



RETURN OF THIRD COUNTRY NATIONALS

Special Report 2022



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RETURN OF THIRD COUNTRY NATIONALS

Special Report 2022

THE GREEK OMBUDSMAN

Contributors

This Special Report is the product of materials processed as part of the work -investigation of complaints, interventions, on-site inspections, monitoring of return procedure- carried out by the Independent Authority's Monitoring Returns Team under the supervision of the Greek Ombudsman Andreas Pottakis and the Deputy Ombudsman Yannis Moschos.

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Introduction

EU's precarious efforts to establish a coherent migration policy is reflected in its efforts to obtain consensus to amend EU law, in line with the Commission's recommendations put forward in September 2020 as part of New Pact on Migration and Asylum.

Slow EU law amendment procedures coupled with individual reactions from Member States to protect their borders, demonstrated as of 2021 onwards as part of the general tension at the EU borders with Belarus, have laid the ground for increasing recourse to emergency measures, introducing a "law of emergency". Thus, EU is missing a standard regulatory framework establishing a single area of freedom, security and justice and providing institutional solutions for effective protection of the EU borders while respecting the Union's fundamental principles.

The proposed Regulation on "instrumentalisation" will allow all Member States to make derogations from EU legislation to their own benefit. The restrictions on fundamental human rights generated by the proposal are so extensive, that raise reasonable doubts as to the necessity and proportionality of the proposal. For example, the definition of 'instrumentalisation' is too broad and contains too many vague terms, such as reference to an assessment of a third country's intention to compromise "fundamental state functions". Treating asylum seekers as a potential security threat "*capable of compromising fundamental state functions*" may encourage third countries to escalate tensions at the EU's external borders.

Without doubt, Member States have a right and an obligation to control their borders. But they also have an obligation not to channel individuals to jurisdictions where they could be treated unfairly. Removing third-country nationals from EU grounds without applying the required institutional safeguards puts these persons at serious risk.

The proposed Regulation not only extends (up to 4 weeks) the deadline for registering applications for international protection and extends to 16 weeks (from 12) the deadline for making a decision, during which time the applicant is under a fictional non-entry status, but also allows Member States to make several departures from the existing legislation on returns. For example, it offers Member States an option to exclude asylum seekers undergoing the asylum procedure at the border from the Recast Return Directive. As a result, applicants whose asylum applications are rejected will be subject to entry refusal under the Schengen Borders Code. Although the "instrumentalisation" Regulation requires compliance with the principle of non-refoulement, it imposes substantial restrictions on the substantive and procedural statutory safeguards and rights of the applicants.

According to Eurostat's annual data¹, there were 881,220 first asylum applications in the EU in 2022, reflecting a 64% increase year-on-year. Germany, France, Spain and Austria are the countries that received the most asylum applications, while Greece is in eighth place after Italy, the Netherlands and Belgium. The EUAA figures² confirm this upward trend: 107,300 asylum applications in November 2022; about 100,000 for a third consecutive month³. According to the Ministry of Immigration and Asylum⁴, a total of 37,362 asylum applications were filed in Greece in 2022⁵.

As a national external control mechanism on forced returns under the EU Returns Directive⁶, the Ombudsman follows the EU law amendment procedures involving changes to the forced returns system. The constitutional safeguards for the independent functioning of the Ombudsman ensure effective protection of the fundamental rights of third-country nationals as well as the accountability and transparency of police return operations, which are key components of any state applying the rule of law.

As part of these specific powers, the Independent Authority records in this special 2022 report a 15% decrease in forced returns compared to year 2021, and an increasing trend in the number of foreigners under administrative detention awaiting return (over 3,500). In particular, there were 2,763 forced returns and deportations, 75% of them concerning Albanian nationals. For yet another year, administrative detention is increasing, as opposed to forced returns which are decreasing. This persistent phenomenon raises legitimate concerns, not only about the effectiveness but also about the proportionality of administrative detention, which is only legitimately imposed in situations where the implementation of a forced return needs to be effectively ensured (Article 15 of the Returns Directive).

