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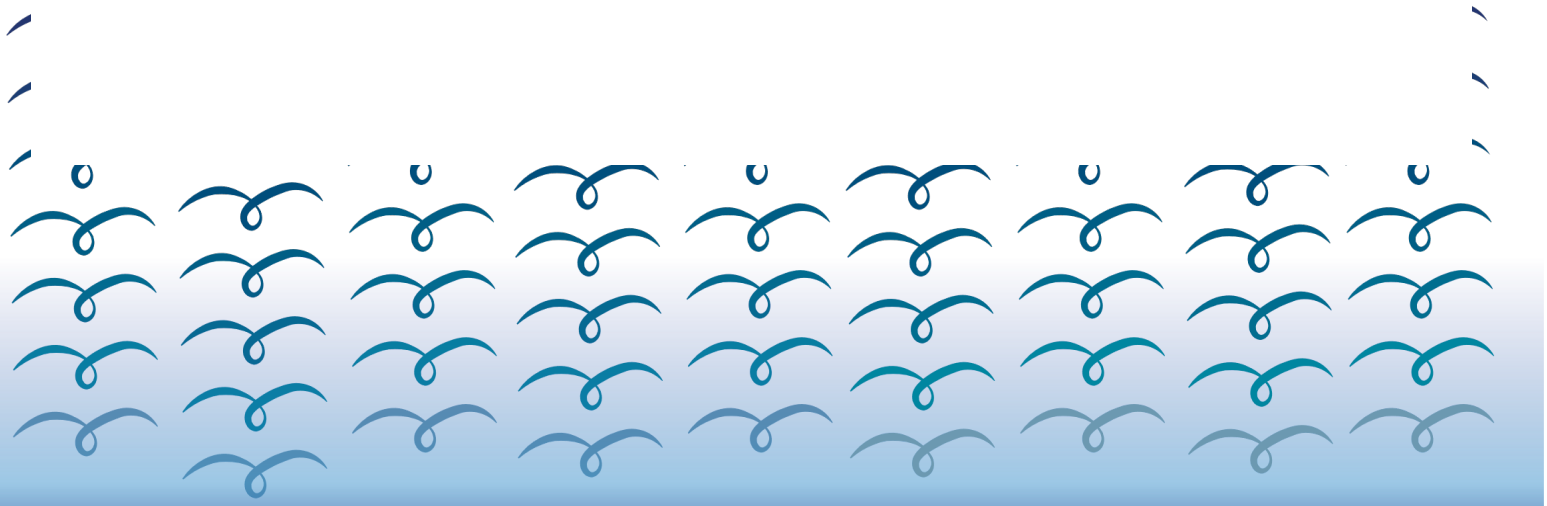

Alternatives to pre-removal detention in return procedures in the EU

Deliverable 2.5

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1. Introduction

Detention of undocumented migrants is a basic component of return policies both at EU and Member States level. Although from a legal perspective deprivation of freedom is ruled as an exceptional measure, strictly linked to the preparation of return decisions or the enforcement of forced removals in certain circumstances[1], pre-removal detention is widely used in most Member States in practice. However, the low number of enforced returns, the legal concerns from a human rights perspective and the human and economic costs of pre-removal detention have in the last decade generated increasing opposition of different stakeholders towards this measure. In this context, the debate on alternatives to detention (ATDs) has received more attention both from a political and legal point of view. However, the availability of such measures remains limited in practice (Bloomfield, Tsourdi and Pétin, 2015; EMN, 2014). Moreover, as Bosworth (2018a, p. 32) points out, 'there is little consistency in the design, rationale or application of alternatives to detention.'

The ADMIGOV project aims to foster the debate on alternatives to pre-removal detention in the framework of the development of an alternative migration governance model. Indeed, Task 2.5 refers to the need to "examine, assess and propose alternative programmes that aim to substitute detention-for-deportation facilities". The debate on ATDs is especially important in a context of opposing political strategies and legal frameworks. On the one hand, the recent UN Global Compact for Migration commits States to use immigration detention "only as a measure of last resort and to work towards alternatives".[2] Although the measures listed within this objective In the Global Compact refer mainly to the ways and conditions under which detention has to take place, States are expressly committed to "prioritize non-custodial alternatives to detention that are in line with international law" and to "promote, implement and expand alternatives to detention, favouring non-custodial measures and community-based care arrangements, especially in the case of families and children". On the other hand, the EU seeks in the last years to increase the effectiveness of the return policy of both the EU and its Member States without questioning the basic components. The clear failure of this policy in terms of efficiency (as acknowledged by the European Commission (2015 and 2017), only one third of all return orders take place in practice) is addressed in terms of removing obstacles for a better implementation of the Return-Directive and increasing support to Member States. Indeed, the measures included in the Communication from the Commission to the European Parliament and the Council on a more effective return policy published in March 2017 (European Commission, 2 March

[1] Art. 15 of Directive 2008/115/EC of the European Parliament and of the Council, of 16 December 20008, on common standards and procedures in Member States for returning illegally staying third-country nationals (so-called, Return Directive).

[2] Objective 13, United Nations, Global Compact for Safe, Orderly and Regular Migration, Resolution adopted by the General Assembly on 19 December 2018, A/RES/73/195, 11 January 2019, p. 21-22.

2017) have been reaffirmed in the recent Communication from the Commission on the New Pact on Migration and Asylum (European Commission, 23 September 2020), in which a more effective return policy and an EU-coordinated approach to returns is one of the basic components. In this context, the space for alternatives to pre-removal detention seems to diminish as the focus is set on hardening the Return-Directive and increasing the operational support to Member States in its implementation. Nevertheless, from a legal and human rights perspective pre-removal detention can only be conceived as an exceptional, cautionary measure that should be used only when other less coercive but also efficient measures are not possible.

This paper seeks to examine and assess the availability of ATDs in the EU, in addition to identifying benefits and challenges of implementing these alternatives in the context of returns. Although the concept of ATDs is not always clear and is sometimes used in a wide sense, we will focus on return procedures for two main reasons: firstly, because the Return-Directive refers to them in art. 15 (although indirectly); and secondly, because only such a narrowed perspective makes it possible to try to focus on concrete alternatives and their real implementation in a paper like ours.

From the very first moment, it is important to note the limited nature of the state of research on alternatives to detention in return procedures. First of all, only a small number of sources have dedicated sections on the use of ATDs in return procedures specifically (Bloomfield, Tsourdi and Pétin, 2015; EMN, 2014; EMN, 2017; FRA, 2010). Much of the literature on ATDs focuses on alternatives to 'immigration detention' as a whole, thus grouping different categories of immigrants and refugees together (Bosworth, 2018a; Edwards, 2011; JRS Europe, 2011; Sampson et al, 2015) . This is illustrated by the EU Return Handbook[3], in which the European Commission refers to a UNHCR report as a source on good ATD practices, while the latter concentrates on the asylum framework rather than returns (UNHCR, 2015). However, the fact that the legal framework and the rights recognized for returnees and persons subject to a pending asylum procedure are distinct makes it difficult to analyse both cases together.

Thus, there is a need for further research on the use of ATDs for persons subject to a return procedure. When may ATDs be ordered, and what do these measures entail? How often and under which conditions are ATDs applied in practice, and which types of ATDs are used? What is the impact on the returnee, and on the return procedure? In the following, we address these questions by reviewing the literature on alternatives to detention and analysing the EU legal framework on detention and alternatives in the context of return procedures.

After first discussing the benefits and challenges of implementing ATDs in the context of migration as presented in the literature, the paper will then outline the legal framework on detention and ATDs in

[3] The Handbook does not create any legal binding obligation to Member States, but provides guidance relating to the performance of duties of national authorities for carrying out return related tasks.

return procedures in the EU, paying special attention to the 2018 Commission proposal to recast the Return Directive and ensuing response from EU institutions and other stakeholders. Finally, the use of alternatives to detention in practice is discussed: which Member States apply ATDs, and what type of measure do they use? In which situation or under what conditions can ATDs be enforced? The final section will furthermore address concerns regarding safeguards in ATDs, including monitoring and unintended effects of ATDs.

2. Detention versus alternatives

In this section, we review the literature on detention and alternatives in the context of migration, in order to identify the theoretical benefits of implementing ATD measures rather than detention in return procedures. In doing so, we highlight the negative impact of pre-removal detention on migrants' well-being and on the migration procedure, as well as the opportunities posed by ATDs. In addition, this section addresses some aspects of ATDs where safeguards are required.

2.1 Criminalization of migration

At its core, pre-removal detention is an administrative measure that can be used to ensure the participation of an individual during the immigration and/or deportation procedure, and to prevent absconding. As analysed later, from a legal perspective pre-removal detention is not a sanction, but a precautionary mesure that aims to prepare or carry out return orders that are not fulfilled voluntarily. However, scholars question the necessity and legality of the structural detention of migrants against the background of criminalization of migration (Bloomfield, 2016, pp. 33-34; De Senarclens, 2013; Kramo, 2014; Majcher and De Senarclens, 2014). Detention is increasingly applied as a way to coerce migrants into cooperating with their own deportation, or to discourage future migrants from entering irregularly (De Senarclens, 2013, pp. 60-62). An additional objective pursued in immigration detention is the prevention of crime, as irregular migrants are considered as inherently suspect (Campesi, 2019, p. 16). Thus, despite being an administrative procedure intended for persons who have not been convicted of any crime, immigration detention increasingly incorporates penal elements. This development coincides with the characterization of unwanted immigration as a security issue and the framing of irregular entry as an illegal act. Justified by this narrative, European migration policy has taken on the logic and rhetoric of the criminal justice system (Bloomfield, 2016; Kramo, 2014; Majcher and De Senarclens, 2014) and contributed to the development of crimmigration in Europe (Spena, 2017; Van der Woude, Barker and Van der Leun, 2017). In addition, the connection of immigration detention to the prison system is clear at least in practice, as migrants are frequently detained in prison buildings that are out of use or facilities that are similar or even worse than prisons and under similar conditions as incarcerated criminals (EMN, 2018; Flynn, 2012).

The criminalisation of migration is apparent in the Return Directive, which consistently refers to 'illegal' migration and 'illegal' stay, and permits Member States to detain migrants for extended periods of time – up to eighteen months – as part of return procedures (Kramo, 2014). However, research indicates that the deterrent impact of immigration detention is less powerful or straightforward than policymakers perceive it to be even if most Member States have extended the maximum length of pre-removal detention after the adoption of the Return Directive (Manieri and LeVoy, 2015; Oomkens and Kalir, 2020, p. 31; Ryo, 2019; Steering Committee for Human Rights, 2018, p. 63; Van Alphen et al 2013, cited in EMN 2014, p. 37). The European Commission has acknowledged that 'an overly repressive system with systematic detention may also be inefficient, since the returnee has little incentive or

encouragement to cooperate in the return procedure', calling instead for the development of alternatives to detention (European Commission, 27 September 2017, p. 141). However, the New Pact on Migration and Asylum launched by the European Commission does not question the efficiency of pre-removal detention when acknowledging that only one third of the return orders issued in the EU do actually take place. On the contrary, as will be analysed later (2.2.4), the proposal to make the return system more efficient and to harden the Return Directive favours the criminalization of migration.

In this context, scholars have highlighted that less coercive alternatives, such as regular reporting to the authorities, surrendering the passport or paying a financial guarantee, could in many cases be sufficient to prepare or carry out the return, while posing fewer restrictions on migrants' liberty (Edwards, 2011, pp. 85-86). Bloomfield, Tsourdi and Pétin (2015) note that persons subject to a return procedure may have multiple reasons not to abscond as they have often developed ties in the country of stay, and would be more inclined to cooperate with their return when subject to ATDs rather than detention, due to the "the impression of fairness in the procedure and transparency in communication" (Bloomfield, Tsourdi and Pétin, 2015, p. 26). There are some indications that a lack of trust in authorities resulting from detention, where migrants experience discrimination, loss of agency and fear, could lead to increased absconding rates (Steering Committee for Human Rights, 2018, p.63). Rather than alienating migrants, authorities could seize the opportunity presented by the immigration proceedings to build up trust and provide guidance, as well as to prepare for a potential return. Alternatives to detention may offer more chances to do so.

