate that they do not intend to visit the responsible Member State in the near future. ■ Multiple applications for asylum in other Member States and leaving the respective Member State before the end of the procedure
Risk of absconding is rebuttably presumed (Section 62 subs. 3a Residence Act)	■ Deception of identity in a way that is significant for an obstacle to removal in a temporal connection with the removal ■ Unexcused absence from an appointment for a hearing or medical examination, provided that the person was informed of the possibility of his or her detention in case of non-attendance when the appointment was announced ■ Violation of the obligation to disclose the place of residence after the expiry of the time limit for leaving the country ■ Existence of a ban on entry and residence without an entry permit ■ Evading removal in the past ■ Expressly declared intention to evade removal

Grounds for detention 'internal security'

The Second Act for the Better Enforcement of the Obligation to Leave the Country of 2019 also amended the detention of persons who pose a particular threat to the security of the Federal Republic or a terrorist threat (so-called potential offenders). As a result of the amendment to the law, they can now also be detained by order of a judge in preparation for a removal order pursuant to Section 58a of the Residence Act. Thus, like preparatory detention, immediate detention is to be made possible if a decision on the removal order cannot be made immediately (Section 62 subs. 2 sentence 1 Residence Act).

New type of detention: Detention pending departure

In 2015, the Act on the Redefinition of the Right to Remain and the Termination of Residence created a new type of detention called Ausreisegewahrsam (detention pending departure) pursuant to Section 62b of the Residence Act, replacing the old regulation of so-called Kleine Sicherungshaft (minor preventive detention to secure removal).[11] According to the explanatory memorandum, the aim of detention pending departure is to "ensure the feasibility of removal measures, especially in the case of removals that require considerable organisational effort", such as collective removals (Deutscher Bundestag 2015a: 55). In contrast to preventive detention, detention pending departure can also be ordered without the existence of a risk of absconding. Thus, a person with an enforceable obligation to leave the country can be detained for a few days by order of a judge if the obligation to leave has expired, it is certain that the removal can be conducted within this time and the person has shown through their behaviour that they will impede or prevent the removal. The duration of detention pending departure was extended from a maximum of four to ten days in 2017 when the Act on the Better Enforcement of the Obligation to Leave the Country[12] came into force. The establishment of detention pending departure was criticised by various stakeholders, such as the German

11 Under the so-called minor preventive detention to secure removal, a person of foreign nationality could be placed in preventive detention for a maximum of two weeks if the deadline for departure had expired and it was certain that the removal could be conducted (Section 62 subs. 3 sentence 2 Residence Act in the version of 26 November 2011).

12 German: Gesetz zur besseren Durchsetzung der Ausreisepflicht of 20 July 2017 (BGBl I. p. 2780).

Lawyers' Association, as well as the opposition parliamentary groups Bündnis 90/Die Grünen and Die Linke, in particular for the fact that, in contrast to preventive detention to secure removal, detention pending departure can be ordered without the existence of a risk of absconding (Deutscher Bundestag 2015b: 11160; Deutscher Bundestag 2019b: 181f.). In this context, however, it should be emphasised that detention pending departure meets the requirements of Article 15 para. 1 letter b of the Return Directive, according to which persons who circumvent or obstruct the return procedure may be detained (Deutscher Bundestag 2019b: 24). An important prerequisite for detention pending departure is a well-founded assumption that the persons in question will impede or prevent the removal process. The indications for this were further specified in the Second Act to Improve the Enforcement of the Obligation to Leave the Country in 2019. In addition to the already existing indications of violation of the obligation to cooperate and deception of identity, convictions for criminal offences committed in Germany and exceeding the time limit for leaving the country by more than 30 days are now standardised as further indications. It was also clarified that, contrary to the previous interpretation of some committing magistrates, there does not have to be a risk of absconding for detention to be ordered (Federal Ministry of the Interior, Building and Community – Bundesministerium des Innern, für Bau und Heimat, BMI 2019).

New type of detention: Detention for cooperation

In 2019, the Second Act to Improve the Enforcement of the Obligation to Leave the Country created another type of detention, the so-called Mitwirkungshaft (detention for cooperation) (Section 62 subs. 6 Residence Act). This implemented Art. 15 para. 1 letter b of the Return Directive. In contrast to preventive detention, the primary purpose of detention for cooperation is not to conduct the removal itself, but to ensure identification appointments at the representations of the state of origin and also the medical determination of fitness to travel if the person concerned has violated these duties to cooperate (Section 82 subs. 4 Residence Act) in the past. The ordering of detention for cooperation is only permissible for the preparation of return or the execution of removal. Detention "for other purposes, for example as a sanction" is not permissible (BMI 2019). Thus, detention is inadmissible if "there is no reasonable prospect of removal", "as then the purpose of the detention can no longer be achieved" (BMI 2019). The reason for this new type of detention is the violation of obligations to cooperate regarding the clarification of identity, which has often been observed in practice. The legislator argues that persons often cannot be found when they are to be brought to an appointment at the representation of the state of origin (Deutscher Bundestag 2019a: 43).

New type of detention: Supplementary preparatory detention

With the entry into force of the Act on the Postponement of the Census to 2022 and the Amendment of the Residence Act[13] on 10 December 2020, preparatory detention was extended to allow persons who violate a ban on entry and residence (Section 11 subs. 1 sentence 2 Residence Act) and file an asylum application to be placed in detention. This created a new type of detention within the asylum procedure. Already before, persons violating an entry ban could be taken into preventive detention to secure removal, since in these cases the grounds for detention, risk of absconding, is rebuttably presumed (Section 62 subs. 3 no. 1 in conjunction with Section 62 subs. 3a no. 4 Residence Act). However, preventive detention to secure removal can only be ordered in cases where the person is subject to a return decision. If the person now files an asylum application before the detention order is issued, the person's stay is permitted for the purpose of conducting the asylum procedure and the obligation to leave the country does not apply. However, if an asylum application is made from detention, there is nothing to prevent detention pending removal from being ordered or maintained (Section 14 subs. 3 Asylum Act). According to the explanatory memorandum to the law, in practice it is regularly a matter of chance whether in such cases a person first applies for asylum or whether detention pending removal is ordered, and thus also a matter of chance whether detention is permissible or not (Deutscher Bundestag 2020a: 18). The regulatory gap was made clear by the 'Miri' case, among others: In 2019, Ibrahim Miri, who had multiple criminal convictions, had been removed to Lebanon and, contrary to the entry and residence ban issued, returned to Germany in the same year to apply for asylum. Since Ibrahim Miri filed a subsequent asylum application, he could be taken into detention pending removal (Section 71 subs. 8 Asylum Act). However, the case drew the attention of the Federal Government to a regulatory gap in the specific case constellation of entry and

13 German: Gesetz zur Verschiebung des Zensus in das Jahr 2022 und zur Änderung des Aufenthaltsgesetzes of 3 December 2020, BGBl. I No. 59, p. 2675.

residence ban, asylum application and danger to security (Deutscher Bundestag 2020b: 23900; RND 2020).

With the new supplementary preparatory detention (Section 62c Residence Act), persons can be detained under the following special conditions in preparation for a removal warning (Section 34 Asylum Act):

- Staying in Germany contrary to an existing entry and residence ban (Section 11 subs. 1 sentence 2 Residence Act) and without an entry permit (Section 11 subs. 8 Residence Act)
- Considerable danger to the life and limb of third parties or significant legal interests of national security or expulsion based on a particularly serious reason for expulsion[14] (Section 54 subs. 1 Residence Act)

Furthermore, as with the other types of detention, the principle of proportionality applies. Detention ends with the delivery of the Federal Office for Migration and Refugees' decision or at the latest four weeks after the asylum application has been filed. If the asylum application is rejected as inadmissible (Section 29 subs. 1 no. 4 Asylum Act) or manifestly unfounded and an application for interim legal protection is then filed, extensions of detention are possible in each case. If the application is rejected by the administrative court, the detention ends at the latest one week after the court decision to enable a transition from supplementary preparatory detention to detention pending removal (Section 62c subs. 2 Residence Act in conjunction with Section 36 subs. 3 sentence 1 Asylum Act; Deutscher Bundestag 2020a: 18). In contrast to the already existing preparatory detention (Section 62 subsection 2 Residence Act), according to which persons can be detained by judicial order to prepare for expulsion or a removal order pursuant to Section 58a of the Residence Act if a decision on the return decision cannot be made immediately and the return would be significantly impeded or thwarted without the detention, the requirements for the extent of the danger posed and the maximum duration of detention are lower in the case of supplementary preparatory detention (Deutscher Bundestag 2020c: 16).

During the public hearing of experts on the draft bill, it was questioned whether it would be possible to conduct a "proper asylum procedure" due to the conditions of detention pending removal (including limited access to asylum counselling) (Deutscher Bundestag 2020c: 23, 76). It was countered that there were no constitutional or Union law aspects that spoke against supplementary preparatory detention (Deutscher Bundestag 2020c: 5ff.).

Execution of detention pending removal

With the Second Act to Improve the Enforcement of the Obligation to Leave the Country, the requirement under European law to separate detainees awaiting removal from prisoners was temporarily suspended until 30 June 2022[15] (Section 62a subs. 1 Residence Act). The reason given for this measure was that a shortage of places in detention pending removal had been identified and that detention pending removal should also be able to be conducted in penal institutions for the planned period if detainees awaiting removal and prisoners are accommodated separately (Deutscher Bundestag 2019c: 3). As of the expiry of this period, the detention of potential offenders in penal institutions should also be possible (Section 62a subs. 1 sentence 2 Residence Act in the version of 1 July 2022).