In 2022, Ombudsman teams visited five (5) Pre-Removal Centres (Taurus, Amygdaleza, Xanthi, Paranesti/Drama, Fylakio/Orestiada), as well as the detention cells of various police stations where foreigners were being held while awaiting return. Problems related to administrative detention conditions inten-

1. https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Asylum_statistics&oldid=558844

2. EUAA (European Union Agency for Asylum), the evolution of EASO. <https://euaa.europa.eu/latest-asylum-trends-asylum>

3. Applicants' main countries of origin: Syria, Afghanistan, Turkey, Colombia, Venezuela

4. <https://migration.gov.gr/>

5. Asylum seekers mainly originate from Afghanistan (15.1 %), Syria (13.5 %), Pakistan (12.2 %), Palestine (7.8 %) and Iraq (7.1 %).

6. Article 8(6) of Directive 2008/115/EC (Returns Directive) and Article 23(6) of Law 3907/2011 which transposed it into Greek law.

sify as the detention period increases, while the chronic problem of detention in police stations that are completely unsuitable for long-term detention still remains unsolved. In 2022, last year's practice of keeping foreigners rescued at sea at the Amygdaleza Detention Centre rather than forwarding them to First Reception Centres continued. Accordingly, foreigners crossing Evros are temporarily taken to the Detention Centre of Fylakio, until they can be admitted to the nearby First Reception Centre. By contrast, in Amygdaleza, the detention of families and/or unaccompanied minors has completely replaced the First Reception Service. However, these practices, which only impair the mission of Pre-Removal Detention Centres, are not applied at the initiative of the Hellenic Police.

Moreover, in 2022, the Ombudsman participated with his staff as observers, in all the mass return air operations organized by the Hellenic Police ("ELAS"), i.e. in seven (7) National Return Operations (NROs) to Pakistan and Georgia and four (4) Joint European Return Operations (JROs) coordinated by FRONTEX, to the above countries and Bangladesh, as well as in two (2) sample overland removal operations from Thessaloniki to Albania.

In all return operations, the Ombudsman highlights the need to timely inform third country nationals of their removal and the need for substantial medical examination - which needs to be carried out otherwise than through a last minute interview - to ascertain that all returnees are fit to travel. The implementation of restraining measures only upon individual risk assessment by the Police and the conduct of a COVID-19 Coronavirus molecular test prior to all return operations by air is positively assessed. There are still substantial deficiencies in terms of infrastructure (e.g. old or inappropriate cage-type transport vehicles) and organisation (e.g. lack of interpretation services in most Pre-Removal Centres in the most common languages spoken by the detainees), which impairs the detainees essential awareness of applicable procedures and of their rights.

As a national mechanism for the protection of fundamental rights in return operations, the Ombudsman also cooperates with the FRONTEX Fundamental Rights Officer (FRO) who forwards to the Ombudsman, in accordance with the relevant EU Regulation [Article 111(4) of Regulation (EU) 2019/1896], all complaints on rights violations allegedly committed in FRONTEX operations by the Member State agents involved in the operations. In 2021, the Ombudsman received two (2) FRO reports on illegal pushbacks at the border of Evros, and five (5) similar reports in 2022. There is also an increasing number of complaints filed by third country nationals directly to the Ombudsman for illegal pushbacks conducted at the land or sea borders. All these complaints are investigated by the Ombudsman in his capacity as the National Mechanism for Investigation of Arbitrary Incidents by law enforcement officials ("E.M.D.I.P.A.")

and have triggered an official internal investigation of the reported incidents by the Hellenic Police.