2.2 Health impact of detention

A second aspect that has to be taken into account in the debate on alternatives to detention is its impact on the returnees' wellbeing. The adverse effects of detention on migrants' physical and mental health are well-documented in multiple countries and present an important criticism of states' reliance on coercive measures in return policy (Sampson et al, 2015, p. III). Depression, suicidal ideation, anxiety, chronic post-traumatic stress disorder and self-harm are among the documented effects of detention on migrants' mental health (Von Werthern et al, 2018). This is true for all detainees, but in particular for persons suffering from past trauma, among which (failed) asylum seekers and women are overrepresented. The likelihood of suffering from such problems increases with the length of detention (Sampson et al, 2015, p. 5; Von Werthern et al, 2018, p. 2). For children, any period of detention should be prevented, as its detrimental effect on childhood development is well-documented, as well as the risk both for parents and children to develop disorders (Bosworth, 2016, p. 25; Lier, L., Jansson, P. and Rich, B., 2011; Vitus, 2010, pp. 26-42; Von Werthern et al, 2018).[4]

[4] In the Danish asylum system the negative impact of detention on children's wellbeing was highlighted a decade ago

Unaccompanied minors may be especially susceptibly for harm while being detained, especially when they are treated as adults (Von Werthern et al, 2018, p. 15).

There are several reasons why persons subject to immigration detention may be extra vulnerable or even become vulnerable in pre-removal detention in comparison with other kind detainees. First of all, their situation is characterised by insecurity, as they are awaiting a decision on their immigration process or a potential deportation. In addition, persons in immigration detention are in a foreign environment and often face a language barrier as well as a lack of information resulting in limited understanding of their circumstances (Bloomfield, 2016). Moreover, migrants who are less equipped to advocate for themselves – due to a lack of understanding, trauma, or other vulnerabilities – are not only more likely to end up in detention, but also to suffer under the deprivation of liberty (Von Werthern et al, 2018, p. 15). While qualitative improvements on detention practices can be made, e.g. by improving staff treatment of detainees and providing better care (Bosworth, 2018b), the impact of detention on migrants' well-being is structural and inherent to the deprivation of liberty that it poses. The debate on alternatives to detention needs to take this into account.

2.3 Alternatives to detention: issues and safeguards

Scholars have also pointed out that although ATD are less restrictive than pre-removal detention, they may still limit freedom of movement and other fundamental and human rights of migrants to some degree. Some alternatives, including reporting requirements, can have serious effects on the returnee's psychological and physical well-being, while electronic monitoring in particular is highly invasive (Bosworth, 2018a, p 31). Furthermore, alternatives that involve a third person, such as a guarantor, a guardian or someone posting bail on behalf of the returnee, carry an additional risk of exploitation (UNHCR, 2015, p. 8). Various authors note also the importance of ensuring an adequate standard of living for persons subject to ATDs, both for the well-being of migrants and to promote cooperation with authorities. Providing legal and material support and offering individual case management may also heighten the success of ATD measures (Steering Committee for Human Rights, 2018, p. 63; Sampson et al, 2015, p. 27; UNHCR, 2016).

Several authors also alert that rather than replacing detention, the implementation of ATDs may also lead to an expansion of coercive enforcement. This so-called 'net-widening effect' has been established with regards to the criminal context, but is understudied in the framework of migration enforcement, where it could have consequences in terms of cost for authorities and the number of individuals that would be subject to return decisions and state control (Bosworth, 2018a, p. 13; Bloomfield, 2016, p. 42). Bloomfield (2016) notes that considering that pre-removal detention increasingly incorporates punitive objectives, it is likely that only the most coercive ATD measures are adopted (Bloomfield, 2016, p. 43). Furthermore, as ATDs are part of the legal framework on detention, encouraging their application to a wider group of people could actually reinforce the idea that they are detainable. This has implications in particular for children, for whom detention is never in their best interest (Flynn, 2019). In addition, where government-funded support is limited to detention centres, persons subject to an ATD measure may be deprived of any kind of assistance if complementary initiatives are not developed (Bloomfield, Tsourdi and Pétin, 2015, p. 102).

To prevent ATDs from becoming "alternative forms *of* detention", scholars claim that governments should use the least coercive measure available to facilitate the return procedure (Bloomfield, Tsourdi

and Pétin, 2015, pp. 62-63; Edwards, 2011, p. iv).[5] Decisions to order an alternative to detention should be in line with Art. 5 ECHR as well as the principle of proportionality as laid down in Art. 52 (1) of the Charter of Fundamental Rights of the European Union. Furthermore, they should adhere to the principle of legal certainty, meaning that alternatives and the criteria for their usage must be properly regulated as well as the remedies that can be taken against them (Mangiaracina, 2016, p. 179). The Steering Committee for Human Rights has emphasised that less-coercive measures should not amount to arbitrary restrictions on freedom of movement or arbitrary restrictions on liberty (Steering Committee for Human Rights, 2018, p. 54). In addition, Bosworth, (2018a, p. 14) notes the importance of providing mechanism for safeguarding accountability and transparency in ATD policies, e.g. to report abuse.

2.4 Conclusion

Scholars have pointed out that ATDs may in many cases be sufficient to prepare or carry out return decisions. Apart from being less costly than pre-removal detention and less harmful for the wellbeing of returnees, ATDs could be more effective in terms of cooperation and reintegration, especially concerning case management. In this respect, ATDs provide the opportunity for authorities to build a relationship of trust with returnees, rather than coerce them into returning. However, authors also highlight the importance of establishing safeguards regarding ATDs. In order to prevent arbitrary restrictions on liberty and to assure that the implementation of ATDs reduces -rather than expands- the use of coercive measures in return procedures, governments should order the less restrictive and effective alternative to detention when there is a ground for detention and when deprivation of liberty is not proportional. However, it is also important to ensure that persons subject to an ATD have access to adequate (legal) support.

3. Legal framework

In the European context, the debate on ATDs in the field of return proceedings has to take into account the legal context. In the following, we examine the relevant provisions of the Return Directive regarding ATDs to clarify the existing European legal regime of pre-removal detention, to identify under what circumstances and conditions ATDs can be ordered instead, and to learn what type of measures these ATDs might entail. Furthermore, in September 2018 the European Commission published a legislative proposal for a recast of the Return Directive, which would alter the framework on detention and ATDs. Therefore, the second half of this section takes a closer look at the changes proposed by the European Commission, as well as the response from EU institutions and other stakeholders till the end

[5] Judgment of the Court of Justice of 30 November 2009, *Kadzoev*, Case C-357/09 PPU, ECLI:EU:C:2009:741

of October 2020. In doing so, we concentrate on how ATDs would be impacted by the revisions. Taking into account that the New Pact on Migration and Asylum mentions the recast of the Return Directive as the main building block to achieve an effective EU return system, special attention will be paid to this recast process.

3.1 Directive 2008/115/EC (Return Directive)

3.1.1 Scope

The EU Return Directive sets the common standards and procedures for the deportation of third-country nationals who are staying irregularly in one of the Member States, excluding Denmark and Ireland. The Directive obligates Member States to take action when detecting an irregular migrant. They can, firstly, issue an administrative or judicial 'return decision' which orders the person to leave the territory of the Member States and go to their country of origin, transit or another third country.[6] In some cases, the individual will be redirected to another Member State, if he or she is authorized to stay there or if that Member State will take over the return procedure.[7] However, the Directive also explicitly gives Member States the option to authorize the stay of an irregular migrant at any moment during the return procedure, even after a return decision has been issued.[8] The European exit regime leaves Member States room of manoeuvre to rule return decisions, deportation proceedings and legal pathways to regularise the legal status of undocumented people. However, directly or indirectly, the Return Directive rules different aspects related to the voluntary or forced departure of returnees, pre-removal detention and ATDs that need to be analysed.

3.1.2 Enforcement and voluntary departure

As a general rule, Member States are obligated to enforce any return decision that they issue.[9] However, they should first grant returnees the opportunity to depart on their own volition. This period for voluntary departure lasts between one week and one month, according to national legislation.[10] During this period, Member States may implement certain measures to prevent absconding. The Directive lists reporting obligations, depositing a financial guarantee, surrendering (identity) documents or residence requirements as examples.[11] While these resemble the ATDs listed by Member States as part of return procedure (see section 3), the fact that there is no ground for detention during the period of voluntary return means that they should not be regarded as alternatives

[6] Art. 6(1), Return Directive
[7] Art. 6(2) and (3), Return Directive
[8] Art. 6(4), Return Directive
[9] Art. 8(1), Return Directive
[10] Art. 7(1), Return Directive
[11] Art. 7(3), Return Directive

to *detention* (Bloomfield, Tsourdi and Pétin, 2015, pp. 4-45; Mangiaracina, 2016, p. 179), but rather as 'measures aiming to avoid the risk of absconding' (EMN, 2014, p. 30).

The risk of absconding may also be taken as a reason by Member States to refrain from granting a voluntary departure period or to shorten it. Other reasons for doing so are if the individual committed fraud when applying for legal stay or if the application was unfounded, or if he or she presents a risk to public policy, public security or public health.[12]

The risk of absconding is defined in Article 3 of the Directive as "the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national who is the subject of return procedures may abscond".[13] While the Return Directive does not currently specify which factors to consider when assessing the risk of absconding, the Commission's Return Handbook lists fourteen criteria that authorities should take into account[14], though Member States are free to establish additional criteria in national legislation and should not use the list as 'the sole basis for assuming automatically a risk of absconding' (European Commission, 27 September 2017, p. 92). The Handbook also recommends that Member States include five additional scenarios, such as when an individual refuses to cooperate with the identification or has 'violently or fraudulently' opposed the return operation, in their national legislation as constituting a rebuttable presumption of a risk of absconding.[15]

In the Return Handbook it is furthermore pointed out that the assessment of the risk of absconding should be based on in the individual case and 'must take into account all relevant factors, including the age and the health and social conditions of the persons concerned that may be directly affecting the risk that the third- country national may abscond, and may in certain cases lead to the conclusion that there is no risk of absconding even though one or more of the criteria fixed in national law are fulfilled' (European Commission, 27 September 2017, p. 92). However, if the existence of a risk is

[12] Art. 7(4), Return Directive

[13] Art. 8(4), Return Directive; Al Chodor, C-528/15.

[14] The listed criteria are: lack of documentation; lack of residence, fixed abode or reliable address; failing to report to relevant authorities; explicit expression of intent of non-compliance with return-related measures (for instance return decision, measures for preventing absconding); existence of conviction for a criminal offence, including for a serious criminal offence in another Member State (3); ongoing criminal investigations and proceedings; non-compliance with a return decision, including with an obligation to return within the period for voluntary departure; prior conduct (i.e. escaping); lack of financial resources; being subject of a return decision issued by another Member State; non-compliance with the requirement to go to the territory of another Member State that granted a valid residence permit or other authorization offering a right to stay; illegal entry into the territory of the EU Member States and of the Schengen Associated countries (European Commission, 27 September 2017, p. 92).

