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EUROPEAN UNION AGENCY FOR ASYLUM

Guidelines on Alternatives to Detention

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On 19 January 2022, the European Asylum Support Office (EASO) became the European Union Agency for Asylum (EUAA). All references to EASO, EASO products and bodies should be understood as references to the EUAA.

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About the guide

Why was this guide created? The mission of the European Union Agency for Asylum (EUAA) is to facilitate and support the activities of EU Member States and Schengen associated countries (EU+ countries ([1])) in the implementation of the Common European Asylum System (CEAS). In accordance with its overall aim of promoting the correct and effective implementation of the CEAS and of enabling convergence, the EUAA develops common operational standards and indicators, guidelines and practical tools.

How was this guide developed? This guide was created with the support of Member State experts from Germany, Ireland, the Netherlands and Sweden, and with valuable input from the European Commission, the EU Agency for Fundamental Rights (FRA), the European Border and Coast Guard Agency (Frontex), the International Organization for Migration (IOM), the United Nations Children's Fund (UNICEF), the Council of Europe (CoE) and the United Nations High Commissioner for Refugees (UNHCR) ([2]). The development was facilitated and coordinated by the EUAA. Before its finalisation, a consultation on the guide was carried out with all EU+ countries through the EUAA networks on reception, asylum processes and Dublin.

Who should use this guide? This guide is primarily intended for national authorities responsible for detention and/or alternatives to detention, including decision-makers and policymakers. Additionally, this tool can be useful for any other person working or involved in the field of detention or alternatives to detention.

How to use this guide. This guide contains guidelines on alternatives to detention, with specific considerations regarding their applicability in the context of a border procedure. The reader may find further guidance in the handbook on European law relating to asylum, immigration and borders jointly published by FRA and the ECtHR and regularly updated, which describes the applicable European law concerning detention and restrictions of freedom of movement in Chapter 7. More specifically on alternatives to detention, the reader may consult the Council of Europe documents on legal and practical aspects of effective alternatives to detention in the context of migration and the Handbook on Alternatives to Immigration Detention: Fostering Effective Results, FRA's publication on alternatives to detention for asylum seekers and people in return procedures and the Frontex document on good practices on alternatives to detention.

How does this guide relate to national legislation and practice? This is a soft convergence tool. It is not legally binding and reflects commonly agreed standards as adopted by the EUAA Management Board in December 2024. The EUAA *Guidelines on alternatives to detention* should be used in conjunction with other available practical guides and tools.

Disclaimer
This guide was prepared without prejudice to the principle that only the Court of Justice of the European Union can give an authoritative interpretation of EU law.

([1]) The 27 EU Member States, complemented by Iceland, Liechtenstein, Norway and Switzerland.
([2]) Note that the finalised guide does not necessarily reflect the positions of IOM, UNICEF, CoE and UNHCR.

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List of abbreviations

Abbreviation	Definition
AMMR	**asylum and migration management regulation** — Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013
APR	**asylum procedure regulation** — Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU
AtD(s)	alternative(s) to detention
Charter	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CRC	Convention on the Rights of the Child
CSO(s)	civil society organisation(s)
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EMN	European Migration Network
EUAA	European Union Agency for Asylum
FRA	European Union Agency for Fundamental Rights
Frontex	European Border and Coast Guard Agency
Member States	EU Member States
RCD (2024)	Directive (EU) 2024/1346 of the European Parliament and of the Council of 14 May 2024 laying down standards for the reception of applicants for international protection
return border procedure regulation	Regulation (EU) 2024/1349 of the European Parliament and of the Council of 14 May 2024 establishing a return border procedure, and amending Regulation (EU) 2021/1148

Abbreviation	Definition
return directive	Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals
screening regulation	Regulation (EU) 2024/1356 of the European Parliament and of the Council of 14 May 2024 introducing the screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817
TCN(s)	third-country national(s)
UNHCR	United Nations High Commissioner for Refugees

The EU+ countries cited in this document are abbreviated as follows.

AT: Austria
BE: Belgium
BG: Bulgaria
CH: Switzerland
CY: Cyprus
CZ: Czechia
DE: Germany
DK: Denmark
EE: Estonia
EL: Greece
ES: Spain
FI: Finland
FR: France
HR: Croatia
IE: Ireland
IT: Italy
LT: Lithuania
LU: Luxembourg
LV: Latvia
MT: Malta
NL: Netherlands
PL: Poland
PT: Portugal
SE: Sweden
SI: Slovenia
SK: Slovakia

Introduction

Recent years have seen a growing attention towards alternatives to detention (AtDs), as a means for Member States to manage migration without depriving individuals of their fundamental right to liberty, unless it is necessary and justified. In this sense, AtDs may prevent and avoid the adverse physical and psychological effects of deprivation of liberty on people, including persons in a vulnerable situation.

This increasing interest towards the subject is also evident by looking at the new Pact on Migration and Asylum ([3]). Its different legislative instruments have not only reiterated the key principles and safeguards underlying AtDs, but have also introduced significant novelties, such as the obligation for the authorities ordering detention to expressly provide reasons in the detention orders anytime AtDs are not applied.

The new Pact also introduces the possibility for Member States to apply restrictions of freedom of movement to manage their reception system (Article 9 reception conditions directive (RCD (2024)) ([4]). These new measures, which are more flexible, will co-exist with AtDs, providing Member States with a comprehensive toolbox from which to choose the most appropriate measure. In some cases, the same measure (e.g. reporting to the competent authorities) can be used as an AtD under Article 10 RCD (2024) or as a restriction of freedom of movement under Article 9 RCD (2024). These guidelines are to be read in conjunction with the guidance related to reception organisation and management measures (including restrictions of freedom of movement) that the EUAA will develop in the future.

Article 5(5) of the return border procedure regulation ([5]) mandates the EUAA to develop 'guidelines on various practices alternative to detention, that could be used in the context of a border procedure'.

As a consequence, these guidelines aim at providing Member States' competent authorities with a tool that summarises the main aspects of AtDs during the different stages of the decision-making process, based on the EU acquis.

The document is divided into six building blocks: **defining**, **establishing**, **deciding**, **implementing**, **reviewing** and **ending** AtDs. Each building block includes a number of guidelines which, in relevant cases, are followed by examples of Member States' practices that could be of inspiration for other countries.

While the guidelines are generally applicable in all phases of the asylum or return procedures, specific considerations analyse the impact of the newly introduced border procedures on

([3]) European Commission: Directorate-General for Migration and Home Affairs, 'Pact on Migration and Asylum', European Commission website, 21 May 2024, accessed 6 December 2024, https://home-affairs.ec.europa.eu/policies/migration-and-asylum/pact-migration-and-asylum_en.

([4]) Directive (EU) 2024/1346 of the European Parliament and of the Council of 14 May 2024 laying down standards for the reception of applicants for international protection.

([5]) Regulation (EU) 2024/1349 of the European Parliament and of the Council of 14 May 2024 establishing a return border procedure, and amending Regulation (EU) 2021/1148.

AtDs, a description of which is contained in Annex 3. In particular, the analysis surrounding the application of AtDs in the return (border) procedure was developed in close collaboration with the European Border and Coast Guard Agency (Frontex), in light of its mandate.

This guidance draws on a number of key sources such as publications, academic studies, reports and jurisprudence issued by relevant organisations, EU agencies and European and international courts. Where appropriate, each source is mentioned in the text or referenced in the footnotes.

These guidelines should be considered as an initial effort of the Agency on the topic of detention and AtDs in line with its mandate.

Defining alternatives to detention

Despite the lack of a universally agreed-upon definition of 'alternatives to detention', broad consensus exists on the fact that alternatives to immigration detention are **non-custodial measures** that entail a **level of coerciveness of a lower degree than detention** ([6]).

National legislations refer to AtDs using different terms ([7]) that relate to a range of practices which may be used to avoid detention, in respect of the principle of necessity and proportionality.

The reception conditions directive (RCD (2024)) defines detention as 'the confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement' ([8]). However, neither the RCD (2024) nor any other instrument of the applicable EU acquis expressly define AtDs ([9]).

Nonetheless, these instruments can help determining two essential elements that qualify the nature of AtDs. Indeed, we can only talk about AtDs when:

- a permitted ground for detention is identified; and
- the non-custodial measures implemented *in lieu* of detention are less restrictive than deprivation of liberty, even though they may entail a certain level and intensity of coerciveness ([10]).

([6]) Council of Europe, *Practical Guidance on Alternatives to Immigration Detention: Fostering Effective Results – Practical guide*, 2019, p. 12. For the difference between deprivation of liberty and restriction of freedom of movement see also Guideline 2.

([7]) For example, 'non-custodial measures', 'less restrictive measures', 'less coercive measures', 'less drastic measures', 'less invasive measures', 'less onerous measures', 'less intrusive measures', 'special measures', 'more lenient measures' or 'alternative measures'. See Council of Europe, *Legal and practical aspects of effective alternatives to detention in the context of migration*, 2018.

([8]) Article 2(9) RCD (2024). The CJEU has confirmed that the meaning of the term 'detention' under the return directive (which does not define it) is the same as in the RCD (2024) (see *FMS and Others* full citation in fn. 26).

([9]) Based on Article 8(4) of the former RCD (Directive 2013/33/EU), the European Migration Network (EMN) defines 'alternative to detention' as 'non-custodial measures used to monitor and/or limit the movement of third-country nationals in order to ensure compliance with international protection and return procedures'.

([10]) In this sense, the definition provided is a narrow one. See C. Costello and E. Kaytaz in UNHCR, *Building Empirical Research into Alternatives to Detention: Perception of Asylum seekers and Refugees in Toronto and Geneva*, 2013, p. 10: '[The term AtD] is used in at least two distinct senses. In the narrow sense, it refers to a practice used where detention has a legitimate basis … yet a less restrictive means of control is at the State's disposal and should therefore be used. In the broader sense, AtDs refer to any of a range of policies and practices … which fall short of detention, but typically involve some restrictions'.

Guideline 1

Alternatives to detention must be applied only if a legitimate ground for detention exists

Lawfulness of detention

Detention must be lawful, i.e. it **must be authorised by and in accordance with the law**. The principle of legal certainty of detention requires the law to be sufficiently precise to allow anyone to foresee the consequences of a given action.

Detention must have a legal basis in national law and the rules prescribing the circumstances under which an applicant or a third-country national (TCN) may be detained, as well as the procedures and guarantees related to detention, must be clear.

If the legal provisions governing detention are not adequately foreseeable in their application and interpretation ([11]), detention may result in being arbitrary ([12]).

Grounds for detention

The principle of lawfulness of detention implies that any decision to detain an applicant or TCN must be **based on a permitted (legitimate) ground for detention** in the concrete case.

Where no such grounds for detention can be established (or cease to apply, see Guideline 9 and Guideline 10), **AtDs have no legal basis** ([13]) and the person concerned must be released.

Entering a country irregularly for the purpose of seeking international protection is not an unlawful act and does not constitute a ground for detention ([14]). In this sense, Article 10(1) RCD

([11]) ECtHR, judgment of 16 December 2016, *Khlaifia and Others v Italy*, No 16483/12, ECLI:CE:ECHR:2016:1215JUD001648312. Summary available in the EUAA Case Law Database.

([12]) The notion of 'arbitrariness' is interconnected with the principles of reasonableness, necessity and proportionality. All these principles must be assessed in the individual cases (see Guideline 5 and Guideline 6). 'The notion of "arbitrariness" is not to be equated with "against the law" but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.' UN Human Rights Committee (HRC), *General comment No 35, Article 9 (Liberty and security of person)*, CCPR/C/GC/35, paragraph 12, 16 December 2014.

([13]) The lack of a ground for detention does not preclude the use of similar restrictive (supervisory or managerial) measures based on national legislation.

([14]) UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012. The same principle is upheld by the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) that has concluded that '[c]riminalizing irregular entry into a country exceeds the legitimate interest of States to control and regulate irregular migration and leads to unnecessary detention' (CMW, *General comment No 5 on migrants' rights to liberty, freedom from arbitrary detention and their connection with other human rights*, 2021). At the same time, the UN Working Group on Arbitrary Detention (WGAD) also confirmed that deprivation of liberty of an asylum-seeking, refugee, stateless or migrant child, including unaccompanied or separated children, is prohibited and cannot be punitive in nature (WGAD, *Revised Deliberation No 5 on deprivation of liberty of migrants*, 2018).

(2024) clarifies that 'Member States must not hold a person in detention for the sole reason that that person is an applicant or on the basis of the nationality of that applicant'.

Depending on the scope, different legislative instruments in the EU acquis contain provisions on the grounds for detention, as detailed below.

Grounds for detention in the context of the asylum procedure

The grounds for detention for applicants for international protection are listed in the **RCD (2024)**. These grounds are exhaustive and must be laid down in the national law of Member States. In accordance with Article 10(4) RCD (2024), an applicant may be detained only on the basis of one or more of the following grounds:

- to determine or verify their identity or nationality;
- to determine the elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular where there is a risk of absconding;
- to ensure compliance with legal obligations imposed on the applicant through an individual decision on restrictions of freedom of movement in cases where the applicant has not complied with such obligations and there continues to be a risk of absconding;
- to decide, in the context of an asylum border procedure, on the applicant's right to enter the territory;
- when the applicant is detained subject to a return procedure, in order to prepare the return, or carry out the removal process, and the Member State concerned can substantiate on the basis of objective criteria, including that the applicant already had the opportunity to access the procedure for international protection, that there are reasonable grounds to believe that the applicant is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision;
- when protection of national security or public order so requires.

Grounds for detention in the context of the return procedure

Based on the **return directive** ([15]), Member States may only keep in detention a TCN who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when:

- there is a risk of absconding or
- the TCN concerned avoids or hampers the preparation of return or the removal process ([16]).

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

([16]) Article 15(1) return directive. The relevant rules on detention described in the return directive must apply during the screening to those who have not made an application for international protection.

Grounds for detention in the context of the responsibility determination procedure

In accordance with Article 10(4) RCD (2024) and Article 44(2) of the asylum and migration management regulation (AMMR) ([17]), Member States can detain a person for the purpose of transfer to the responsible Member State in case of:

- a risk of absconding; or
- protection of national security or public order ([18]).

Considerations related to border procedures

Detention grounds in the asylum border procedure

The grounds for detention listed in the RCD (2024) are also applicable during the asylum border procedure. In particular, specific considerations are needed in the following cases.

- **Determination or verification of identity or nationality**

  It should not be interpreted as justifying detention for all those applicants who do not possess proper documentation. Detention should be applied if it is clear that depriving the applicant of their liberty is the **only way** for the authorities to determine or verify the individual's identity or nationality. Certain indicators could assist the authorities in this assessment, such as: the intentional attempt of the person to mislead the authorities; the existence of clear grounds to consider that the applicant has, in bad faith, destroyed or disposed of an identity document in order to prevent determination of their identity or nationality; the use of forged documents; the intentional lack of cooperation from the applicant during the screening process; the presentation of clearly contradictory information; and the risk of absconding.

- **Deciding on the applicant's right to enter the territory**

  This detention ground could apply to all applicants channelled to the asylum border procedure. However, as described under Guideline 6, the **systematic** application of detention without an individual assessment is not compliant with international and EU legal standards. Therefore, the circumstance alone that the applicant is channelled to the asylum border procedure is not sufficient to issue a detention order under Article 10(4)(d) RCD (2024). Member States may detain the person concerned to decide on the right to enter the territory especially if there is a risk of absconding after an individual assessment.

([17]) Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013.

([18]) Article 45 AMMR further establishes that the requests concerning a person detained in accordance with the AMMR provisions should be sent within 2 weeks of the registration of the application or reception of the Eurodac hit. The receiving Member State should reply within 1 week. The transfer should then be carried out as soon as possible and, in any case, within 5 weeks of the date when the request was accepted or when the appeal or review no longer has suspensive effects.

- **National security or public order**

  It is mandatory to channel an individual to the asylum border procedure if there are reasonable grounds to consider they pose a threat to national security. Authorities may have information from the security check conducted during the screening that the person may present a danger to the national security or public order. However, this does not mean that the applicant will be automatically detained based on this information, as the requirements for channelling to the asylum border procedure are different from those for issuing a detention order. Only those applicants who represent a genuine, present and sufficiently serious threat affecting a fundamental interest of society or the internal or external security of the Member State can be detained, after an individual assessment on the necessity and proportionality of detention ([19]).

Detention grounds in the return border procedure

The return border procedure has introduced new grounds for detention, envisaging the possibility to detain TCNs whose application has been rejected in the context of an asylum border procedure ([20]).

The return border procedure regulation distinguishes the two categories below.

- Persons who were detained during the asylum border procedure, who no longer have a right to remain and who are not allowed to remain: they may continue to be detained for the purpose of preventing their entry into the territory of the Member State concerned, of preparing their return or of carrying out the removal process.
- Persons who were not detained during the asylum border procedure, who no longer have a right to remain and who are not allowed to remain: they may be detained if there is a risk of absconding, if they avoid or hamper the preparation of return or the removal process or if they pose a risk to public policy, public security or national security.

([19]) CJEU, judgment of 30 June 2022, *M.A. v State Border Protection Service at the Ministry of the Interior of the Republic of Lithuania*, C-72/22 PPU, EU:C:2022:505, paragraphs 89-90. Summary available in the EUAA Case Law Database.

([20]) Article 5(2) and (3) return border procedure regulation. Article 4(3) refers to the return directive on the procedural safeguards and principles regarding detention.

Figure 1. Grounds for detention in each procedure

ASYLUM (BORDER) PROCEDURE

- To determine or verify identity or nationality; or
- To determine the elements on which the application is based; or
- To ensure compliance on restrictions of freedom of movement; or
- To decide on the applicant's right to enter the territory; or
- The application is made to delay or frustrate the return and the applicant is already detained; or
- To protect national security or public order.

