

Benchmark

Detention and alternatives to detention in international protection and return procedures

The situation in the Netherlands compared to other EU Member States

The benchmarks of EMN Netherlands compare the Dutch results of EMN studies with the results of other EU Member States and Norway. What are the most relevant similarities and differences? Benchmarks are drafted on the basis of EMN studies, in consultation with Dutch experts. See the EMN Netherlands website for more information about the studies (Dutch): www.emnnetherlands.nl/onderzoeken.

Introduction

In the area of migration in the European Union, detention¹ can be used within the context of international protection and return procedures and should be used as a last resort. If possible, alternatives to detention² have to be used, in line with the principles of necessity and proportionality, legality, non-arbitrariness and the right to liberty and security. These alternatives must be imposed on a case-by-case basis. Despite the legal obligation to consider their use, it has been noted that alternatives to detention remain widely underused by Member States.³ Therefore, in 2021, the EMN conducted a study on the use of detention and alternatives to detention, in which 25 Member States participated.⁴ The study follows the 2014 publication of the EMN study on 'The Use of Detention and Alternatives to Detention in the Context of Immigration Policies'.

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1 The EMN Glossary defines detention as: "non-punitive administrative measure ordered by an administrative or judicial authority in order to restrict the liberty of a person through confinement so that another procedure may be implemented", retrieved from https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_en.

2 There is no legal definition for alternatives to detention, but the EMN Glossary defines them as: "non-custodial measures used to monitor and/or limit the movement of third-country nationals in advance of forced return or deciding on the individual's right to remain in the Member State", retrieved from https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_en.

3 Council of Europe, 'Legal and practical aspects of effective alternatives to detention in the context of migration', Analysis of the Steering Committee for Human Rights (CDDH), 7 December 2017, <https://rm.coe.int/legal-and-practical-aspects-of-effective-alternatives-to-detention-in-/16808f699f>, last accessed on 12 July 2021. Commissioner for Human Rights, 'Human Rights Comment, High time for states to invest in alternatives to migrant detention', 31 January 2017, <https://www.coe.int/en/web/commissioner/-/high-time-for-states-to-invest-in-alternatives-to-migrant-detention>, last accessed on 12 July 2021. PACE, 'The alternatives to immigration detention of children', Resolution 2020 (2014), final version, § 8, <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21295&lang=en>, last accessed on 12 July 2021; UN, 'Report of the Special Rapporteur on the human rights of migrants, François Crépeau Regional study: management of the external borders of the European Union and its impact on the human rights of migrants', A/HRC/23/46, 24 April 2013, § 48, https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/23/46, last accessed on 12 July 2021.; Communication on EU Return Policy, COM(2014) 199 final, p. 15, [https://ec.europa.eu/transparency/documents-register/detail?ref=COM\(2014\)199&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=COM(2014)199&lang=en), last accessed on 12 July 2021.

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

The study aimed to identify similarities, differences, practical challenges, and advantages in the use of detention and alternatives to detention in Member States in the framework of international protection procedures and return procedures. This benchmark from EMN Netherlands compares the Dutch policies and practices to those of other Member States.

Definition of alternatives to detention in the Dutch context

In this study, the definition of alternatives to detention refers to non-custodial measures used to monitor and/or limit the movement of third-country nationals in advance of forced return or deciding on the individual's right to remain in the Member State. The study maintains a strict focus on measures that are used *instead* of detention, i.e. in a situation where a ground for detention exists. In practice, it is not always clear if a non-custodial measure is used to replace detention, or as a supervisory measure on a different ground, for example as a measure to prevent absconding.

The Dutch contribution to the study contains information only on those non-custodial measures that can (also) be used as an alternative to detention in practice, according to experts from government organisations. Other less-coercive measures (*lichtere middelen*) that are not used in that manner, most notably the Open Family Facility (*Gezinslocatie*) and return counselling, were therefore excluded from the scope.

Key points

- The Dutch policy on (alternatives to) detention is similar to that of other EU Member States.
- All 25 Member States participating in the study allow for detention both in return and international protection procedures, but the grounds on which detention may be applied vary. This is a small increase from 2014, when only 24 out of 26 responding Member States provided alternatives to detention.
- The five most common alternatives to detention in the Member States are:
 - Reporting obligations
 - Obligation to communicate the address to the authorities
 - Requirement to reside at a designated place
 - Obligation to surrender a passport or travel document
 - Issue of a financial deposit / release on bail
- The Netherlands applies all of the abovementioned alternatives to detention, except 'obligation to communicate the address to the authorities' which is a general procedural obligation in the Netherlands.
- Less common alternatives are electronic monitoring, release to a care worker (for children), and community management programmes. These alternatives are not available in the Netherlands.
- Return counselling is also noted as an alternative to detention by two Member States, while in the Netherlands return counselling is provided to all returnees, whether there is a ground for detention or not.
- Main advantages of alternatives to detention, as identified by the Member States, are the lesser impact on the individual and reduced costs of resources or capacity. A challenge is that it is not always possible to apply an alternative due to the personal situation of the third-country national.
- Data on the uptake of alternatives to detention and of their impact on procedures is not widely available across Member States. The Netherlands could provide data on the requirement to reside at a designated place and issue of a financial deposit, but not on the other alternatives.