[15] These are: refusing to cooperate in the identification process, using false or forged identity documents, destroying or otherwise disposing of existing documents, or refusing to provide fingerprints; opposing violently or fraudulently the return operation; not complying with a measure aimed at preventing absconding (see section 6.2); not complying with an existing entry ban; engaging in unauthorised secondary movement to another Member State (European Commission, 27 September 2017, p. 92).

established, or if the period for voluntary return has passed and the returnee has not complied, Member States have to remove the person and may use coercive measures if necessary, as long as they are in line with the principle of proportionality and do not breach fundamental rights (Diaz Crego, 2019, p. 3).

3.1.3 Detention

According the Return Directive, there are two main scenarios in which administrative or judicial authorities may order the detention of an individual subject to a return procedure in order to prepare or carry out the removal. Firstly, it may be justified if there exists a risk of absconding; and secondly, deportable subjects may be detained if they avoid or hamper the preparation of return or the removal process.[16] The Commission's Return Handbook specifies that 'detention may already be imposed – if all conditions of Article 15 are fulfilled – before a formal return decision is taken, i.e. if the preparations of the return decision are under way but a return decision has not yet been issued' (European Commission, 2017, p. 141).

As stated in Article 15 of the Return Directive, detention may only be ordered "if there are no other, less coercive measures available that would be sufficient and effective". ATDs are therefore indirectly included in the Return Directive as an obligation if Member States decide to include pre-removal detention in their legal system. The exceptional character of pre-removal detention and the fact that it is a temporary deprivation of freedom linked to an administrative infringement (illegal stay), explains also that detention has to be ordered for the shortest possible period of time and that this measure is always subject to the principle of proportionality.[17] The Directive foresees a maximum period of detention of six months, with a possibility of extension of a maximum period of another 12 months in certain circumstances[18]. In any case, pre-removal detention needs to stop immediately once a reasonable prospect of removal disappears.[19]

The Return Directive and the jurisprudence of the European Court of Justice have also stated that pre-removal decisions taken under the Directive should be adopted on a case-by-case basis and based on objective criteria.[20] This means that decisions to detain should always be based on an individual assessment of the returnee's circumstances, taking into account the proportionality of the decision.[21] From this proportionality principle, however, the Court has still not required that national authorities have to assess the efficiency of ATDs prior to order pre-removal detention. But as ruled in the Return

[16] Art. 15(1)(b) Return Directive.

[17] Art. 15(1); recital 16, Return Directive

[18] Namely, that regardless all reasonable efforts the removal operation is likely to last longer than the original maximum period due to a lack of cooperation of the returnee or delays in obtaining the necessary documentation from a third country.

[19] Art. 15(4), Return Directive; CJEU, *Kadzoev,* C-357/09 PPU.

[20] Recital 6, Return Directive

[21] Para. 41, CJEU, *Sagor*, C-430/11, EU:C:2012:777; Para. 70, Case C-146/14 PPU; C924 and 925/19 PPU.

Directive, pre-removal decisions need to be regularly reviewed if requested by the detainee or in cases of long periods of freedom deprivation. When state authorities extend pre-removal detention, the European Court of Justice has required in some cases to re-assess whether less coercive measures would be effective and, if not, if there continues to be a risk of absconding.[22]

3.1.4 Alternatives to detention

As already mentioned, the Return Directive does not explicitly mention ATDs. However, following case law, the condition that detention may only be ordered if no 'other sufficient but less coercive measures can be applied effectively in a specific case', as set out in Article 15(1) of the Directive, must be understood as obligating Member States to 'carry out the removal using the least coercive measures possible', thus requiring them to provide ATDs.[23] The Return Handbook confirms that this article 'must be interpreted as requiring each Member State to provide in its national legislation for alternatives to detention'(European Commission, 27 September 2017, p. 140). However, it is important to remember that when there is no ground to order detention, it is also not justified to enforce an alternative to detention (Bloomfield, Tsourdi and Pétin, 2015, p. 62).

Like other coercive measures, ATDs are 'subject to the principles of proportionality and effectiveness with regard to the means used and objectives pursued.'[24] No further definition of ATDs is provided, nor is their use subject to any additional requirements or safeguards following the Return Directive. In the 2017 Return Handbook however, the Commission specifies that Member States must provide for ATDs 'that can achieve the same objectives of detention (i.e. prevent absconding, avoid that the third-country national avoids or hampers return) while using means that are less intrusive of the right to liberty of the individual' (European Commission, 27 September 2017, p. 140). As examples, it lists 'residence restrictions, open houses for families, case-worker support, regular reporting, surrender of ID/travel documents, bail and electronic monitoring'(European Commission, 27 September 2017, p. 140). Furthermore, it refers national authorities to a paper issued by UNHCR (2015), although this paper was written in the framework of asylum seekers, and is not specified towards return procedures (European Commission, 27 September 2017, p. 140; UNHCR, 2015). The paper highlights that 'Alternatives work when asylum seekers and other migrants are treated with dignity, humanity and respect throughout the relevant immigration procedure; are provided with clear and concise information about rights and duties under the alternative to detention and consequences of non-compliance; are referred to legal advice including on all legal avenues to stay; can access adequate material support, accommodation and other reception conditions; and are offered individualised 'coaching' or case management services' (UNHCR, 2015, p. 1).

[22] Para. 69, CJEU, *Mahdi,* Case C-146/14 PPU.
[23] CJEU, *Kadzoev*, Case C-357/09 PPU, ECLI:EU:C:2009:741.
[24] Recital 13, Return Directive.

Furthermore, the UNHCR paper emphasises the importance of providing for appropriate screening and assessment of the special needs of certain individuals, as well as offering free legal support to detainees (UNHCR, 2015, pp. 2 & 4). In addition, it calls for automatic reviews of detention decisions within 24-48 hours by an independent authority, in order to increase the availability of ATDs in practice (UNHCR, 2015, p. 3). ATDs should also be available to periodic review, according to UNHCR, 'in order to minimise the restrictions imposed over time so they are no more than necessary' (UNHCR, 2015, p. 4). The paper furthermore provides ample examples of ATDs throughout the world, and gives tips for the safeguarding of migrants' and asylum seekers' rights in the implementation of these measures (see section 3). The paper briefly refers to return procedures as it states that "NGOs can support rejected asylum-seekers and migrants in an irregular situation to work towards a dignified and voluntary return while in an alternative to detention' and 'extra support may be required for persons with vulnerabilities or special needs" (UNHCR, 2015, p. 10). However, as the paper is intended as a resource to decrease the use of detention of applicants for international protection, some of the information may not necessarily be relevant for return procedures, for example regarding the designation of residence of asylum seekers until their status is determined (UNHCR, 2015, p. 9). Moreover, it provides no information on how to tackle the risk of absconding in ATDs, which is a particular concern in return procedures (EMN, 2014, pp. 39-41).

3.1.5 Vulnerable persons

Detention of vulnerable persons is not prohibited by the Return Directive, but national authorities have to take the situation of detainees into account during detention.[25] The Directive defines vulnerable persons as '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.'[26] In the Return Handbook, the Commission recommends that Member State authorities take the situation of vulnerable persons into account throughout the Return procedure, and also consider other circumstances increasing vulnerability, such as illness and disorders or being a victim of THB or female genital mutilation (European Commission, 27 September 2017, p. 94). In most Member States, the obligation to carry out individual assessments prior to decisions on detention is enshrined in the law, and comprises considerations regarding special needs, the presence of minors, and the health of the returnee (Bloomfield, Tsourdi and Pétin, 2015, p. 75; EMN, 2014, p.22). However, vulnerability is not usually considered a ground for prohibiting detention on its own (EMN, 2017, p. 60 and further).

Furthermore, the Return Directive states that detention of unaccompanied minors and of families with minors may only be ordered as a measure of last resort and for the shortest appropriate period of

[25] Art. 16(3), Return Directive.
[26] Art. 3(9), Return Directive

time, and that they should be provided separate accommodation.[27] Moreover, it emphasizes that 'the best interests of the child shall be a primary consideration' in the context of pre-removal detention.[28] In this regard, the Commission's Return Handbook refers to the UNHCR and EU Agency for Fundamental Rights for good practices on alternatives to detention for minors and families (European Commission, 27 September 2017, p. 154; FRA, 2017; UNHCR, 2015)

3.1.6 The role of Member States in the implementation of the Return Directive

As described in the previous sections, the aim of the Return Directive is to establish common rules and procedures for returning illegally staying third-country nationals, but their current provisions leave very important margin of discretion to Member states to rule all components of the exit regime. Member States have to issue return orders to all undocumented migrants, but they can legalise the situation of individual persons at any moment and for any reason. They have to grant voluntary return as a general rule, but they can rule the period and the requirements for it. They can also avoid a voluntary return period in case of risk of absconding or other reasons, but they are not obliged to it. And they can also include pre-removal detention in their legal system in certain cases (not only if there is risk of absconding or if returnees try to avoid or hamper return), as well as the duration and conditions of pre-removal detention within certain limits linked to the exceptional nature of this form of freedom deprivation. Finally, they need to admit ATDs for the same reason, although they are almost completely free (not) to do so.

Member States have made extensive use of their margin of manoeuvre so that the specific regulation of most components of the exit regime differ significantly between all of them. This is for example the case in the regulation of the reasons for detention of undocumented migrants (EMN, 2014, pp. 15 and 23) or in the maximum period of pre-removal detention, that as shown in Deliverable 2.1 of the ADMIGOV Project varies between 60 days and 18 months depending on the Member State (Oomkens and Kalir, 2020, p. 30). In any case, the implementation of the Return Directive and therefor of the EU return policy diverges a lot in the different Member States.

3.2 Proposed Return Directive (recast)

In 2017, the European Commission put forward a proposal to revise the Return Directive, following the recast procedure. The main aim of the proposal is to improve the 'effectiveness' of the EU's return policy in terms of increasing the rate of detected irregular migrants who are deported, as the return rate decreased from 45.8% in 2016 to 36.6% in 2017 (European Commission, 12 September 2018, p. 2). Furthermore, it aims to improve the coherency of EU's return policy and to ensure that it is in line with fundamental rights (European Commission, 12 September 2018, p. 2). The Commission's

[27] Art. 17, Return Directive
[28] Art. 17(5), Return Directive.

document proposes significant changes, especially regarding the assessment of the risk of absconding, and greatly expands the use of detention in return procedures. It has received considerable criticism from the European Parliament, the EU Agency for Fundamental Rights and other stakeholders such as NGOs (Amnesty International, 2018b; Diaz Crego, 2019; ECRE, 2018; Eisele, 2019; European Parliament Committee on Civil Liberties, Justice and Home Affairs, 2020; FRA, 2019; Meijers Committee, 2018). An important point of critique concerns the fact that the Commission did not deem it necessary to conduct an impact assessment when preparing the proposal, due to previous assessments and expert consultations in the field of return policy as well as the 'urgency in which legislative proposals need to be tabled' (Diaz Crego, 2019, p. 10; ECRE, 2018; Meijers Committee, 2018). In addition, the Commission's decision to define effectiveness in terms of increasing the return rate has been questioned in previous deliverables of the ADMIGOV project due to the lack of reliable data and the need to take into account other aspects such as the durability of Exit (Oomkens and Kalir, 2020, p. 82).

In the following, we discuss the Commission's proposal and the response from the European Parliament and civil society, again addressing the different aspects that are most relevant to alternatives to detention. Furthermore, we make reference to the draft report of the EP's LIBE Committee on the Commission's proposal for a recast Return Directive, which was prepared by rapporteur Tineke Strik and published in February 2020. It should be noted that the LIBE Committee has not finished its work yet.

3.2.1 Scope

The Commission proposal seeks to introduce a "return border procedure" which would apply to return decisions following a failed application for international protection, if that application was submitted at the border or in a transit zone following Article 41 of the Asylum Procedure Regulation (European Commission, 13 July 2016), which has not yet been adopted (Diaz Crego, 2019, p. 8; European Commission, 12 September 2018, art. 22, pp. 36-38). The border procedure would extend the maximum period of detention to 22 months and preclude important safeguards such as the period of voluntary return, alternatives to detention and the right to an effective remedy (European Parliament, 2020, amendment 40, p. 39).