RETURN BORDER PROCEDURE

The individual **was detained** during the asylum border procedure:

- to prevent entry; or
- to prepare return; or
- to carry out the removal process.

The individual **was not detained** during the asylum border procedure and:

- there is a risk of absconding; or
- the person avoids or hampers the preparation of return; or
- the person poses a risk to public policy, public security or national security.

RESPONSIBILITY DETERMINATION PROCEDURE

- There is a risk of absconding; or
- To protect national security or public order.

RETURN PROCEDURE

- There is a risk of absconding; or
- The person avoids or hampers the preparation of return.

Guideline 2

Alternatives to detention must not amount to deprivation of liberty

Alternatives to detention and deprivation of liberty

AtDs must be less restrictive than deprivation of liberty. As a result, if the restrictions imposed, considered individually or cumulatively, amount to a situation comparable to deprivation of liberty, such measures cannot be considered as alternative to detention, but **rather alternative forms of detention or *de facto* detention**, regardless of the way they are labelled in national systems.

Examples include situations of **confinement to any place** ([21]) where deprivation of liberty may occur, practices that envisage overly onerous conditions or restrictions (and/or a combination thereof). For specific examples, see case-law below.

ECtHR, Nolak and K v Russia ([22])

In **Nolan and K v Russia**, the ECtHR stated that in order to determine whether someone has been 'deprived of his liberty' within the meaning of Article 5, the starting point must be **his concrete situation**, and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. '**The difference between deprivation of and restriction upon liberty is merely one of degree or intensity, and not one of nature or substance**'. In the specific case, the Court found that the conditions of the applicant's overnight stay in the transit hall of Sheremetyevo Airport in Moscow (where he was locked up in a small room and allowed to use the toilet, bar and telephone in the following day under constant supervision by a border control officer) were equivalent in practice, in view of the restrictions suffered, to a deprivation of liberty.

([21]) Based on the *General comment No 1 (2024) on article 4 of the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, the term 'places of deprivation of liberty' should be understood broadly to encompass 'any place, whether permanent or temporary, where persons are deprived of their liberty by, or at the instigation or with the consent and/or acquiescence of public authorities'. These places can include private or public settings, including institutions whose operation has been outsourced or delegated to private actors and/or institutions run by non-state actors.

([22]) ECtHR, judgment of 12 February 2009, *Nolan and K. v Russia*, No 2512/04.

ECtHR, Guzzardi v Italy ([23])

In the leading case **Guzzardi v Italy**, the European Court of Human Rights (ECtHR) found that the measures applied, namely confinement at a particular place on a small island, a residence requirement, the obligation to report twice a day and being subject to constant supervision amounted to deprivation of liberty within the meaning of Article 5. The Court noted that the restrictions imposed made it difficult for the individual concerned to make social contacts. The Court concluded that **these measures taken individually could not amount to a deprivation of liberty but when taken cumulatively and in combination they amounted to *de facto* detention** and thus fell under the scope of Article 5 European Convention on Human Rights (ECHR) ([24]).

ECtHR, Amuur v France ([25])

The case concerned Somali nationals who were not granted the right to enter France and were held in the international zone of the Paris-Orly airport. The Court noted that holding a person in international zones involves restrictions upon liberty. Recalling the case Guzzardi v Italy, the Court stated that 'confinement, accompanied by suitable safeguards for the persons concerned, is acceptable' insofar it enables a state to prevent unlawful immigration while complying with its international obligations. The Court also noted that restriction could not be 'prolonged excessively'. In the case at hand, the Court concluded that the 'restrictions suffered' – namely being under strict police surveillance without access to legal or social assistance – was equivalent to a deprivation of liberty.

CJEU, *FMS v OIF* ([26])

In its assessment, the Court considered the cumulative effects of relevant indicators such as restricted perimeter enclosed by a high fence and barbed wires, containers serving as accommodation with a surface of less than 13 m^2, inability to receive visits without authorisation, limited movements, and surveillance by police officers in the area and its immediate surroundings. In addition, the Court found that it was manifestly impossible for the applicant to leave the transit zone voluntarily insofar as (i) it was located on the land border with Serbia, a country in which the TCN was inadmissible and whose entry made him liable to penalties, and (ii) leaving the transit zone meant, under Hungarian national

([23]) ECtHR, judgment of 6 November 1980, *Guzzardi v Italy*, No 7367/76.
([24]) Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, ETS 5, 4 November 1950.
([25]) ECtHR, judgment of 25 June 1996, *Amuur v France*, No 19776/92, ECLI:CE:ECHR:1996:0625JUD001977692.
([26]) CJEU, judgment of 14 May 2020, *FMS and others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendeszeti Főigazgatóság,* joint cases C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraphs 216-231. Summary available in the EUAA Case Law Database.

regulations, withdrawing the asylum application, without the TCN being able to appeal that decision. The Court concluded that when a TCN is **forced to remain permanently in a restricted, closed transit zone, where their movements are limited and monitored and from which they cannot leave voluntarily**, this constitutes deprivation of liberty.

Differentiating alternatives to detention from other concepts

AtD should be distinguished not only from alternative forms of detention but also from other concepts, as detailed below.

Alternatives to detention and restrictions of freedom of movement

AtDs are not a means to manage the reception system. In line with RCD (2024), Member States are free to organise their reception system ([27]). While reception measures do not usually entail any restriction on freedom of movement, the RCD (2024) grants Member States the possibility to impose certain conditions which might be similar to AtD measures, including by restricting the person's freedom of movement.

The provisions governing the allocation of applicants to a geographical area and the restrictions of freedom of movement are envisaged in Articles 8 and 9 RCD (2024). These provisions are not directly linked to detention ([28]). Rather, they describe a modality through which Member States manage their reception systems.

While there could be in practice some overlapping between AtDs and restrictions of freedom of movement as per Article 9 RCD (2024) ([29]), **the key criteria to take into account is that AtDs apply only if there is a legitimate ground for detention** (see Guideline 1). Restrictions of freedom of movement under Article 9 RCD (2024) are autonomous measures and not an AtD. Although there is no need for a detention ground, an individual decision is still required when applying restrictions of freedom of movement.

Alternatives to detention and accommodation modalities

AtDs are not accommodation modalities. Accommodation modalities are part of the material reception conditions that need to be guaranteed as soon as an individual expresses the intention to seek asylum ([30]). AtDs may entail a form of accommodation, e.g. placement in reception facilities resulting from the obligation to stay in a designated area. However, this is not true for all AtDs (e.g. reporting requirements, deposit of a

([27]) Recital 17 RCD (2024): 'Member States should be able to freely organise their reception systems. As part of that organisation, Member States should be able to allocate applicants to accommodation within their territory in order to manage their asylum and reception systems'.

([28]) As indicated under Guideline 1, the restriction of freedom of movement may however give rise to a ground for detention, if the applicant subject to restrictions has not complied with the obligations imposed and there continues to be a risk of absconding (Article 10(4)(c) RCD (2024)).

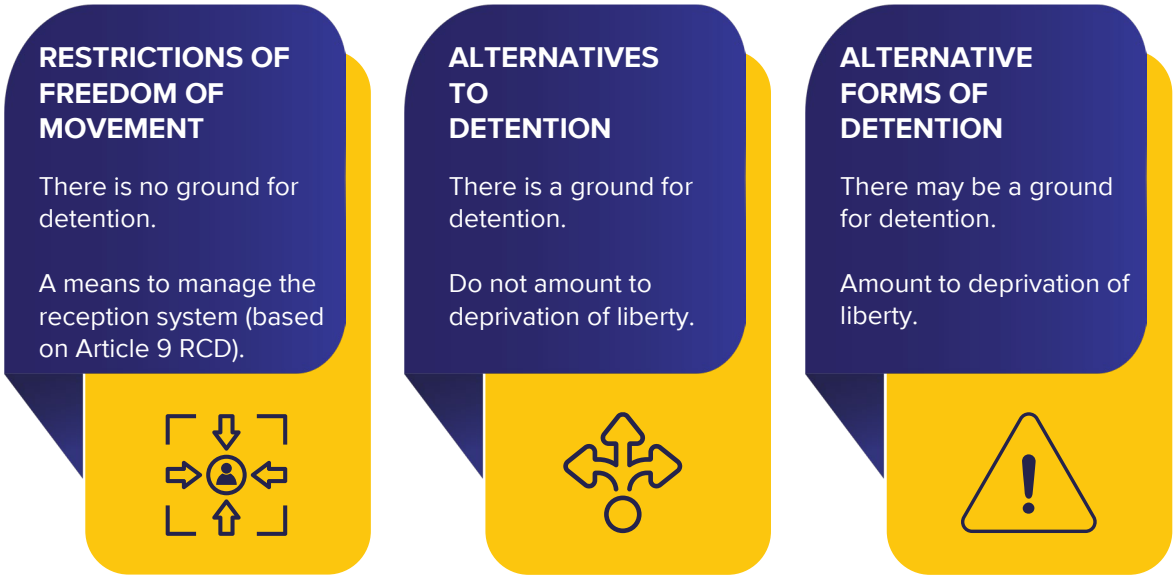
([29]) For example, AtDs usually entail forms of restriction of freedom of movement; the facilities used for AtDs and for the restriction of freedom of movement may be the same; the restriction of freedom of movement may entail, where necessary, reporting requirements or supervisory measures that are also a type of AtD.

([30]) Recital 7 RCD (2024): 'It is necessary to clarify that material reception conditions should be available to applicants from the moment they express their wish to apply for international protection to officials of the competent authorities'.

financial guarantee or surrender of travel or identity documentation, or their combination).

In practice, applicants for international protection and persons subject to AtDs can be accommodated in the same facilities ([31]). In this case too, **the key criteria to take into account is that AtDs apply only if there is a legitimate ground for detention** (see Guideline 1).

Figure 2. Differentiating alternatives to detention from other concepts



([31]) For example, children under AtDs can be placed in a dedicated facility used to host also children who are not under AtDs.

Articles 8 and 9 RCD (2024)

Article 8 – Allocation of applicants to a geographical area

1. Member States may allocate applicants to a geographical area within their territory in which they are able to move freely, for the duration of the procedure for international protection in accordance with Regulation (EU) 2024/1348.

2. Member States may allocate applicants to a geographical area within their territory pursuant to paragraph 1 only for the purpose of ensuring the swift, efficient and effective processing of their applications in accordance with Regulation (EU) 2024/1348 or the geographic distribution of those applicants, taking into account the capacities of the geographical areas concerned.

Member States shall inform applicants in accordance with Article 5 of their allocation to a geographical area, including of the geographical boundaries of that area.

Article 9 – Restrictions of freedom of movement

1. Where necessary, Member States may decide that an applicant is allowed to reside only in a specific place that is adapted for housing applicants, for reasons of public order or to effectively prevent the applicant from absconding, where there is a risk of absconding, in particular with regard to:

(a) applicants who are required to be present in another Member State in accordance with Article 17(4) of Regulation (EU) 2024/1351; or

(b) applicants who have been transferred to the Member State where they are required to be present in accordance with Article 17(4) of Regulation (EU) 2024/1351 after having absconded to another Member State.

Where an applicant has been allowed to reside only in a specific place in accordance with this paragraph, the provision of material reception conditions shall be subject to the actual residence by the applicant in that specific place.

2. Member States may, where necessary, require applicants to report to the competent authorities at a specified time or at reasonable intervals, without disproportionately affecting the rights of the applicants under this Directive.

Such reporting requirements may be imposed to ensure that the decisions referred to in paragraph 1 are respected or to effectively prevent applicants from absconding.

Establishing alternatives to detention

Guideline 3

Alternatives to detention must be established by law, which should clearly specify the authority responsible to adopt and implement them, the criteria for their application and the range of available options

In accordance with Article 10(5) RCD (2024), 'Member States shall ensure that the **rules concerning alternatives to detention**, such as regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place, **are laid down in national law**'.

National laws should clarify, inter alia, who is responsible for adopting and implementing AtDs, when AtDs should be examined and what the different AtDs available are ([32]).

Who examines and applies alternatives to detention?

The authorities responsible to decide whether to apply detention or AtDs are different across the Member States. Depending on the national system, these authorities usually encompass border guards, the police, immigration and asylum authorities, as well as judicial authorities. In this sense, Article 11(2) RCD (2024) and Article 15(2) return directive establish that detention must be ordered in writing **by judicial or administrative authorities**, stating the reasons in fact and in law ([33]).

When to examine and apply alternatives to detention?

In general, the assessment of whether to apply detention or AtDs is undertaken at first when detention is ordered or validated, simultaneously with the identification of an applicable ground for detention. Indeed, both the administrative and judicial authorities ordering or validating the initial detention must first consider whether a ground for detention is in place (see Guideline 1) and, if so, examine the possibility of applying less coercive measures (see Guideline 5).

([32]) UNHCR, *Detention Guidelines*, *op. cit.,* fn. 14, guideline 4.3, paragraph 36.
([33]) Similarly, Article 44(4) AMMR.

If the initial decision to detain is taken by an administrative authority (the police, the border or immigration authorities), Article 11(3) RCD (2024) provides that the decision must be reviewed by a judicial authority (*ex officio* or upon request of the applicant) **as speedily as possible** ([34]) and no later than 15 days (21 days in exceptional situations) from the beginning of the detention (or the launch of the request for review).

Similarly, Article 15(2) return directive provides that a speedy judicial review must take place, *ex officio* or upon request of the individual concerned.

AtDs may be also examined at a later stage, during the review of detention and/or AtDs, either *ex officio* or upon request of the individual concerned who may challenge the initial detention decision at any time (see Guideline 9)

What types of alternatives to detention?

Member States implement a range of AtDs. The following list outlines the main ones ([35]), including those specifically mentioned by Article 10(5) RCD (2024) and Article 7(3) return directive ([36]), i.e. regular reporting to authorities, deposit of a financial guarantee and obligation to stay at a designated place.

It is important to note that the list below is **not exhaustive** and that the alternatives can be used **autonomously or in combination**, provided that the cumulative effect of the restrictions does not lead to deprivation of liberty (see Guideline 2).

Most importantly, **there must be viable alternatives to detention**. Member States should make available **at least two options** and cannot detain individuals simply on the basis that no AtDs are available.

([34]) The ECtHR has stated that 'any period in excess of four days is *prima facie* too long'. See also Council of Europe, *Guide on Article 5 of the Convention – Right to Liberty and Security*, 2014, p. 24. For more information on the case-law of ECtHR see: ECtHR, judgment of 23 June 2009, *Oral and Atabay v Turkey*, No 39686/92, paragraph 43; ECtHR, judgment of 3 October 2006, *McKay v the United Kingdom*, No 543/03, paragraph 47; ECtHR, judgment of 4 October 2007, *Năstase-Silvestru v Romania*, No 74785/01, paragraph 32.

([35]) The different options listed may not be necessarily considered as an AtD by all Member States.

([36]) Article 7(3) return directive, in relation to the period of voluntary departure, states that Member States may apply certain obligations to prevent absconding, such as regular reporting to the authorities, deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a certain place, which may be imposed for the duration of the period for voluntary departure. These provisions have to be considered together with the ones derived from Article 15(1) return directive which, although not defining nor providing a list of alternatives to detention, states that the proceeding authority may keep a TCN in detention only if other sufficient but less coercive measures cannot be applied effectively. Such legal embedment implies a positive obligation on the Member State's side, as to include in their national legislation the necessary provisions to make AtDs available in the scope of a return procedure, thus allowing for the adoption of the least coercive measure deemed necessary and effective to enforce the removal of the concerned TCN. See Frontex, *Good Practices on Alternatives to Detention*, 2024.

Regular reporting to authorities

It requires the individual concerned to report to the competent authorities at specific intervals of time. Reporting can be done in person or through the use of electronic means or modern technologies (e.g. telephone voice recognition) ([37]). The frequency of the reporting may differ depending on the individual circumstances and can be scheduled around other official appointments with the authorities (e.g. asylum interview) to avoid excessive burden.

As indicated by recital 20 RCD (2024), reporting requirements should not disproportionately affect the rights of the individual concerned. Indeed, too strict or frequent reporting duties that impose an excessive burden on a person in terms of time and cost may, on its own or on a cumulative basis with other forms of AtDs, amount to *de facto* detention (see Guideline 2) or to violation of fundamental rights such as the right to family life (see Guideline 4) ([38]).

Overview in Member States

Regular reporting to authorities is used in 25 Member States ([39]).

Lithuania also introduced the possibility of using electronic communication for reporting: special mobile applications, surveillance devices and an email identifying the sender ([40]).

Reporting frequency

- **Most Member States**: every 24 hours.
- **Ireland**: every 4-5 weeks for some procedures.

([37]) For examples of reporting modalities, see *Commission Staff Working Document – The Dublin Roadmap in action – Enhancing the effectiveness of the Dublin III Regulation: identifying good practices in the Member States*, 2023, p. 6. Such examples include: 'Introduction of an "entry-exit system" to monitor the presence in the reception centre (BG); daily self-registration at the reception centre and transmission of the list of applicants residing in the centre routinely to the Dublin unit to determine which applicants are still residing in the centre or are no longer present in the centre (LU); assignment of specific employees to check whether all applicants are in their designated area every day. If they are not present within the specific timeframes in which they are obliged to be present in the reception centre, a protocol is activated and the applicants are informed that further measures can be taken, including detention (BG); obligation to contact the government once a week in order to get social welfare benefits, together with the obligation to report to the reception centre in a regular manner (CH).'

([38]) On the possible consequences of failing to comply with reporting see: Frontex, *Good Practices on Alternatives to Detention*, 2024: such consequences may range from a fine to the imposition of a harsher alternative to detention itself , or even the immediate accompaniment to the border in cases where an enforceable return decision has been taken and no obstacles remain to the return of the TCN to the country of origin. Such non-compliance may also prevent the TCN to access alternatives to detention in a future return proceeding.