The effective monitoring of the protection of fundamental rights at the borders by an independent mechanism was rendered imperative after the relevant announcement of the European Commission in the so-called “New Pact on Migration and Asylum”. In 2022, the EU Agency for Fundamental Rights (FRA) published a short Guide for Member States, recommending that this power be comprehensive in scope and effective in relation to both human and financial resources; that it make full use of the existing powers and expertise of the national mechanisms (e.g. the Ombudsman in Greece); and that it provide maximum independence safeguards. Similar proposals were filed by the LIBE Committee of the European Parliament, leading to amendments to the proposed border screening proposal in March 2023.

The need for substantially independent border monitoring mechanisms is becoming increasingly relevant as the European Union proceeds with the discussion on the adoption of the regulatory measures outlined in the New Pact on Migration and Asylum, focusing on speedy screening and return procedures for newcomers at the borders. The Ombudsman and his counterparts (independent national mechanisms of the Member States) have a constitutional duty to be pioneers in the process of ensuring actual compliance with the Charter of Fundamental Rights of the European Union upon the evolution of the existing European asylum and return systems.

Athens, May 2023

Andreas I. Pottakis
The Greek Ombudsman

1. The Ombudsman's mandate as the National Mechanism for External Monitoring of Forced Returns

The Ombudsman is the national mechanism for external control of forced return procedures of third country nationals to their countries of origin, in accordance with the provisions of EU law (Article 8(6) of Directive 2008/115/EC, "Return Directive") and Law 3907/2011 which transposed the Return Directive into Greek law (Article 23 para. 6). There is a twofold objective: **transparency in administrative actions and protection of the fundamental rights of returnees**.

In this context, the Ombudsman is specifically empowered to monitor all stages of the forced return procedure, from the minute a return order is issued until it is thoroughly implemented, i.e. the person concerned is returned by land, sea or air transport to his/her country of origin.

Such power has been systematically exercised since 2014, covering a wide range of frequent monitoring of national air return operations or joint European operations for returns of foreign nationals to various countries, as well as forced removal operations by land, sea or air to neighbouring countries, on the basis of readmission agreements. It also includes visits to Pre-Removal Centres or other places of administrative detention.

1.1. Legal framework

The external monitoring process is provided for in Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive, Article 8(6)) and has been assigned to the Ombudsman by Law 3907/2011 [Article 23(6)], which provides for the Authority's cooperation with international organisations and NGOs for this purpose. The Ombudsman's powers were fully put into practice when the details of the external monitoring system were defined in the Joint Ministerial Decision (Government Gazette 2870B/24.10.2014) that was issued upon the Ombudsman's proposal. This Joint Ministerial Decision provides for a constant flow of information from all agencies responsible for forced returns and readmissions. Since mid-2015 the Independent Authority has been receiving continuous information from Hellenic Police on upcoming operations, in order to be able to carry out sample controls.

The Ombudsman checks the legality of the acts, omissions and material actions of the competent agencies, using all institutional tools available to him under its statutory provisions, having unhindered access to all detention, waiting or

transit areas across the country. In addition, he carries out random checks, by participating (with his staff) as observers in operations executing return orders. The Ombudsman files reports and recommendations to the administration for improvements to the return procedures. The administration is under the obligation to provide a reasoned reply. The Ombudsman publishes his summary findings in a special report, which is annually submitted with the Parliament.

The EU area is governed by the principles of freedom, security and justice, which also underpin the Return Directive 2008/115/EC, which relies on a set of fundamental rights relating to forced returns, e.g.:

- Non-refoulement under international law,
- The right of appeal and judicial protection against forced removal,
- Humane treatment throughout the process,
- Deprivation of liberty of returnees as an exception when milder, alternative measures may not be applied,
- The institutional safeguard of an external monitoring body in relation to the forced return of third-country nationals to their countries of origin.

In most Member States the mandate of external monitoring is assigned to independent institutions similar to the Greek Ombudsman.