The LIBE draft report recommends the rejection of this article "as it is impossible to assess the fundamental rights implications" (European Parliament, 2020, amendment 118, pp. 85-86). Furthermore, the EU Agency for Fundamental Rights emphasizes that the scope of the procedure is unclear, as it is unknown 'whether it will apply only to persons apprehended directly at the border or if it will be possible, for example, to channel into the border procedure also persons apprehended elsewhere in the territory of a Member State, or if it can apply to all categories of applicants for international protection, including vulnerable persons' (FRA, 2019, p. 61).

3.2.2 Voluntary departure

Following the Commission's proposal, Member States would no longer be required to offer at least seven days for voluntary departure, but could set their own minimum period (Diaz Crego, 2019, p.7). Furthermore, the proposal seeks to introduce an obligation for Member States not to allow voluntary departure if a risk of absconding has been established; if a previous application for legal stay was fraudulent or manifestly unfounded; or if the returnee presents a risk to public policy, public security or national security (European Commission, 12 September 2018, art. 9(4), p. 28). Currently, Member States may choose whether or not to issue a voluntary departure period in these scenarios.

By restricting the use of voluntary departure, the proposal limits 'opportunities for third-country nationals to leave humanely and with dignity', according to the European Council on Refugees and Exiles (ECRE), which argues to expand the minimum period for voluntary departure to one month (ECRE, 2018, p. 3). Furthermore, the EU Agency for Fundamental Rights points out that the grounds for denying voluntary departure potentially apply to a significant number of returnees, including all rejected asylum seekers from 'safe countries of origin' if they are regarded as having submitted an unfounded claim. As such, the new requirement would 'undermine the primacy of voluntary departure over forced return as a key principle laid down in the directive' and significantly increase the costs for Member States, 'without any practical benefit' (FRA, 2019, pp. 24-25). Furthermore, considering that a perceived risk of absconding would automatically prohibit Member States from granting a period for voluntary departure, the measures aimed at preventing the risk of absconding – which are maintained in the proposal – would become 'purely hypothetical'(FRA, 2019, p. 25).

3.2.3 Risk of absconding

The proposal introduces a list of 16 criteria that should be considered when determining the risk of absconding, including a lack of documentation, residence or financial resources; being the subject of a return decision issued by another Member State; and non-compliance with an existing entry ban (European Commission, 12 September 2018, art. 6(1)). The list is non-exhaustive, which means that Member States would be able to add more criteria (Diaz Crego, 2019, p. 6). In addition, the proposal establishes a rebuttable presumption of the risk of absconding in four cases – the individual has used false or forged documents, has violently opposed return procedures, did not comply with an entry ban or with a measure aimed at preventing the risk of absconding. If these four criteria would be met, a risk of absconding would be presumed, thus reversing the burden of proof (FRA, 2019, p. 48). The proposal furthermore seeks to obligate third-country nationals to cooperate with the return procedure (Diaz Crego, 2019, p. 7). Refusal to fulfil this obligation is listed as one of the criteria for the risk of absconding, and could thus lead to detention (Diaz Crego, 2019, p. 7; European Commission, 12 September 2018, art. 6(1)(j), p. 25).

Though the proposed criteria overlap with those suggested in the Commission's Return Handbook, the proposal nonetheless presents a significant change from the original Directive, which left the concept of the risk of absconding open to be interpreted by Member States. This has consequences for the use of detention in return procedures, for which the risk of absconding functions as justification. In addition, the proposal seeks to prohibit Member States from granting a period for voluntary departure if a risk of absconding has been determined, and obligates the issuing of an entry ban (Diaz Crego, 2019, p. 6). Such requirements do not apply in the current Directive.

Considering the impact that the assessment of the risk of absconding has on other aspects of the Directive, critics question whether the criteria are sufficient to prevent arbitrary detention, due to the broad formulation of the criteria and the lack of guidance on how to assess them (Amnesty International, 2018a, p. 2; Diaz Crego, 2019 , p. 6; Eisele, 2019; FRA, 2019; Meijers Committee, 2018, p. 2). In addition, the Meijers Committee asks for these criteria to be based on factual evidence, as it is currently unclear "why some of the criteria indicate the risk of absconding, such as a lack of identity documents and a lack of financial resources", especially considering that they differ from the criteria recommended in the Return Handbook (Meijers Committee, 2018, p. 2). NGOs furthermore warn that the expanded definition will furthermore lead to increased use of detention (ACT Alliance EU et al, 2018, p. 2; ECRE, 2018, p. 3; Gómez-Escolar Arias, 2018). In this regard, the introduction of a rebuttable presumption of a risk of absconding is especially problematic, argues the European Council on Refugees and Exiles (ECRE), which 'recommends deleting the overly broad criteria and replacing them with a forward-looking risk assessment of the individual's likely future conduct or stated intention not to comply' (ECRE, 2018, p. 3). The Meijers Committee suggests the inclusion of criteria to assess the

absence of such a risk, 'such as having a social network, family members or a long period of stay' (Meijers Committee, 2018, p. 2).

In short, stakeholders question why these criteria are apt to predict a risk of absconding, and criticise the decision to obligate Member States to order detention based on these criteria. Furthermore, they call for a clarification of how to assess these criteria, and ask to introduce also negative criteria, i.e. conditions reducing the risk of absconding. The draft report of the LIBE Committee joins this criticism and recommends to delete the proposed article listing the criteria for determining the risk of absconding, as the long list and broad formulation of criteria "may capture almost all irregularly staying third-country nationals" and thus create an automatic use of detention, while also failing to harmonise standards as Member States would be allowed to include further criteria in their national legislation. In addition, it underlines 'that an individual assessment of the presence of a risk of absconding should always be carried out' (European Parliament, 2020, pp. 43-45).

3.2.4 Detention

The proposal promotes the use of detention not just through the elaboration of criteria for assessing the risk of absconding, but also by adding a third ground for detention, i.e. when 'the third-country national concerned poses a risk to public policy, public security or national security' (European Commission, 12 September 2018, art. 18(1), p. 34; Meijers Committee, 2018). While some Member States have already included public order reasons as a ground for detention of returnees in their national legislation (EMN, 2014), it is not mentioned in the current Return Directive, which only lists the risk of absconding or the avoidance or hampering of the preparation of return or the removal process as the main two grounds (European Commission, 19 December 2017, p. 140). Furthermore, the proposal seeks to allow Member State to include additional grounds in their national legislation, as it no longer requires them to "only" detain returnees based on the grounds listed in the Directive.[29]

The choice to include public order reasons as grounds for pre-removal detention is striking, considering that in the 2017 Return Handbook, the Commission explicitly prohibited Member States from ordering detention for these reasons, as 'it is not the purpose of Article 15 to protect society from persons which constitute a threat to public policy or security. The legitimate aim to protect the society should be addressed by other pieces of legislation, in particular criminal law, criminal administrative law and legislation covering the ending of legal stay for public order reasons' (European Commission, 19 December 2017, p. 140). Detention for public order reasons would, according to the Commission, constitute "light imprisonment" (European Commission, 19 December 2017, p. 140).

However, the Commission explained its choice in the proposal based on the rise of "new risks (…) which make it necessary that illegally staying third-country nationals who pose a threat to public order or national security can be detained" (European Commission, 12 September 2018, p. 8). The Meijers Committee questioned this response, asking "What new risks, and why is the criminal law framework,

[29] Compare Art. 18(1), European Commission 2018, p. 34, and art. 15(1), Return Directive.

which is the normal avenue for protecting society from such risks, deemed insufficient to deal with them?" (Meijers Committee, 2018, p. 3). It furthermore points out that the conflation of criminal law and the detention of aliens may not be in line with the prohibition of arbitrary detention in Art. 5 ECHR (Meijers Committee, 2018, p. 3). In addition, it recalls, citing case law, that 'As public policy, public security or national security are, like the risk to absconding, quite open concepts and susceptible to different interpretations, they can only form a ground for detention if national law defines the precise conditions under which detention is allowed' (Meijers Committee, 2018, p. 3).

The proposal would furthermore oblige Member States to maintain a maximum period of detention of between three and six months (European Commission, 12 September 2018, art. 8, pp. 26-27). Under the current Directive, Member States are free to decide on this maximum period in their national legislation, as long as it does not surpass six months. The proposal would thus require Member States that limit pre-removal detention to less than three months to prolong this period. This would obviously have consequences for detainees in Member States where the maximum period is currently lower. In addition, it would increase the group of people who may be subject to detention, as detention is only permitted when there is a reasonable prospect of removal within the maximum period of detention as set out in national legislation (see also Lutz, 2018).[30]

The Commission justifies its proposal with the argument that short maximum periods of detention in some Member States are inhibiting deportations, though it does not provide proof of this claim (European Commission, 12 September 2018, p. 8). The interviews conducted in other avtivities of the ADMIGOV project (D.2.2) as well as other studies support also the weakeness of this presumption (Diaz Crego, 2019, p. 6; European Parliament, 2020, p. 90). In fact, the LIBE report emphasises that '(…) research on detention practices suggests that chances of effective return decrease significantly after 30 or 60 days of detention, due to inter alia the lack of cooperation of the authorities of the country of return' (European Parliament, 2020, amendment 118, p. 86). ECRE states also that 'detention should always be for the shortest period possible. Under no circumstances should the already excessive maximum period of detention laid down in the current Directive be further expanded" (ECRE, 2018, p. 3).

3.2.5 Vulnerable persons

The proposal maintains the original provision which states that unaccompanied minors and families with children may only be detained as a measure of last resort and for the shortest appropriate period of time (European Commission, 12 September 2018, art. 20(1), p. 36). However, by increasing the grounds on which adults may be detained, the changes foreseen in the proposal may lead to an increase in the number of children being detained together with their family, as noted by the EPRS in its Substitute Impact Assessment for the proposal (Eisele, 2019, p. 74). Moreover, it does not prevent authorities like the Danish from continuing their longstanding practice of detaining the heads of families in order to keep the rest incheck. Furthermore, the new Border Procedure may lead to

[30] Art. 15 (4), Return Directive.

arbitrary detention of minors, if they are included in this procedure (Eisele, 2019, p. 75). To limit detention of minors, it argues that "it would be appropriate to specify that the requirement that national law allows detention for a maximum of at least three months does not prevent legislation excluding or strongly limiting detention for children and other vulnerable categories"(Eisele, 2019, pp. 74-75). The LIBE Committee goes further by calling for a prohibition of detention on minors and families (European Parliament, 2020, amendment 112, pp. 82-83). It explains that 'as detention has a particularly detrimental physical and psychological impact on children, whether unaccompanied or separated or with their families, they should not be detained. Detention is never in children's best interests'(European Parliament, 2020, amendment 24, pp. 24-25).'

The Commission's proposal makes no changes to the legal provisions regarding vulnerable persons. It maintains that the needs and situation of vulnerable persons should be considered pending return and during detention (European Commission, 12 September 2018, art. 17, p. 33 and art. 19, p. 35). By contrast, the LIBE report calls for Member States to "ensure that a vulnerability assessment is carried out for persons facing return procedures", while also specifying the factors that should be considered during a vulnerability assessment (European Parliament, 2020, amendment 13, pp. 15-16). Regarding detention, it emphasises that detention should be for as short as possible, 'particularly in the case of persons in a vulnerable situation'(European Parliament, 2020, amendment 103, pp. 76-77). In addition, it broadens the definition of 'persons in a vulnerable situation'. Rather than listing certain categories of people, e.g. elderly people or pregnant women, it defines 'persons in a vulnerable situation' as 'persons having a diminished capacity to resist, cope with, or recover from violence, exploitation, abuse or violations of their rights' (European Parliament, 2020, amendment 44, pp. 41-42). It proposes to look at a multitude of factors at that can render a person more or less vulnerable or, by contrast, protect them.