The abolition of the separation requirement for detainees awaiting removal and prisoners was called into question with regard to the provisions of Union law (Dienelt 2019).[16] Furthermore, it was doubted whether more detention places would also "actually lead to more removals", as France and Italy, for example, had more migration-related detention places available in 2018, but fewer people had been subject to removal than in Germany (Rietig/Günnewig 2020: 33). The Federal Ministry of the Interior, for Construction and Home Affairs (BMI), on the other hand, emphasised that the suspension of the separation requirement was only a temporary solution due to the small number of detention places for removal. Accommodation should also be arranged in such a way that detainees awaiting removal and prisoners would not be able to meet each other (Koch 2019). As of 27 March 2019, there was a capacity of around 490 detention places for detainees awaiting removal, which according to the Federal Government was disproportionate to the number of persons subject to an enforceable obligation to leave the country. The overcrowding of the detention centres for detainees awaiting removal also represents a

14 Final conviction to a custodial or juvenile sentence of at least two years for one or more intentional offences or order of preventive detention to secure removal at the last final conviction (Section 54 subs. 1 Residence Act).

15 The possibility is provided for in European law in Art. 18 of the Return Directive (Directive 2008/115/EC).

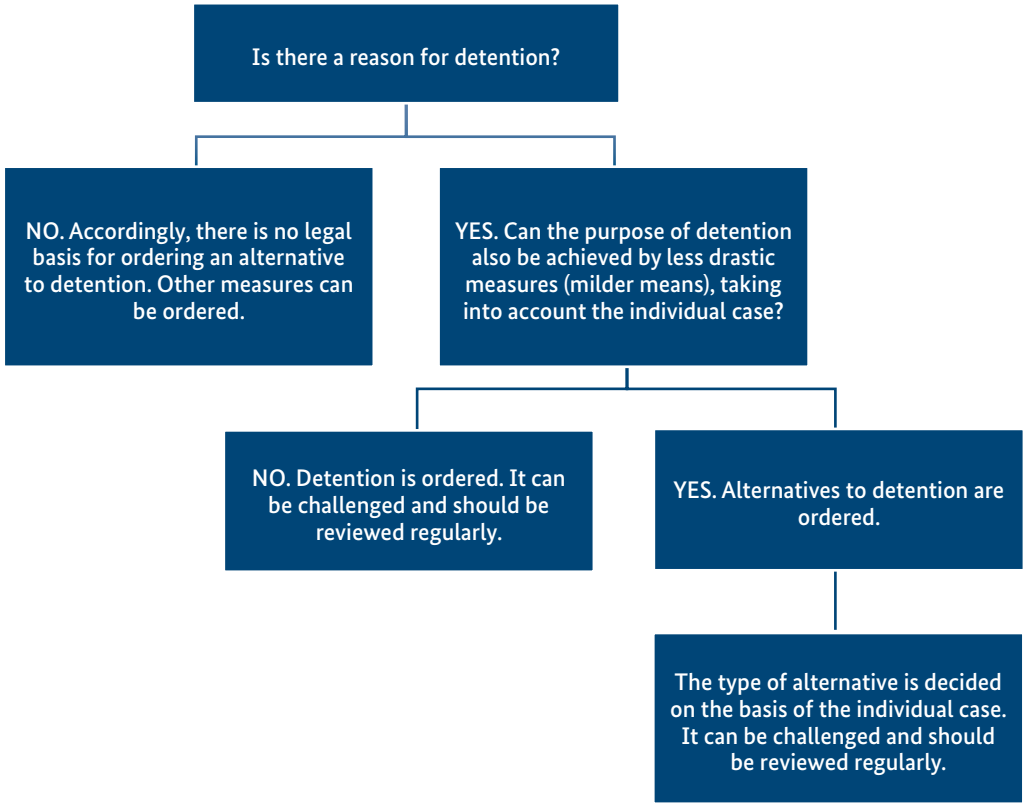
16 The European Court of Justice has ruled that potential offenders may also be placed in penal institutions for the purpose of detention pending removal if they are separated from prisoners (ECJ, ruling of 2 July 2020 – C-18/19 [ECLI:EU:C:2020:511].

major bottleneck in the enforcement of the enforceable obligation to leave the country (Deutscher Bundestag 2019a: 44). In recent years, the Länder have increased their detention capacities: On 30 May 2021, 619 detention places were available (Deutscher Bundestag 2021a: 130). When the removal detention and departure detention facilities planned by the Länder come into operation, 1 133 places will prospectively be available (Deutscher Bundestag 2021a: 22ff., own calculations).

2.3 Alternatives to detention pending removal: Definition

As previously stated, the proportionality must always be examined before detention is ordered: Can the purpose of detention also be achieved by a milder means, an alternative to detention pending removal? If so, detention is inadmissible (Section 62 subs. 1 sentence 1 Residence Act). Alternatives to detention pending removal are measures where "a justified reason for detention is established in the individual case, but a less restrictive means of control is available to the state" and this is applied instead of detention (Costello/Kaytaz 2013: 10). Where there is no legal basis for detention, there is thus also no legal basis for ordering an alternative to detention pending removal (Bloomfield/Tsourdi/Pétin 2015: 62). If a means of control is ordered without the existence of a reason for detention, it is not an alternative to detention pending removal, but merely an unspecified means of migration control to ensure and enforce the obligation to leave the country. Figure 1 illustrates the definition used. The alternatives available in Germany and how they are applied are discussed in Chapter 3.1.

Figure 1: Definition of alternatives to detention pending removal



Source: Adapted from Bloomfield/Tsourdi/Pétin 2015: 86.

2.4 Alternatives to detention pending removal: Changes in law and practice

The law does not explicitly define which milder means within the meaning of Section 62 subs. 1 sentence 1 of the Residence Act may be considered instead of detention to enforce the obligation to leave the country. Even in the explanatory memorandum to the law on the implementation of the Return Directive at the time, there is no further definition of which measures could be ordered (Bundesrat 2011: 65). Nevertheless, in individual places in the Residence Act and in the General Administrative Regulation to the Residence Act (Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz, AVwV AufenthG), measures can be found that are intended as more lenient means (e.g. Section 46 subs. 1, Section 61 subs. 1e, 1f, 2 Residence Act, No. 46.1, 61.2 AVwV AufenthG; see Chapter 3.1). For example, according to the explanatory memorandum to the law, the placement of persons in departure facilities is a milder means than detention pending removal (Deutscher Bundestag 2003: 64). However, since the ordering of the above-mentioned measures is not dependent on the existence of grounds for detention, the milder means available are only to be seen as an alternative to detention in individual cases.

Alternatives to detention in the Länder

In recent years, it has been debated in various places whether alternatives to detention pending removal should also be comprehensively regulated by law. In some Länder, measures were then taken to regulate the use of alternatives more explicitly at the Länder level by decree (Bremen[17], North Rhine-Westphalia[18], Lower Saxony[19], Brandenburg[20] and Schleswig-Holstein[21]). In other Länder parliaments, the motions of the respective opposition party Bündnis 90/Die Grünen were rejected, for example in Mecklenburg-Vorpommern in 2015 (LT MV 2015a), in Saxony in 2017 (LT SA 2016) and in Bavaria in 2018 (LT BY 2018a). An explicit regulation of detention alternatives was rejected in these cases with reference to the current legal situation: both the foreigners authorities before filing the detention application and the judge when deciding on the detention application must check whether the measure involving deprivation of liberty is proportionate and whether other measures are not possible. Thus, there is no need for "[more detailed] implementing provisions" on the possible milder measures, as "this has long been customary practice" (LT MV 2015b: 32).

Federal level

In addition to the discussions at the Länder level, a debate arose in the Bundesrat and Bundestag at the beginning of 2015 within the framework of the legislative procedure on the Act to Redetermine the Right to Remain and the Termination of Residence[22] on the more explicit regulation of alternatives to detention in the Residence Act. In its statement on the draft bill, the Bundesrat took the view that "[t]he previous regulatory approach in the Residence Act [...] should be supplemented by instruments for avoiding detention and milder means [...] [should] be examined and provided for by law" and asked for the amendments to be considered in the further legislative process (Bundesrat 2015: 19f.). According to the counterstatement, the Federal Government saw no reason to additionally regulate the regulations on the examination of milder means that already exist in the Residence Act and the General Administrative Regulation on the Residence Act (Deutscher Bundestag 2015c: 4f.).

As the number of persons with an obligation to leave the country increased in connection with the increased migration of refugees in 2015 and 2016 and security policy aspects became more relevant in the migration debate, various amendments to the law with regard to detention pending removal were made in 2017 with the Act on the Better Enforcement of the Obligation to Leave the Country and in 2019 with the Second Act

17 Decree – e13-05-01 – of the Senator für Inneres und Sport Freie Hansestadt Bremen of 15 May 2013 on Section 62 Residence Act – Preventive detention to secure removal – Principle of proportionality.

18 Guidelines for Detention Pending Removal in the Land of North Rhine-Westphalia (Abschiebungshaftrichtlinien, AHaftRL). Circular of the Ministry of the Interior and Local Government – 121-39.21.01.-2-AHaftRL – of 8 June 2016.

19 Legal information and procedural guidelines on the organisation and implementation of return and transfer enforcement (removal) and on applying for detention pending removal (return decree). Circular of the Lower Saxony Ministry of the Interior and Sport of 24 August 2016 – AZ 15 – 12231.3.

20 Implementing provisions on Section 3 No. 6 and Section 4 of the Ordinance on Responsibilities in the Law on Foreigners (General Instruction in the Law on Foreigners No. 09/2020 – AW-AuslR No. 2020.09).

21 Decree of the Ministry of the Interior, Rural Areas, Integration and Equality of the Land of Schleswig-Holstein on the right of residence; here: Implementation of detention pending removal, detention pending transfer and detention pending departure of 1 Sept. 2017.