([39]) EMN, *Detention and alternatives to detention in international protection and return procedure*, 2022 (EMN study). In particular, 17 Member States make regularly use of it AT, CY, CZ, DE, EE, EL, ES, FI, FR (in the framework of house arrest), HR, IE (mostly used for people with deportation orders or subject to a Dublin transfer decision), IT, LT, NL, PT, SE, SI (in the framework of alternative 'requirement to reside at a designated place' in the return procedure); 8 rarely do: BE, BG, HU, LU, LV, MT, PL, SK.

([40]) EMN study, 2022, *op. cit.*, fn. 39, p. 18.

- **Netherlands and Belgium**: frequency varies from daily to monthly.

Deposit of a financial guarantee

It requires the individual concerned to deposit an amount of money to the authorities. If the individual complies the requirements imposed by the alternative, the deposited sum will be returned to them as soon as the alternative ceases. Otherwise, it may be transferred to the authorities.

The deposit of a financial guarantee can be required by the authorities from the outset or as a condition for release (so-called release on bail). In the latter case, it is not strictly an AtD ([41]).

The amount to be deposited should be reasonable and proportionate, in light of the individual circumstances. In this sense, the amount should not be fixed, rather it should be decided on a case-by-case basis, also considering the effectiveness of the AtD. The amount may fall within a range (minimum and maximum amounts) that Member States may have pre-defined in their national legislation. The assessment of the financial capacity of the individual may be based on a personal declaration, as it may not be possible for the Member State to prove it ([42]). The individual concerned should be informed on the consequences of not complying with the requirements and on the pre-requisites and modalities for the refund.

Overview in Member States

- **Bulgaria, Cyprus, Germany, Finland, Croatia, Hungary, Luxembourg**: TCNs can provide a deposit or financial guarantee to remain in the country.
- **Hungary**: the maximum amount covers total travel and residence expenses.
- **Netherlands**: the maximum amount is EUR 1,500 (AtD used in the return procedure ([43])).
- **Italy:** the financial guarantee is set by law between EUR 2,500 and EUR 5,000.

([41]) The deposit of a financial guarantee differs from release on bail. The latter entails releasing a TCN from custody upon payment of a financial deposit from the concerned individual or a guarantor. Release on bail cannot be defined strictly as an AtD, since it can be used only after detention has been applied and not before. According to the EMN study, release on bail is available in 9 Member States but is used in practice in only 4. Similarly, release from detention may be based on a written agreement between the authorities and the individual concerned (bond) or on a guarantee provided by a third-party (guarantor) that the person will comply with the requirements. Both forms may be accompanied by a financial deposit.

([42]) Applying detention solely based on the fact that the person does not possess sufficient financial means to access this AtD would be discriminatory (see Guideline 4).

([43]) EMN study, 2022, *op. cit.*, fn. 39, p. 21.

Obligation to reside at a designated place

It requires the individual concerned to stay at a specific location designated by authorities, ranging from private residences to shelters or reception centres (see Alternatives to detention and accommodation modalities). The obligation usually lasts until the end of the examination procedure or the actual removal. Prior approval is needed if the person wants to change the location.

Overview in Member States

The obligation for TCNs to reside at a designated place exists in 20 Member States ([44]) and used in 17 ([45]). This alternative is sometimes used together with other AtDs, such as reporting requirements (e.g. the Netherlands).

In Denmark, returnees accommodated in open return centres are to continuously observe and uphold a number of duties, including a 'duty to reside', a 'duty to notify' and a 'duty to report', to help the authorities keep track of their whereabouts. If a returnee does not show up for a scheduled interview, a locally present caseworker from the Outreach Unit can reach out to the returnee at the open return centre. Experience shows that locally present and easy-to-reach caseworkers, access to financial reintegration support, trust-based relationship building, and involving the returnee in planning their own return are among the key elements to encourage long-term stayers to comply with their return process and pave the way for sustainable return operations ([46]).

Children

The facilities accommodating unaccompanied children and families with children must be specifically designed to meet their needs, providing sufficient safeguards, privacy and essential services (see Guideline 7).

Compliance and monitoring

Mechanisms for monitoring compliance with this AtD are present in about half of the countries. Estonia, Hungary and Poland may conduct inspections at the designated residence. To ensure compliance, restrictions on movement must be proportionate and necessary, respecting individual rights. Defining overly restricted areas or forcing individuals to remain permanently at the designated place may amount to *de facto* house arrest (see Guideline 2).

([44]) AT, BE, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE, IT , LT (accommodation at the State Border Guard Service is applied only for applicants for international protection), LU, MT, NL, PL, SI (EMN study, 2022, *op. cit.*, fn. 39).

([45]) AT, BE, CZ, DE, EE, EL, FI, FR, HR, HU, IE, IT, LT, LU, NL, PT, SI (EMN study, 2022, *op. cit.*, fn. 39). In Italy, the measure is only applied if the person has a valid passport and an eligible official residence.

([46]) Frontex, *Good Practices on Alternatives to Detention*, 2024.

Obligation to surrender a travel or identity document

It requires the individual concerned to surrender to the authorities any valid identity or national travel documents they have.

Identity documents should be withheld only if strictly necessary and must be returned to the owner without any delay, once the proceedings for which the documents were withheld have been completed, unless circumstances require otherwise ([47]).

In any case, applicants must be provided with the necessary documentation which proves their status in the Member State in line with Article 6(1) RCD (2024) and Article 29(1) APR (see Guideline 8).

Overview in Member States

This AtD exists in 19 Member States ([48]) and is used regularly in 15 ([49]).

Implementation

This alternative can be combined with other AtDs and remains in force until conditions for entry or stay are met, or until a removal decision is enforced.

Obligation to communicate an address

It requires the individual concerned to inform the authorities of their residence address and of any changes to it.

Overview in Member States

This alternative exists in 14 Member States ([50]) and is used in 9 ([51]).

Implementation

In some countries (e.g. Poland, Slovenia and Italy), this is already a **general procedural requirement**. Communication of an address is an obligation for every applicant residing in any Member State under the asylum procedures regulation ([52]) (APR) while – under Directive 2013/32/EU – it is possible but not mandatory. In some countries, **it functions as an AtD**, requiring TCNs to report their address and any changes promptly, typically within the next working day. This alternative is usually combined with other AtDs.

([47]) For example, if the person is granted international protection, the Member State may decide to keep the identity documents surrendered, replacing them with new identity documents.

([48]) BG, CY, EE, EL, ES, FI, FR, HR, HU, IE, IT, LU (not a standalone alternative but included in reporting obligations), LV, MT, NL, PL, SE (EMN study, 2022, *op. cit.*, fn. 39). This practice is also envisaged in NO and SI.

([49]) BG, CY, EE, ES, ES, FI, FR (house arrest procedures), HR, IE, IT, LV, NL, SE (EMN study, 2022, *op. cit.*, fn. 39). This practice is also in use in Norway and Slovenia. Further, Italy reports to only use it in preparation for forced return.

([50]) CZ, EE, EL, FI, FR (house arrest procedures), HR, HU, IE, IT, LU, MT, PT, SE. (EMN study, 2022, *op. cit.*, fn. 39). This practice is also envisaged in SI, as general procedural requirement.

([51]) CY, CZ, EE, FI, FR, HR, IE, PT (EMN study, 2022, *op. cit.*, fn. 39). This practice is also in use in Norway and SI.

([52]) Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU

Sponsorship by a citizen or long-term residence

Sponsorship by a citizen or long-term resident is an AtD where a responsible individual (the sponsor) provides housing, basic needs, and ensures the compliance of the sponsored individual ([53]). This can be required by the authorities from the outset or as a condition for release (in the latter case, it is not strictly an AtD). As a prerequisite, sponsors are vetted by the authorities and declared legally fit to act as sponsors.

Overview in Member States

Sponsorship by a citizen or long-term resident is used in Lithuania ([54]).

Community management programmes or supervision

It allows the individual concerned to reside within the community, under condition of supervision by authorities, other designated bodies or organisations (e.g. religious or community organisations). These programmes often include case management services that provide support in navigating the asylum or return process, access to legal assistance, and connections to social services. The supervisor, be it the authorities or designated bodies, can carry out regular check-ins and visits ([55]).

Overview in Member States

Community management programmes or supervision is used as AtDs in 2 Member States ([56]).

Implementation

The use of supervision as an AtD must be carefully considered to avoid potential human rights concerns, as it can be intrusive depending on the type and on the enforcement approach. Therefore, it is essential to tailor supervision to the individual circumstances and needs, prioritising non-enforcement methods that emphasise community engagement and support.

([53]) National legislation may foresee additional requirements: for example, the sponsor may be required to evidence of their availability of sufficient income to act as a sponsor.

([54]) Odysseus Network, *Alternatives to Immigration and Asylum Detention in the EU*, p. 92. See also Frontex, *Good Practices on Alternatives to Detention*, 2024. SI reported that this practice is no longer in use.

([55]) The supervising officer should be a different person from the one who is taking the decision on asylum-return. This helps establishing trust and cooperation in the process. For more information on this see *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, 2011.

([56]) CY, SE (EMN study, 2022, *op. cit.*, fn. 39). As for BE, the ICAM programme, while making use of case management services, does not entail any form of supervision. See the box on 'case management' under Guideline 8.

Electronic monitoring

Electronic monitoring consists of technological solutions aimed at mitigating the risk of absconding, while avoiding the individual deprivation of liberty.

The use of electronic monitoring as an AtD can take different forms, such as monitoring through dedicated apps, geo-localisation of the person or tagging. These devices monitor the individual's location and ensure compliance with restrictions of movement and reporting requirements.

Tagging is a form of electronic monitoring that entails constant tracking of the person by using electronic devices, such as ankle/wrist bracelets or GPS-enabled devices.

Overview in Member States

The use of electronic monitoring is under consideration in some Member States. Some practices specifically related to electronic monitoring through reporting are described in the section 'Regular reporting to authorities' above.
The practice of tagging is extremely limited in EU+ countries ([57]).

Implementation

If tagging is envisaged, national legislation must provide for fundamental safeguards to regulate the use of such devices, including by ensuring that they do not unnecessarily interfere with personal freedom and do not pose any health risk to the person.
Tagging must be carefully used, given the serious impact on personal freedoms and privacy that it may entail. Wearing a tagging device can be stigmatising, marking individuals as under suspicion or control. This can lead to feelings of shame, anxiety and stress, negatively affecting mental health. In line with the principle of minimum intervention, this restrictive measure could be applied after considering less intrusive alternatives.

([57]) Tagging usually accompanies forms of detention, such as house arrest (e.g. Luxembourg): in this sense, it may not be considered strictly as an AtD.

The main advantages and challenges of alternatives to detention

Provided that risk of absconding is a challenge in all forms of AtDs, the table on the next page lists additional challenges and advantages for each of the types of AtD illustrated in this section, without being exhaustive.

Table 1. The main advantages and challenges of AtDs

Alternative measure	Main advantages	Main challenges
Regular reporting to authorities	- Cost-effective - Maintains freedom of movement - Regular contact promotes integration - Community ties - Allows family unity	-Administrative burden
Deposit of a financial guarantee	- Less costly than detention - Lower impact on the person's life - Suitable for long-term residents - Promotes community ties and integration - Facilitate family unity	- Administrative complexity, including in determining the appropriate amount - Risk of discrimination based on financial means - Difficulty to issue refunds - Potential risk for the applicant who might have to incur debt and fall into trafficking
Obligation to reside at a designated place	- Allows family unity - Suitable for children - Promotes integration and community support - Less expensive than detention	- Limited availability of appropriate facilities and/or staff - Costs associated with expanding facilities. - Potential problems raised by a measure that defines an excessively restricted area or an excessively long duration.
Obligation to surrender travel or identity documents	- Easy to implement - Reduces administrative burden - Verification of identity simplifies oversight	- Not effective alone to prevent travel - Risk of fraudulent documents - Limited availability of valid documents -Risk of the applicant obtaining a new passport or having additional travel or ID documents on them
Obligation to communicate address	- Low administrative burden - Promotes integration and community ties - Easy to implement	- Difficulty in monitoring if the address changes frequently

Community management programmes or supervision	- Cost-effective - Promotes integration and compliance - Family unity - Strengthens community ties	- Resource-intensive for case management
Sponsorship by citizen or resident	- Promotes social integration and community ties - Cost-effective - Empowers individuals	- Burden on sponsor - Risk of non-compliance - Inconsistent monitoring - Administrative complexity - Risk of exploitation
Electronic monitoring	- Cost-effective (except tagging) - Maintains freedom of movement - Allows family unity	- Administrative burden - Possibility of malfunctioning of electronic devices - Possibility of malfunctioning, lost signal, or inaccurate tracking and false alarms for tagging devices.

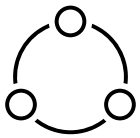
Guideline 4

Alternatives to detention must uphold fundamental human rights standards and principles

In line with recital 33 RCD (2024), 'any alternative measure to detention should respect the fundamental human rights of applicants' ([58]).

Besides the right to liberty (Article 6 of the EU Charter of Fundamental Rights (the Charter) ([59]) and Article 5 ECHR) and the need to respect and protect human dignity (Article 1 of the Charter), the key fundamental rights below may be affected.

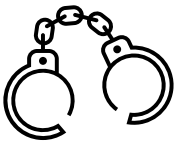
Respect of the principle of non-discrimination



Any discrimination based on any ground, such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation is prohibited.

(Article 21 of the Charter; Article 14 ECHR)

Prohibition of torture and inhuman or degrading treatment or punishment



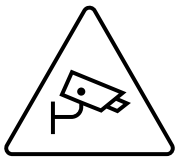
AtDs must respect the dignity of the person and should not lead to, nor consist of, in any manner whatsoever, inhuman or degrading treatment, torture or punishment.

(Article 4 of the Charter; Article 3 ECHR)

([58]) The return directive does not mention specifically that AtDs should respect fundamental rights. However, it recalls this principle in recital 24 ('This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European union.'), and Article 1 ('This Directive sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations').

([59]) European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02.

Respect of the right to privacy



AtDs must not interfere arbitrarily or unlawfully with the private life of the person concerned.

(Article 7 of the Charter; Article 8 ECHR)

Respect of the right to health

AtDs must ensure that health needs are met, including mental health support, avoiding barriers to access healthcare services. Everyone has the right of access to preventive healthcare and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection must be ensured in the definition and implementation of all the Union's policies and activities.

(Article 35 of the Charter)

Respect of the right to family life

The application of AtDs should not prevent individuals from maintaining contact with their family. AtDs must ensure that children and their caregivers are not separated, except in cases where such separation is lawful, necessary and proportionate to the circumstances. The right to family life includes obligations such as ensuring emotional, social and financial support, protecting family unity, and fostering a stable and nurturing environment for all family members.

(Article 7 of the Charter; Article 8 ECHR, Article 8 Convention on the Rights of the Child (CRC) ([60])**)**

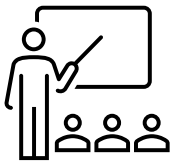
Respect of the best interests of the child

In any decision involving AtDs, the best interests of the child must be the primary consideration. This involves considering the child's physical, emotional and developmental needs, and ensuring that their wellbeing is prioritised. In addition, Member States must ensure that their national legal framework includes robust child-protection safeguards.

(Article 24 of the Charter; Article 3 CRC)

([60]) UN General Assembly, Convention on the Rights of the Child, United Nations, Treaty Series, vol. 1577, p. 3, 20 November 1989.

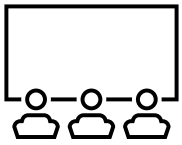
Respect of the right to education



AtDs must not interfere with the child's right to education. This means ensuring that children have access to schooling and educational opportunities without interruption or discrimination.

(Articles 14 and 24 of the Charter; Article 28 CRC; Article 2 Protocol 1 to the ECHR ([61]))

Respect of the child's right to information and participation



The application of AtDs must ensure respect for the child's right to information and participation. This includes guaranteeing that a child capable of forming their own views is provided with clear, age-appropriate information about the AtD process, and is given the opportunity to express their views freely in all matters affecting them, including decisions regarding their placement or care. These views must be given due weight, taking into account the child's age and maturity. The child must also have the opportunity to be heard in any judicial or administrative proceedings related to their situation, either directly, through a representative, or an appropriate body, in accordance with national legal procedures.

(**Article 24 of the Charter; Article 12 CRC**)

Respect of the right to an effective remedy

Individuals subjected to AtDs must have the possibility to seek a judicial review of the decision restricting their rights (see also Guideline 9).

(**Article 47 of the Charter; Article 13 ECHR**)

([61]) Council of Europe, Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 9, 20 March 1952.

Considerations related to border procedures

Fundamental rights in the asylum border procedure

The APR prescribes that **Member States must establish a mechanism to monitor the respect for fundamental rights** during all activities undertaken in the asylum border procedure ([62]). These include measures entailing deprivation of liberty and restriction on freedom of movement as laid out in the screening regulation ([63]). The mechanism should also incorporate the comprehensive guidance provided by the EU Agency for Fundamental Rights (FRA) ([64]).

([62]) Recital (71) and Article 43(4) APR.

([63]) Regulation (EU) 2024/1356 of the European Parliament and of the Council of 14 May 2024 introducing the screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, Article 10(2)(a).

([64]) See FRA, *Monitoring fundamental rights during screening and the asylum border procedure – A guide on national independent mechanisms*, 19 September 2024. In line with FRA's guidance, the mechanism should be fully independent, operationally autonomous and have the authority to act on its own initiative. It should systematically and regularly monitor all activities carried out in the context of screening and of the asylum border procedure, including the operation of referral mechanisms, ensuring that these activities are conducted with full respect for human dignity and the fundamental rights of vulnerable individuals.