1.2. 2022 at a glance

In 2022, the members of the Ombudsman's Return Team **carried out a total of 11 on-site visits as follows:**

- at the Pre-Removal Detention Centres ("PROKEKA") of Tavros, Amygdaleza, Xanthi, Drama and Orestiada (5 Centres in total of those currently in operation⁷),
- at the holding cells at the Thessaloniki Aliens Directorate (Menemeni, 2 on-site controls),

7. By Joint Ministerial Decision No. 8038/23/22 (GG B, 6787/28-12-2022), the operation of the Pre-Removal Detention Centres for Aliens established by Joint Ministerial Decision 8038/23/22-xiii dated 20.01.2015 (GG B, 118) was extended until 31.12.2023. The Centres are still in operative status, except for that of Lesbos, which has suspended operations due to the catastrophic fire that took place on 08.09.2020. By JMD 82136 - GG B 605/11-2-2022, special detention facilities were established in the Closed Controlled Facilities ("KED") of the islands of Samos, Leros and Kos, as per Article 31 of Law 3907/2011, to operate as Hellenic Police Stations. The Pre-Removal Centre of Kos island (as a set of responsibilities, jobs and staff) was transferred as a whole to the KED of Kos. In the context of the on-site visits that were conducted by the Ombudsman as the National Prevention Mechanism (NPM), in July 2022 members of the Authority visited the KED of Samos, where they discovered that the special detention unit had not yet been put into effective operation.

- at the Migration Management Departments of Agios Athanassios/Chalkidona and Thessaloniki (Kordelio),
- at the Border Guard Stations of Tycheron/Evros and Orestiada (Neo Cheimonio).

In 2022, the Ombudsman participated with members of his staff as monitors **in all mass return air operations that were organised by ELAS:**

- 7 National Return Operations (NROs) (conducted by air) to Pakistan and Georgia;
- 4 Joint European Return Operations (JROs-CROs) (conducted by air) coordinated by FRONTEX to Pakistan, Georgia and Bangladesh.

The Ombudsman's staff also participated in sample controls that took place in the context of:

- 2 **overland removal operations** from Thessaloniki to Albania (Krystallopigi).

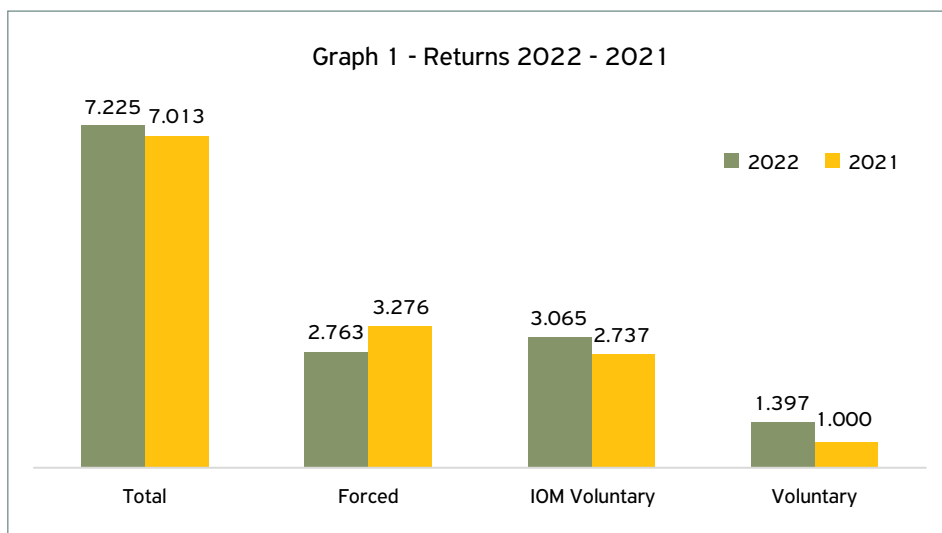
It is noted that no readmissions to Turkey took place, either by sea or by air, in 2022, due to the suspension since 19/03/2020 of the EU– Turkey Joint Statement.