22 German: Gesetz zur Neubestimmung des Bleiberechts und der Aufenthaltsbeendigung of 27 July 2015 (BGBl. I No. 32, p. 1386).

on the Better Enforcement of the Obligation to Leave the Country (see above). The aspect of alternatives to detention pending removal was not addressed in this context. In the area of security policy, the possibility of electronic residence monitoring (also called electronic tagging) of persons subject to a return decision was created in 2017 in connection with the 'Amri' case (Section 56a Residence Act). While the explanatory memorandum to the law mentions the electronic tag as an alternative to detention, in the opinion of experts it cannot be considered as a less severe means of detention pending removal due to the different objectives, as the aim of this measure is to monitor foreigners who pose a security threat and not to prepare or secure removal (Deutscher Bundestag 2017: 132f.).

Overall, it should be noted that the authorities in Germany have various measures at their disposal that can be considered as alternatives to detention pending removal. In this context, it has been debated repeatedly in recent years, both at the Länder and federal level, whether the existing measures should be incorporated into the Residence Act in a more systematic way, without any corresponding regulations having come into being, as the existing regulations were deemed sufficient.

3 Availability and practical organisation of alternatives to detention

3.1 Alternatives to detention pending removal in Germany

In practice, the foreigners authorities have various migration control measures at their disposal that can (also) be used as alternatives to detention pending removal in individual cases where there are grounds for detention. The aim of these measures is to secure the access of the foreigners authorities to the persons concerned and thus enforce their return. Nevertheless, according to the Länder involved in the study, it should be noted that these measures are also used by default when detention is not yet being considered. Table 3 gives an overview of alternatives to detention.

Table 3: Alternatives to detention pending removal in Germany

Measure	Legal basis
Obligation to report regularly to the foreigners authority or police for residence monitoring (reporting requirement)	Reporting requirement "to promote return" in respect of a person who is subject to a return decision (Section 46 subs. 1 Residence Act; No. 46.1.4.1 AVwV AufenthG)
	Reporting requirement once a week or at longer intervals "to secure and implement the return decision [...] when concrete measures to enforce removal are imminent" (Section 61 subs. 1e Residence Act)
Spatial restriction of residence	Obligation not to leave a certain spatial area (Section 46 subs. 1 Residence Act; No. 46.1.4.5 AVwV AufenthG)
	The residence of persons who are subject to a return decision can be restricted, among other things, if concrete measures to enforce return are imminent. Residence is to be restricted if the person causes the obstacle to removal themselves, e.g. by deceiving identity, or does not meet reasonable requirements to cooperate in order to remove the obstacle to return (Section61 subs. 1c sentence 1 no.3 Residence Act).
Obligatory residence in a place or accommodation designated by the foreigners authority	Obligation to take up residence at a certain place or in a certain accommodation (Section 46 subs. 1 Residence Act; No. 46.1.4.4 AVwV AufenthG)
	Requirement to reside in a departure facility to secure and enforce the obligation to leave the country if concrete measures to enforce return are imminent (Section 61 subs. 1e, 2 Residence Act)
Night-time restriction/ house arrest at night/ availability order	Order to remain in the allocated accommodation between 10 p.m. and 6 a.m. (Section 46 subs. 1, Section 61 subs. 1e Residence Act) Order to be available in their room in the accommodation for a certain time during the day (e.g. 7:30 to 9:00 a.m.) for a period of approx. 14 days, short-term absences of less than ten minutes being excluded
Deposit	Obligation to save financial means for funding the return and to pay these into a blocked account set up by the foreigners authority for this purpose (Section 46 subs. 1 Residence Act; No.46.1.4.3 AVwV AufenthG) Although this measure is provided for in the General Administrative Regulation on the Residence Act (AVwV AufenthG), it has not yet been applied in the Länder.
Sureties	Sureties by persons of trust (No. 2 AHaftRL NRW[23]) There are no federal regulations for this measure so far, nor is it applied in the Länder.
Electronic monitoring	The residence of persons who are obliged to leave the country and pose a threat to security may be electronically monitored for a maximum of three months by order of a judge. Monitoring may be extended for a maximum of three months at a time (Section 56a Residence Act). This has not yet been applied in the Länder.

23 Guidelines for Detention Pending Removal in the Land of North Rhine-Westphalia (Abschiebungshaftrichtlinien, AHaftRL). Circular of the Ministry of the Interior and Local Government – 121-39.21.01-2-AHaftRL – of 8 June 2016.

Reporting requirements

If a person is ordered to report pursuant to Section 46 subs. 1 or Section61 subs. 1e of the Residence Act, they must report regularly (once a week or at longer intervals) to the foreigners authority. The prerequisite for ordering a reporting requirement is that it serves the purpose of leaving the country (No. 46.1.3 AVwV AufenthG). There are no specifications regarding the maximum period for which a person may be subject to a reporting requirement; at the same time, the administrative order must be proportionate (No. 46.1.3 AVwV AufenthG). The person concerned has legal remedies: objections and legal action against a reporting order pursuant to Section 46 subs. 1 of the Residence Act have suspensive effect (No. 46.0.2 AVwV AufenthG).

As a rule, the foreigners authorities are responsible for ordering registration requirements for foreign nationals. If the person concerned violates the reporting requirement, this is sanctioned as an administrative offence and can be punished with a fine of up to EUR 1,000 (Section 98 subs. 3 no. 4, subs. 5 Residence Act). In addition, the repeated violation of a reporting requirement imposed pursuant to Section 61 subs. 1e of the Residence Act to secure and enforce the obligation to leave the country can be considered concrete evidence of the existence of a risk of absconding when deciding whether to order detention pending removal (Section 62 subs. 3b no 6 Residence Act). No statistical data are available on the ordering of reporting requirements as an alternative to detention pending removal.

Night-time restriction/house arrest at night/ availability order

Persons may be required to stay in the assigned accommodation during individual hours of the day or night. There are different names for this alternative: the so-called night-time restriction in Saxony-Anhalt, house arrest at night in Thuringia and the day-time availability order in Bavaria (STMI BY, IM ST, MMJV TH). In Thuringia, it is sometimes ordered at the same time as a reporting requirement that the person concerned must remain in their assigned accommodation between 10 p.m. and 6 a.m. In Bavaria, persons who are regularly absent from their assigned accommodation, but who do not present sufficient evidence that they at risk of absconding, are obliged to remain in their room for a certain period during the day (e.g. from 7:30 to 9:00 a.m.) to secure their removal. This is usually done for a period of 14 days. These conditions can be seen as a temporary house arrest and can be ordered under Section 46 subs. 1 or Section 61 subs. 1e of the Residence Act. There are no guidelines on the maximum duration of such an order, but the principle of proportionality also applies here and the person concerned has legal remedies available as described above. In addition, the violation of this measure, too, is punished as a regulatory offence and, in the event of a repetition, can be considered as concrete evidence for the existence of a risk of absconding when deciding whether to order detention pending removal (Section 62 subs. 3b no. 6 Residence Act). No statistical data are available on the ordering of such measures as alternatives to detention pending removal.

Spatial residence restriction

The spatial restriction of residence consists in the fact that the residence of persons can be restricted either to the Land or to the district of the foreigners authority (Section 61 Residence Act). There are no guidelines on the maximum duration of such an order, but the principle of proportionality also applies here and the person concerned has legal remedies available as described above. No statistics are available on the use of spatial confinement as an alternative to detention pending removal.

Residence requirement and departure facilities

Another measure is the obligation to live in a certain place, e.g. in a departure facility (Section 61 subs. 1d, 1e and 2 Residence Act). The Länder have the option of creating so-called departure facilities (Section 61 subs. 2 Residence Act). According to the law, the aim of the stay in the departure facilities is to promote the willingness to leave the country voluntarily by providing support and counselling and to ensure accessibility for authorities and courts as well as the enforcement of the return (Section 61 subs. 2 sentence 2 AufenthG). So far, four Länder have made use of the option of creating departure facilities: Bavaria, Lower Saxony, Saxony-Anhalt and Schleswig-Holstein. The maximum duration of such an order is not specified, but the principle of proportionality also applies here and legal remedies are available. The decision is at the discretion of the authority and must be justified in the individual case (Dollinger 2020: Section 61 Residence Act margin no. 31). In Bavaria, persons subject to an enforceable obligation to leave the country who deceive about their identity or do not fulfil their legal obligations to cooperate are obliged to live in departure facilities. Furthermore, in Bavaria, persons are also to be accommodated in such accommodation “where

the Central Foreigners Authority comes to the assessment that their central accommodation and the associated closer supervision by the Foreigners Authority is necessary for the enforcement of the return decision" (LT BY 2018b: 3). No statistics are available on the use of departure facilities as an alternative to detention pending removal. Only individual figures from Bavaria on the use of departure facilities give an indication of the frequency of use: according to the Bavarian State Ministry of the Interior, for Sport and Integration, 26 persons were accommodated in Bavarian departure facilities and 53 persons were detained in Bavarian removal detention facilities as of 30 June 2021.

3.2 Challenges and advantages of alternatives to detention from the point of view of the Länder

The greatest challenge regarding the application of alternatives to detention pending removal is that from the Länder's point of view the milder means available in Germany do not offer an effective alternative to detention if there is a risk of absconding. In the survey conducted for this study, most responsible ministries of the interior and integration stated that neither reporting requirements, spatial restrictions on residence, compulsory residence in accommodation designated by the foreigners authority nor house arrest at night are effective alternatives, as they cannot rule out the possibility of the person concerned absconding.