Deciding alternatives to detention

Guideline 5

Alternatives to detention must be duly examined and ruled out before resorting to detention, in line with the principles of necessity and proportionality

Alternatives to detention as a measure of first resort

EU legislation establishes that **detention should be a measure of last resort.** Member States need to examine, in each individual case, whether there are any less restrictive measures, among those available. to achieve the same purposes (see Guideline 6). **This means that AtDs must be considered, analysed and eventually ruled out before applying detention** ([65]).

Therefore, there should be a presumption in favour of the right to liberty and the use of AtDs should be prioritised vis-à-vis the use of detention: the right to liberty is the default position ([66]) and it can be compressed only in limited cases and justified circumstances, to the least extent possible.

Consequently, any mandatory, automatic or systematic detention, e.g. detaining specific groups of people based on their nationality ([67]) or detaining an individual without first ruling out AtDs, is unlawful.

([65]) Recital 33 RCD (2024) and Article 10(2) RCD (2024). Similarly, Article 15(1) return directive stipulates that detention for the purpose of removal is only allowed if 'other sufficient but less coercive measures [cannot] be applied effectively in a specific case'. In the Commission Recommendation (EU) 2017/2338 of 16 November 2017 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return-related tasks (OJ L 339 19.12.2017, p. 83), this provision is interpreted as 'requiring each Member State to provide in its national legislation for alternatives to detention'. Further, recital 11 screening regulation provides that detention can be ordered only if other less coercive alternative measures cannot be applied effectively. In addition, Article 44(2) AMMR establishes that Member States may detain a person concerned in order to ensure transfer procedures 'on the basis of an individual assessment of the person's circumstances, and only in so far as detention is proportional and other less coercive alternative measures cannot be applied effectively'. See also International Detention Coalition, *Immigration Detention as an Exceptional Measure of Last Resort*, 2023.

([66]) UNHCR, *Detention Guidelines*, *op. cit.,* fn. 14, guideline 2, paragraph 14, p. 13.

([67]) Article 10(1) RCD (2024) clarifies that Member States may not hold an applicant in detention on the basis of their nationality.

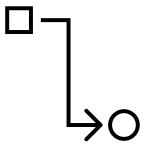
The obligation to provide reasons for not applying alternatives to detention

The principle of detention as a measure of last resort implies that reasons must be given anytime AtDs are not applied. The lack of available AtDs cannot be a reasonable ground to detain individuals (see Guideline 3).

This is confirmed in the RCD (2024) that has introduced a new provision according to which 'the detention order shall **state the reasons** in fact and in law on which it is based as well as **why less coercive alternative measures cannot be applied effectively**' ([68]).

The necessity test

Detention can only be applied after duly considering and ruling out the possibility to apply AtDs and only once it is demonstrated that it is **necessary** to pursue the legitimate objective.



The test of necessity looks at whether detention is indispensable and absolutely essential to achieve the legitimate objective of general interest in a specific case. Detention may be deemed necessary, for example, when there is an evidenced risk of absconding or national security concerns. The test of necessity involves assessing whether alternative measures can achieve the same objectives and applies both to the initial detention decision and to any ensuing extension.

The proportionality test

If detention is assessed as necessary, the test of proportionality needs to be applied ([69]).

The test of proportionality requires an assessment balancing the harm caused by the deprivation of liberty with the goal pursued in the individual case. Indeed, in deciding whether to apply detention, authorities should ensure that the legitimate objective in the individual case will be achieved without exceeding what is strictly needed, in accordance with the principle of minimum intervention.

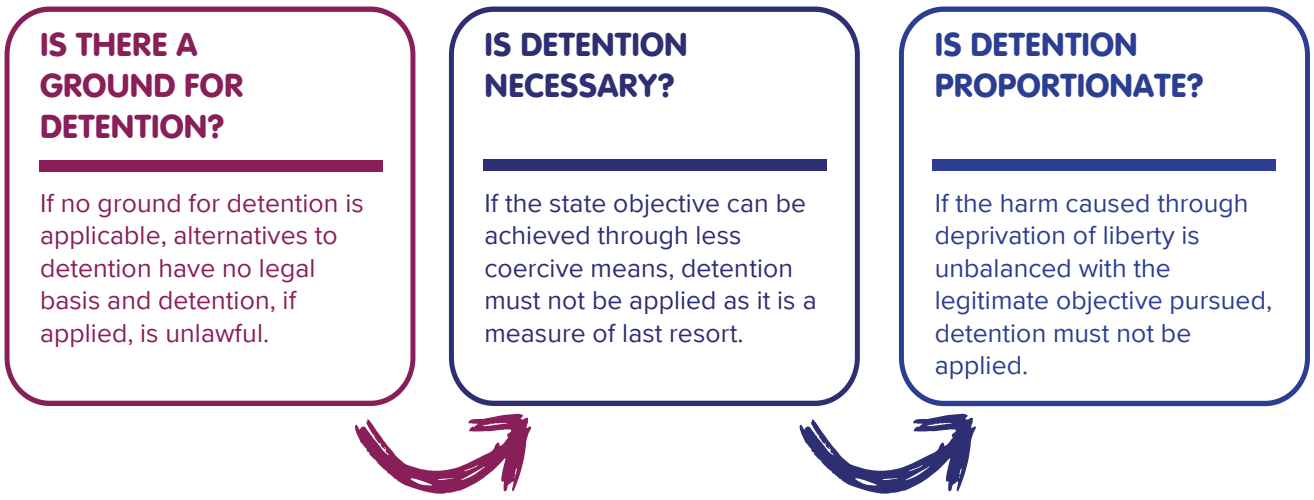
The test of proportionality applies both to the initial detention decision and to any ensuing extension. If the assessment of the proportionality test fails, then detention cannot be ordered.

In the context of return, it is considered disproportionate to detain or continue to detain someone where no tangible and reasonable prospect of removal exists. Such principle finds legal coverage in Article 15(4) return directive, according to which when a reasonable prospect of removal no longer exists, detention ceases to be justified ([70]). If the initial circumstances that led to the application of detention no longer apply,

([68]) Article 11(2) RCD (2024).
([69]) See recital (22) RCD (2024), recital (13) return directive, recital (11) screening regulation and Article 44(2) AMMR,
([70]) See also CJEU, judgment of 28 April 2011, *Hassen el Dridi, alias Karim Soufi*, C-61/112 PPU, EU:C:2011:268, paragraph 41. Summary available in the EUAA Case Law Database.

then the person concerned must be released (see Guideline 9 and Guideline 10).

Figure 3. Pre-requisites to apply detention



Practical tip

The test of necessity replies to the following questions.

- Is detention indispensable in the specific case or can the objectives pursued by detention be achieved through less coercive measures?
- Are there specific reasons that necessitate detention?
- Are there specific needs or individual circumstances that would preclude detention?

The test of proportionality replies to the following questions.

- Would detention constitute a disproportionate harm to the person given their specific needs or individual circumstances?
- Is the harm caused by detention balanced and justified vis-à-vis the objectives pursued by detention?
- Can these objectives be achieved with less coercive measures?

Guideline 6

Alternatives to detention must be based on a case-by-case assessment and take into account the individual circumstances and specific needs

The individual assessment

AtDs should be examined on a case-by-case basis, taking into account the specific needs and the individual circumstances of the person concerned. This is a necessary precondition for deciding the type of AtD to apply and its features, e.g. frequency of reporting.

The individual assessment principle is recalled in Article 10(2) RCD (2024), according to which 'where necessary and **on the basis of an individual assessment of each case**, Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively' ([71]). Similarly, Article 15 and recital 6 return directive imply a case-by-case assessment before detaining a person. In fact, detention in preparation of return and/or to carry out the removal process is only admissible if other sufficient but less coercive measures cannot be applied effectively in the specific case.

During the individual assessment of the case, the authorities competent to issue the decision to detain or to apply an AtD need to consider **different elements** as part of the necessity and proportionality test (see Guideline 5).

In particular, they need to strike a delicate **balance** between ensuring compliance with asylum or return procedures and safeguarding the rights and well-being of the individual.

Evaluating compliance with the procedure and risks of absconding

In evaluating compliance with the procedure, the administrative and/or judicial authority may consider a number of indicators, as detailed below.

Previous history of compliance

The person's previous failure to comply, without any justifying reasons, with past orders of the authorities or with previously imposed AtDs can be a factor that steers the decision towards detention.

([71]) In this sense, see recital 33 RCD (2024) that clearly mentions that 'the obligation to examine those alternative measures should not prejudge the use of detention where such alternative measures, including residence and reporting obligations, cannot be applied effectively'.

For example, in a return procedure, non-compliance with a previous order to leave the territory may lead authorities to be more prone to apply detention so that the person cannot avoid or hamper once again the preparation of return or the removal process. This circumstance should not, however, be considered in an automatic or isolated way, but be duly framed in the overall individual circumstances.

Conversely, the administrative and/or judicial authority may decide that detention is not necessary if the person has a previous positive history of compliance.

Risk of absconding

Among the elements of non-compliance, the risk of absconding plays a significant role in the EU acquis. As indicated in Article 2(11) RCD (2024), in assessing the risk of absconding, authorities should generally consider the existence of specific reasons and circumstances to believe that an applicant might deliberately abscond ([72]). The assessment of the risk of absconding should be based on **objective criteria laid down in the national legislation** and be done on an individual basis. The existence of such a risk should not be derived automatically from the lack of identity documents or of a fixed address, also in light of the fact that most applicants do not possess them.

In line with recital 24 RCD (2024), 'in the overall assessment of the individual situation of an applicant, a combination of several factors frequently provides the basis for concluding that there is a risk of absconding'.

Indicators that could be used to assess the risk of absconding may include, for example: the applicant's cooperation with competent authorities or compliance with procedural requirements; the applicant's links in the Member States; whether the application for international protection has been rejected as abusive or manifestly unfounded; employment or educational commitments; and active participation in community or support networks. The high frequency with which TCNs coming from certain countries of origin abscond may be an additional indicator, when evaluating the risk of absconding. In the overall assessment, however, other indicators specific to the individual situation are to be taken into account.

Likewise, in the return domain, the risk of absconding refers to the existence of specific reasons in an individual case, based on objective criteria defined by law, to believe that a TCN subject to return procedures may abscond ([73]). In the absence of clear criteria laid down in either the return directive or the return border procedure regulation, it is the

([72]) Article 2(12) RCD (2024) defines 'absconding' as the action by which an applicant does not remain available to the competent administrative or judicial authorities, such as by leaving the territory of the Member State without permission from the competent authorities, for reasons which are not beyond the applicant's control'. In a similar way, recital 23: '... encompassing both a deliberate action and the factual circumstance, which is not beyond the applicant's control, of not remaining available to the competent administrative or judicial authorities, such as by leaving the territory of the Member State where the applicant is required to be present.'

([73]) Article 3(7) return directive.

Member States' responsibility to clearly set in their national law the objective criteria to be used in determining such risk ([74]).

Degree of cooperation

The degree of cooperation shown by the individual concerned is an additional element to factor in when making the decision of applying detention or an AtD. The expressed intention not to cooperate or the lack of factual cooperation may indeed favour a detention decision. Even in this case, this situation should not be viewed in isolation, but rather be considered within the context of the overall individual circumstances.

Evaluating vulnerability factors

The assessment of elements of compliance with the procedure, risks of absconding and degree of cooperation needs to be balanced by an assessment of vulnerabilities: factors such as health conditions, the presence of dependants and the age of the individual must be carefully considered. This is affirmed by recital 21 RCD (2024) according to which all decisions restricting an applicant's freedom of movement should take into account relevant aspects of the individual situation of the applicant, including their special reception needs. In this sense, authorities are required to **identify** the persons in a vulnerable situation and to **assess** their specific reception and/or procedural needs.

Related EUAA tools

The **IPSN tool** aims at supporting the authorities and specialised personnel in the timely identification of persons with special procedural and/or reception needs. The tool can be used at any stage of the asylum procedure and reception process to identify any existing or emerging vulnerabilities.

The **SNVA tool** is meant to help specialised personnel to assess the specific needs of applicants and provides a framework for ongoing assessment and support.

Member States must be particularly vigilant in recognising and addressing the specific needs of persons in a vulnerable situation ([75]). Vulnerability factors to take into consideration include, for example, whether the person is a child (unaccompanied or not), a single parent with children or an elderly person, whether they have a disability or any medical conditions (physical or mental) not compatible with detention (including conditions requiring medical treatments that cannot be provided in detention settings) or whether they may be survivors of human trafficking ([76]), torture, rape or other forms of psychological, physical or sexual violence

([74]) See also CJEU, judgment of 15 march 2017, *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v Salah Al Chodor and Others*, C-8/15, paragraph 28. Summary available in the EUAA Case Law Database.

([75]) See Article 24 RCD (2024) and Article 3(9) return directive for the respective definitions of categories of persons with special needs

([76]) The principle of non-punishment for victims of trafficking in human beings ensures that individuals who have been trafficked or are at risk of being trafficked are not penalised for crimes committed under coercion and without their consent. The new EU anti-trafficking directive states that victims of trafficking must not be

such as gender-based violence, female genital mutilation, child or forced marriage, or violence committed with a sexual, gender, racist or religious motive.

Detention of applicants with special reception needs

Detention of applicants with special reception needs is permissible under the RCD (2024), in line with the principles of necessity and proportionality, unless it is considered that detention will put their physical and mental health at serious risk ([77]).

If detention is applied, certain guarantees need to be in place, considering that the deprivation of liberty can be particularly detrimental for applicants in a vulnerable situation and may risk aggravating their vulnerabilities, leading to further trauma and hindering their ability to recover and integrate.

As indicated by Article 10(3) RCD (2024), 'when detaining an applicant, Member States shall take into account any visible signs, statements or behaviour indicating that the applicant has special reception needs. Where the … [vulnerability assessment] has not yet been completed, it shall be completed without undue delay and its results shall be taken into account when deciding whether to continue detention or whether the detention conditions need to be adjusted' (see Guideline 9).

Further, Member States must ensure regular monitoring of, and adequate support to, applicants with special reception needs, taking into account their particular situation, including their physical and mental health ([78]).

In all cases involving applicants with special needs, AtDs must be preferred to ensure their well-being, provide the necessary support, and uphold their fundamental rights. Specific considerations related to children are elaborated in Guideline 7.

ECtHR, *Thimothawes* v *Belgium*, 2011 ([79])

The ECtHR pointed out that general or automatic decisions to detain asylum seekers without any individual appraisal of any special needs could raise an issue under Article 5(1) ECHR.

punished for activities related to their trafficking situation and should be provided with the necessary support to aid their recovery and integration. When AtDs are applicable on the basis of other grounds for detention, they must be carefully designed to avoid further harm or stigmatisation. They should facilitate access to protection, recovery and support services, in line with the person's specific needs. See also Giammarino M.G. – Special Rapporteur on trafficking in persons, especially women and children, *The importance of implementing the non-punishment provision: the obligation to protect victims*, 2020.

([77]) See Article 13(1) RCD (2024). Some Member States explicitly prohibit in their national legislation the detention of specific categories of persons in a vulnerable situation, such as children, pregnant women, survivors of trafficking in human beings and torture. In Italy, for example, Legislative Decree No 142/2015 prohibits to detain those whose health or vulnerable conditions are not compatible with detention, as well as children.

([78]) Article 13(1) RCD (2024).

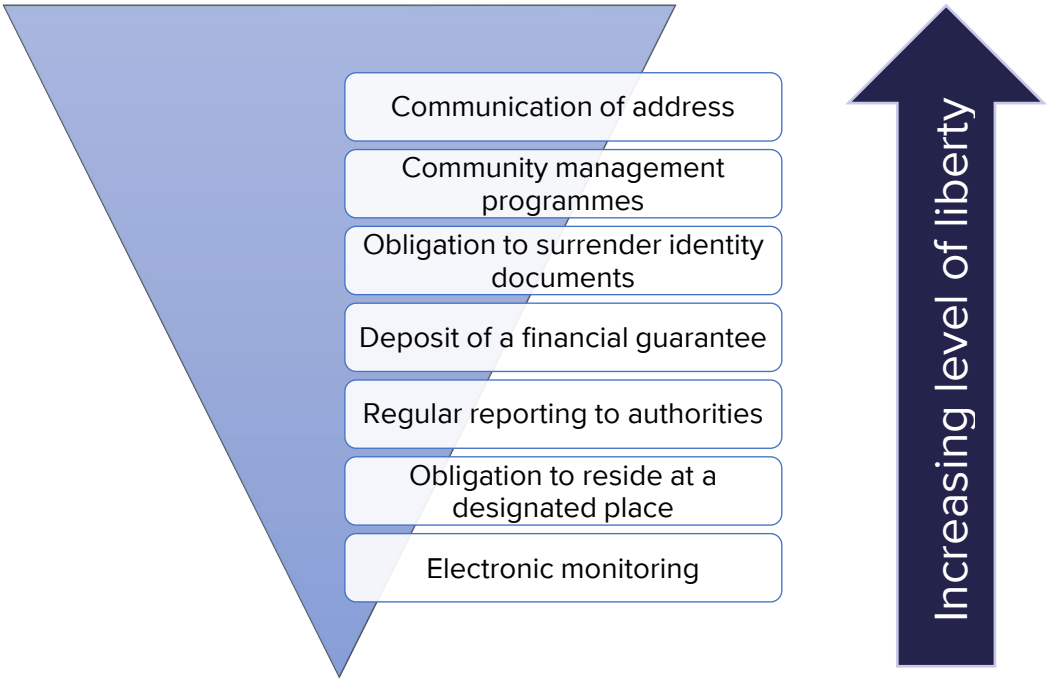
([79]) ECtHR, judgment of 4 April 2017, *Thimothawes v Belgium*, No 39061/11, paragraph 73, ECLI:CE:ECHR:2017:0404JUD003906111. Summary available in the EUAA Case Law Database.

Applying the principle of minimum intervention

The individual assessment should also determine which type of available AtDs (or a combination thereof) is **most appropriate** to the individual circumstances and specific needs of the person concerned.