The Ombudsman also participated with his staff as trainers in two (2) FRONTEX training seminars: Training of external monitors of the EU Pool of Monitors of FRONTEX (Bratislava, 29.09.2022-02.10.2022) and training of FRONTEX's own fundamental rights monitors in forced return operations (Vilnius, 26-30.09.2022).

2. Information on the scope of external monitoring

2.1. Figures related to returns

The data transmitted by ELAS indicate a **reduction in forced returns** by 15.6 % compared to year 2021. In particular, 2,763 forced returns and deportations took place in 2022, compared to 3,276 in year 2021 (see Graph 1).

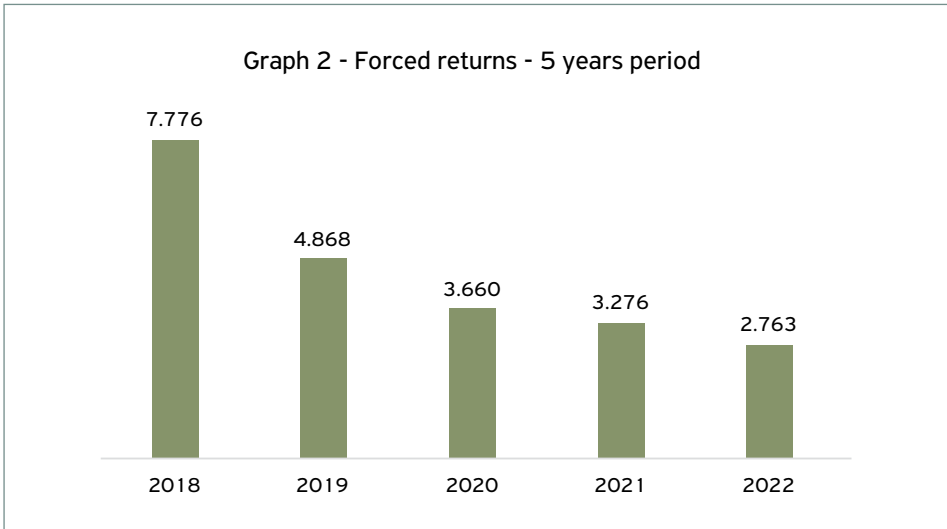


This shows a stable declining trend of forced returns (see Graph 2). Forced returns include readmissions under bilateral agreements with neighbouring countries. 75% of forced returns and deportations from Greece involve Albanian nationals. It is also noted that readmissions of third country nationals from Lesvos, based on the EU-Turkey Joint Statement, have been suspended by Turkey since 19.3.2020, (the alleged cause being the pandemic) and have not resumed as at this date.

By contrast, there is a relative increase in *voluntary* returns⁸ of the International Organisation for Migration (IOM) (3,065 in 2022 over 2,737 in the previous year) as well as in the number of persons returned by ELAS in the context of the “**voluntary** departure”⁹ (1,397 over 1,000 in the previous year).

8. International Organisation for Migration (IOM), Assisted Voluntary Return and Reintegration (AVRR) Programme <https://www.iom.int/assisted-voluntary-return-and-reintegration>

9. Returnees under Article 22 of Law 3907/2011, being returned on the basis of a prior return decision setting a voluntary departure deadline and holding non-removal certificates for humanitarian reasons



The Ombudsman points out that attention must be paid to whether the so-called “voluntary” returns are indeed the result of the free will of returnees, in light of the adverse effects of their refusal to consent to the removal, according to ECtHR case-law¹⁰.

Irrespective of that, the European Commission also tends to focus on voluntary rather than forced returns¹¹, as forced returns appear to be **less effective across the EU**. According to the available Eurostat data¹², in 2022 approx. 96,800 foreigners were returned and 422,400 return orders were issued (23% more than those issued in 2021) (i.e. fewer than 1 in 4 were returned) and forced returns accounted for 53% of the total. The largest ethnic groups of returnees in 2022 are citizens from Albania and Georgia rather than from countries of origin related to the so-called refugee crisis of 2015, with Syrians holding the third place.

under Article 78A of Law 3386/2005, as well as returnees who waived their asylum applications.