In the case of individual measures, such as the ordering of reporting requirements and availability orders, some Länder report that these are seen by the persons concerned as a forewarning and could thus encourage them to abscond. Another challenge with reporting requirements is that return measures, especially regarding charter measures, cannot be scheduled in such a way that an arrest is possible in the course of fulfilling the reporting requirement in the authority. Compulsory residence also fails as an alternative because "some of the persons obliged to leave the country regularly do not stay in the accommodation but with relatives or acquaintances", as evidenced by experiences in Thuringia (MMJV TH). Additional challenges arise with other alternatives. For example, the occupancy requirements do not allow for the accommodation of families with underage children. In the case of so-called house arrest at night, one challenge is that monitoring compliance with the requirement proves to be problematic for legal and factual reasons.

Furthermore, the Länder also see challenges in alternatives that have not yet been used in Germany. Whereas in other EU Member States persons who are obliged to leave the country are sometimes handed over to the responsibility of social workers (e.g. social welfare office, youth welfare office, independent welfare organisations, migrant organisations and other non-governmental organisations) for individual case management, in Germany this has so far only been practised in the case of unaccompanied minors, who are usually taken into care by youth welfare offices. A challenge here would be that these institutions see their task in representing the interests of the persons concerned, which does not include return. The situation is similar regarding sureties as an alternative to detention, as here, too, it would be difficult to find a guarantor due to the different interests involved.

These challenges aside, the Länder also perceive a few advantages in terms of alternatives to detention pending removal. On the one hand, individual Länder see advantages for the persons concerned, as alternatives are a milder measure compared to detention. On the other hand, the Länder see various advantages on the part of the authorities. According to some Länder, reporting requirements are advantageous from an administrative point of view in that, in contrast to the detention application procedure, they are less burdensome and involve only low costs and personnel expenditure overall. Furthermore, in the view of the Länder, measures that can be ordered pursuant to Section 61 subs. 1e of the Residence Act (e.g. reporting requirements) also have an indirect advantage with regard to the enforcement of the obligation to leave the country: the repeated violation of such a measure provides (further) evidence for the existence of a risk of absconding as grounds for detention and thus facilitates the imposition of detention pending removal.

Overall, it can be stated that from the viewpoint of the Länder, alternatives to detention are predominantly associated with challenges. In particular, the existing alternatives to detention pending removal cannot prevent absconding.

4 Decision-making practice on detention pending removal and alternatives to detention

In Germany, a two-step procedure is used to decide whether a person is to be detained or whether an alternative is to be ordered. In principle, a person may not be detained without a prior court order (Art. 104 para. 2 sentence 1 Basic Law). The court may only order detention at the request of the competent administrative authority (Section 417 FamFG). First, the competent administrative authority examines the individual case and makes a preliminary decision. If the prerequisites for detention are met (including grounds for detention) and the purpose of detention cannot be achieved by a milder means, a detention application is usually filed with the competent district court. There, the case is comprehensively examined. As previously noted in Chapter 3.1, the measures available in Germany are used by default in enforcing the obligation to leave the country, "even long before the question of whether or not to apply for detention pending removal is addressed in the individual case" (IM BW). Detention pending removal is only applied for when milder measures have proven to be impracticable and detention is the only enforceable solution.

The following describes in more detail which factors speak for and against the use of alternatives in individual cases. First, the practice of the administrative authorities will be addressed and then the proportionality test in judicial proceedings will be examined in more detail. The focus is always on the question of detention pending removal or alternatives.

4.1 Application for detention by the administrative authority

The foreigners authorities[24] (Section 71 subs. 1 Residence Act), the police forces of the Länder (Section 71 subs. 5 Residence Act) and the Federal Police (Section 71 subs. 3 no. 1e Residence Act in conjunction with Section 2 subs. 1 Federal Police Act[25]) are responsible for arresting and applying for detention. Before a detention application is filed, the administrative authority examines whether the prerequisites for detention are met within the framework of a case-by-case examination. The principle of proportionality is also observed (No. 62.0.3.2 AVwV AufenthG). An application for detention must contain the following information:

- the identity of the person concerned,
- their habitual residence,
- the necessity of the deprivation of liberty,
- the required duration of the deprivation of liberty and
- in proceedings for detention pending removal, detention to prepare removal after unauthorised entry and detention to prevent unauthorised entry, the obligation of the person concerned to leave the country as well as the prerequisites and feasibility of return,
- the file of the person concerned (also called 'foreigners file') (Section 417 subs. 2 FamFG).

In this context, since a procedural amendment by the Second Act to Improve the Enforcement of the Obligation to Leave the Country in 2019, the authority may

24 The Land government or the body designated by it may determine that only one or several foreigners authorities are responsible for individual tasks. A centrally competent authority shall be designated in each Land for the enforcement of removals (Section 71 subs. 1 sentences 2 and 4 AufenthG).

25 German: Bundespolizeigesetz (BPolG) of 19 October 1994 (BGBl. I pp. 2978, 2979).

supplement the statement of reasons until the end of the last factual instance (Section 417 subs. 3 FamFG). The following describes in more detail which aspects the administrative authority usually examines in this context. The procedures are illustrated in Figure 2.

Only in certain exceptional cases regulated by law may the administrative authority detain a person concerned and place them in temporary detention even without a prior court order. This is the case if there is an urgent suspicion that the conditions for risk of absconding exist, the judicial decision on ordering detention cannot be obtained beforehand and there is a well-founded suspicion that the person concerned intends to evade the detention order. However, the person must be brought before the court immediately for a decision (Section 62 subs. 5 Residence Act). This also applies to detention pending departure (Section 62b subs. 4 Residence Act). If the deprivation of liberty is not ordered by a judicial decision by the end of the next day, the person concerned must be released (Section 428 subs. 1 sentence 2 FamFG).

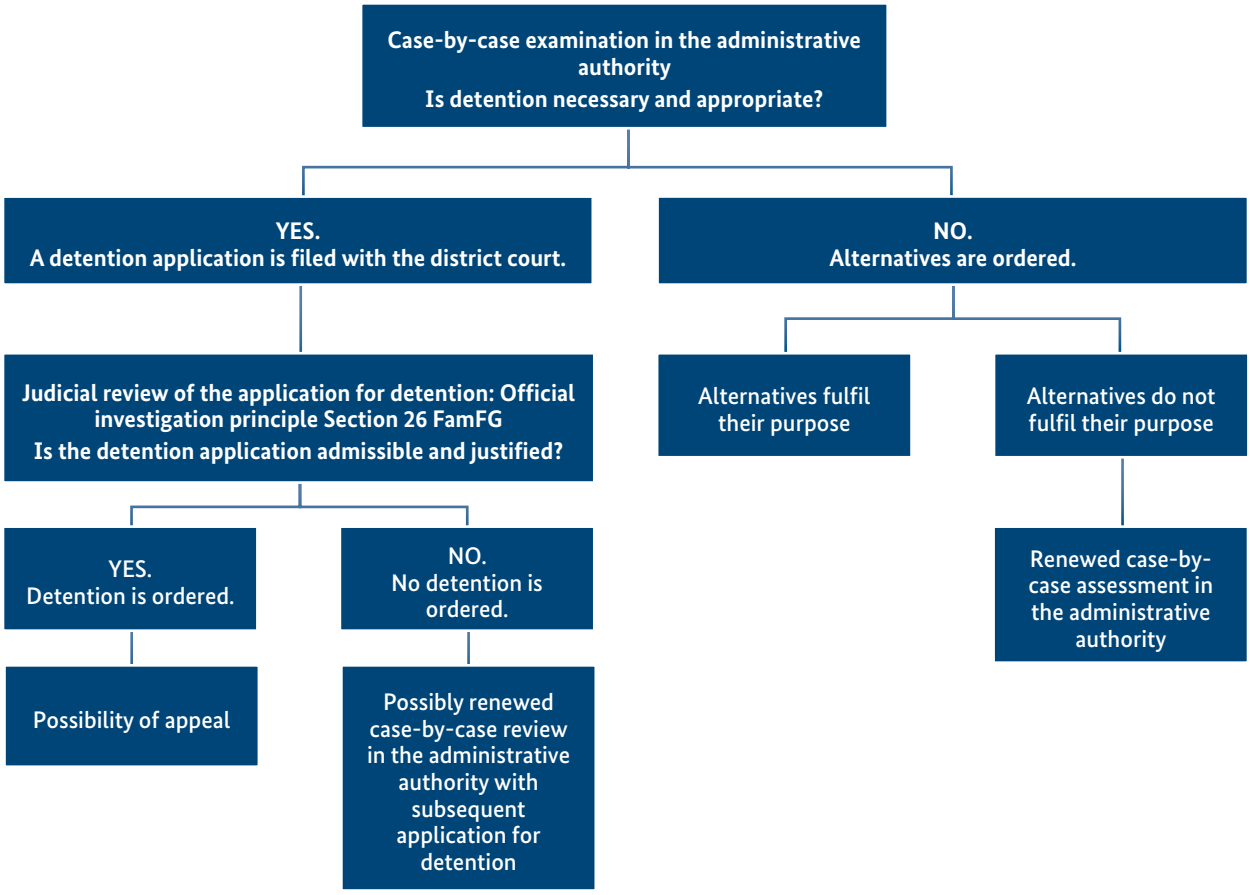
Grounds for detention: Risk of absconding or avoidance or hampering of return

If the conditions for detention are met, the administrative authority will usually also consider the degree of risk of absconding or the likelihood that the person will frustrate or impede the return as part of the individual case assessment. The higher the risk of absconding, the less likely it is that alternatives to detention will be able to secure the enforcement of removal. According to the Länder surveyed, a substantial risk of absconding generally precludes the use of milder means. However, each individual case is examined separately by weighing up which circumstances speak for and which against detention. The criteria that play a role beyond the grounds for detention are discussed in the following paragraphs.