To this end, authorities should take into account the principle of minimum intervention, that requires to adopt the **least possible intrusive** measure ([80]) among those that can be effectively applied. Indeed, AtDs can vary significantly in terms of the level of coerciveness. Some may impose higher restrictions on personal liberty, such as regular reporting requirements, while others may be less restrictive, such as community supervision. As clarified by the CJEU, this '**gradation goes from the measure which allows the person concerned the most liberty … to measures which restrict that liberty the most**' ([81]).

Figure 4. Example of sliding scale of restrictive level of measures



The figure portrays a possible sliding scale of measures from the most restrictive (bottom) to the least restrictive (top). This is indicative, as the actual degree of restrictions may be determined by the obligations imposed in a specific case. For example, reporting with a low frequency may be less restrictive than residing in a semi-open centre. Conversely, reporting with a high frequency may be more restrictive than residing in an open centre.

([80]) Bustamante J., *Report of the Special Rapporteur on the human rights of migrants*, A/65/222, 2010, paragraphs 92(a) and 95; CRC Committee, *Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration*, 2012, paragraph 79; UNHCR, *Detention Guidelines*, *op. cit.,* fn. 14, guideline 4.3, paragraph 39.

([81]) CJEU, judgment of 28 April 2011, *Hassen el Dridi, alias Karim Soufi v Court of Appeal of Trento (Italy)*, C-61/112 PPU, EU:C:2011:268, paragraph 41. Summary available in the EUAA Case Law Database.

Considering type, duration and impact

The most appropriate AtD is not only the least intrusive one, but also the one that fits best in the specific case, taking into account the individual circumstances and vulnerability factors. When selecting the most appropriate AtD, authorities must pay close attention to different elements, including those below.

- **Type of AtD vis-à-vis target group**

  The nature of the alternative, whether it involves reporting requirements, periodic monitoring, designated residence, community supervision. For example, family-based care arrangements are more suitable for unaccompanied or separated children; apartments or dedicated facilities are more suitable for families.
- **Duration of AtD**

  Long-term restrictions should be avoided unless necessary in the individual circumstances and be subject to regular judicial review. In principle, the longer the duration, the less restrictive the AtDs should be. The time-limit of the imposed AtD should always be respected.
- **Impact on the individual**

  The impact of the AtDs on the individual's life, including their ability to comply with the obligations, work, access education, receive healthcare, and maintain family and community ties.

Calibrating the obligations

In applying the AtD in the individual case, authorities should also adjust the required obligations, so as to ensure they are suitable to meet the individual's circumstances. Reporting times and frequency should be flexible and take into consideration, inter alia, the individual's working hours and health conditions. For example, in-person reporting may not be appropriate for persons with physical impairments, for whom electronic reporting may be better suited. The obligation to reside in a designated area may be more suitable than reporting for someone who is working or has children to look after.

AtD arrangements should be regularly reviewed to assess their continued necessity and proportionality, making necessary adjustments based on any changes in the individual's circumstances or vulnerabilities (see also Guideline 9).

Notification of decisions

The decision of applying AtDs must be notified promptly and in writing to the individual concerned. The written notification serves as an official document that can be referenced by both the individual and the relevant authorities. Without prejudice to national legislation, the notification should be provided in a format that is accessible to the individual, taking into account any language or literacy barriers. It should include a detailed explanation of the reasons the specific AtDs are needed, referencing specific concerns or factors that have led to the assessment of the individual's risk profile, such as previous history of compliance. Additionally, it should provide clear information on the **right to effective remedy** (see

Guideline 4), with instructions on how to initiate this process, request legal assistance and submit additional information or evidence for reconsideration. Delays in notification may impede the individual's ability to challenge the decision on AtDs (see Guideline 9).

Good practice

The notification includes contact information of a designated point of contact within immigration or asylum authorities, to whom the individual concerned can address any questions or concerns they may have regarding the decision on AtDs.

Practical recap

When applying alternatives, the three main steps below must be undertaken.

1. **Conducting an individualised risk assessment**

   A risk assessment must be conducted to determine the likelihood that the individual might not comply with procedural requirements and/or abscond. It entails reviewing the individual case file and, if necessary, interviewing the person to gather a comprehensive understanding of their history. During the risk assessment, authorities should not only look into indicators of non-compliance or risk of absconding (e.g. history of compliance with previous AtDs and history/evidence in terms of absconding), but also consider factors that may lower such risks, including family ties, community connections, employment or education involvement. The individual's motivation and willingness to cooperate with the authorities and comply with AtDs obligations should also be taken into account. All information collected should support the authorities in determining the prospects of non-compliance and the risk of absconding. This assessment is crucial to decide on the appropriate type and level of AtDs, ensuring it reflects the individual's risk level. Even if the risk assessment shows potential for non-compliance or risk of absconding, a vulnerability assessment needs to be carried out.

2. **Conducting an individualised vulnerability assessment**

   A vulnerability assessment should be carried out in a comprehensive manner and look into the individual's physical and mental health, family situation, past experiences and specific needs. It must consider the intersectional vulnerabilities, risks and harm factors, as well as protective factors and the resilience of the individual and their social and family networks. The goal is to gain a deeper understanding of the person's unique needs and develop a holistic approach to address them.

   In cases involving children, particularly unaccompanied minors (see Guideline 7), specific child protection safeguards must be integrated into the individual assessment process. This includes ensuring that all actions are in the best interests of the child, as required by national and international standards. A legal representative/guardian must be appointed for unaccompanied children to support and protect their rights throughout the procedure. The assessment should be conducted in a child-friendly manner, taking into account the child's age, maturity

and specific needs. Furthermore, the views of the child should be given due weight in accordance with their age and level of understanding.

The assessment should be carried out by trained professionals who can identify potential vulnerabilities, e.g. post-traumatic stress disorder, physical disabilities and other health conditions.

3. **Adjusting AtDs to the individual case**

Based on the vulnerability and risk assessments, authorities should determine the most appropriate AtDs in the specific case. This process should take into account numerous elements, including the respect of the principle of minimum intervention.

Authorities should further tailor the obligations imposed by the AtD to match the individual's ability to comply with them and to suit the individual's circumstances. Reporting times and frequencies should be flexible, allowing adjustments based on the individual's daily routine and health conditions.

Integrating support services, such as counselling, psychosocial support, medical care and legal assistance into the AtD scheme can comprehensively address the individual's needs (see also Guideline 8). Additionally, the AtD arrangements should be reviewed to assess their continued necessity and proportionality, making necessary adjustments based on any changes in the individual's circumstances or vulnerabilities (see also Guideline 9).

The chosen measure should eventually strike a balance between ensuring compliance with asylum or return procedures and minimising the impact on the individual's freedom and daily life.

Considerations related to border procedures

Integrating screening outcomes into risk and vulnerability assessments

It is essential to integrate the preliminary findings of the screening process into the risk and vulnerability assessments carried out during the border procedures. This helps to prevent unnecessary additional interviews and avoids the 're-victimisation' of persons in a vulnerable situation, that may occur when individuals who have experienced trauma or distress are subject to repeated questioning or invasive procedures that can trigger memories of past traumas. Not only does re-victimisation worsen the person's psychological distress but it also erodes their trust in the authorities and the overall protection system.

To ensure an efficient process, the results of the initial health and vulnerability checks carried out at screening should be promptly shared with the relevant authorities responsible for making decisions on detention or AtD. This allows them to build on the information already collected, rather than restarting the assessment process from scratch.

It is crucial that the sharing of information is coordinated and targets specifically the authorities involved in the various stages of the process or the other entities tasked with specific decisions regarding the individual case. The sharing of information must comply with the General Data Protection Regulation (GDPR ([82])) to ensure that personal data is

([82]) Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p.1-46).)

handled lawfully, securely and with respect for the individual's privacy. Strict confidentiality must be maintained, and the individual's consent must be obtained, when appropriate, before sharing personal data.

Border procedures and applicants with specific needs

If the person has special reception needs that cannot be catered for at the border, the Member State has an obligation to authorise entry and to channel the individual to the appropriate procedure. Applicants identified as needing special procedural guarantees should receive appropriate support to ensure genuine and effective access to the procedures ([83]). Necessary support within border procedures should be determined through individual assessments and may include, for instance, access to specialised medical care, such as mental health and psychosocial support for individuals with trauma or other mental health conditions.

Additionally, it could also involve providing accommodation adapted to the needs of persons in a vulnerable situation ([84]), ensuring the availability of interpreters, legal assistance and/or legal representation as required, or offering family-friendly facilities and services tailored to families with children, including child protection measures, access to education and appropriate healthcare (see also Guideline 7). Border procedures should not be applied if adequate support cannot be provided.

The individual assessment in the border procedures

One needs to keep in mind that during the asylum border procedure as framed in APR applicants will be required to reside in the locations where the border procedure takes place (at or in proximity to the border or within the territory depending where the locations are situated). Such a requirement to reside in a certain place is based on Article 9 RCD (2024).

In the asylum border procedure, assessing the risk of absconding for newly arrived applicants can be challenging, as indicators may be limited. Member States may not have sufficient information about the individual, particularly given the short timeframe for the assessment. Although the responsibility for determining applicable AtDs rests solely with Member States, the applicant's active collaboration plays a crucial role. When applicants are informed about the process and encouraged to share relevant personal information, this can significantly support the Member State in making a more accurate evaluation of AtDs, tailored to the applicant's circumstances.

At the start of the return border procedure, a new assessment has to be undertaken in order to establish if detention remains applicable, taking also into account that detention may only be maintained if a reasonable prospect of removal exists and the related arrangements are being executed with due diligence ([85]). If such conditions are not met or cease to apply, then detention is no longer applicable and the individual must be released (see also Guideline 10).

TCN(s) who were detained during the asylum border procedure can remain detained during the return border procedure if the national authorities can prove that the detention requirements are still in place and no new circumstances, notably those specific to the

([83]) Recital 20 APR.
([84]) Article24 RCD (2024). For example, someone who has limited mobility might need access to accessible accommodation, transportation, or special medical equipment.
([85]) Article 5(4) return border procedure regulation.

return context (e.g. there is no reasonable prospect of removal) have arisen that could impact the assessment in each individual case.

Conversely, if an AtD was applied during the asylum border procedure and the applicant complied with it, it should be expected that the same measure could be sufficient during the return border procedure. Nevertheless, it should be taken into account that in some cases the risk of absconding is likely to increase after the rejection of the application of international protection. Therefore, this risk should be carefully assessed at the start of the return border procedure.

Guideline 7

Alternatives to detention must be applied, as a rule, whenever considering the detention of children, in line with the principle of the best interests of the child

The EU legal framework

The EU legislation recognises that children should, as a rule, not be detained ([86]) and that detention is a measure of last resort permissible only in exceptional circumstances ([87]). The RCD (2024) also emphasises that Member States need to consider the guidance provided by the CRC ([88]) when dealing with children.

In particular, the RCD (2024) has introduced novelties concerning the **exceptional** circumstances in which detention of children may occur. This is only possible when detention is in the best interests of the child, e.g. where the accompanied child's parent or primary caregiver is also detained and it is in the best interests of the child to stay with them, or where detention safeguards the unaccompanied child ([89]).

([86]) There is broad international consensus (e.g. Committee on the Rights of the Child, Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the UN Working Group on Arbitrary Detention) on the fact that children should not be detained for immigration-related purposes, irrespective of their own or their parents' legal/migratory status, and that detention is never in their best interests. The detrimental effects of detention upon children are well documented and indisputable. Regardless of the duration and conditions in which children are held, detention can have a profound and negative impact on the child health's and development. At international level, several initiatives aim at ending immigration detention of children, urging States to eradicate this practice. See UN General Assembly, *Global Compact for Safe, Orderly and Regular Migration*, 2018, Objective 13, paragraph 29(h); UNHCR, *Beyond Detention – A-Global Strategy to support governments to end the detention of asylum seekers and refugees – 2014-2019*, Goal 1, revision 1, 2024; Felipe González M., *Report of the Special Rapporteur on the human rights of migrants – Ending immigration detention of children and providing adequate care and reception for them*, 2020; UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, *Joint general comment No 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, 2017.

([87]) Recital 40 and Article 13(2) RCD (2024); Article 17(1) return directive.

([88]) Recital 40 RCD (2024) states that '[…] Member States are to take into account the New York Declaration for Refugees and Migrants of 19 September 2016, relevant authoritative guidance by the United Nations' treaty body on the 1989 United Nations Convention on the Rights of the Child and relevant case-law.

([89]) Article 13(2) RCD (2024).

Only in the exceptional circumstance where detention is assessed to be in the child's best interests ([90]), then children may be detained.

Practical guide on the best interests of the child ([91])

This guide supports EU+ countries' authorities in applying the principle of the best interests of the child. It covers background elements of the best interests of the child, relevant guarantees, guidance on how to assess the best interests in practice and vulnerability and risk indicators

Reinforced guarantees for children in detention

In the exceptional cases when a child is deprived of liberty, beyond the guarantees applicable to all persons in detention ([92]), the following must be respected.

- All efforts should be made to release the detained child and place them in a suitable accommodation ([93]).
- The child's right to education ([94]) and the possibility to engage in leisure activities, including play and recreational activities appropriate to their age ([95]), are guaranteed.
- The child is never detained in prison or in facilities used for law enforcement purposes ([96]).
- Detained families should be provided with separate accommodation that guarantees adequate privacy and is adapted to the needs of children ([97]).
- Standards of living are adequate for the child's physical, mental, spiritual, moral and social development ([98]).
- The detained child has access to effective remedies and free legal representation ([99]).

In addition, the specific provisions below apply to unaccompanied children.

- Unaccompanied children should be accommodated separately from adults ([100]).

([90]) The best interests of the child is a fundamental principle in international and European law, outlined in Article 24 of the Charter and Article 3 CRC. It requires that the child's best interests be a primary consideration in all actions affecting them.
([91]) EASO, *Practical guide on the best interests of the child in asylum procedures*, February 2019.
([92]) The guarantees applicable to all detained applicants or TCN(s) apply also for children, including the fact that detention must be for the shortest possible period of time and that a detention order must be always issued in writing, detailing the factual and legal grounds upon which it is based, as well as the duration of detention. In addition, a legal representative or guardian must be appointed in all cases, regardless of whether detention or an AtD is applied. This is essential to ensure that children can lodge an application or challenge a detention order effectively. The obligation to appoint a representative is not conditional upon the detention status but is a mandatory safeguard to uphold their legal rights and ensure fair treatment throughout the process.
([93]) Article 13(2) RCD (2024); Article 17(1) and (4) return directive.
([94]) In accordance with Article 16 RCD (2024).
([95]) Article 13(2) RCD (2024); Article 17(3) return directive.
([96]) Article 13(2) RCD (2024).
([97]) Article 13(4) RCD (2024).
([98]) Article 26(1) RCD (2024).
([99]) Article 29 RCD (2024); Article 13 return directive.
([100]) Article 13(3) RCD (2024) and Article 17(4)-(5) return directive.

- Children must be accommodated, as far as possible, in institutions staffed with qualified personnel and facilities suitable for the needs of their age group and separately according to sex ([101]).

ECtHR, Rahimi* v *Greece ([102])

In this case, the ECtHR has emphasised that, under Article 5(1)(f) ECHR, particular consideration must be given to AtDs for individuals or groups in vulnerable situations to ensure that any detention is conducted in good faith and is free from arbitrariness. **The Court explicitly held that AtDs must be considered for unaccompanied children**. This underscores the obligation of authorities to prioritise non-custodial measures and to conduct thorough, individualised assessments of each case, ensuring that the most appropriate and least restrictive measures are applied.

ECtHR, Kanagaratnam and others* v *Belgium ([103])

The Court found that by placing the children in a closed facility, Belgian authorities exposed them to anxiety and compromised their development, amounting to inhuman and degrading treatment in violation of Article 3. It also ruled that, by detaining them in conditions meant for adult illegal immigrants, the authorities failed to protect the children's right to liberty, breaching Article 5.1.

Alternatives to detention for unaccompanied and separated children

Member States must consider AtDs that uphold the best interests of the child and prioritise their well-being, including by placing children in safe environments.

Accommodation options could include, for example, placement to specialised reception centres, foster care or community-based options where children receive appropriate care and protection (see Guideline 3). In practice, the places where children under AtDs and children not subject to AtDs are accommodated may be the same: the main difference is the presence of a **ground for detention** (see Guideline 1)

Most importantly, when implementing AtDs a one-size-fits-all approach is ineffective. It is crucial to adopt an individualised strategy, assessing each child's circumstances and ensuring that the chosen measures effectively address the child's specific needs while protecting their

([101]) Article 13(3) RCD (2024) and Article 17(4) return directive.
([102]) ECtHR, judgment of 5 April 2011, *Rahimi* v *Greece*, No 8687/08, ECLI:CE:ECHR:2011:0405JUD000868708. Summary available in the EUAA Case Law Database.
([103]) ECtHR, Chamber judgment of 13 December 2011, *Kanagaratnam and others* v *Belgium*, No 15297/09 (judgment in French). A press release is available in English.

rights. Individual assessments should involve multidisciplinary teams, including child psychologists, social workers and legal experts, to ensure a holistic approach.

Several solutions should be available and, most often, different alternatives need to be combined to best meet the cultural and linguistic needs of each child. In this sense, effective case management is crucial to ensure the well-being of the child, regardless of the alternative(s) chosen (see Guideline 8).

For unaccompanied and separated children, foster care, including placements with extended family or within community networks, offers a family-like environment and helps establish trusting relationships which can reduce the likelihood of children disappearing from care. Foster families should receive the necessary support and training to address the specific needs of the child, including managing the effects of their migration experiences, as well as to prevent abuse and exploitation. In some cases, older adolescents may be best suited for independent living arrangements, such as child-headed households, where an older sibling or peer takes on a supervisory role. These arrangements should have a **reinforced monitoring system** to ensure a safe and supportive environment. Placement in group apartments could also be a solution to create a supportive and stimulating environment.