3.2.6 Alternatives to detention

At first glance, the proposal makes few changes regarding the use of ATDs in return procedures. It maintains that detention cannot be ordered if "other sufficient but less coercive measures can be applied effectively in a specific case", it has not introduced any clarification regarding what these measures comprise. It is unclear why the examples listed in the Return Handbook ('residence restrictions, open houses for families, case-worker support, regular reporting, surrender of ID/travel documents, bail and electronic monitoring') have not been included in the recast proposal (Meijers Committee, 2018, p. 2). By comparison, the 2013 Reception Conditions Directive (RCD), explicitly refers to "alternatives to detention" in the framework of applications for international protection, listings reporting requirements, financial deposits and residence requirements as possible ATD measures.[31] Furthermore, the proposal does not make explicit the requirement for Member States to adopt

[31] Recital 20, Reception Conditions Directive; Art. 8(4) Reception Conditions Directive.

national rules on alternatives to the detention as established by the CJEU, while this requirement has already been acknowledged by the European Commission (European Commission, 19 December 2017, p. 140).

The proposal actually appears to discourage the use of ATDs as part of the Border Procedure, as the provisions regarding this new procedure do not specify whether it would be obligatory for Member States to consider less coercive measures before ordering detention (Eisele, 2019, p. 72; European Commission, 12 September 2018, art. 22(7). In general, the proposal does not seek to strengthen or promote the use of ATDs in return procedures. Here, it is telling that the explanatory memorandum of the proposal lists "a more effective use of detention to support the enforcement of returns" as a key objective, while failing to mention any aims regarding ATDs. Shortly, the main aim of the European Commission to allegedly move towards a more efficient return policy will clearly have a negative impact on the development of ATDs.

In response to the Commission's proposal, the Draft Report of the European Parliament's LIBE Committee underlines the benefits of ATDs as part of the EU return policy and seeks to standardize their usage. In the explanatory statement, the report calls for the introduction of 'appropriate and community-based alternatives to detention and a social work approach, empowering and building trust with migrants to work towards resolution of their case, thus achieving better results for both governments and the migrants involved' in order to improve the durability of returns and the effectiveness of return procedures (European Parliament, 2020, pp. 89-90).

Importantly, it seeks to amend article 18 of the proposal, which lists the grounds and conditions for pre-removal detention. Here, the report adds that 'a measure of detention may only be applied provided it would not disproportionately harm the person concerned.' Therefore, it calls for a vulnerability test to be conducted prior to or immediate after detention. Furthermore, it emphasises the need for detention to be as short as possible in the case of vulnerable persons. Finally, the report adds that 'alternatives to detention shall always be given preference, and they shall be made effectively available' (European Parliament, 2020, pp. 76-77).

This commitment to increasing – and improving – the use of ATDs is elaborated on in the amendment to recital 13 of the European Parliament proposal, where the report seeks to add the following phrase: 'Member States should ensure that alternatives to detention, in particular non-custodial, engagement-based models embedded in the community, are preferred and prioritised' (European Parliament, 2020, amendment 23, pp. 23-24). In the justification, the rapporteur clarifies that such ATDs would include 'case-management systems, open reception centres, centres for special support to vulnerable migrants and community-based alternatives'. Furthermore, she emphasises that 'the most effective ATD are those that engage migrants in migration procedures, in particular though tailored case management' as ATDs are shown to be more effective in terms of compliance rate, while operating at a fraction of the cost of detention. 'They work because people are more likely to stay engaged and comply with immigration requirements, including negative decisions on their status, when they feel they have been through a fair and efficient process, and have been able to explore all migration outcomes. In contrast, approaches based on coercion and detention can encourage migrants to resist perceived injustice, and decrease their ability and motivation to cooperate with government requirements' (European Parliament, 2020, p. 24).

The need for implementing ATDs – especially for families – is repeated throughout the report (European Parliament, 2020, amendments 24, 27 and 36). As the report insists that detention is never in the interest of minors and should therefore not be detained, it turns instead to the use of

alternatives to detention for families. Whereas the Commission proposal allows families to be detained as long as they have separate accommodation, Amendment 114 to the Parliament proposal states that 'Pending removal, unaccompanied and separated minors and minors accompanied by their families shall be provided with adequate alternatives to detention'(European Parliament, 2020, pp. 83-84). The provision of ATDs to families in their entirety would serve to ensure that children and their parents are not separated during the procedure (European Parliament, 2020, pp. 83-84). In the justification for this amendment, the rapporteur recalls that 'Detention of minors is never in their best interests, including when family units are available' (European Parliament, 2020, p. 84).

3.3 Conclusion

This section explored the legal provisions affecting the use of alternatives to detention in the context of return procedures, based on the EU Return Directive. Under this Directive, persons subject to a return procedure can in some cases be detained. Detention is justified mainly if there is a risk of absconding or if the individual hampers or avoids the return procedure. However, detention is only permitted if a less-coercive alternative would not be sufficient and effective. Member States are required to provide for alternatives to detention in their national legislation, and should choose the least coercive measure available. However, the Return Directive does not use the term "alternatives to detention" at all, and does not clarify what type of measures may be provided instead of detention. The Return Handbook, which provides guidelines for the implementation of the Return Directive, provides a bit more guidance by mentioning examples of ATDs -- residence restrictions, open houses for families, case-worker support, regular reporting, surrender of ID/travel documents, bail and electronic monitoring. However, it does not specify what these measures entail nor how they can be implemented effectively and with respect for the rights of migrants in the context of return procedures. As a result, the legal framework on ATDs can be considered underdeveloped.

The Proposal for a Recast Return Directive expands the uses for detention both directly and indirectly, by including security risks as a third ground for detention, promoting a broader definition of the risk of absconding, and by requiring Member States to adopt maximum periods of detention of at least 3 months. Furthermore, it limits the application of a voluntary departure period and introduces a new border procedure where the realm of detention would be increased. The increased use of coercion is claimed to be necessary in order to increase the number of 'effective returns'. This claim is however not supported by evidence, which is reflected in stakeholders' criticism of the proposal.

The Proposal does note promote the usage of ATDs to counter the increased use of detention, as it leaves legal framework on ATDs largely intact. It does not expand or clarify the existing provisions, nor does it include additional safeguards. In its Draft Report on the Proposal, the LIBE Committee of the European Parliament has proposed a number of amendments that would deprioritize detention and promote the use of ATDs in return procedures. It calls for the establishment of community-based alternatives, while also seeking to incorporate a 'social work approach' during the entire return procedure, in order to build trust with migrants and resolve their case. Furthermore, the Draft Report increases the weight of vulnerability assessments and seeks to abolish the detention of minors.

In short, the legislative proposal for a recast Return Directive does not appear to reflect the EU's commitment in the Global Compact on Migration to prioritise the use of non-custodial alternatives to detention. However, the critical response to the legislative proposal and the amendments suggested by the LIBE committee show that the use of coercion in return procedures is highly contested, in particular for children and vulnerable persons. It remains to be seen to what extent the legislative procedure will affect the legal framework on ATDs in return procedures, which, as it stands now, is

underdeveloped. One of the reasons that may contribute to this trend is also the limited knowledge about ATDs and their real implementation.

4. Implementation of ATDs in EU Member States

This section serves to identify the different measures that are applied as alternatives to pre-removal detention in the EU. A short introduction to each of the ATD measures will be provided, including some aspects to consider in their implementation and assessment as based on the literature.[32] Furthermore, we discuss examples of the use of these measures in the EU Member States. This section makes use of two EMN reports that have mapped ATD measures in the European Union (EMN, 2014; EMN, 2017). A third update report was supposed to be published by the end of 2020 based on a common template sent to all Member States. However, by the end of 2021 only Latvia and Louxemburg submitted their answers. The attempt during the writing of this report to contact the service provider that is working on the 2020 update report didn't succeed. Therefor, information on ATD practices in individual Member States is derived from the EMN (2014) report and the contributions of Member State contact points to this report, unless specified otherwise. Furthermore, we reflect on the guidelines and definitions provided by UNHCR (2015), which describes a wide array of ATD measures and is recommended by the European Commission as a source on good practices regarding ATDs for families and minors (European Commission, 19 December 2017, p. 140; UNHCR, 2015). In addition, we include information from other sources to complement these findings (Bloomfield, Tsourdi and Pétin, 2015; Edwards, 2011; FRA, 2017; Steering Committee for Human Rights, 2018; UNHCR, 2012).[33] The objective of this section is to identify which ATD measures have been implemented in the framework of return procedures in the EU, what these measures entail, and to what extend they are used.

4.1 Types of ATDs

In spite of the legal obligation to consider less coercive options, the availability of ATDs for returnees remains limited in the EU. In 2014, the European Commission reported that while almost all Member States had provided for the use of ATDs in their domestic legislation, the majority of these measures were not applied in practice or no information was made available (Basilien-Gainche, 2015, p. 110; European Commission, 28 March 2014, p. 16). The scope of the current usage of ATDs is unclear due to a lack of available data. In a report on the use of ATDs in the EU for immigrants and asylum seekers, EMN (2014) found that most Member States were furthermore unable to provide statistics. It reported

[32] This also includes literature that is not focused specifically on ATDs in return procedures, but on immigration procedures in general or asylum procedures specifically.

[33] Interviews with Michael Flynn (Global Detention Project), Marta Gionco (PICUM) and Niclas Axelsson (Swedish Migration Agency).

that France had the highest instance of alternatives to detention (1 258), followed by Austria (771), Belgium (590) and Sweden (405). However, in some other Member States where statistics were available, alternatives were ordered in few cases or never (Slovakia, the Netherlands) (EMN, 2014, p. 5). In the light of these statements and the fact that deportation orders can be fulfilled voluntarily it cannot be presumed that the discrepancy between the number of removal orders and of pre-removal detentions is an indicator of a frequent use of ATDs.

As mentioned above, the Return Directive does not currently specify what measures Member States can apply as less-coercive alternatives to detention. However, the Commission lists the following examples: 'residence restrictions, open houses for families, case-worker support, regular reporting, surrender of ID/travel documents, bail and electronic monitoring', and refers national authorities to a UNHCR paper (2015) for good practices on detention (European Commission, 19 December 2017, p. 140 ; UNHCR, 2012). According to research conducted by EMN in 2017, the following alternatives are offered in the context of return procedures in the European Union (EMN, 2017, p. 47):

- Reporting obligations
  (AT, BE, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE, IT, LT LU, LV, MT, NL, SE, SI, SK, UK)
- Obligation to surrender a passport or travel documents
  (CY, DE, EE, ES, FI, FR, HR, HU, IT, LU, LV, MT, NL, SE, UK)
- Residence requirements
  (AT, BE, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE, IT, LU, MT, NL, SI, UK)
- Release on bail
  (AT, CY, CZ, FI, LU, NL, MT, SK, UK)
- Electronic monitoring
  (DE, LU, UK)
- Guarantor requirements
  (HR, HU, LT, NL, UK)
- Release to case worker or under a care plan
  (HR, UK)
- Participation in an NGO project on voluntary return
  (NL)

In addition, two 'other' alternatives are described in the report: accommodation in open reception centres with the option of counselling on voluntary return (Belgium), and a 'return preparation' scheme (France). Both of these options are intended for asylum seekers whose claim was rejected (EMN, 2017, p.47).