Consideration of milder means

Always required for a deprivation of liberty are explanations regarding the specific legal grounds for detention as well as their prerequisites and elucidations

Figure 2: Procedure on the application for and order of detention



Source: Own representation.

on the extent to which these are given in the case in question (Wendtland 2019: Section 417 FamFG margin no. 11). As the Federal Court of Justice (Bundesgerichtshof, BGH) clarified in 2017, the authority satisfies these requirements if it explains in the application why it considers the requested detention to be necessary. "It does not have to additionally explain that and for what reasons a milder means, by which the purpose of the requested detention can be achieved in an equally sufficient manner, is not available" (BGH, ruling of 30 March 2017, margin no. 11[26]). The information presented in the application for detention is intended to provide an adequate basis for the court's consideration. This is already achieved by the authority stating the grounds for which detention is to be ordered and the facts on which these grounds are based in each case, without additionally emphasising that milder means do not constitute an alternative. Rather, it is the task of the judge to critically examine this during the hearing (BGH, ruling of 30 March 2017, margin no.12).

In some Länder, however, the authorities are obliged by decree to address such statements on the possible use of milder means in the application for detention. In Brandenburg, for example, this is specified as follows: In the application for detention "information must be provided on all the facts of Section 417 subs. 2 nos. 1–5 FamFG. In particular, the necessity of detention pending removal or detention pending departure must be explained. This also includes that no milder and equally suitable means is available to secure the removal" (No. 5.2 AW-AuslR[27]). In North Rhine-Westphalia, too, a decree stipulates that "[i]n the application for detention [...] it must be stated that alternative means of detention have been examined" (No. 2 AHaftRL[28]).

Whether an alternative is a milder means than detention pending removal is a question of the specific individual case. "The alternative must fit the person and their behaviour in the past" (MMJV TH). Here, the person's personal situation and circumstances (family or individual) can also play a role in the selection of suitable alternatives. Regarding the person's previous behaviour, according to the surveyed Länder, aspects coming into play in individual cases include frequent violation of official requirements, previous periods of presence, unknown residence, accessibility for the administrative authority, financial standing of the person as well as their willingness to leave voluntarily. The (lack of) willingness to cooperate is determined during personal interviews, which often already take place in establishing identity, passport procurement and return counselling. As previously described in Chapter 3.1.1, the administrative authorities of the Länder are often confronted with the difficulty that none of the existing measures can prevent absconding.

Need for protection and fitness for detention

For persons in need of protection, higher standards apply to the proportionality test. On the one hand, this derives from the Residence Act, according to which minors and families with minors may only be detained in special exceptional cases and only for as long as is reasonable, considering the best interests of the child (Section 62 subs. 1 sentence 3 Residence Act). Furthermore, the General Administrative Regulation on the Residence Act (AVwV AufenthG)[29] stipulates that minors under 16 years of age and persons over 65 years of age as well as pregnant women or mothers within the maternity protection regulations[30] should generally not be detained. In the case of unaccompanied minors, the foreigners authority must contact the youth welfare office. Unaccompanied minors should usually be accommodated in the previous accommodation. In the case of families with minor children, an application for detention should be made for only one parent as a rule (No. 62.0.5 AVwV AufenthG). According to case law, in the case of minors, the administrative authority is obliged to "examine all possibilities that can secure the intended removal in a milder and less drastic way. [...] The fact that such milder means were examined by the administration and why they cannot be considered in the individual case must already be presented in detail by the administration in its application for detention" (Cologne Higher Regional Court, ruling of 11 September 2002[31]). In addition, individual Länder have issued decrees regulating the extent to which the administrative authorities must state in their detention applica-

26 BGH, ruling of 30 March 2017 – V ZB 128/16 [ECLI:DE:BGH:2017:300317BVZB128.16.0].

27 Implementing provisions on Section 3 No. 6 and Section 4 of the Ordinance on Responsibilities in the Law on Foreigners (General Instruction in the Law on Foreigners No. 09/2020 – AW-AuslR No. 2020.09) of 10 December 2020.

28 Guidelines for Detention Pending Pemoval in the Land of North Rhine-Westphalia (Abschiebungshaftrichtlinien, AHaftRL). Circular of the Ministry of the Interior and Local Government – 121-39.21.01-2-AHaftRL – of 8 June 2016.

29 General Administrative Regulation on the Residence Act of 26 October 2009, GMBl p. 877.

30 The last six weeks before childbirth and eight or, in exceptional cases, 12 weeks after childbirth (Section 3 subs. 1 and 2 Act on the Protection of Mothers at Work, in Training and in Degree Courses (Mutterschutzgesetz, MuSchG)) of 23 May 2017 (BGBl. I p. 1228)).

31 OLG Köln, ruling of 11 September 2002 – 16 Wx 164/2002 [ECLI:DE:OLGK:2002:0911.16WX164.2002.00].

Infobox 3: Vulnerable persons pursuant to Art. 3 No. 9 Return Directive

Vulnerable persons are:

- minors,
- unaccompanied minors,
- disabled people,
- elderly people,
- pregnant women,
- single parents with minor children and
- persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.

tions whether alternatives to detention have been examined in the case of persons in need of protection. In North Rhine-Westphalia, for example, in the case of "persons in need of protection" within the meaning of Art. 3 No. 9 of the Return Directive (see Infobox 3), all alternatives must be examined before an application is made. In the application for detention, it must be explained and documented why the alternatives are not sufficient in the specific case (No. 2 AHaftRL[32]).

Whether a person in question is to be considered in need of protection is decided by the authorities in connection with the review of the fitness for detention. According to information provided by the surveyed Länder, this is usually examined based on the file, for example if information on an existing need for protection is already available from the asylum procedure or another previous procedure, and/or through an interview as part of the proportionality assessment regarding the current situation. Priority is given to whether there are obstacles to removal[33] due to the need for protection. It is also examined whether the detention facility is suitable, for example in terms of its equipment, for the accommodation of the person in need of protection in the individual case. In addition, a medical certificate of fitness for detention must be provided before a person is admitted to detention pending removal.

Organisational requirements

The administrative authority checks whether a place of detention is available before applying for detention. In addition, the authorities check the organisational requirements for the removal (e.g. documents, flights). In this context, the nationality or country of origin of the person concerned may also play a role. If, due to the country of origin, it is not certain whether it will be possible to obtain substitute passport papers or achieve the return within a reasonable period of time, a detention application is usually not filed because this means that the prerequisites for a detention order are not met. In the case of expulsions and removals of persons against whom public charges have been filed or criminal investigation proceedings have been initiated, the consent of the public prosecutor's office must also be obtained, unless there is only a minor interest in prosecution (Section 72 subs. 4 sentences 1 and 3 Residence Act). According to the current case law of the Federal Court of Justice (BGH), the consent of the public prosecutor's office no longer must be available when the application for detention is filed. The authority only needs to show that this will be available by the scheduled date of removal or that it will have become dispensable by then (BGH, ruling of 12 February 2020, headnote[34]) Economic aspects, on the other hand, usually play no role: from a constitutional point of view, economic efficiency must not be the decisive factor in the decision. In individual cases, however, effort and staff capacities in the administrative authority are considered.

32 Guidelines for Detention Pending Removal in the State of North Rhine-Westphalia (Abschiebungshaftrichtlinien, AHaftRL). Circular of the Ministry of the Interior and Local Government – 121-39.21.01-2-AHaftRL – of 8 June 2016.

33 When it comes to the question of whether any destination-related prohibitions on removal pursuant to Section 60 subs. 5 and 7 of the Residence Act exist in the state to which the person in question is to be removed, the administrative authorities are obliged to involve the Federal Office for Migration and Refugees (Section 72 subs. 2 Residence Act).

34 BGH, ruling of 12 February 2020 – XIII ZB 15/19 [ECLI:DE:BGH:2020:120220BXIIIZB15.19.0].

4.2 Judicial review and detention order

After the application for detention has been filed by the administrative authority with the district court, the application for detention is examined by the magistrate. The court must conduct the necessary investigations ex officio to establish the facts relevant to the decision (Section 26 FamFG, so-called official investigation). In principle, the person concerned must also be heard for this purpose.[35] The court must examine whether the detention order is reasonable. This means that it must be examined "whether the effects of detention pending removal are proportionate to the intended removal. Whenever the encroachment on the rights of the third-country national concerned is no longer proportionate to the state's interest in securing the termination of residence, detention pending removal may not be ordered" (Hörich 2015: 169). Within the framework of this proportionality test, the court must examine various aspects that are regulated in residence law and concretised in the case law of the Federal Court of Justice (Grotkopp 2020: 41ff.). These are

- the absence of a milder means (Section 62 subs. 1 sentence 1 Residence Act),
- the restriction of detention to the shortest possible duration (Section 62 subs. 1 sentence 2 Residence Act),
- the consideration of social hardship cases in the case of minors and families (Section 62 subs. 1 sentence 3 Residence Act; Federal Court of Justice, ruling of 6 December 2010, headnote[36]),
- the existence of health impediments (fitness for detention and fitness to travel[37]; Federal Court of Justice, ruling of 1 June 2017, margin no. 8[38]),
- the impossibility of removal; for example, "due to a lack of actual willingness to accept the returnee in the country of destination", which would "certainly condemn the removal to failure" (Federal Court of Justice, ruling of 17 June 2010, margin no. 18[39]),
- considering the willingness of the person concerned to cooperate (Grotkopp 2020: 46),
- and voluntary return (Section 62 subs. 3 sentence 2 Residence Act; Federal Court of Justice, ruling of 17 June 2010, margin no. 26).