Other AtDs that may accompany the placement could be, for example, reporting to the authorities or surrender of documents, tailored to the individual circumstances.

Practical tip: accommodating unaccompanied and separated children

Member States should establish or review workflows and protocols to ensure that the best interests of the child are systematically assessed and prioritised at every stage of the AtD process. Additionally, reception systems for AtDs must be tailored to account for the child's specific age, needs and vulnerabilities, ensuring that these factors are consistently considered and addressed throughout the process.

Below are crucial principles to observe when arranging accommodation for unaccompanied and separated children.

- **Minimise changes in residence**. Ensure that children remain in a stable environment and keep attending the same school, unless a move is in their best interests, to maintain continuity of care.
- **Keep families/siblings together**. Whenever possible, siblings should be accommodated together to support family unity.
- **Separate children from unrelated adults.** To ensure safety, children should be housed separately from unrelated adults, minimising the risk of inappropriate contact or influence.
- **Protect children from inappropriate external contacts.** Safeguards should be in place to protect children from any unsuitable interactions with people from outside their care environment.
- **Provide adequate living conditions.** Children must have access to appropriate living conditions, which include sufficient space, freedom of movement and opportunities for positive interaction with peers and other individuals.

- **Ensure regular supervision and assessments**. Qualified professionals should provide continuous evaluations of the care arrangements.
- **Engage with the children**. Children should be informed, through child-friendly communication, about their care arrangements, and their opinions should be considered in decisions affecting them.
- **Offer education and recreational activities**. Providing access to education and recreational activities is essential for children's development and well-being. These activities should be age-appropriate and culturally sensitive and help them to continue learning and enjoy normalcy despite the circumstances.
- **Provide necessary healthcare, including psychosocial support**. It is vital to ensure children have access to comprehensive healthcare services, including mental health and psychosocial support. This care addresses the physical and emotional impacts of their experiences and supports their overall well-being.

A critical component of care for unaccompanied and separated children is family tracing and reunification. Efforts should be made **to locate family members** immediately and assess the potential for safe reunification. If reunification is not feasible, community-based care that respects the child's cultural background and supports their development is recommended.

Practical guide on family tracing ([104])

This guide provides a set of guidance and reference materials to support EU+ countries on family tracing. It also maps the current practices of family tracing across EU+ countries.

Alternatives to detention for families with children

Article 13(2) RCD (2024) states that 'adequate alternatives to detention shall, as a rule, be used for families with minors in accordance with the principle of family unity. Such families shall be placed in accommodation suitable for them'.

Common accommodation options for families include joint housing facilities such as dedicated apartments or family centres (see Guideline 3). These settings enable families to stay together in a supportive environment while their immigration or asylum cases are processed. Open centres may also be an option, especially when it is possible to provide individualised support tailored to each child's unique needs. These centres should ensure appropriate security measures that protect families while maintaining a non-restrictive environment, striking a balance between safety and freedom for the individuals residing there. Providing case management support in these facilities is essential to help families navigating the legal processes and accessing necessary services, including healthcare, legal assistance and other community resources (see Guideline 8).

Other AtDs that may accompany the placement could be, for example, reporting to the authorities or surrender of documents, tailored to the adult family members or taking into account the family as a whole. Other AtDs for families include bail schemes to ensure compliance with immigration proceedings or reporting requirements, or schemes whereby

([104]) EASO, *Practical guide on family tracing*, March 2016.

guarantors or sponsors agree to support the care and supervision of a family in the community.

Considerations related to border procedures

Border procedures and unaccompanied children

Unaccompanied children are exempted from the asylum border procedure, unless they pose a danger to national security or public order. In the exceptional cases where an unaccompanied child is channelled to the asylum border procedure and an AtD is applied, the Member State is obliged to ensure that all of the necessary support can be provided to them (e.g. placement in specifically designed facilities, access to education).

Implementing alternatives to detention

Guideline 8

Alternatives to detention must be implemented in the most effective way, with safeguards and processes in place to increase the compliance rate

Determining the **most appropriate** AtD(s) to be applied in a concrete case, taking into consideration the individual circumstances and specific needs of the person concerned, is not sufficient to ensure the effectiveness of the measure. During the implementation of AtDs other safeguards and processes need to be in place to increase the chances that individuals subject to AtDs will comply with the requirements imposed ([105]).

Issuance of documentation

Applicants for international protection subject to AtDs must be provided with documentation that certifies their status, in accordance with Article 6(1) RCD (2024) and Article 29(1) APR. A similar provision is applicable to those who are subject to return procedures. Recital 12 return directive specifies that TCNs staying illegally but who cannot yet be removed, should be provided with written confirmation of their situation, in order to be able to demonstrate their specific situation in the event of administrative controls or checks. The issuance of documentation is indeed a key element to avoid re-processing or re-detention of the person concerned.

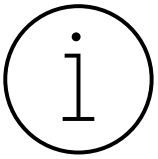
([105]) Council of Europe, *Practical Guidance on Alternatives to Immigration Detention: Fostering Effective Results – Practical guide*, 2019.

Access to dignified living conditions and access to services

As laid down in the RCD (2024) ([106]), all applicants for international protection must have access to housing, when needed, and key services, such as healthcare. This also applies to applicants subject to AtDs. In fact, there are more chances that individuals comply with AtDs requirements if they are able to meet their needs. For example, those having a stable accommodation are better placed to remain in contact with authorities than homeless and destitute individuals. Those who do not have access to dignified reception conditions may engage less constructively with procedures and are more likely to move onwards to another Member State ([107]).

Pending return, the following guarantees must be ensured specifically to the TCNs who have been granted a period for voluntary departure: family unity, healthcare and access to the basic education system for children ([108]).

Access to information



Access to information enables the person concerned to understand the reasons why an alternative scheme has been implemented, the rights and obligations they need to fulfil and the consequences of non-compliance. In this sense, providing adequate, timely and up-to-date information may enhance the compliance with the applied alternative(s) to detention, contributing to its effectiveness.

Based on EU legislation ([109]), information should be provided in writing in a concise, transparent, intelligible and easily accessible form, using clear and plain language and in a language that the person understands. Where necessary, it must also be provided orally or in a visual form, such as by using videos or pictograms, and be adapted to the individual needs, e.g. child-friendly language. The support of an interpreter should be used when needed: it is important to verify the person's understanding of the information provided, also by giving the possibility of asking clarifications.

Information could be also provided by third parties, including international and/or civil society organisations (CSOs) with relevant expertise on the subject.

([106]) Recital 7 and 9 RCD (2024).
([107]) International Detention Coalition, *There are alternatives*, 2015.
([108]) Article 14(1) return directive.
([109]) Article 5 RCD (2024). Similarly, Article 12 return directive establishes that information on return decisions should be provided in writing, giving reasons in fact and law and about the legal remedies. The main elements of the decision should be given in written or oral translation in a language the TCN understands. See Articles 19 and 20 AMMR for information to be provided in the context of responsibility determination procedures. See recital 38 and Article 11 screening regulation, for information to be provided during the screening procedure.

Access to legal counselling and legal assistance

The APR establishes that applicants should have the right to consult a legal adviser on matters related to their application at all stages of the administrative procedure ([110]).

Legal counselling is different from legal assistance and includes guidance, assistance and explanation of the whole procedure: rights, obligations, rules on the different procedures, information on how to challenge a negative decision. It is free of charge and the applicant should be informed of the possibility of requesting it upon registration at the latest. Member States must provide legal counselling – even in group sessions – to the applicant(s) who request it ([111]).

Free-of-charge legal counselling helps the person concerned understand the reasons for implementing the alternative scheme as well as the applicable procedures and potential avenues to solve their case. As a consequence, it increases the chances of compliance with the AtD requirements.

During the procedure to appeal the outcome of the asylum or the return procedure, the individual concerned, upon request, must be provided with free legal assistance and representation ([112]). This includes the preparation of documents, appeal, and participation at the hearing before the appeal body. Legal advice – be it counselling, assistance or representation – could be provided also by third parties, including international and/or CSOs and legal aid service providers with relevant expertise on the subject.

([110]) Article 15(1) APR.
([111]) Only few categories of applicants are excluded from legal counselling, namely those who: lodged a first subsequent application merely to delay or frustrate the return; lodged a second or further subsequent application; are represented by a legal representative.
([112]) Article 17(1) APR; Article 13(4) return directive.

Towards an effective implementation of alternatives to detention

Case management

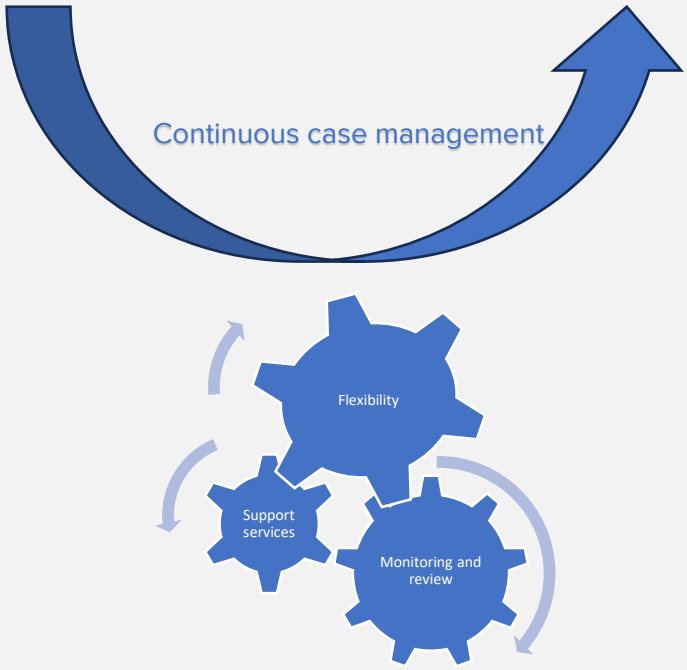
An effective implementation of AtDs relies heavily on case management, a holistic and structured approach that provides comprehensive support to individuals and that should be applied throughout the process.

Case managers work to address the specific needs of the person in the specific context. They take into account the person's unique circumstances, including their strengths, vulnerabilities and risk factors.

By doing so, they build a collaborative relationship with individuals and families and empower them to make informed decisions. This enhances their well-being and develops their problem-solving skills.

By resolving outstanding issues and providing information on community resources, case managers enable individuals to navigate their communities with confidence. This includes ensuring access to services, referral mechanisms to respond to special needs, reliable information, and legal advice on all options available to the person (including return counselling), Assisted Voluntary Return and Reintegration programmes as well as options to appeal against negative decisions and information on the consequences of non-compliance.

Promoting high compliance rates through a protection-focused strategy means respecting the rights and meeting the basic needs of the person, supporting access to documentation and formal status and providing fair and timely case resolution.



Individual Case Management (ICAM): Belgium experience with case management

The programme, established within the Alternatives to Detention Department, aims at providing coaching to potential returnees who are not in detention. This includes families with minors, irregularly staying migrants with a known address, TCNs without a known address that are intercepted by the police and minors staying at a relative's address. The coaching is offered in residential settings as well as in separate regional centres where individuals are invited by a coach ([113]).

Training staff

An effective implementation of AtDs requires well-trained personnel who are knowledgeable about fundamental rights standards, the asylum and return procedures, immigration laws and best practices in managing non-custodial measures.

Training personnel is not only an obligation under the CEAS but also represents a guarantee for the quality and compliance of the work carried out in the framework of international protection. A similar concept, applicable to the return domain, stems from the European integrated border management strategy, of which return is an essential component ([114]).

Relevant officials, including the police, border officials, immigration authorities and judges, should receive comprehensive training to ensure their ability to make informed decisions and to manage cases with due regard to the well-being of the individual concerned.

Piloting projects

Piloting projects can be a cost-effective way to understand whether the selected AtDs are effective (for instance, in relation to a particular target group). It can offer numerous advantages, as detailed below.

Risk mitigation

Piloting allows to identify and mitigate potential risks before implementing a measure in full-scale. This can prevent costly mistakes.

Feasibility assessment

Piloting a small-scale version of a project can help understand whether it is viable in specific and concrete conditions and can be adapted to local contexts.

Resource optimisation

Piloting can help determining the most efficient use of resources, ensuring that time, money and efforts are invested wisely.

Stakeholders engagement

Engaging stakeholders, including community members, government agencies and CSOs, is easier in a pilot phase. Their feedback can be invaluable in refining the project to better meet the needs and expectations of all involved parties.

([113]) Frontex, *Good Practices on Alternatives to Detention*, 2024.
([114]) See European Border and Coast Guard Regulation (EU) 2019/1896, Article 3(1)(i) and (2), Article 9(1) and (4), Article 10(1)(l) and (w), and Article 62(1), (2), (4) and (5).

	Data collection and analysis Piloting provides an opportunity to collect detailed data and analyse the outcomes. This evidence-based approach can inform decision-making and demonstrate the effectiveness of the project to policymakers and funders. **Scalability testing** Piloting can reveal whether an initiative is scalable. It helps understand the challenges that might arise when expanding the project to a larger population or different geographic locations. **Policy influence** Successful pilot projects can serve as case studies to influence policy change. Demonstrating the effectiveness of AtDs, for example, can encourage broader adoption and reform.
Establishing a complaint and response mechanisms	Individuals subject to alternatives should have timely access, in a safe and confidential manner, to an effective complaint and response mechanism.
Evaluating and assessing alternatives to detention	An effective implementation of AtDs requires Member States to put in place a mechanism to assess, on a regular basis, the overall efficiency and effectiveness of the system and its potential risks. Indeed, evaluation of the AtDs can serve different purposes, including verify the correct functioning of applied AtDs; identify strengths and weaknesses, take corrective actions where necessary with the final aim of improving the system; support and influence legal and policy changes. To evaluate the effectiveness of ATDs, the elements below should be regularly assessed. **Compliance rate** Calculating the percentage of individuals complying with the requirements of an AtD, as well as the incidence of individuals committing serious crimes while subject to AtDs. **Absconding rate** The absconding rate can be broken-down by type of AtD, with disaggregated data on age group, gender, vulnerabilities, nationality, intended destination country etc. Such information would provide vital insight to the assessment of the effectiveness of the AtDs. **Support services** Assessing the accessibility, availability, quality and use of support services provided to individuals, such as legal aid, housing and health services. **Cost effectiveness** Comparing the costs of AtDs to those of detention, including long-term financial and social costs to determine whether the alternatives in place offer a sustainable and economical solution. It implies looking at resources and costs (cost per person in AtDs vis-à-vis cost per person

in detention, including administrative, operational and human resources, duration of the AtDs vis-à-vis duration of detention).

Fundamental rights impact

Assessing whether AtDs:

- respect human dignity and fundamental rights;
- provide adequate support and resources;
- avoid discrimination and marginalisation.

Community impact

Evaluating the impact of AtDs assessing how well they are received by the host community. This includes assessing whether AtDs:

- foster a sense of trust and cooperation between the community and individuals;
- promote social cohesion and reduce tensions;
- address concerns and misconceptions about migration

Data gathering and analysis

Quantitative (e.g. compliance rates, cost savings compared to detention) and qualitative (e.g. case outcomes) data on the above indicators should be collected systematically.

Data can be gathered and assessed through different sources and means, e.g. feedback from individuals subject to AtDs, case managers and other stakeholders (including CSOs involved in the implementation of AtDs), interviews, surveys and focus groups.

The analysis of these data may improve the understanding of the strengths and weaknesses of the system, with the aim of improving its overall efficiency and, if necessary, of proposing changes in the legal and policy frameworks governing AtDs.

Example of piloted project on alternatives to detention

- **EPIM**, *Alternatives to detention: building a culture of cooperation. Evaluation of two-year engagement-based alternative to immigration detention pilot projects in Bulgaria, Cyprus and Poland*, July 2020. According to the evaluation, the three pilot projects provided case management to 126 individuals with irregular immigration status. 86 % remained engaged, 12 % disengaged or absconded and 2 % were forcibly removed. 25 % achieved case resolution, with a permanent or temporary migration outcome ([115]).

([115]) According to Frontex, the representativeness of the sample used in the 2-year long pilots is quite low, not only because it is composed by solely 126 TCNs but also because 82 % of the participants belonged to vulnerable groups. In addition, according to Frontex analysis, after 2 years only 25.4 % of the migrants reached some kind of case resolution, with a permanent or temporary migration outcome. Of these 25.4 % case resolution outcomes, 16.6 % correspond to TCNs either granted asylum, international protection or other types of

Considerations related to border procedures

In principle, all types of AtD(s) can be used in the context of border procedures. However, it should be noted that, in practice, certain AtDs may be more challenging to implement due to the specific characteristics of the border procedures, such as the legal fiction of non-entry and the fact that the border procedures often occur in areas that are difficult to access. This may complicate coordination with the organisations that support case management as these may not operate at border locations ([116]).

To address the potential challenges, authorities may need to combine different AtDs during border procedures. For example, residence in designated locations near the border could be combined with other measures such as regular reporting. Additionally, Member States can develop integrated case management systems that allow for regular consultations on procedural steps, even in difficult environments such as airports or remote areas. In these cases, transferring applicants to specific locations designed for the border procedures would not be considered as entry into the territory ([117]).

The key elements of successful AtDs, such as community-based placement, access to services, the ability to meet needs, building a relationship of trust and effective case management, may be harder to achieve in light of the challenges mentioned above. It is nonetheless crucial to address these challenges. The legal fiction of non-entry, which is applied in the asylum border procedure, may significantly affect AtDs by restricting access to the territory and services. Nevertheless, it remains essential to ensure that individuals, particularly those in vulnerable situations, have access to necessary support services.