- Few Member States have conducted research on the effectiveness of detention versus alternatives. In the Netherlands, the Advisory Committee for Aliens Affairs concluded that in return procedures, detention is more effective in achieving returns than all other measures grouped together. However, it was not possible to compare detention with specific alternatives, as no reliable data on their effectiveness exists.
- In conclusion, little information is available about the uptake of alternatives to detention and on their impact on migration procedures when compared to detention. These findings echo the conclusions of the previous EMN Study on Detention and Alternatives to Detention from 2014.

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

Overview of procedures used to place a person in detention or to provide an alternative to detention

Procedures to place a person in detention or an alternative to detention in the Netherlands do not differ significantly from procedures in other Member States:

- All Member States participating in the study allow for detention both in return and international protection procedures. However, the grounds on which detention may be applied vary.
- In most Member States, the same national authorities are responsible for deciding on the placement of a third-country national in detention or the use of an alternative to detention; depending on the institutional framework the competent authorities involved are the police,⁵ immigration and asylum authorities,⁶ border guards,⁷ and judicial authorities.⁸
- In the Netherlands, detention can be imposed by the National Police and Seaport Police, the Royal Netherlands Marechaussee, the Immigration and Naturalisation Service, and the Repatriation and Departure Service. The same organisations are responsible for alternatives to detention, but generally more officers are authorised to impose less-coercive alternatives compared to detention.
- The possibility of providing alternatives to detention when a ground for detention exists, is systematically considered across most Member States, including the Netherlands.⁹
- In the Netherlands, when grounds for detention exist, the competent officer must assess the possibility of applying an alternative. Conversely, when applying an alternative, the officer is not required to motivate why detention is not ordered.

Decision-making process to assess whether or not to place the third-country national in detention or to provide an alternative to detention

When there is a legal ground to detain a third-country national, Member States use various criteria to assess whether it is indeed necessary to order detention or whether an alternative can be applied. Like most other Member States, the Netherlands uses the following criteria to assess whether or not to place the third-country national in detention or provide an alternative to detention: the principle of proportionality (i.e. applying the least invasive measure possible), level of risk of absconding, vulnerability, and suitability

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

6 AT, BE, BG, CY, CZ, EE (Police and Border Guard Board), HR, IE, LU (Minister for Immigration and Asylum involved in both international protection and return procedures), MT (Principal Immigration Officer is involved in both international protection and return procedures), NL, SE, SI

7 FI, IE, LV, NL, PL

8 EE, FR, IE, LT, PL

9 AT, BE, BG, CY, CZ, DE, EE, EL, FI, FR (in return procedures), HR, HU, IE, IT, LT, LU, LV, MT, NL, PT, PL, SE, SI (in international protection procedures), SK

of the alternative to the needs of the individual case. Some other criteria are less commonly used by Member States, including the Netherlands:

- In international protection procedures, the nationality or country of origin of the third-country national is usually not considered by Member States when deciding whether to use detention or an alternative. In Malta and Sweden however, nationality can be a relevant factor for detention. In the Netherlands, in specific circumstances¹⁰ the law provides the possibility to take into account whether the country of origin is safe when deciding whether or not to detain, although this factor is not considered in practice.
- In return procedures, seven Member States¹¹ assess whether the country of origin collaborates in readmission. In the Netherlands, if the assessment of the country of origin of the individual rules out forced return, detention is not applied and a less-coercive measure may instead be imposed.
- In Germany, Estonia and the Netherlands, the degree to which an individual is likely to cooperate with the competent authorities is also considered. Alternatives for detention are more likely to be applied if the individual is likely to cooperate. For instance, as part of the return procedure in Estonia and the Netherlands, failing to cooperate with the authorities (including cooperating to acquire the documents necessary for return) can lead to a decision to detain.¹²
- Other criteria include national security and public order¹³ or the existence of criminal records.¹⁴
- In Luxembourg, applicants who have applied for international protection in another EU Member State, as identified in the Eurodac system, are systemically placed under home custody at the semi-open return structure (SHUK) even before a Dublin decision is taken.