"In the judicial examination of the application for detention by the authorities, there is a tension between the principle of the application, which imposes far-reaching obligations on [the applicants] to provide evidence, and the official investigation" (Grotkopp 2020: 115). Thus, the committing magistrate may not simply accept the information in the authority's detention application without further examination, but "must [...] themselves establish the facts that justify the deprivation of liberty" (Federal Constitutional Court, ruling of 30 October 1990[40]). This is particularly the case if the person in question disputes facts presented by the authority. Here, the court must explain in the detention order why and on what basis it made the decision (Federal Court of Justice, ruling of 11 May 2017, margin no. 6f.[41]). As far as the judicial examination of possible alternatives to detention is concerned, according to case law, the court does not have to additionally explain in the detention order "that and for what reasons a milder means, by which the purpose of the requested detention can be achieved in an equally sufficient manner, is not available" (Federal Court of Justice, ruling of 11 January 2018, margin no. 24[42]). The committing magistrate only needs to do this if there are indications that the purpose of detention could also be achieved by a milder means. In this context, the court can also order alternatives instead of detention by suspending the detention order on conditions (Section 424 FamFG; Grotkopp 2020: 41f.).

The need for protection is also re-examined during the official investigation. As far as minors are concerned, the Federal Court of Justice has ruled that "the principle of proportionality is of particular importance when ordering preventive detention due to the severity of the interference" (Federal Court of Justice, ruling of 29 September 2010, margin no. 9[43]). If the court deviates from legal requirements for the detention of

35 A personal hearing may only be dispensed with if, according to a medical opinion, there is reason to fear considerable disadvantages for the person's health, if the person suffers from a communicable disease within the meaning of the Infection Protection Act (German: Infektionsschutzgesetz) or if the person is obviously not able to make their will known (Sections 34 subs. 2 and 420 subs. 2 FamFG).

36 BGH, ruling of 6 December 2012 – V ZB 218/11.

37 The question of fitness to travel must be examined by the competent administrative court. In cases where the ability to travel also concerns the possibility of removal within three months (Section 62 subs. 3 sentence 3 Residence Act), the district court must further examine the matter (Grotkopp 2020: 46).

38 BGH, ruling of 1 June 2017 – V ZB 163/15 [ECLI:DE:BGH:2017:010617BVZB163.15.0].

39 BGH, ruling of 17 June 2010 – V ZB 13/10.

40 BVerfG, ruling of 30 October 1990 – 2 BvR 562/88, NJW 1991, 1284.

41 BGH, ruling of 11 May 2017 – V ZB 175/16 [ECLI:DE:BGH:2017:110517BVZB175.16.0].

42 BGH, ruling of 11 January 2018 – V ZB 28/17 [ECLI:DE:BGH:2018:110118BVZB28.17.0].

43 BGH, ruling of 29 September 2010 – V ZB 233/10.

vulnerable persons, this must be justified in the order (Federal Court of Justice, ruling of 7 March 2012, margin no. 7f.[44]). Furthermore, the fitness to be detained is also examined again in court (Grotkopp 2020: 45). The administrative authorities or administrative courts, on the other hand, determine the fitness to travel, which could influence the return. Only if the fitness to travel influences the possibility of removal within three months, the committing magistrate must determine it themselves (Grotkopp 2020: 46; for the competences between district courts and administrative courts see Infobox 4).

If there are "serious investigative deficits on the part of the authority" in a detention application, the court may not attempt to compensate for these on its own initiative but must inquire with the authority in the sense of Section 26 FamFG and suggest appropriate improvements (Grotkopp 2020: 115). If the committing magistrate is convinced that the matter has been sufficiently clarified, the court issues the detention order. In doing so, the court is bound by the detention request of the administrative authority and may not exceed the requested detention period but is obliged to go below it if "only a shorter detention period than requested appears necessary" (Schmidt-Räntsch 2014: 119).

As described above, the committing magistrates must conduct a comprehensive examination of the detention application. Against this background, there is a debate among experts on how comprehensive the examination of alternatives for detention pending removal should be in the courts. In this context, it is argued that the district courts responsible for ordering detention, in contrast to the foreigners authorities, lack the "intensive knowledge of the milieu" needed to assess the necessity of detention and the availability of alternatives (Hailbronner 2020: Section 62 AufenthG margin no. 58f.). It would therefore be appropriate to "grant the foreigners authorities a margin of appreciation regarding the availability and effectiveness of milder means" (Hailbronner 2020: Section 62 AufenthG margin no. 58f.).

Nevertheless, the legal examination is the responsibility of the committing magistrate. In this context, various experts criticise the lack of knowledge among magistrates about alternatives to detention as well as the overall high complexity of removal law (Deutscher Bundestag 2015d: 13, 34f.). In dealing with the law on detention pending removal, the ordinary courts have "reached the limits of what can realistically be dealt with" (Grotkopp 2020: V). Several factors play a significant role here: first, committing magistrates are usually not sufficiently familiar with residence law issues, as these are usually overseen by the administrative courts. Compared to other measures involving deprivation of liberty, magistrates are confronted with the issue of detention pending removal far less frequently, which means that they lack the necessary practical experience. In addition, EU law and the steadily growing

44 BGH, ruling of 7 March 2012 – V ZB 41/12.

Infobox 4: Jurisdiction of the district court and administrative court

While in Germany the district courts are responsible for all measures involving deprivation of liberty, including detention pending removal, the administrative courts are responsible for all other residence law matters.

Thus, although the district court decides on the ordering of detention pending removal, it does not decide on the legality of the administrative decision on return and removal itself, as the administrative courts are responsible for this. Hence the scope of examination of the committing magistrate regarding the existence of the obligation to leave the country and the prerequisite for return is limited to a formal examination. The examination of legality is the responsibility of the administrative courts (Grotkopp 2020: 6f.).

However, when examining the feasibility of removal within three months, the district court must consider pending urgent proceedings before the administrative court, clarify the situation and take this into account in its decision (Federal Constitutional Court, ruling of 27 February 2009, margin no. 26[45]).

45 BVerfG, ruling of 27 February 2009 – 2 BvR 538/07.

case law of the Federal Court of Justice regarding procedural law must be observed at several points when ordering detention. To increase the professionalism and quality of detention decisions, competences have been redefined. In Baden-Württemberg, for example, the jurisdiction of the district courts in detention cases to secure the termination of residence was centralised in the individual districts as of 1 January 2017. Instead of a total of 32 different district courts, only 17 different district courts are now responsible in the first instance (Section 30 Ordinance on judicial competence[46] in the version of 29 March 2006 and 30 August 2016).

4.3 Legal remedies and advice

When ordering alternatives in the administrative procedure

Persons for whom the foreigners authority has ordered alternatives to detention by way of an administrative act can lodge an objection as far as this is provided for by Land law and file a complaint against the measures ordered. The objection must be lodged within one month after the administrative act has been notified to the person concerned (Section 70 of the Administrative Court Code (German: Verwaltungsgerichtsordnung, VwGO)). If the foreigners authority considers the objection to be well-founded, redress is granted. If not, an objection decision is issued, against which the person concerned may file a complaint with the administrative court within one month of being served (Sections 73, 74 Residence Act). An appeal against the decision of the administrative court may be lodged with the competent higher administrative court. Objection and action against the requirement to live in a departure facility as well as other requirements to secure and enforce the enforceable obligation to leave the country pursuant to Section 61 subs. 1e of the Residence Act do not have a suspensive effect (Section 84 subs. 1 sentence 1 no. 2, 2a Residence Act).

In court proceedings: Complaint and appeal on points of law

If detention has been ordered, the person concerned or their legal representation may lodge an appeal against the district court's order within one month of the written notification (or within two weeks in the case of interim orders; Sections 63, 64 FamFG). If the court considers the complaint to be well-founded, it must rectify it, otherwise the complaint is to be submitted to the regional court as the court of appeal for a decision (Section 68 FamFG). If the complaint is rejected by the regional court, the person concerned may file an appeal on points of law within one month with the Federal Court of Justice as the court of appeal on points of law (Section 70 subs. 3 no. 3, Section 71 subs. 1 FamFG). In the case of an appeal to the Federal Court of Justice, it must be considered that the person concerned can only be represented by a lawyer who is admitted to the Federal Court of Justice[47] (RAK BGH 2021b).

Legal advice and financial support

In contrast to criminal law, where a public defender is appointed in cases of necessary defence of the accused person (Sections 140, 141 Code of Criminal Procedure (German: Strafprozessordnung, StPO)), this does not apply in the law governing detention pending removal. A person concerned can, of course, still call in legal representation. In addition, the law on detention pending removal provides that the court may appoint a guardian ad litem to represent the interests of the person concerned (Section 419 FamFG; Grotkopp 2020: 130). In doing so, the court must examine whether the person concerned cannot "properly exercise their procedural rights themselves" (Deutscher Bundestag 2007: 291). The following points can be mentioned as criteria for the appointment of a guardian ad litem:

- restriction of procedural rights, for example in urgent proceedings,
- duration of the measure,
- existence of a suitable representative,
- lack of linguistic communication and lack of a suitable interpreter,
- special need for protection (Grotkopp 2020: 130f.).

46 Ordinance of the Ministry of Justice on Responsibilities in the Judiciary (German: Verordnung des Justizministeriums über Zuständigkeiten in der Justiz (Zuständigkeitsverordnung Justiz, ZuVOJu)) of 20 November 1998 (GBl. p. 680).

47 At the time the study was conducted, 39 lawyers were admitted to the BGH (RAK BGH 2021a).

If the person is indigent, as is often the case with the persons in question, and if there are sufficient prospects of success, the court may grant legal aid pursuant to Sections 76ff. FamFG in conjunction with Sections 114ff. Civil Procedure Code (German: Zivilprozessordnung, ZPO) (Grotkopp 2020: 135). Legal aid covers the court and lawyer's fees. In this case, a lawyer must also be assigned to the person concerned (Section 78 subs. 3 FamFG; Federal Court of Justice, ruling of 28 February 2013, headnote[48]; Deutscher Bundestag 2018: 130). The lawyer must be given the opportunity to attend the hearing of the person concerned (Federal Court of Justice, ruling of 10 July 2014, margin no. 8[49]).