All the processes outlined in Guideline 8 (issuance of documentation, access to dignified living conditions, access to information, access to legal counselling and assistance) need to be carried out systematically and efficiently, also in light of the strict timeline within which the asylum border procedure needs to be completed. Collaboration with CSOs and international organisations is critical. These actors can play a key role in implementing AtDs, offering tailored solutions and providing specialised services to specific groups, including vulnerable individuals.

temporary or permanent residency status. Only 8.7 % returned to the respective countries of origin voluntarily. Added to the 2.4 % of those forcibly removed, this number leads to a total of 11.1 % of migrants effectively returned. So, after 2 years, it was only possible to return 11.1 % of the migrants, 12 % absconded or disengaged from the pilots, 16.6 % were granted either international protection or other residence cards and 60.3 % did not reach any case resolution. See Frontex, *Good Practices on Alternatives to Detention*, 2024.

([116]) Article 54(1) APR specifies that applicants subject to a border procedure must reside at or in proximity to the external border or transit zones, or in other locations designated by the Member State.

([117]) Recital 65 and Article 54(5) APR.

Reviewing alternatives to detention

Guideline 9

Alternatives to detention must be subject to a judicial review that takes into account any changes in the individual circumstances

Review of detention and alternatives to detention

Since detention or AtDs may have significant repercussions on the right to liberty of individuals, it is crucial to **ensure mechanisms of judicial review**, in line with the right to an effective judicial remedy ([118]).

Both the **RCD (2024) and the return directive** contain provisions regulating the judicial review of detention but **do not address the topic of judicial review of AtDs**. Nevertheless, the judicial review of detention may imply the (re)examination of the applicability of less coercive measures, notably AtDs.

Review mechanisms are primarily aimed at assessing whether detention or AtDs are necessary and proportionate and to evaluate any change in the individual circumstances, such as emerged vulnerabilities (e.g. deterioration of the individual physical and mental health) and/or new risk factors (e.g. compliance with required obligations).

Initial review of detention

The initial review by a judicial body is carried out when detention is ordered by an administrative authority for the first time during the asylum or return procedure ([119]). This review is aimed at validating the grounds for detention, as well as at reassessing the requirements of necessity and proportionality (see Guideline 1 and Guideline 5). The judicial body in charge of the initial review must re-evaluate the application of AtDs, also taking into account new circumstances that may have arisen since the detention

([118]) Article 47 of the Charter.

([119]) In line with Article 11(3) RCD (2024), 'where detention is ordered by administrative authorities, Member States shall provide for a speedy judicial review of the lawfulness of detention to be conducted *ex officio* or upon the request of the applicant, or both'. See also Article 15(2)return directive: '[w]hen detention has been ordered by administrative authorities, Member States shall: (a) either provide for a speedy judicial review of the lawfulness of detention to be decided on as speedily as possible from the beginning of detention; (b) or grant the third-country national concerned the right to take proceedings by means of which the lawfulness of detention shall be subject to a speedy judicial review to be decided on as speedily as possible after the launch of the relevant proceedings. In such a case Member States shall immediately inform the third-country national concerned about the possibility of taking such proceedings'.

decision. If the review is not concluded within the deadlines, the person must be released (see Guideline 10) ([120]).

The initial review can be conducted *ex officio*, upon the request of the person, or both.

- ***Ex officio* review**

  The *ex officio* review during the asylum procedure must be conducted as speedily as possible and no later than 15 days (in exceptional cases 21 days) from the beginning of detention ([121]).

  In the return procedure, the authorities must assess whether the person should be detained as speedily as possible, from the beginning of detention ([122]).

- **Review upon request of the individual**

  The applicant can challenge the initial detention decision at any time and request a review of it, by virtue of the right to effective remedy. The deadline to conclude this review is 15 days (21 days in exceptional situations) from the request during the asylum procedure, and as speedily as possible during the return procedure. In such a case, AtDs can be examined during the court hearing.

  The effective possibility to challenge a decision on detention is contingent on the availability of information, access to free legal representation and, in the case of children, to the appointment of a guardian or representative (see also Guideline 4).

Periodic review

The decision to detain is subject to periodic reviews that should be conducted at regular intervals of time, based on national legislation, in particular whenever detention is of a prolonged duration, relevant circumstances arise or new information becomes available which may affect the lawfulness of detention ([123]).

The periodic review of detention may also activate the examination of AtDs. Its main purpose is to verify whether the initial grounds for detention are still valid and assess whether the requirements of necessity, reasonableness and proportionality of detention continue to be in place. During such review, competent authorities must re-evaluate the application of AtDs, also taking into account new circumstances that may have arisen.

([120]) The return directive does not provide for a specific deadline for the initial review of the detention. It mentions solely the obligation of the Member States to provide for a speedy judicial review. On that matter, the Commission Recommendation (EU) 2017/2338, paragraph 14(2), p. 142, states, in relation to the maximum duration of 'speedy judicial review' that the text of the return directive is inspired by the wording of Article 5(4) ECHR, which requires a 'speedy judicial review by a Court'. Relevant ECtHR case-law clarifies that an acceptable maximum duration (i.e. a reasonable time) cannot be defined in abstract. It must be determined in the light of the circumstances of each case, taking into account the complexity of the proceedings as well as the conduct by the authorities and the applicant. Taking a decision within less than one week can certainly be considered a good practice that is compliant with the legal requirement of speediness.

([121]) Article 11(3) RCD (2024).

([122]) Article 15(2) return directive.

([123]) Article 11(5) RCD (2024). See also Article 15(3) return directive: '[i]n every case, detention shall be reviewed at reasonable intervals of time either on application by the third-country national concerned or ex officio. In the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority.'

Similarly to the initial review of detention, the periodic review can be conducted *ex officio*, upon the request of the person, or both. By contrast, the periodic review of a decision to detain an unaccompanied child must be activated *ex officio* ([124]) (see also Guideline 7).

Specific review procedures on alternatives to detention

Depending on national legislation, the legal avenues to challenge AtDs may be the same as those used to challenge detention. However, AtDs may also be re-examined during specific review procedures in which the individual concerned challenges the application of AtDs only, if the Member State legislation so provides.

The possible outcomes of the judicial review

The judicial review process can lead to different outcomes, as detailed below.

Confirming alternatives to detention

An AtD decision should be confirmed when the grounds for detention are still applicable and: (i) no new relevant circumstances in the case arose, or (ii) no other effective AtD can be applied.

Release of the person concerned

Article 11(5) RCD (2024) and Article 15(2) return directive establish that where, as a result of the judicial review, detention is held to be unlawful, the person concerned must be released immediately (see Guideline 10).

In addition, ongoing administrative procedures relevant to the grounds for detention must be executed with due diligence. Delays in administrative procedures that cannot be attributed to the individual concerned must not justify a continuation of detention ([125]).

In the return procedure, the individual concerned must be released immediately when it appears that a reasonable prospect of removal no longer exists ([126]).

Transitioning from alternatives to detention to detention

If national legislation so allows, the judicial authority in charge of the review may decide to withdraw AtDs and apply detention. In this case, all prerogatives and guarantees valid for any initial decision for detention must apply. These include adherence to fundamental rights standards and national laws, regular review of the decision as well as the principles that detention is a measure of last resort, must be deemed necessary,

([124]) Article 11(5) RCD (2024).
([125]) Article 11(1), second subparagraph, RCD (2024). In the return procedure, it may happen that delays in administrative procedures are responsibility of the country of origin, i.e. delays in obtaining the necessary documentation from third countries. In such cases, although the TCN cannot be held responsible for the delays, it is lawful to maintain the detention, on the basis of Article 15(6)(b) return directive.
([126]) Article 15(4) return directive.

proportional and be of the shortest duration possible. The transition from an AtD to detention may happen in different cases, as detailed by the examples below.

- **Failure to fulfil asylum or return obligations**

  If an individual fails to cooperate with the asylum or return process, e.g. by not attending interviews, not providing necessary documentation, obstructing the return process without a justified reason or hampering the preparation of return or the removal process, authorities may determine that detention is necessary ([127]).

- **Non-compliance with conditions**

  If an individual fails to comply with the conditions set out under the applied AtD, the latter may be deemed ineffective. Persistent non-compliance may lead authorities to consider detention as a necessary measure to ensure adherence to immigration processes.

- **Increased risk of absconding**

  If there is evidence of a higher risk of absconding, the authorities may reconsider the appropriateness of detention. For instance, rejection of the individual's asylum claim might lead to heightened stress or fear of deportation, increasing the likelihood of absconding.

- **Higher threat to public order or national security**

  If there is evidence of a higher threat to national security or public order, the authorities may reconsider to detain. This may include situations where there is credible evidence of involvement in criminal activities or associations with groups that threaten public safety, although in these situation Member States must prioritise criminal prosecution and detention under criminal law ([128]).

Transitioning from detention to alternatives to detention

Conversely, the review may convert a previous detention decision into an AtD, based on changes in the individual circumstances and on the consideration that the AtD is indeed appropriate.

This may be the case, for example, when there are changes in family life (such as the birth of a child) or when vulnerabilities or other medical conditions that are not compatible with detention and cannot be adequately treated in detention settings emerge during detention ([129]).

The decision to transition from detention to AtDs may also result from emerging indications that the individual concerned may have special reception needs ([130]) as well as from the outcome of the corresponding assessment ([131]).

([127]) Article 15(1) return directive; Article 5(3) return border procedure regulation.
([128]) Recital 30 RCD (2024).
([129]) Article 13(1) RCD (2024).
([130]) Article 10(3) RCD (2024).
([131]) Article 25 RCD (2024).

Additionally, if the detained person obtains financial means after the decision to detain, authorities may consider this as a new circumstance that may trigger the decision to release the person on bail (see Guideline 3, fn. 41).

Modifying the alternative(s) to detention in place

The review process may confirm the need for an AtD while ordering that the type or the requirements of the AtD in place must be modified. The possible practical outcomes are the following:

- applying a new type of AtD or, if available in the national context, a combination of new AtDs that are considered more effective;
- combining the AtD in place with another alternative;
- modifying the requirements of the AtD in place so that it better suits the individual needs and circumstances.

Notification of withdrawal

When AtDs are withdrawn, it is imperative that the individual concerned is notified promptly and in writing.

As for the notification of the decision (see Guideline 6), the written notification of withdrawal should be provided in a format that is accessible to the individual, taking into account any language or literacy barriers. It should include a detailed explanation of the reasons why the AtDs are withdrawn, referencing specific concerns or factors that have led to the reassessment of the individual's risk profile, such as a history of absconding or non-compliance with conditions. Additionally, it should provide clear information on the right to challenge the decision to withdraw AtDs, with instructions on how to initiate this process and submit additional information or evidence for reconsideration.

Where available, individuals should be directed to support services or organisations that can provide assistance and guidance during this transition period, including legal aid providers, community organisations or social service agencies.

Withdrawal of alternatives to detention: unaccompanied children

When assessing the withdrawal of AtDs for unaccompanied children, it is crucial to prioritise their best interests and to provide them with the opportunity to be heard in any judicial and administrative proceedings affecting them. During their time in AtDs, unaccompanied children often establish routines and relationships within the community that provide stability and security. Sudden changes to their living arrangements can significantly disrupt their stability, affecting their emotional and psychological well-being.

If a transfer is necessary and in the best interests of the child, ongoing monitoring and support should be provided to ensure that transitions are conducted in a manner that promotes the child's well-being and respects their rights.

Considerations related to border procedures

During the border procedures, the review of detention should be conducted at regular intervals. The review of alternatives to detention should be also conducted, in accordance with national legislation. In determining the frequency of such reviews, authorities must take into account the fact that the border procedures need to be completed within a short timeframe. The person concerned should also be able to request a review, especially if new circumstances have arisen in their case.

In addition to periodic reviews, continuous monitoring is crucial. This involves real-time tracking of compliance with the conditions of the AtDs. Any indications of non-compliance or increased risk of absconding should trigger an immediate review to reassess the appropriateness of the alternative in place.

The review process should be flexible enough to accommodate the rapid resolution of any issues that may arise. If a particular alternative proves ineffective or inappropriate, authorities should be prepared to swiftly implement a more suitable measure. This might involve shifting from one type of AtD to another, increasing the level of support provided or, when necessary, considering detention if other options cannot be effectively applied.

Ending alternatives to detention

Guideline 10

Alternatives to detention must be temporary in nature

Alternatives to detention should be limited in their duration

As indicated by Article 11(1) RCD (2024), detention should be permissible 'for as short a period as possible and only for as long as the grounds for detention are applicable'.

Similarly, Article 15(1) return directive states that 'any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence'. In the return procedure, Member States may keep in detention TCNs who are subject to a return procedure for maximum 18 months ([132]). However, detention must be ended if 'a reasonable prospect of removal no longer exists' ([133]).

In any case, detention should not last longer than what is necessary to achieve the legitimate state objective. National law should indicate the maximum period for detention; as recommended by UNHCR ([134]), indefinite detention is to be considered arbitrary.

As a consequence, AtDs, too, need to be limited in the duration. The decision to apply AtDs should set the maximum time for which the AtDs can be applied.

Expiry of the legal basis for alternatives to detention

AtDs are applicable only if a legal ground for detention is in place (see Guideline 1). If the legal ground ceases to exist, for instance after a judicial review, then AtDs are no longer applicable and must be lifted immediately, as they lack a legal basis (see Guideline 9). In this case, it could still be possible to apply restrictions of freedom of movement under Article 9 RCD (2024) (see Guideline 2).

([132]) Articles 15(5-6) return directive.
([133]) Article 15(4) return directive.
([134]) UNHCR, *Detention Guidelines*, *op. cit.*, fn. 14, guideline 6.

Considerations related to border procedures

The strict deadlines of the border procedures (12 weeks for the asylum border procedure and 12 weeks for the return border procedure) rule out in practice the indefinite application of detention and AtDs.

However, this does not mean that the individual concerned should be detained or comply with the obligations established by AtDs for the full duration of the border procedures, without prejudice to Article 54(1) APR. Authorities need to constantly assess the individual circumstances. If the application for international protection cannot be decided on the merits in the asylum border procedure, detention or AtD may end. For example, where the applicant is detained (or subject to an AtD) under the ground of deciding on the right to enter the territory and this right is granted, the applicant must be channelled out of the asylum border procedure into the regular asylum procedure. In this case, the national authorities can decide to re-apply an AtD (or, if necessary, detention) during the asylum procedure, if the relevant requirements are applicable (i.e. other grounds for detention apply).

Annex 1. Guidelines summary table

Defining AtD	Guideline 1	Alternatives to detention must be applied only if a legitimate ground for detention exists
	Guideline 2	Alternatives to detention must not amount to deprivation of liberty
Establishing AtD	Guideline 3	Alternatives to detention must be established by law, which should clearly specify the authority responsible to adopt and implement them, the criteria for their application and the range of available options
	Guideline 4	Alternatives to detention must uphold fundamental human rights standards and principles
Deciding AtD	Guideline 5	Alternatives to detention must be duly examined and ruled out before resorting to detention, in line with the principles of necessity and proportionality
	Guideline 6	Alternatives to detention must be based on a case-by-case assessment and take into account the individual circumstances and specific needs
	Guideline 7	Alternatives to detention must be applied, as a rule, whenever considering the detention of children, in line with the principle of the best interests of the child
Implementing AtD	Guideline 8	Alternatives to detention must be implemented in the most effective way, with safeguards and processes in place to increase the compliance rate
Reviewing AtD	Guideline 9	Alternatives to detention must be subject to a judicial review that takes into account any changes in the individual circumstances
Ending AtD	Guideline 10	Alternatives to detention must be temporary in nature

Annex 2. Guidelines checklists

Checklist – Defining alternatives to detention

Guideline 1: Alternatives to detention must be applied only if a ground for detention exists

- ☐ The grounds for detention are clearly regulated in national law.
- ☐ A legitimate ground for detention has been identified in the individual case.

Guideline 2: Alternatives to detention must be applied only if a ground for detention exists

- ☐ AtDs are non-custodial in nature and less restrictive than deprivation of liberty.
- ☐ The restrictions on rights and liberties imposed in the specific case, considered individually or cumulatively, do not amount to a situation comparable to detention.

Checklist – Establishing alternatives to detention

Guideline 3: Alternatives to detention must be established by national laws that should clearly specify the authority responsible to adopt and implement them, the criteria for their application and the range of available options

- ☐ The AtDs are laid down in national law.
- ☐ At least two AtDs are available.
- ☐ The relevant laws specify the authority responsible to adopt and implement AtDs.
- ☐ No individual is detained on the basis that no AtDs are available.

Guideline 4: Alternatives to detention must uphold key fundamental human rights standards and principles

- ☐ AtDs respect the principle of non-discrimination.
- ☐ AtDs respect the dignity of the person and do not lead to or consist of torture, inhuman or degrading treatment or punishment.
- ☐ AtDs respect the right to privacy and do not interfere arbitrarily or unlawfully with the private life of the person concerned.
- ☐ AtDs respect the right to health, including by ensuring that health needs are met.
- ☐ AtDs respect the right to family life, including by not preventing individuals from maintaining contact with their family.
- ☐ AtDs respect the best interests of the child, the rights of the child to information and participation, and the child's right to education.
- ☐ AtDs respect the right to an effective remedy.

Checklist – Deciding alternatives to detention

Guideline 5: Alternatives to detention must be duly examined and ruled out before resorting to detention, in line with the principles of necessity and proportionality

- ☐ AtDs are considered, analysed and ruled out in the individual case before examining detention.
- ☐ No detention order is issued automatically before considering the applicability of an AtD in light of the individual's specific circumstances.
- ☐ Reasons are given where AtDs are not applied.
- ☐ Detention is applied only after demonstrating that it is necessary to pursue the legitimate objectives in the individual case.
- ☐ Detention is applied only after demonstrating that the harm caused by the deprivation of liberty is proportional to the legitimate objectives pursued in the individual case.