All Member States participating in the study indicated that they provide support during the decision-making process for detention or an alternative to detention. In the Netherlands and most other Member States, this includes: medical and healthcare, legal aid, interpretation/translation support. In some other member States social and psychological support are also provided.¹⁵ In the Netherlands and four other Member States, legal guardians are designated immediately after identifying an unaccompanied minor.¹⁶ They represent their interests at all stages of the procedure.

2. Types of alternatives to detention

One of the aims of the EMN Study was to map which alternatives to detention are provided in the Member States as part of international protection procedures and return procedures. Out of the five most commonly used alternatives to detention in the Member States, the Netherlands uses four: reporting obligations, requirement to reside at a designated place, obligation to surrender a passport or travel document, issue of a financial deposit/release on bail. The fifth alternative, obligation to communicate the address to the authority, is not applied as an alternative to detention in the Netherlands but is a general procedural obligation in immigration procedures. In addition, some lesser-

¹⁰ Detention on the ground of art. 5.1c, paragraph 3, Aliens Decree (Vb) 2000, see also A5/6.3 Aliens Act Implementation Guidelines (Vc) 2000

¹¹ BE, DE, ES, IT, MT, NL, SE

¹² In the Netherlands, the level of cooperation is one of the criteria for assessing whether there is a risk of absconding, which may lead to detention, as laid down in article 5 of the Aliens Decree (Vb) 2000

¹³ AT and EE

¹⁴ EE and NL. In the NL, one of the criteria for assessing whether there is a risk of absconding (which may lead to detention), is whether the third-country national is a suspect of any crime or has been convicted for it, as laid down in article 5 of the Aliens Decree (Vb) 2000.

¹⁵ See p. 27 of the study for more information.

¹⁶ EE, FI, HR, NL, SI

known alternatives are noted by Member States in the study which are not applied in the Netherlands, such as electronic monitoring, community management programmes, and release to a care worker.

Reporting obligations

- Reporting obligations are defined as a requirement of reporting to authorities (e.g. the police or immigration authorities) at regular intervals, to prove that they are still present in the territory. This alternative is most widely available, namely in the Netherlands and 24 other Member States.¹⁷
- The reporting intervals range from every 24 hours (most Member States) to every 4-5 weeks (Ireland). In the Netherlands, there is no set frequency, with intervals ranging from daily to monthly depending on the case.
- Only three Member States were able to provide statistics on the use of this measure as an alternative to detention.¹⁸ The Netherlands could not provide data, as it was not possible to differentiate in statistics between the use of this measure as an alternative to detention or as a different supervisory measure.

Requirement to reside at a designated place

- 20 Member States may require third-country nationals to reside at a designated place, such as a facility or specific region, as an alternative to detention.¹⁹ France, Hungary and Luxembourg furthermore reported on home custody within this category.
- In the Netherlands, third-country nationals may be subject to this alternative most notably when they reside in a Freedom-restricting location (*Vrijheidsbeperkende Locatie, VBL*), a shelter where persons subject to a return decision prepare to leave the Netherlands. It can also be applied at the border: if the third-country national is refused entry, he or she may be required to stay in a designated space or place for a few days (usually the International Lounge of Schiphol Airport).
- In most cases, this alternative has no set duration and lasts until the procedures for international protection or return are completed.
- The Netherlands and five other Member States were able to provide statistics on the use of this alternative in practice.²⁰

Obligation to surrender a passport, travel document or identity document

- A third common alternative to detention is the obligation to surrender a passport, travel document or identity document to the authorities. This alternative is legally available in 17 Member States, including the Netherlands.²¹
- In the Netherlands, this measure can be used as an alternative to detention in the following scenarios:
 - if a third-country national is apprehended by the police and there are reasons to believe he or she is staying irregularly, but it is not possible to transfer the third-country national to a location where a hearing can take place right away;
 - in return procedures: to mitigate the risk of absconding during the voluntary departure period or when the (voluntary or forced) return is postponed, or if obtaining the document is needed for forced return.
- Data on the application of this measure is available only in Finland and Poland.

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

18 FI, LT, PL

19 AT, BE, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE, IT, LT, LU, MT, NL, PL, SI. It is not used in practice in CY, ES and MT.