It should be noted, however, that due to the limited information and the lack of statistics provided by the Member States, it is not possible to verify whether each of the alternatives mentions above are applied in practice. Similar to the conclusions of other deliverables of the ADMIGOV project both in the entry and the exit regime (Deliverables 1.4 and 2.1), the "quality of data" is a relevant indicator for the debate on alternatives to detention.

4.2 Reporting obligations

The imposition of reporting obligations as an alternative to detention requires individuals to present themselves to authorities at regular intervals (EMN, 2014, p. 34). Usually, they are required to appear in person at the police station or other competent government body, but checks may also be performed by telephone (Edwards, 2011; UNHCR, 2012, Annex A, p. 41). In the EU, it is the most

common alternative used in immigration procedures. The frequency of reporting varies from daily to monthly. This alternative is relatively simple to implement, ensures availability of the returnee for important proceedings, and increases contact between the returnee and the authorities. However, if reporting requirements are implemented in a poor manner, e.g. when the returnee is required to travel long distances to the reporting location, they can hinder or discourage compliance. Moreover, reporting requirements restrict the returnee's liberty and may thus interfere with other rights, as well as lead to anxiety or fear of detention (Steering Committee for Human Rights, 2018, p. 69).

UNHCR (2015) therefore recommends that the frequency of reporting should be limited to what is strictly necessary. Moreover, reporting conditions should be adapted to the specific needs of the returnee and the situation and periodically reviewed, with the frequency of reporting being reduced over time. The reporting location should be convenient and accessible, so that non-compliance is avoided. In this regard, it is furthermore recommended some flexibility be shown regarding delays in reporting. It may be useful to let the returnee report to other authorities than those involved in the migration procedure, such as social workers, 'to avoid retraumatisation' (UNHCR, 2015, p. 7). However, sooner or later non-compliance of reporting obligations leads to pre-removal detention if no other ATD is available,

Variations in Practices in the EU

In the **Czech Republic** and **Bulgaria**, a person with reporting obligations is required to report once a week, while residing either at their own address or in an open reception centre. Failure to report results in detention. In Bulgaria, reporting obligations were long the only alternative to detention in immigration procedures, but have recently been complemented by a case management pilot project (see below).

In other Member States, the frequency of reporting can vary by case. For example, in **Latvia** the frequency is determined individually. In **the Netherlands**, the frequency can be daily, weekly or monthly.

The Greek contribution to EMN (2014) does not mention reporting obligations as an alternative to detention, nor does it provide any other alternatives used in **Greece**. However, it states that "Third-country nationals released after a court ruling –where expulsion is impossible (e.g. Syria nationals) and they do not pose a threat– are required to report to the police department of their place of residence on the first and fifteenth of each month".

Luxembourg does not have reporting requirements. In **Belgium**, there is a legal basis for reporting obligations, but it is not applied in practice.

Slovenia imposes reporting obligations on persons in return procedures who are subject to a residence requirement (see below), but reside outside of the Centre for Foreigners.

In **Slovakia**, reporting obligations can only be imposed if the person provides proof of accommodation and sufficient financial means for the duration of the stay. While the frequency of reporting depends on the individual case, it is usually done twice per week. In 2013, reporting obligations were only provided two times.

Some Member States **(Slovakia, Sweden)** pair reporting obligations with the condition to surrender travel documents.

In the **United Kingdom**, reporting obligations have a compliance rate of 95% and are considered the standard alternative to detention (Bosworth, 2018a, p. 17). According to some migrants subject to reporting obligations in the UK, the reporting process itself was fast and straightforward. However, they expressed frustration as they were unable to get information about their case from officers working in the reporting centre (JRS Europe, 2011, p. 30).

4.3 Surrendering of documents

To avoid the risk of absconding, returnees may be required to surrender their identity or travel documents to authorities (EMN, 2014, p. 35). This ARD requires that returnees do have travel documents, which is not always the case. However, when possible the confiscation of documents is often ordered in combination with other ATDs, such as reporting requirements (Bloomfield, Tsourdi and Pétin, 2015, p. 89). Regarding the surrendering of documents, included in the Return Handbook as a potential ATD, UNHCR (2015) mentions that 'Documentation remains one of the key safeguards against arbitrary detention or re-detention. For those required to surrender their passports or other travel documents as a condition of their stay, substitute documentation is required' (UNHCR, 2015, p. 4). UNHCR (2016) specifies that "individuals will need to be issued with substitute documentation that authorizes their stay in the territory and/or release into the community, in order to avoid re-detention on the grounds of failing to possess appropriate documentation" (UNHCR, 2016, p. 151). While the requirement to surrender documents is easy to implement, it may strand on practical obstacles where identity documents are lacking or in case of concerns regarding forged documents.

Especially with regards to the obligation to surrender a passport or travel documents in the EU, Member States have provided limited details on the use(fulness) of this practice in their territory, and it is largely ignored in literature on alternatives to detention, despite it being a common option in EU Member States. Therefore, it is not possible to elaborate on the practical implementation of this measure in the EU.

4.4 Residence requirements

The term residence requirements may refer to different types of ATDs. EMN (2014) uses it one the hand for the requirement that returnees communicate their address to authorities and notify authorities prior to absences or changing address, or ask permission to do so. On the other hand, it employs the term for designated residence, i.e. the requirement that returnees live in housing facilities made available by the state (EMN, 2014, p. 35). In order to qualify as alternatives to detention rather than detention, such facilities should be open or semi-open. Residence requirements may furthermore refer to distribution policies, where individuals are required to reside in a specific region or facility in order to facilitate burden-sharing and fair allocation of resources between regions (Steering Committee for Human Rights, 2018, p. 70). This form of designated residence is used as an alternative to detention in the framework of the asylum system (UNHCR, 2015, p. 9; UNHCR, 2016, p. 151).

Residence requirements are often coupled with reporting obligations (EMN, 2014, p. 34). The organization of this measure, and the degree of flexibility that is permitted (e.g. in terms of absences) varies widely (EMN, 2017, pp. 34-35; Steering Committee for Human Rights, 2018, p. 70). Like reporting obligations, residence requirements can be a relatively low-cost alternative. When returnees are allowed to continue living in their private homes, this measure is also a way to limit the disruption to family life (Bloomfield, Tsourdi and Pétin, 2015, p. 102). They are also a way of involving the family or community, and can build on existing reception facilities. However, depending on the extent of the restrictions imposed on residence, such as curfews or having to reside in a remote location, residence

requirements in particular carry the risk of becoming alternative forms *of* detention (Steering Committee for Human Rights, 2018, p. 70). Moreover, returnees who do not have the means to support themselves from their designated address are at risk of facing severe social, psychological and financial consequences (Steering Committee for Human Rights, 2018, p. 70).

UNHCR argues that it is preferred to allow individuals to live independently in the community in private accommodation, preferably with the right to work. This would allow migrants to live "normal lives", while the provision of social support and caseworkers could encourage cooperation with the migration process (UNHCR, 2015, p. 6). If an individual is required to live in a certain place, this 'should not interfere with broader freedom of movement rights, some flexibility is required' (UNHCR, 2015, p. 9). Furthermore, "any distribution system needs to take into account the personal situation of the claimant and his/her family, such as family or diaspora links, any special support or services required, best interests of the child, etc'(UNHCR, 2015, p. 9).

Variations in Practices in the EU

Member States report two different types of residence requirements. On the one hand, there is the requirement to communicate the address (and any changes therein) to the police, possibly paired with other measures, such as reporting obligations. The second type of non-detention residence requirements regards residence in a designated facility.

In **Belgium**, residence requirements are implemented in the form of open housing facilities for returnee families with minor children. The use of semi-open 'return homes', where families were assisted by a case manager[34] were considered a good practice, but in recent years have seen rapidly increasing absconding rates (Van der Vennet, 2015, cited in Steering Committee for Human Rights, 2018, p. 71). As a result, the use of this alternative was reduced, with increased emphasis on detention, including for children (Bosworth, 2018a, pp. 27-28). The introduction of dedicated "family units" to closed detention centres in 2018 did not take away observers' concerns regarding the detention of children, in particular due to the lack of safeguards preventing prolonged detention. In reaction to these concerns, Belgium suspended its policy regarding child detention, although the detention of minors remains legally possible (European Database of Asylum Law, 2019; Global Detention Project, 2020).

Regarding this measure, Bloomfield, Tsourdi and Pétin (2015) note that "the Belgian "return houses" entail designated residence in a centre providing a high level of services and coaching. Although initially designed for families in a return procedure, it was opened up to families filing an asylum claim at the border and families in a Dublin transfer. This use of the units for families in an asylum determination procedure has been criticised by organisations pleading for them to be granted access

[34] Belgium, national contribution to EMN 2014.

to the normal reception system. This is mainly due to the fact that, when placed in these family units, the families are formally detained and that the type of support is not always geared to their needs as asylum seekers (e.g. support in the asylum procedure)" (Bloomfield, 2016, p. 97). This could be seen as an example of the 'expansionism' of ATDs, where alternatives to detention expand the realm of detention rather than reduce it (Bosworth, 2018a, p. 13).

In **Luxembourg**, persons subject to an immigration procedure can be placed under 'home custody' for up to six months. In this period, the individual has to be home at set hours, during which a control visit can be made. In 2014, the Member State stated it was planning to open return homes as well, as an alternative geared to families.

In **Bulgaria**, persons who are allowed to reside outside of the 'Centre for Foreigners' can be ordered to reside at a particular location. Their movement may also be restricted to that location, or they may be required to report regularly to the police.

In **Slovakia**, residence requirements are not an alternative in itself, but residence at the address specified by the individual can be a precondition for other alternatives.

The **Netherlands** employs two designated residence facilities: reception facilities with restricted movement for persons who may be returned within 12 weeks; and family accommodation for families with minor children.

4.5 Release on bail and guarantor requirements

Following EMN (2014), release on bail entails the payment of a financial guarantee to the authorities for expenses related to the residence or return of the migrant. Release on bail allows the returnee to be in a situation of liberty until the return date. The required amount can be paid either by returnees themselves or by a third person (EMN, 2014, p. 35). In case of the latter, the measure is related to the provision of a guarantor, i.e. 'a person who ensures that the third-country national attends hearings, official appointments and meetings, etc.', which is listed by EMN (2014) as a separate ATD measure.

UNHCR (2015) states that when the involvement of guarantors or sureties is permitted, it should be thoroughly checked whether this presents a risk of exploitation to the migrant or asylum seeker. Moreover, authorities should provide clear information about the bail system and ensure the availability of lawyers or legal aid to returnees (UNHCR, 2015, p. 8). In addition, it encourages the use of automatic bail hearings, to increase their usage as an alternative to detention (UNHCR, 2015, p. 8).

This alternative may be cost-effective for States, and suitable for situations where the returnee has strong connections to the country or local community. However, it excludes persons whose financial resources are insufficient and who do not have contacts with a possible guarantor, thus disproportionally impacting vulnerable persons. Bloomfield, Tsourdi and Pétin (2015) therefore emphasise the need for bail sums to be proportional to the means of the applicant, and that persons subject to this ATD understand how the money can be recovered (Bloomfield, Tsourdi and Pétin, 2015, p. 95). In practice, good legal support is often a prerequisite for individuals to have access to release on bail (JRS Europe, 2012, p. 1). To increase the use of release on bail in immigration procedures, UNHCR (2016) therefore recommends that bail hearings be automatically available for persons in immigration detention (UNHCR, 2016, p. 152).

Variations in Practices in the EU

In **Belgium**, legislation provides the option of release on bail, but it is not used in practice. One obstacle to implementation concerns the logistics of returning the money when the person has returned to his country of origin.

Croatia has not used this requirement either, despite there being a legal basis. **Finland** also states that release on bail is seldom used as an alternative.