Guideline 6: Alternatives to detention must be based on a case-by-case assessment and take into account the individual circumstances and specific needs

- ☐ AtDs are examined on the basis of an individual assessment.
- ☐ During the individual assessment, authorities take into account:
  - the history of compliance with the orders of the authorities or previously imposed AtDs;
  - objective indicators related to the risk of absconding, including any evidence of previous absconding as well as factors that may mitigate and lower such a risk;
  - the degree of cooperation shown by the person concerned.
- ☐ During the individual assessment, authorities take into account, inter alia, whether the person:
  - is a child (unaccompanied or not), a single mother with children, an elderly person, a pregnant woman;
  - has any disability or medical condition (physical or mental) not compatible with detention;
  - may be a survivor of human trafficking, torture, rape or other forms of psychological, physical or sexual violence, for example gender-based violence, female genital mutilation, child or forced marriage, or violence committed with a sexual, gender, racist or religious motive.
- ☐ During the individual assessment, authorities take into account whether detention will not put the person's physical and mental health at serious risk.
- ☐ The identification and assessment of vulnerabilities was carried out by trained and specialised staff.
- ☐ Any visible sign, statement or behaviour indicating that the applicant has special reception needs is duly considered when detaining an applicant.
- ☐ When deciding the most appropriate AtD or combination thereof in the specific case:
  - the least intrusive option is considered and applied;
  - factors such as the type of AtD, the duration and the impact on the concerned individual are taken into account;
  - AtD(s) obligations and conditions (e.g. frequency of reporting) are calibrated to the individual case.

Guideline 7: Alternatives to detention must be applied as a rule whenever dealing with children, in line with the principle of the best interests of the child

- ☐ If applied, detention (and AtD) is assessed to be in the best interests of the child after having carried out a best interests assessment.
- ☐ AtDs prioritise family-like settings for unaccompanied or separated children.
- ☐ The principle of family unity is respected.
- ☐ The AtD provides for families with children to be placed in accommodation suitable for them.

Safeguarding measures to mitigate risks of violence, abuse and exploitation are in place, combined with safe, accessible and confidential mechanisms to report any related incidents.

Checklist – Implementing alternatives to detention

Guideline 8: Alternatives to detention must be implemented in the most effective way, with safeguards and processes in place to increase the compliance rate

Documentation

- ☐ Individuals subject to AtDs are issued, in a timely manner, with documentation that certifies their status.

Dignified conditions and access to services

- ☐ Applicants for international protection subject to AtDs have access to material and non-material reception conditions as indicated in the RCD (2024), also taking into account the type of AtD applied in the specific case.
- ☐ Pending return, TCNs who have been granted a period for voluntary departure have access to key services such as healthcare and education for children.

Access to information

- ☐ Individuals subject to AtDs are timely informed about the alternative scheme applied in their case, their rights and obligations, including consequences of non-compliance.
- ☐ The information is provided in writing in a concise, transparent, intelligible and easily accessible form.
- ☐ Where circumstances so require, the information is also provided orally or in a visual form, e.g. through videos and pictograms.
- ☐ The information is provided in a language that the person understands.
- ☐ The information is adapted to the specific needs and individual circumstances of the concerned individual.

- ☐ An interpreter is provided, if circumstances so require.
- ☐ Understanding of the concerned individual is verified.

Legal counselling and assistance

- ☐ Individuals subject to AtDs have timely access to legal counselling and assistance.
- ☐ Legal counselling is free of charge.
- ☐ The person concerned is informed about the possibility of requesting legal counselling upon registration at the latest.
- ☐ During the procedure to appeal the negative asylum or return decision, the individual can request free legal assistance.

Case management

- ☐ Individuals subject to AtDs are supported by a case manager in the resolution of their case.

Training

- ☐ Relevant officials, including the police, border officials, immigration authorities and judges, have received comprehensive training to ensure they can make informed decisions and are able to manage cases with due regard to the well-being of the individual concerned and respect of fundamental rights.

Evaluation of AtDs

- ☐ A mechanism is in place to assess, on a regular basis, the overall efficiency and effectiveness of AtDs.
- ☐ Quantitative and qualitative data are systematically collected on different indicators, such as compliance rate, absconding rate, cost-effectiveness, the impact of the AtDs on fundamental rights and on communities, accessibility and use of services.
- ☐ Safe and confidential mechanisms to report any incidents of violence, abuse and exploitation are in place and accessible to individuals subject to AtDs.
- ☐ Individuals subject to AtDs have access to an effective complaint and response mechanism, as applicable.

Checklist – Reviewing alternatives to detention

Guideline 9: Alternatives to detention must be subject to a judicial review that takes into account any changes in the individual circumstances

Initial judicial review

- ☐ The applicability of AtDs in the concrete case are (re)examined during the initial review of detention.

Periodic review

- ☐ Periodic reviews of detention are conducted at regular intervals to verify the persisting validity of the initial grounds for detention as well as the requirements of necessity and proportionality.
- ☐ AtDs are (re)examined periodically.
- ☐ The detention of unaccompanied children is always subject to *ex officio* periodic reviews.

Specific review procedures

- ☐ If envisaged by national law, AtDs are (re)examined during specific review procedures activated by the individual concerned.

Notification of alternatives to detention cessation

- ☐ In the case of AtDs withdrawal, the individual concerned is promptly notified in writing, in a format they can access and in a language that they understand.
- ☐ The notification includes an explanation of the reasons the AtDs are withdrawn.
- ☐ The notification includes information on the right and modalities to challenge the decision to withdraw AtDs.

Checklist – Ending alternatives to detention

Guideline 10: Alternatives to detention must be temporary in nature

- ☐ The maximum duration of the AtD is set in the decision ordering the alternative.
- ☐ If the ground for detention ceases, the AtD ceases too.

Annex 3. Screening and the border procedures

The new Pact on Migration and Asylum

The new Pact on Migration and Asylum introduces new rules aimed at harmonising the way in which Member States manage migratory flows when people arrive in an irregular manner at the EU external borders, channelling them towards the appropriate procedure. Indeed, the Pact introduces a new mandatory asylum border procedure to examine applications for international protection in an expedite manner, as well as a return border procedure to swiftly return persons who are not granted international protection.

Under the new system, three pieces of the legislation are crucial for the procedures at the external border: 1) the screening regulation, 2) the APR (in the part envisaging the asylum border procedure); and 3) the return border procedure regulation. Though contained in different legal instruments, the provisions aim to establish one seamless workflow to effectively manage migration flows at external borders.

Screening

The screening applies to TCNs who do not fulfil the entry conditions set out in the Schengen Borders Code and:

- are apprehended in connection with an unauthorised crossing of an external border; or
- have disembarked following a search and rescue operation; or
- have applied for international protection at external border crossing points or transit zones; or
- are illegally staying within the territory after crossing an external border in an unauthorised manner and have not already been subjected to screening ([135]).

Screening serves as a tool to gather initial information on the individual and to assist the authorities to steer the person to the appropriate procedure. As such, screening precedes the asylum border procedure and is not part of it.

Screening must be completed in 7 days at external borders or in 3 days if a person is found irregularly staying within the territory ([136]). These time limits cannot be extended and the

([135]) Articles 5(1)-(2) and 7(1) screening regulation.
([136]) See Article 7(1) screening regulation, 'Member States shall carry out the screening of third-country nationals illegally staying within their territory only where such third-country nationals have crossed an external border to enter the territory of the Member States in an unauthorised manner and have not already been subjected to the screening in a Member State …'

person should be referred to the appropriate procedures and authorities (asylum or return) before the deadline expires.

Screening includes the following steps:

- information provision;
- preliminary health check and vulnerability checks;
- age assessment, if needed;
- identification or verification of identity;
- registration of biometric data;
- security check;
- filling out a screening form;
- referral to the appropriate authority.

When screening is completed or when the deadline passes, the TCN will be referred either to the authorities responsible for the return or, if they made an application for international protection before or during the screening, to the authorities competent for registering the asylum application ([137]). In the latter case, the RCD (2024) fully applies. Consequently, the facilities used for screening must be adequate to provide reception conditions in line with the RCD (2024).

During the screening, the individual is required to remain available to the responsible authorities in a dedicated location situated at or in proximity to the external borders or, alternatively, in other locations within the national territory ([138]). Member States must take measures to prevent absconding, for example by restricting freedom of movement ([139]).

In any case, detention during the screening process must respect the principles of legality, necessity and proportionality (see Guideline 5). There is no automatic detention during the screening. If it is applied, detention must comply with the procedural safeguards in the RCD (2024) or the return directive, depending on whether the person applies for international protection or not.

The asylum border procedure

If the TCN has made an application for international protection during the screening, it is mandatory for the Member State to carry out the asylum border procedure for applicants who:

- have intentionally misled the authority by presenting false information/documents or by withholding relevant information/documents;
- are a danger to national security or public order; or

([137]) Article 18(1) and (2) screening regulation.
([138]) Articles 6 and 8(1) screening regulation.
([139]) For more detailed information on the principles governing freedom of movement and related restrictions, you may refer to the Council of Europe, *Guide on Article 5 of the Convention – Right to Liberty and Security*, 2014.

- come from a low recognition country ([140]).

The Member State may also apply the asylum border procedure to further categories of applications based on other grounds, for an accelerated examination on the merits or inadmissibility.

The asylum border procedure **cannot** be applied in the following cases:

- when the applicant is an unaccompanied child, unless they present a danger to national security or public order;
- when the grounds for rejecting the application as inadmissible or the grounds for accelerated examination are not applicable;
- if special procedural guarantees or reception needs cannot be provided/met;
- in case of relevant medical reasons;
- when guarantees and conditions for detention are not met and the border procedure cannot be applied to the applicant without the use of detention.

In these cases, the applicant must be authorised to enter the territory of the Member State and channelled to the regular asylum procedure.

The asylum border procedure, from the registration of the application until the decision is taken (including the appeal) must be completed in 12 weeks. Following this period, the applicant must be authorised to enter the territory of the Member State ([141]).

If the decision on the merits of the asylum application is negative, it should be issued together with the return decision. Both can be appealed jointly.

Conversely, if the decision is positive, a permit to stay must be issued and the entry into territory must be granted.

The reception of applicants in the asylum border procedure should meet the standards outlined in the RCD (2024). Particular attention is to be paid to ensuring that families with children reside in reception facilities appropriate to the best interests of the child with an adequate standard of living for the child's physical, mental, spiritual, moral and social development ([142]).

([140]) Article 45(1) APR.
([141]) Article 51(2) APR
([142]) Article 54(2) APR.

The return border procedure

The return border procedure applies to TCNs who have been rejected in the context of the asylum border procedure ([143]), unless the national authority decides to not apply the return directive ([144]).

A period for voluntary departure must be granted unless there is a risk of absconding, the application has been rejected as manifestly unfounded or the person is a risk to public policy and public or national security. Such period must be granted only upon request and cannot exceed 15 days. For the period of voluntary departure to be granted, the person must surrender any valid travel document in their possession to the authorities to prevent absconding ([145]).

If the return decision cannot be enforced within 12 weeks, a regular return procedure must be conducted in line with the provisions laid down in the return directive ([146]).

The persons in the return border procedure should be guaranteed the general reception conditions and healthcare, with the same standards as applicants for international protection ([147]).

A person in the return border procedure can be subject to detention or AtD(s) ([148]).

The legal fiction of non-entry

The concept of 'fiction of non-entry' in the context of screening and border procedures refers to a legal and administrative construct used to manage and process individuals, including applicants for international protection, who arrive at the borders but have not been formally admitted into the territory of the Member State. It implies that the individual is treated as if they have not legally entered the country, even though they are physically present at the border or in a transit zone within the country. The Charter as well as international human rights law and international refugee law continue to apply.

TCNs should not be authorised to enter the Member State territory during the screening, the asylum border procedure and return border procedure ([149]). To this end, Member States should lay down provisions in their national law and the persons should remain at the disposal of the authority in the locations dedicated for screening ([150]). Any measures to prevent

([143]) Article 1(1) return border procedure regulation.
([144]) Article 2(2)(a) return directive
([145]) Article 4(5) return border procedure regulation.
([146]) Article 4(4) return border procedure regulation.
([147]) For more information, see Article 4(2) return border procedure regulation according to which '… The conditions in those locations shall meet the standards equivalent to those of the material reception conditions and healthcare in accordance with Articles 19 and 20 of Directive (EU) 2024/1346 of the European Parliament and of the Council considered to be applicants.'
([148]) Article 5(1-3) return border procedure regulation
([149]) Article 6 screening regulation, Article 43(2) APR, and Article 4(1) return border procedure regulation.
([150]) Article 6 screening regulation.

unauthorised entry to the territory for applicants for international protection need to be in line with the RCD (2024) ([151]).

Screening and the border procedures are, as a general rule, carried out in proximity of the external borders or transit zones. Alternatively, they can be conducted in designated locations within the territory where the person is required to reside ([152]). The RCD (2024) gives the Member States some flexibility where to conduct the border procedures. This flexibility helps them to create the sufficient capacity and logistics needed to implement it.

Another element to be considered is the provision of necessary support to persons with special procedural needs. Another important element to be considered is the location in which AtDs will be implemented, with particular regard to access to services.

In this framework, Member States can restrict the freedom of movement of the applicant based on Article 9 RCD (2024) by requiring residence in a specific place or requiring the applicant to report to the authorities. However, restrictions under Article 9 RCD (2024) do not constitute detention nor AtDs, which are regulated by Article 10 RCD (2024) (see Guideline 2).

([151]) Article 43(2) APR.
([152]) Article 8(3) screening regulation, Article 54(1) APR, and Article 4(2) return border procedure regulation.

The Screening and the Border Procedures

If the TCN makes an application for IP → If the application for IP is rejected

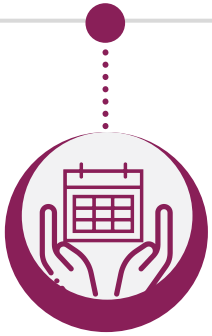
Screening

To be completed in 7 days at the external border or in 3 days within the territory

- **Info provision**
- **Preliminary health and vulnerability check**
- **Age assessment (if needed)**
- **Identification or verification of identity**
- **Registration of biometric data**
- **Security check**
- **Filling out a screening**
- **Referral to the appropriate procedure**

Asylum border procedure

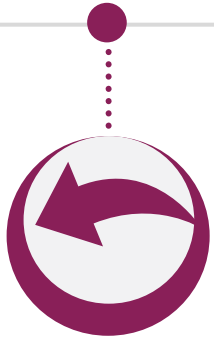
To be completed in 12 weeks



- **Info provision**
- **Registration and lodging**
- **Determination of MS responsible**
- **Decision on asylum and return**
- **Appeal - Request to remain**
- **Decision on the request to remain**
- **Hearing**
- **Decision of the appeal body**

Return border procedure*

To be completed in 12 weeks



- **Info provision**
- **Return counselling (it applies at all stages of the return process)**
- **Confirming the person's identity and obtaining a valid travel document (if needed)**
- **Assessment on return modalities and resulting arrangements.**
- **Implementation of return (voluntary return/departure or removal).**

* The actual procedure is not established yet. Therefore, the order of the steps below may be changed and/or additional steps may be added.

* The issuing of a return decision and subsequent appeals have not been included as, in accordance with Article 37 asylum border procedure, the return decision must be issued as part of the decision rejecting the application for international protection.

Annex 4. Glossary

Term	Definition	Source
Absconding	In the asylum procedure: action by which an applicant does not remain available to the competent administrative or judicial authorities, such as by leaving the territory of the Member State without permission from the competent authorities, for reasons which are not beyond the applicant's control.	Article 2(12) RCD (2024)
	In the return procedure: action by which a person seeks to avoid administrative measures and/or legal proceedings by not remaining available to the relevant authorities or to the court.	EU collection of terms in IATE
Applicant	a third-country national or stateless person who has made an application for international protection in respect of which a final decision has not yet been taken.	EUAA collection of terms in IATE
Child/minor	A third-country national or stateless person below the age of 18 ([153]).	Article 2(4) RCD (2024)
Country of origin	the country or countries of nationality or, for stateless persons, of former habitual residence.	Article 3(13) Regulation (EU) 2024/1347 (qualification regulation)
Degrading treatment or punishment	treatment that humiliates or debases an individual, showing a lack of respect for, or diminishing, their human dignity, or when it arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance.	EMN Asylum and Migration Glossary
Detention	the confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement.	Article 2(9) RCD (2024)
Fundamental rights	universal legal guarantees without which individuals and groups cannot secure their fundamental freedoms and human dignity and which apply equally to every human being regardless of nationality, place of	EMN Asylum and Migration Glossary

([153]) Child and minor are considered as synonyms and both terms are used in this publication. The EUAA preferred term is child, however, the term minor is used when it is explicitly used by a legal provision or specific article (for example the EU asylum acquis provisions).

	residence, sex, national or ethnic origin, colour, religion, language, or any other status as per the legal system of a country without any conditions.	
Irregular stay	presence on the territory of an EU Member State of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of Regulation (EU) 2016/399 (Schengen Borders Code) or other conditions for entry, stay or residence in that EU Member State.	EU collection of terms in IATE
Return	the process of a third-country national going back — whether in voluntary compliance with an obligation to return, or enforced — to: - his or her country of origin, or - a country of transit in accordance with Community or bilateral readmission agreements or other arrangements, or - another third country, to which the TCN concerned voluntarily decides to return and in which he or she will be accepted.	Article 3(3) return directive
Third-country national	any person who is not a Union citizen and who does not enjoy the right of free movement under Union law.	Derived from Regulation (EU) 2016/399 (Schengen regulation)
Unaccompanied child/minor	a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her, whether by the law or practice of the Member State concerned, and for as long as that minor is not effectively taken into the care of such an adult, including a minor who is left unaccompanied after he or she has entered the territory of the Member States	Article 2(5) RCD (2024)
Voluntary departure	compliance with the obligation to return within the time-limit fixed for that purpose in the return decision	Article 3(8) return directive

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