In addition, legal advice for people with low incomes is to be offered in Germany as a matter of principle, regardless of their nationality, for a personal contribution of EUR 15, which can, however, also be waived (BMJV 2021: 10; Caritas n.d.a; Deutscher Bundestag 2018: 102). In removal cases, legal advice includes legal counsel and, if necessary, representation. The application for legal advice is filed at the district court. Persons who "[have] so little money at their disposal that [they] would receive legal aid pursuant to the provisions of the Code of Civil Procedure without having to pay instalments from [their] income or something from [their] assets" are entitled to legal advice (BMJV 2020): 10). A sufficient likelihood of success is not a prerequisite for the granting of legal advice. In addition, various welfare associations and non-governmental organisations offer free legal advice in matters of residence law (e.g. advice centres and online advice by Caritas,[50] refugee councils of the Länder (e.g. Caritas n.d.b; Flüchtlingsrat Niedersachsen 2020)). If a person has already been detained, they also have access to legal advice from within detention, which in Bavarian removal detention facilities is offered by organisations such as the Jesuit Refugee Service and Amnesty International (JRS n.d.).

Social and psychological counselling

Various welfare associations and non-governmental organisations offer free counselling on social and psychological issues in their advice centres (e.g. advice centres and online advice by Caritas (Caritas n.d.b)). In addition, in some Länder there are also state counselling services in the removal detention facilities provided by social workers (e.g. in Baden-Württemberg, Bavaria and Hesse) and prison psychologists (in Bavaria) (Deutscher Bundestag 2018: 93, 102f.). Moreover, the detention centres are usually visited regularly by welfare associations and non-governmental organisations to provide social and psychological support (e.g. Verein Hilfe für Menschen in Abschiebehaft Büren e. V.[51]).

Health care

The Länder entrust physicians with the health care and treatment of detainees awaiting removal (Deutscher Bundestag 2018: 95). The granting of benefits is based on the Asylum Seekers' Benefits Act (German: Asylbewerberleistungsgesetz, AsylbLG) and only includes the treatment of acute illnesses and pain conditions. Chronic illnesses are only treated if they lead to acute conditions or if the treatment of the acute condition necessarily requires the treatment of the chronic illness (Korff 2021: Section 4 AsylbLG margin no. 4f.).

48 BGH, ruling of 28 February 2013 – V ZB 138/12.

49 BGH, ruling of 10 July 2014 – V ZB 32/14.

50 https://www.caritas.de/hilfeundberatung/onlineberatung/migration/start

51 http://www.gegenabschiebehaft.de/hfmia/index.php?id=43

5 Effectiveness of detention and alternatives to detention

The aim of this EMN study is, on the one hand, to present the various alternatives to detention and the decision-making processes for and against the ordering of detention or its alternatives. On the other hand, this study also seeks to analyse to what extent and in which case constellations the alternatives used are effective. The objective of detention pending removal and alternatives to detention is to enable the authorities to access the persons concerned and to enforce the return decision, while respecting fundamental rights. Alternatives to detention are seen as less costly and more humanitarian than detention (IDC 2015: 75), but the extent to which they are comparable in their effectiveness remains as yet unclear for Germany. To evaluate the extent to which the measures available in Germany achieve this objective, it must therefore be examined whether they 1. enable the authorities to control the persons concerned, 2. promote return and 3. preserve fundamental rights. In the case of Germany, it has not yet been possible to scientifically evaluate the effectiveness of the various alternatives to detention pending removal, as there is no nationwide systematic collection of the required data. Alternatives to detention have not been statistically recorded so far. Furthermore, an analysis of effectiveness would have to take into account that the group of persons for whom alternatives to detention are imposed and the group of persons for whom detention is ordered can differ systematically with regard to certain characteristics (including probability of risk of absconding, willingness to cooperate with the authorities), which significantly influences the complexity and thus also statements about the effectiveness of the measures. Reliable findings about the effectiveness of said two options should therefore be based on methods of analysis that consider possible systematic group differences, which cannot be guaranteed, for example, by comparing return rates (Angrist/Pischke 2008). In the following, reference is therefore only made to individual figures and anecdotal evidence.

The systematic recording of figures on detention pending removal differs between the Länder. For instance, the answers of the Länder to a major question by the Left Party in the Bundestag show that only in some Länder is a distinction made in the statistics between preparatory detention, preventive detention, detention for cooperation and detention pending departure (Deutscher Bundestag 2018: 29ff.; Deutscher Bundestag 2021a: 7ff.). In addition, the Länder data are partly not comparable with each other due to different data collection procedures. As a result, there are, for example, no reliable figures for the total number of persons detained in Germany each year. There are data collection differences among the Länder that do not maintain their own removal detention facilities[52] (Deutscher Bundestag 2018: 12ff.; Deutscher Bundestag 2021a: 3ff.). The statistics published so far usually do not indicate how many cases were executed for which Land in administrative assistance. As can be seen in Table 5, Bavaria and North Rhine-Westphalia have by far the highest number of persons in detention pending removal. This is explained by a higher number of persons seeking international protection and correspondingly more people with an obligation to leave the country in these Länder: on 31 December 2020, 75 485 persons in North Rhine-Westphalia and 36 546 in Bavaria were subject to an obligation to leave the country (Deutscher Bundestag 2021b: 50f.).

Securing access by the authorities

To evaluate the effectiveness of the measures to secure access to the persons concerned by the authorities, the different measures would have to be compared with each other regarding the proportion of persons who by absconding evade access by the au-

52 Not all Länder have their own removal detention facilities: both Saarland and Thuringia have concluded administrative agreements with Rhineland-Palatinate to use the capacities in Ingelheim (Breyton 2019; Deutscher Bundestag 2018: 89). In 2019, the Länder of Mecklenburg-Vorpommern, Schleswig-Holstein and Hamburg entered into an administrative agreement for the joint use of a detention facility in Glückstadt (Schleswig-Holstein), which was put into operation in August 2021 (Bürgerschaft Hamburg 2020: 1; Schleswig-Holstein 2021). Moreover, detention, even if the Land concerned has its own detention facility (e.g. in the event of capacity issues), can also be executed in administrative assistance in other Länder (LT TH 2019: 2). Besides, for the duration of the suspension of the separation requirement by the Second Act to Improve the Enforcement of the Obligation to Leave the Country, the Länder may also use detention places in penal institutions if removal detainees are accommodated separately from prisoners (see Chapter 2.2; Section 62a subs. 1 Residence Act).

Table 4: Number of persons in detention pending removal in the Länder per year (2015 to 2020)

Land	2015	2016	2017	2018	2019	2020
Baden-Württemberg[1)]	N/A	251	421	333	502	339
Bavaria	N/A	445	912	1,232	1,492	851
Berlin[2)]	186	0	0	5	18	18
Brandenburg	N/A	N/A	N/A	N/A	N/A	4
Bremen	N/A	N/A	N/A	80	68	14
Hamburg	N/A	N/A	243	351	243	149
Hesse	N/A	N/A	N/A	208	329	236
Mecklenburg-Vorpommern	N/A	N/A	N/A	N/A	N/A	1
Lower Saxony	N/A	N/A	N/A	502	407	163
North Rhine-Westphalia	367	888	1,180	1,416	1,614	1,017
Rhineland-Palatinate[3)]	232	359	586	452	499	322
Saarland	4	6	69	46	51	28
Saxony	N/A	N/A	N/A	3	137	69
Saxony-Anhalt	19	13	9	19	18	26
Schleswig-Holstein	N/A	13	18	48	67	26
Thuringia	12	20	20	19	38	17

Source: Deutscher Bundestag 2021a: 9ff; MFFJIV RP.

NB: The figures are only comparable to a limited extent due to possible different approaches to data collection between the Länder.

1) The Pforzheim removal detention facility was put into operation on 1 April 2016. Regarding the figures, it must be considered that the capacities in the Pforzheim detention facility were not constant throughout the entire period but were increased in the interim. There were also repeated short-term reductions in capacity due to construction work.

2) Between November 2015 and September 2018, the Land Berlin did not have its own detention facility.

3) The figures for Rhineland-Palatinate also include cases that were executed in administrative assistance for other Länder.

thorities. Here, the number of persons in detention pending removal would have to be compared with the number of persons subject to the various alternatives to detention. However, these figures are only incomplete or not available at all. In this context, it should also be noted that what is often referred to by the foreigners authorities as absconding may in part also represent a voluntary decision by the person to leave Germany (Deutscher Bundestag 2021c: 69; Deutscher Bundestag 2020e: 62; Grote 2015: 16). Moreover, it is not regulated at what point a failed contact is considered to constitute absconding. There are no valid figures on how many people escape from detention pending removal each year (e.g. when attending a medical appointment or staying in hospital). Nor can any information be provided on how many persons subject to an alternative to detention regularly abscond.

To evaluate the effectiveness of alternatives to detention pending removal, empirical values from practice can be consulted in addition to statistics. These reveal: from the viewpoint of the surveyed Länder, the milder means available in Germany are hardly suitable as effective alternatives to detention pending removal. As previously discussed in Chapter 3.2, the greatest challenge for each of the alternatives mentioned is that, in the view of the Länder, they cannot effectively prevent the person in question from absconding and, in contrast to detention pending removal, do not offer the possibility of access to the persons in question at any time. Particularly in cases where there is a risk of absconding, detention pending removal is said to be without alternative to ensure access by the authorities and thus return.