In **Slovakia** and the **Netherlands**, bail can be posted by the individual himself or by a third person. The amount is determined on an individual basis. In Slovakia, this alternative can be enforced on the condition that the individual makes his address known to the police, continues to reside there (residence requirement), and surrenders his travel documents. He must also have sufficient financial coverage for his stay. The deposit is returned after the person is deported or has returned voluntarily.

Some Member States require a financial deposit not as a way of reducing the risk of absconding, but to ensure that the returnee has enough money available to leave the country. For this purpose, authorities in **Finland** may seize the returnee's travel ticket to the country of a destination (EMN, 2014, p. 35). In **Hungary**, authorities may seize the money required for a travel ticket, or the return ticket itself. However, it excludes returnees from release on bail, instead opening it up only to applicants for international protection. In **Germany**, the returnee may be obligated to save money for the return, which is then transferred to the immigration authorities. However, this measure should guarantee that the individual maintains a minimum income.

4.6 Surety/guarantor requirements

In the **United Kingdom**, **Croatia** and **Lithuania**, a third person may act as 'surety' for the returnee, in a financial sense but also to ensure that the returnee complies with the migration procedure. In the United Kingdom, the person acting as surety must either have a personal connection to the individual, or be acting on behalf of a reputable organization that has an interest in their welfare. In Croatia, Croatian citizens may propose a postponement of the removal of the returnee. For this, they need to show proof of adequate accommodation and sufficient income, as well as a written request from the returnee.

In Lithuania, citizens or relatives residing legally in the country may act as a guardian, in cases where the returnee is a vulnerable person. This is considered a good practice by UNHCR (2015) which states that the guarantor "commits to taking care and supporting the migrant on the territory. Never applied to asylum-seekers, this provision has however been implemented in a few cases of other aliens. Aliens have been released, for example, to the care of a charity or church" (UNHCR, 2015, p. 9).

Certain places in **Germany** (Bremen and Brandenburg) have also considered the implementation of surety or guarantor requirements. In North-Rhine Westphalia, a crossover between the case worker programme and a guarantor requirement is seen: 'If an immigrant has been detained pending deportation for three months (…) the immigrant may be released if: a third person whom the immigrant in detention pending deportation has confidence in and who has the trust of the foreigners authorities (chaplain, a social worker focusing on psycho-social care or a person offering their services free of charge at the pre-removal detention centre) declares his intention to look after the immigrant after he has been released from detention and other prerequisites are mentioned.'

4.7 Release to a care worker and case management support

The ATDs listed by EMN furthermore include the release of returnees to care workers, e.g. social or religious workers, or under care plans (EMN, 2014, p.36). Although no further specification of this measure is provided, case worker support is an integral part of case management programmes, which are widely promoted either as independent alternatives to detention, or as complementary measures to detention or ATDs.

Case management is defined by UNHCR as 'strategy for supporting and managing individuals and their asylum or other migration claims whilst their status is being resolved, with a focus on informed decision-making, timely and fair status resolution and improved coping mechanisms and well-being on the part of individuals' (UNHCR, 2015, p. 5). The Steering Committee for Human Rights explains that "The role of the case manager, who can be either a state or a civil society representative, is to ensure access to information, legal aid and representation in relation to immigration procedures. This can also entail basic survival mechanisms such as facilitating access to welfare services, health care, work or education." Case management may be provided during the entire procedure, and usually involves an individual assessment; the development of a case plan to address individual needs; and 'referral which involves continuous monitoring to ensure that any changes are properly addressed' (Steering Committee for Human Rights, 2018, p. 66). Active information sharing and the establishment of a code of conduct may furthermore increase the effectiveness of case management programmes and prevent abuse (UNHCR, 2015, p. 5).

The case worker is not responsible for taking decisions in the migration procedure (Ohtani, 2016, p. 26). As such, he/she is able to build a better relationship with the returnee. Reportedly, case management programmes often have high compliance rates.[35]

Case management can be provided when the migrant lives at home or at a designated facility. It can be regarded as an alternative to detention on its own, or it can be seen as a useful component to increase the success of other alternatives, when paired together (UNHCR, 2016, p. 154). Case management as an alternative to detention is relatively expensive, but has clear benefits, especially for higher risk and vulnerable persons, because of the intensive guidance. Bosworth (2018a, pp. 4-5) finds that "well-funded, and well-supported case-management programs offering legal advice, housing and access to social and health care have high levels of compliance with all stages of the immigration system, including removal." However, implementing case guidance only at a late stage in the migration process (i.e. following a return decision), may reduce compliance. The individual may also be disappointed and lose trust in the migration process if the role of the caseworker is not clearly established (Steering Committee for Human Rights, 2018, p. 66). UNHCR (2015) emphasizes that case

[35] 99% according to The Real Alternatives to Detention, 2017, https://www.immigrantjustice.org/research-items/policy-brief-real-alternatives-detention; add more

management should be appointed early on in the migration or asylum procedure, and underlines the importance of establishing a code of conduct for social workers or other case managers, to prevent potential abuse (UNHCR, 2015, p. 5).

Variation in Practices in the EU

Case management as an alternative to pre-removal detention has not been applied on a wide scale in the EU. However, in recent years three Member States have launched pilot projects: **Bulgaria**, **Poland** and **Cyprus** are jointly testing "engagement-based" alternatives to migration detention. The projects are implemented by civil society organisations in the three states[36], and are supported by the European Alternatives to Detention Network[37], which aims to produce evidence on the affordability and effectiveness of case-management ATDs, as well as show that they are more humane (Ohtani, 2018, pp. 4-5).

The projects were designed in the framework of the International Detention Coalition's Community Assessment and Placement Model, which departs from an assumption of liberty and excludes the detention of vulnerable persons (Ohtani, 2018, p. 6; Sampson et al, 2015). Following this model, migrants as a standard remain within the community, either with or without conditions, while detention is only considered as a measure of last resort. Case management plays a role in all three options, following a holistic social work approach that moves beyond legal assistance or psychological support (Ohtani, 2018, pp. 3 & 7). Moreover, the implementing organisations advocate with authorities for reducing the use of detention in migration procedures, thus showing the objective of influencing the migration detention system rather than individual cases (Ohtani, 2018, p. 7).

All three projects support migrants who are at risk of detention or are already being detained. Participants were selected based on several criteria, including their vulnerability, financial independence and willingness to cooperate (Ohtani, 2018, p. 11). Only the Polish pilot is targeted specifically at migrants in return procedures. As of April 2018, it supported 23 adults, some of which were subject to reporting requirements. Many of the participants were part of family units (Ohtani, 2018, pp. 10 & 16).

In total, 93 individuals had been receiving case management support in the three countries by early 2018. Of these persons, three legalized their situation (in Bulgaria and Cyprus), four returned to their country of origin (all in Bulgaria), and 3 persons absconded (in Bulgaria and Poland) (Ohtani, 2018, p. 16). 90% of the individuals had been in the country for more than one year; 94% had close ties to the community, and 65% were considered vulnerable (Ohtani, 2018, p. 18). The cost of case management

[36] Center for Legal Aid – Voice in Bulgaria and the Bulgarian Lawyers for Human Rights; Cyprus Refugee Council; Stowarzyszenie Interwencji Prawnej.

[37] This network is led by the International Detention Coalition (IDC), Detention Action and the Platform for International Cooperation for Undocumented Migrants (PICUM).

per person per day ranged from 4-9 EUR (Bulgaria), to 19-38 EUR (Cyprus) and 22-44 EUR (Poland) (Ohtani, 2018, p. 28). An interim evaluation found that while the projects require "relatively small amounts of financial resources" (provided by the European Programme for Integration and Migration), the amount of time, preparation and reflection needed for their implementation is substantial (Ohtani, 2018, p. 7).

In the **United Kingdom**, case management programmes are combined with other alternative-to-detention measures, such as reporting obligations (EMN, 2014).

Case management is also used in **Sweden**, though there it is applied mostly to asylum seekers (Bosworth, 2018a, p. 28), while detention is more frequent for persons subject to a return procedure (Segenstedt, 2015). Asylum seekers are allocated two case workers: one is responsible for investigating the asylum claim, while the second is there to provide support to the asylum seeker with questions regarding housing, medical care, counselling etc. (International Detention Coalition, 2015). In addition, the second case worker provides "motivational counselling", in order to prepare the individual for a possible negative asylum decision, and to mitigate the risk of absconding in the event of a return decision (International Detention Coalition, 2015).

4.8 Electronic monitoring

Electronic monitoring generally refers to the tracking of an ankle bracelet which is worn by the individual. However, it may also refer to digital surveillance through voice recognition or other form of biometric registration and dataveillance in expulsion centers including monitoring smartphones (Bloomfield, Tsourdi and Pétin, 2015, p. 102). According to EMN (2014), "Electronic monitoring has not been found to be very effective in reducing the number of absconders in the Member States". However, it argues that electronic monitoring "is considered a useful way to increase contact with individuals, to monitor compliance with reporting restrictions and to provide an early warning in case of an attempt to abscond (EMN, 2014, p. 36)." The measure is derived from the criminal system and is considered severely restricting and intrusive (Bloomfield, Tsourdi and Pétin, 2015; (Steering Committee for Human Rights, 2018, pp. 72-73). Due to the criminal stigma associated with the measure and its interference with the right to private and family life, its use has been discouraged by the UNHCR, FRA and the UN Special Rapporteur on the human rights of migrants (Steering Committee for Human Rights, 2018, p. 73).

Variations in Practices in the EU

Electronic monitoring as an ATD in return procedures is uncommon in the European Union. The measure is only used in the **United Kingdom** and **Luxembourg**. In its contribution to EMN (2014), **Germany** (Schleswig-Holstein) stated that it was also considering the measure, though this 'would not mean using "electronic tags" exclusively but also the obligation to phone the authorities and to use voice detection systems".'

EMN (2014) further reported that **Portugal** had used electronic monitor as a complementary measure for house arrest. However, it emphasised that 'In this case, as third-country-nationals are not allowed to leave the house, this represents an alternative form of detention and not an alternative to detention' (EMN, 2014, p. 36).

4.9 Return counselling

Return counselling consists of intensive pre-departure assistance focused on voluntary return. This can include financial initiatives. The International Organisation for Migration provides return counselling services to a number of states worldwide. They can also be provided by State authorities or by civil society (Steering Committee for Human Rights, 2018, p. 71). Though return counseling is lauded as an alternative to pre-removal detention by UNHCR, its application in the sphere of forced return is unlikely (EMN, 2017; UNHCR, 2015).

Variations in Practices in the EU

In 2014, the **Netherlands** reported having seen good results from two return counselling projects, carried out by the 'Bridge to Better Foundation' and the 'SHIP Foundation' in cooperation with the Repatriation and Return Service. The programmes aimed at promoting a durable reintegration in the country of origin, and building realistic plans for the future. They were mentioned as a good practice by UNHCR (EMN, 2017; UNHCR, 2015). However, in both cases, cooperation with the Dutch government has been terminated (Amnesty International, 2018a, p. 28).[38]

4.10 Conclusion

This section has made clear the variety of measures adopted by Member States as alternatives to detention in the framework of return procedures. Though certain ATD measures can be found in different Member States, e.g. reporting obligations, surrendering documents and residence requirements, there is often no clear definition available of what these measures entail, so that comparison is not always easy. In the literature, the provision of case management support and return counselling is often is regarded as an ATD. However, these measures entail a form of complementary support that could be provided regardless of whether detention, an ATD or no measure at all is ordered. By placing case support or counselling in the framework of (alternatives to) detention, this support may become unavailable in situations where there is no ground for detention. In addition, it may promote the application of ATDs to persons who would otherwise not be subject to the detention framework.