20 BE, FR, HU, LT, LU, NL

21 BG, CY, EE, EL, ES, FI, FR, HR, HU, IE, IT, LU, LV, MT, NL, PL, SE. It is not used in practice in EL, HU, MT and PL.

Obligation to communicate the address to authorities

- In 13 Member States,²² third-country nationals may be required to communicate their address to authorities as an alternative to detention. The measure usually entails a requirement to communicate the address or any changes in the address as soon as possible to the police.
- None of the Member States provided statistics on the use of this measure.
- In the Netherlands and four other Member State, there is an obligation to communicate the address, but this measure is a general procedural obligation and not an alternative to detention.²³ For example, in the Netherlands and Poland all third-country nationals subject to immigration procedures are required to communicate their address to authorities.

Financial alternatives to detention (issue of a deposit / release on bail)

- Financial alternatives to detention, i.e. the requirement to submit a financial deposit or the possibility of release on bail, are available in fourteen Member States.²⁴ The difference between these measures is that a financial deposit prevents the use of detention, whereas in the case of release on bail, the third-country national is released from detention.
- The sums imposed for release on bail or the issue of a financial deposit may be paid for by the third-country nationals themselves or by a third party. Sums are usually determined on a case-by-case basis. In Hungary for example, bail may range from € 500 to € 5000 euros, and financial deposits are the equivalent of the person's total travel and residence expenses.
- In the Netherlands, financial deposits are only available in the return procedure, for third-country nationals who have signed a 'return contract'. The deposit is set at a maximum of €1500, and is returned once the individual leaves the Netherlands.
- Statistics on the use of this measure were provided by three Member States.²⁵

Other alternatives

- Electronic monitoring (e.g. tagging) is available as an alternative to detention in Hungary and Portugal. It is also legally available in Germany and Luxembourg, but not (yet) used in practice.
- Belgium and Estonia consider return counselling an alternative to detention. In Estonia, following an assessment of the existence of grounds for detention, the person may be requested to attend compulsory counselling sessions. The Netherlands also provides return counselling, but independently of whether there is a ground for detention. In other words, in the Netherlands return counselling is provided to all persons subject to a return procedure, regardless of whether detention or an alternative are applied, or no measure at all.
- Community management programmes are used as alternatives to detention in three Member States.²⁶ This measure refers to programmes where individuals live independently in the community with a designated case manager, either in dedicated facilities or in private houses. In Belgium, families with minor children who are staying in the country irregularly are housed in open community-based family units. Residents enjoy freedom of movement, albeit with certain restrictions and rules. They are guided by case managers, with whom they discuss the possibility of voluntary return. The measure has similarities with the Open Family Facility (*Gezinslocatie*) in the

²² CZ, EE, EL, FI, FR, HR, HU, IE, IT, LU, MT, PT, SE. It is not used in practice in EL, HU, IT, LU, MT, SE.

²³ HR, LU, NL, PL, SK

²⁴ Release on bail: AT, BG, CY, CZ, EL, HU, IE, PL, SK; Financial deposit: BG, CY, DE, FI, HR, HU, LU, NL.

²⁵ HU and PL (release on bail), NL (financial deposit)

²⁶ BE, CY, SE

Netherlands, although as there is no legal ground to detain families residing there, the Open Family Facility is not considered an alternative to detention.

- Release to a care worker is used in Ireland for children only, as detention of children for immigration-related purposes is prohibited and no alternative to detention applies.
- Accommodation in return and asylum facilities has been used by several Member States as an alternative to detention when a third-country national does not have access to a private residence or other form of accommodation.²⁷ An example is France, which since 2015 has piloted the use of reception facilities (DPARs) in several regions. For the period 2021–2023 it aims to open 1,300 new places within the DPARs for use as alternatives to detention and to facilitate the return of foreign nationals in an irregular situation.

3. Effectiveness of detention and alternatives to detention

The study looked at three indicators for effectiveness of detention versus alternatives: ensuring compliance with the international protection/return procedure (including prompt and fair case resolution, facilitating voluntary and forced returns, reducing absconding); improving the cost-effectiveness of migration management; and upholding fundamental rights.

Ensuring compliance with migration procedures

- As only limited data was available, it was not possible to draw conclusions about a causal link between detention or alternatives and compliance with migration procedures.
- Data provided by five Member States (BG, HR, LV, LU, SI) indicate that in the *international protection procedure*, detention appears to have a bigger impact on reducing absconding rates, while alternatives to detention are more often associated with shorter status determination processes and higher appeal rates.
- In the *return procedure*, the few available sources in four Member States indicate that forced return procedures may be more efficient when using detention compared to alternative measures.²⁸
- In the Netherlands, a study by the Advisory Committee for Aliens Affairs found a higher return rate for persons in detention (67%) than for the total group of persons subject to a return decision (33%), indicating a higher effectiveness of detention compared to all other measures.²⁹ However, it was not possible to compare detention with specific alternatives to detention, as no reliable data exists on the effectiveness of such measures in the Netherlands.