Return

To evaluate the extent to which the various alternatives to detention or detention pending removal secure the return of the persons concerned, the different measures would have to be compared with each other in terms of the proportion of persons obliged to leave the country who either return voluntarily or are forcibly returned. In addition, the comparison could refer to the duration from the time the measure was ordered until the departure from Germany. Again, only limited data are available in Germany, which is why no analysis can be made.

The average length of time for which persons are held in detention pending removal can be seen in Table 5, although here, too, the figures from all Länder are not available. Between 2015 and 2020, the annual averages range from eight days (Saxony in 2018) to 59 days (Berlin in 2018). As far as the figures are available, the average annual duration of detention for most Länder in the individual years under consideration is between 20 and 30 days, and thus below the regular maximum duration of three months when preventive detention is first ordered (Section 62 subs. 3 sentence 3 Residence Act). Since the available figures on the duration of detention are not also shown separately for the distinct reasons for the end of detention (including return, release), further analyses would have to be conducted in this regard to determine the average duration of detention in the case of successful return. The average length of time for which persons are subject to an alternative to detention pending removal is not known.

Upholding fundamental rights

In addition to questions of effectiveness, it would also have to be examined to what extent fundamental rights can be safeguarded in the available measures. No statistics are available in Germany on the number of human rights complaints filed by persons in detention pending removal and persons subject to an alternative to detention. However, information on violations of the rights to freedom and the fundamental right to a fair trial can be considered as examples. In the period from 2015 to 2020, the Ministry of Justice of North Rhine-Westphalia reported a total of 13 applications for compensation due to unlawful detention pending removal. In Rhineland-Palatinate, there were a total of 32 compensation payments due to un-

Table 5: Average length of detention in days in the Länder (2015 to 2020)

	2015	2016	2017	2018	2019	2020[1)]
Baden-Württemberg	N/A	20	26	34	30	22
Bavaria	N/A	28	32	33	30	20
Berlin[2)]	11	0	0	59	17	28
Brandenburg	N/A	N/A	N/A	N/A	N/A	N/A
Bremen	N/A	N/A	N/A	19	21	16
Hamburg	N/A	N/A	N/A	16	17	12
Hesse	N/A	N/A	N/A	22	23	22
Mecklenburg-Vorpommern	N/A	N/A	N/A	N/A	N/A	N/A
Lower Saxony	N/A	N/A	N/A	20	22	21
North Rhine-Westphalia	22	25	34	34	29	23
Rhineland-Palatinate	15	17	26	29	26	25
Saarland	10	23	30	26	38	16
Saxony	N/A	N/A	N/A	8	22	16
Saxony-Anhalt	N/A	N/A	26	23	28	13
Schleswig-Holstein	N/A	N/A	N/A	23	26	22
Thuringia	16	N/A	20	31	19	22

Source: Deutscher Bundestag 2021a: 36ff.; IM SL.

1) Due to the COVID-19 pandemic, the figures on the duration of detention in 2020 are only comparable with previous years to a limited extent (Deutscher Bundestag 2021a: 66).

2) "Insofar as detentions took place beyond 31 December of a year, the total period of detention in the year of detention was taken into account" (Deutscher Bundestag 2021a: 36).

lawful detention pending removal in the same period (Deutscher Bundestag 2018: 30ff.; Deutscher Bundestag 2021a: 26ff.). Since there are no nationwide statistics on the unlawfulness of detention, it is not possible to assess in how many cases the district courts wrongfully order detention pending removal.

In summary, due to a lack of data, it is not possible to conduct analyses in Germany on the effectiveness of the various available alternatives to detention pending removal in comparison to detention.

6 Conclusion

Both the Residence Act and the regulations under EU law stipulate that persons may only be detained if the purpose of the detention cannot be achieved by a milder means. Before detention, it must therefore first be examined whether the purpose of detention cannot also be fulfilled by an alternative. In Germany, detention is therefore always ultima ratio.

The foreigners authorities have various measures at their disposal that can be ordered instead of detention. They regularly resort to reporting requirements, spatial restrictions on residence, obligations to take up residence in a certain place (e.g. departure facility) and orders to stay in the allocated accommodation at certain times. These measures are often routinely used in Germany even before there is any concrete consideration of ordering detention pending removal. Since no data on the ordering of alternatives to detention are collected in Germany, it is unclear to what extent they are actually applied.

The legal standardisation of detention pending removal has been subject to various changes in Germany in recent years. In particular, the possibilities of detention have been expanded and the prevention of danger has been more firmly anchored in residence law. Nevertheless, the legal regulations on alternatives to detention have not changed nationwide. However, individual Länder have specified the extent to which alternatives to detention are to be examined by the competent authorities in the context of the application for detention.

Whether someone is taken into detention pending removal is decided in a two-step procedure. First of all, the competent administrative authority, usually the foreigners authority, examines the individual case to determine whether the prerequisites for detention are met and whether no alternative measures can be considered. If this can be affirmed, the foreigners authority files an application for detention pending removal with the district court, as measures involving deprivation of liberty in Germany always require a judicial order. The court then examines the requirements and the proportionality of the detention. Since district court judges have only few points of contact with the Residence Act in their daily work and the law on detention pending removal is characterised by growing complexity, responsibility has been partly pooled with specialised Land authorities and district courts to professionalise and improve the quality of detention decisions.

From the viewpoint of the surveyed Länder, the milder means available in Germany are hardly suitable as effective alternatives to detention pending removal. The Länder see the greatest challenge in connection with ordering alternatives to detention in the fact that, in their view, there are no effective alternatives to detention in Germany that could safely prevent the person concerned from absconding. From the point of view of the authorities, the advantages of alternatives to detention are that they are a milder measure for the persons concerned and that they are partly less time-consuming and require fewer staff than a detention application procedure.

This EMN study should also compare the effectiveness of different alternatives to detention with each other as well as with detention pending removal. Since the data required for this are only incompletely collected in Germany and no effectiveness evaluations are available, no statements can be made on this. A better and systematic collection of statistics on detention pending removal and its alternatives would be the first major step towards evaluating the different measures of residence termination, including detention pending removal and its alternatives.

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Annex

Feedback provided by the Länder/Ministries

Land	Ministry	Abbreviation
Baden-Württemberg	Ministry of the Interior, Digitalisation and Migration	IM BW
Bavaria	State Ministry of the Interior, for Sport and Integration	STMI BY
Berlin	Senate Department for the Interior and Sport	SenInnDS BE
Brandenburg	Ministry of the Interior and for Municipal Affairs	IM BB
Hamburg	Ministry of the Interior and Sports - Office for Migration	AM HH
Mecklenburg-Vorpommern	Ministry of the Interior and Europe	IM MV
North Rhine-Westphalia	Ministry for Children, Family, Refugees and Integration	MKFFI NRW
Rhineland-Palatinate	Ministry for Family, Women, Youth, Integration and Consumer Protection	MFFJIV RP
Saarland	Ministry of the Interior, Building and Sport	IM SL
Saxony-Anhalt	Ministry of the Interior and Sport	IM ST
Schleswig-Holstein	Ministry of the Interior, Rural Areas, Integration and Equality	IM SH
Thuringia	Ministry for Migration, Justice and Consumer Protection	MMJV TH

List of Abbreviations

Para.	Paragraph
AHaftRL	Removal Detention Guidelines
AIDA	Asylum Information Database
AM HH	Ministry of the Interior and Sports - Office for Migration Hamburg
Art.	Article
AsylG	Asylum Act
AufenthaltG	Residence Act
AVwV AufenthG	General Administrative Regulation on the Residence Act
AZR	Central Register of Foreigners
BAMF	Federal Office for Migration and Refugees
BGBl.	Federal Law Gazette
BGH	Federal Court of Justice
BPolG	Federal Police Act
BVerfG	Federal Constitutional Court
CDU	Christian Democratic Union
i.e.	that is (id est)
e. V.	registered association
ECRE	European Council on Refugees and Exiles
EC	European Community
EMN	European Migration Network
EU	European Union
ECJ	European Court of Justice
FamFG	Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction
GG	Basic Law
IM BB	Ministry of the Interior and for Municipal Affairs Brandenburg
IM BW	Ministry of the Interior, Digitalisation and Migration Baden-Württemberg
IM MV	Ministry of the Interior and Europe Mecklenburg-Vorpommern
IM SH	Ministry of the Interior, Rural Areas, Integration and Equality Schleswig-Holstein
IM SL	Ministry of the Interior, Building and Sport Saarland
IM ST	Ministry of the Interior and Sport Saxony-Anhalt
COM	European Commission

MFFJIV RP	Ministry for Family, Women, Youth, Integration and Consumer Protection Rhineland-Palatinate
MKFFI NRW	Ministry for Children, Family, Refugees and Integration North Rhine-Westphalia
MMJV TH	Ministry for Migration, Justice and Consumer Protection Thuringia
NPD	National Democratic Party of Germany
No.	Number
OLG	Higher Regional Court
RL	Directive
SenInnDS BE	Senate Department for the Interior and Sport Berlin
SPD	Social Democratic Party of Germany
STMI BY	State Ministry of the Interior, for Sport and Integration Bavaria
StPO	Code of Criminal Procedure
Subs.	subsection
et al.	among other things (et alia)
VO	Ordinance
VwGO	Administrative Court Code
ZPO	Code of Civil Procedure
ZuVoJu	Competence Ordinance Justice

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Federal Office for Migration and Refugees (2021)

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Author: Janne Grote (2021)

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WM Migration Monitoring: Educational and Labour Migration to Germany. Annual Report 2019.
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FM Freedom of Movement Monitoring: Migration of EU Nationals to Germany. Annual Report 2020.
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SoKo Potential of Asylum Applicants: Analysis of "Social Component" Data relating to Applicants' Social Structure. Annual Report 2020.
Author: Barbara Heß (2021)

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