In any case, the inclusion of ATDs in national legal frameworks does not guarantee that they are accessible in practice, and in the context of return procedures in particular. Due to a lack of data on their application it is not possible to assess to what extent these measures are available to returnees. Improved data-gathering is thus necessary to create a more accurate picture on the use of alternatives

[38] Wob-besluit 17 mei 2018 inzake de totstandkoming beëindiging van de samenwerking met enkele terugkeerorganisaties, 17 May 2018; Kamerstuk Nr 1483, Vreemdelingenbeleid 19 637.

to pre-removal detention in the EU. Without clear evidence that ATDs are not only less coercive, but also efficient in ensuring that return orders are respected, the debate on ATDs can hardly progress.

5. Practical issues

After having set out the potential benefits and risks of ATDs, clarified their legal framework in the EU and identified ATD practices in the Member States, this section will now address issues regarding the implementation of ATDs in practice as identified in the literature on this topic.

5.1 Monitoring and evaluation

A first important finding regards the fact that as of 2014, no Member State had carried out studies on the impact of ATDs on the effectiveness of return procedures (EMN, 2014, p. 5). Studies on respect for fundamental rights in alternatives to detention are also almost non-existent, with only Belgium and Latvia providing information on this topic (EMN, 2014, p. 5). Bosworth (2018a, p. 4) points out that not many alternative to detention programmes have been independently evaluated. The overall existence of evaluations is limited. They are often focused on one specific (pilot) project, such as in Sweden (Segenstedt, 2015), or with regard to the 'case management' projects that have been piloted in Cyprus, Bulgaria and Poland (Ohtani, 2018).

Research carried out in Europe in 2015 also found 'a lack of monitoring tools and regular evaluation of alternative schemes. Some evaluations were carried out by the authorities or by NGOs in the UK and Belgium, but they were not always made public. (…) Figures obtained on the cost of running a detention centre and alternatives to detention schemes where either unavailable or not comparable (…) similarly, absconding rates were rarely publicly available and usually unreliable' (Bloomfield, Tsourdi and Pétin, 2015, p. 113). Based on limited data, the report found that absconding rates for alternatives to detention in return procedures ranged from, on average, less than 25% in the UK, Sweden and Belgium, to 85% in Slovenia and similarly high in Lithuania. However, due to the many variables at play in each Member State, it could not determine the reason for this difference. One explanation for the high rate in Slovenia was that ATDs were often applied to persons who already had a high risk of absconding (Ohtani, 2018, p. 114).

Broader evaluations of the availability, use and impact of alternatives to detention in immigration procedures are also infrequent, with the EMN (2014) and (2017) reports being the most notable exceptions, as well as a 2013 research report by the Dutch Advisory Committee on Migration Affairs (ACVZ), which, though limited in its coverage, assessed the use of detention and alternatives in return procedures, including a number of alternative-to-detention pilot projects that had been rolled out

since 2011.[39] It regretted that the projects were implemented under very restrictive criteria and on a small scale, and that a planned independent evaluation of these pilot projects had been cancelled (Adviescommissie voor Vreemdelingenzaken, 2013, p. 61). Regarding the general framework, the report furthermore found that the cooperation of persons involved in return procedures could be increased through simple steps, such as improving and simplifying the information systems that are used in these procedures (Adviescommissie voor Vreemdelingenzaken, 2013, p. 62). It also emphasized the importance of good case management during the return process, with a focus on building trust. Since government officials have a limited possibility of building trust with the returnee, appointing a truly independent case worker brings significant advantages, the report argues (Adviescommissie voor Vreemdelingenzaken, 2013, p. 62). Importantly, it also notes several obstacles encountered by authorities for ordering alternatives rather than detention in practice, such as lack of time and information when deciding to order detention or an alternative, and the fact that the legal and policy framework is focused on clarifying the grounds on which someone may be detained, rather than when a less coercive measure or liberty should be ordered (Adviescommissie voor Vreemdelingenzaken, 2013, p. 58-60).

5.2 Obstacles for ordering ATDs in practice

Member States encounter several obstacles regarding the use of alternatives to detention in practice. This has to do, in the first place, with the restrictive conditions under which certain alternatives can be ordered, as a result of which many returnees are automatically ineligible for an alternative measure. Release on bail can for example only be applied if the returnee has sufficient funds; and a fixed address might be necessary to order residence obligations (EMN, 2014; EMN, 2017, p. 48).

Furthermore, Member States cite high costs and a lack of resources as hindering the implementation of ATDs (EMN, 2017, p. 48). Even though alternatives to detention are often cheaper than detention itself, the financial cost may remain a challenge in their implementation. Not all alternatives are equal: a weekly reporting requirement will be cheaper than a case-management programme, which typically requires more intensive support by a personal caseworker allocated to the returnee. In the same vein, a lack of human resources and training can also hamper the use of alternatives to detention in practice (Bloomfield, Tsourdi and Pétin, 2015; Bosworth, 2018a).

The impossibility to accurately predict the risk of absconding or the likelihood of motivation returns is another contributing factor for the low use of alternatives to detention in return procedures (EMN, 2014; EMN, 2017). As governments strive to keep the absconding rate as low as possible, ATDs are generally reserved for persons who are considered low risk, such as families with young children. The process of determining the risk of absconding is complicated and notoriously hindered by

[39] Kamerstuk Nr 1483, Vreemdelingenbeleid 19 637, https://zoek.officielebekendmakingen.nl/kst-19637-1483.html.

'stereotypical and non-substantiated decisions' (Bloomfield, 2016, p. 37; Bloomfield, Tsourdi and Pétin, 2015, pp. 69-70). EMN (2017) confirms that absconding assessments are currently unsatisfactory, stating that 'often, the first definite sign of the risk of absconding was the person's disappearance' (EMN, 2017, p. 32). While acknowledging this problem, scholars and human rights experts provide few suggestions for improvement (Edwards, 2011, pp. 77-78; Ohtani, 2018; Srikantiah, 2018). Indeed, there is a lack of research on absconding among returnees specifically. Research on absconding among asylum seekers subject to an ATD may not be applicable to return procedures, as the incentives to cooperate with authorities may differ between the two groups. Asylum seekers may be more likely to cooperate in order to maintain access to the protection procedure, whereas for persons subject to a return procedure, the length of residence and the presence of strong ties to the community may act as incentives for cooperation (Bloomfield, Tsourdi and Pétin, 2015, p. 26). In this regard, the suggestion made by the Meijers Committee in the context of the recast procedure of the Return Directive, i.e. to include criteria for assessing the *absence* of a risk of absconding 'such as having a social network, family members or a long period of stay' in the country could prove useful (Meijers Committee, 2018, p. 2).

5.3 Consequences of non-compliance

What happens if an alternative to detention is unsuccessful, i.e. if the person subject to the measure absconds or continues to avoid return proceedings? According to the Steering Committee for Human Rights, states should not automatically order detention if a person has failed to comply with an alternative to detention (Steering Committee for Human Rights, 2018, p. 54). However, in several Member States, non-compliance with the alternative is, in itself, a ground for detention (EMN, 2014, p. 15). [40] In others, non-compliance with the conditions of an alternative to detention does not automatically lead to detention, but is followed first by an individual assessment (EMN, 2014). This is in line with the Return Directive, which states that decisions taken under the Directive should be adopted on a case-by-case basis.[41]

The Jesuitic Refugee Service in Europe (2011) points out that non-compliance with migration procedures and ATD measures is often a survival strategy, rather than a sign of bad intentions. As such, governments could reduce non-compliance or absconding rates by ensuring that migrants' basic rights are protected and needs are met (JRS Europe, 2011, pp. 7, 39-40; Sampson et al, 2015, p. 27; Steering Committee for Human Rights, 2018, p. 63; UNHCR, 2016). Moreover, some authors point out that depending on the design of an ATD measure, they may also set the returnee up to failure, e.g. reporting obligations if migrants are required to travel large distances to reach the reporting locations, or residence requirements if migrants are housed in isolated locations (UNHCR, 2016, p. 151). Research on this issue is therefore important to investigate the causes of non-compliance in order to address

[40] AT, CY, CZ, DE, ES, FI, HU, IE, LV, LT, LU, PL, UK, NO.
[41] Recital 6, Return Directive

them in the development of ATD measures and understand which ATDs are suitable in the context of return procedures and under what conditions.

5.4 Conclusion

The lack of knowledge regarding to what extent ATDs are applied in the context of return procedures in the EU is exacerbated by the lack of monitoring and evaluation on ATD practices in the Member States. Little is known about the effectiveness of ATD measures in the context of return, in terms of ensuring cooperation, preventing absconding and avoiding unsuitable ATDs. Research on 'pilot projects' provide important insights regarding the impact and cost of measures such as case management, but the measures that are already available in most of the Member States (e.g. reporting obligations) remain understudied, in particular in the framework of return. This hampers the application of ATDs in practice, as the fear that persons subject to an ATD will abscond is not properly addressed and often remains as an unbased prejudgement. Further research is required to more accurately predict for which individuals ATDs may work, and how these measures may be adapted to avoid absconding and promote compliance in the context of return.

6. Conclusion

In this paper, we have sought to examine and assess the availability of alternatives to detention in the EU, in addition to identifying the benefits and challenges of implementing ATDs in the context of returns, based on a literature review, the legal analysis of the EU Return Directive and its recast proposal and some interviews with experts.

From a legal point of view, EU Member States are obligated to consider less-coercive alternatives before ordering pre-removal detention, which may be justified if an individual presents a risk of absconding or avoids or hampers the return procedure. However, while the availability of alternatives to detention may have been achieved in EU Member States' national legislation, their implementation remains limited and underassessed. In particular in the context of return procedures, it is unclear to what extent ATDs are applied in practice as statistics on their usage are not available. Moreover, the majority of Member States have not carried out any independent evaluations of their ATDs, nor of the effect that alternative measures have on the returnee and on their procedure. While the interest in "pilot projects" has generated useful insights, it is disconcerting that the four most commonly available ATDs in the EU (reporting obligations, surrendering documents, residence requirements, release on bail) have not yet been the subject of in-depth or comparative research in the framework of return. Moreover, as the needs and characteristics of persons subject to a return procedure may differ from asylum seekers, it should be avoided to base guidelines on ATDs in return procedures solely on findings in the context of protection.

Furthermore, this paper has addressed the potential changes a recast Return Directive and the New Pact on Migration and Asylum may bring. As it stands now, this recast would increase grounds for detention and expand the interpretation of a risk of absconding, while deprioritizing alternatives to detention. This development is not in line with the aim to use pre-removal detention only as a measure of last resort and to work towards alternatives, to which EU Member States have committed in the Global Compact on Migration. For this reason, the revision of the EU's legal framework regarding return procedures should provide an opportunity to clarify what ATD measures may entail and to standardize their usage, as well as encourage information-sharing in this area. In doing so, it should be

guaranteed that ATDs replace detention rather than expand the application of coercive measures to persons subject to a return procedure. Furthermore, decisions to order an ATD should take into account the situation of vulnerable persons, and the application of ATDs to children should be considered with care as they may act as a slippery slope towards detention, which is never in their best interest. Finally, measures aimed at providing assistance, e.g. case management or return counselling, should not be framed as ATDs, to ensure that access to support is not coupled to detention.

Considering the overall limited amounted of information on ATDs in return procedures in the EU, further research should first and foremost focus on gathering data and providing insight in the actual design and usage of ATDs by Member States. In order to promote the usage of ATDs in a responsible way, it is important to create an understanding of how ATDs can be made sufficient to facilitate the return procedure, while posing as little restrictions as possible. In this respect, it is necessary to understand which factors promote or discourage cooperation within ATDs, and to develop tools for authorities to assess the risk of absconding without disadvantaging migrants.

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