Cost-effectiveness

- Regarding cost-effectiveness, only three Member States (BE, NL, SI) reported on studies or reports on this topic which had been conducted in their Member States.
- Research in Belgium found that in the return procedure, detention was more costly, but also more effective. Compliance with alternatives to detention was high, but the successful returns remained low.
- Independent research in Slovenia found that detention and alternatives had similar costs, but that the latter led to higher absconding rates.
- For the Netherlands, several reports indicated that cost-effectiveness of alternatives had not been assessed, or that no reliable data was available.

27 BE, CY, DE, FR, SI. It is not used in practice in CY.

28 BE, BG, LV, SI

29 ACVZ, Samen werken aan terugkeer, 2021, p. 33

Guaranteeing fundamental rights

The second indicator of effectiveness considered in the study is the extent to which fundamental rights are guaranteed while in detention or when providing alternatives to detention.

- The vast majority of Member States, including the Netherlands, reported on guaranteeing the right to legal aid, the right to be heard, and the right to healthcare both in detention and when providing alternatives to detention.
- Some additional safeguards apply only in detention, but are provided by the majority of Member States: right to receive visits; right to receive or send correspondence; and social and psychological counselling.³⁰

Some Member States differentiate in the rights provided to different alternatives or different categories of migrants:

- The Netherlands for example gives the right to be heard when applying a freedom-restricting measure (i.e. requirement to reside at a designated place), but not for the other alternatives.
- In Ireland, civil legal aid is provided to international protection applicants but not to other third-country nationals who are refused entry or given an order to return. The latter category may arrange legal aid themselves or through NGOs.

None of the Member States conducted official evaluations or studies to specifically assess the impact of detention versus alternatives to detention on the fundamental rights of migrants. However, reports on detention, e.g. by national independent human rights institutions or NGOs, highlighted a number of shortcomings in accessing rights during migration detention, including access to legal remedies,³¹ and the negative consequence of detention on the physical and mental health³² or well-being³³ of detainees.

4. Lessons learnt: challenges and advantages of alternatives to detention

Member States were asked to indicate which advantages or challenges they encountered in the use of alternatives to detention. Overall, they note that alternatives to detention are less intrusive for the third-country national, and less intensive for authorities with regard to resources and capacity. These advantages were noted by practitioners in the Netherlands as well.

Dutch practitioners furthermore mentioned as a positive aspect of alternatives to detention that they increase the array of supervisory measures available to authorities. Instead of having to choose between applying detention or no measure at all, they can choose a measure that best suits the situation of an individual. In return procedures, alternatives to detention also provides more time to conduct return counselling and work towards voluntary return, according to practitioners in the Netherlands. Additionally, they note that more NGO support for reintegration and return is available within alternatives to detention compared to detention since most NGOs do not offer these services for forced return. However, in the context of return it was highlighted that even when persons comply with the conditions of the alternative to detention, this does not necessarily mean they comply with the return procedure.

³⁰ See p. 30 of the Study for more information on additional rights applied by certain Member States.

³¹ FR, IE

³² NL, IE

³³ SE

Other Member States also noted challenges in the application of alternatives, as some measures, e.g. reporting obligations and residence requirements, can pose a high administrative burden on staff. A challenge cited by most Member States regards the suitability of an alternative for the individual case. For example, imposing financial obligations can be hindered if the individual has limited funds, and surrendering travel or identity documents is impossible if such documents are lacking. These challenges were also mentioned by practitioners in the Netherlands.

The findings of the study furthermore highlight two additional challenges. Firstly, there is a lack of data gathering on the uptake of alternatives to detention. Such data could only be provided by a handful of Member States for each alternative, including for the most widely available measure, i.e. reporting requirements. Secondly, little is known about the available on the impact of detention and alternatives to detention on factors like the duration of the procedure or the absconding rate, cost-effectiveness or the return rate. These findings reflect the conclusions of the 2014 Study, which found that very little data was available to measure the impact of detention or alternatives on the effectiveness of Member States' return policies and international protection procedures.

Participating countries

Austria (AT), Belgium (BE), Bulgaria (BG), Cyprus (CY), Croatia (HR), Czech Republic (CZ), Estonia (EE), Finland (FI), France (FR), Germany (DE), Greece (EL), Hungary (HU), Ireland (IE), Italy (IT), Latvia (LV), Lithuania (LT), Luxembourg (LU), Malta (MT), Netherlands (NL), Poland (PL), Portugal (PT), Slovakia (SK), Slovenia (SI), Spain (ES), Sweden (SE)