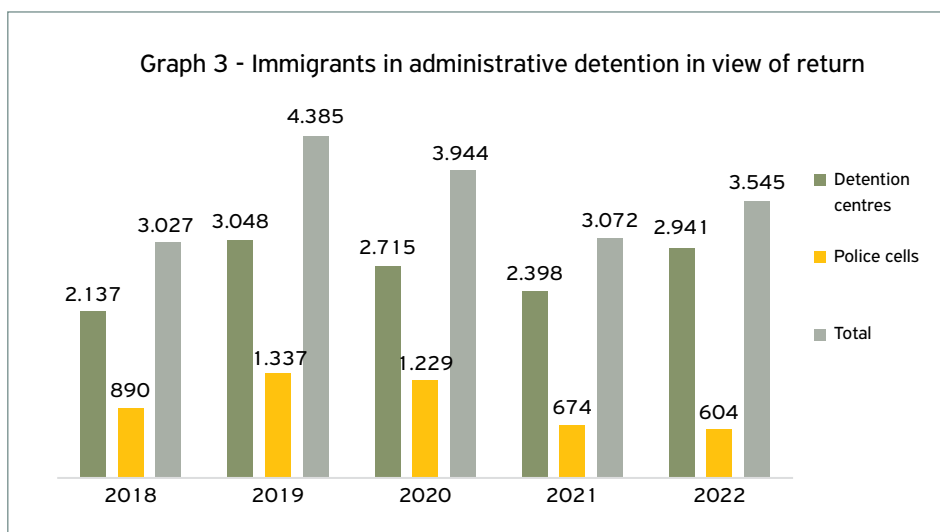
10. See ECtHR judgements in cases *N.A. v. Finland* (14.11.2019) and *M.A. v. Belgium* (17.10.2020), on interpretation, legal assistance and effective prior information on the right to international protection, as prerequisites of effective consent.

11. In its proposal for the New Pact on Asylum and Migration: Commission Communication [COM (2020) 609 final] of 23.9.2020, https://ec.europa.eu/home-affairs/news20200923/new-pact-migration-asylum-setting-out-fairer-more-european-approach_en

12. May 2023, <https://ec.europa.eu/eurostat/en/web/products-eurostat-news/w/ddn-20230505-2>

2.2. Figures on administrative detention of third-country nationals awaiting return

As regards administrative detention, according to ELAS information, on 1.11.2022 2,941 foreigners were detained at Pre-Removal Centres and 604 in police stations, awaiting return¹³. 3,545 detainees in total. There was a decline in the number of detainees in the corresponding period of year 2021, from approx. 4,000 in the previous years to 3,072, while the 2022 data show an increasing trend of administrative detention (*see Graph 3*).



The key observation is that, while forced returns are decreasing, administrative detention is increasing. This pattern raises reasonable concern, not only as to the effectiveness but also as to the proportionality of administrative detention as a measure, given that it may only be imposed when it is imperative to ensure the implementation of forced returns (Article 15 of the Return Directive)¹⁴.

13. In every annual report that was filed by the Ombudsman as an external monitoring mechanism for returns from year 2014 to this date, the Ombudsman consistently adopts the view that police station detention facilities are not suitable for long detention (for several days, which practically extend to several months) of persons awaiting return.

14. See 2020 Return Report, p. 31 with regard to the problematic (from an EU law standpoint and also from the standpoint of the constitutional principle of proportionality in restrictions to personal freedom) amendment of Article 30 of Law 3907/2011 by Article 51 of Law 4686/2020, which seems to render the alternative measures an exception and administrative detention a regular practice, even though the latter is a more onerous measure. <https://old.synigoros.gr/?i=human-rights.en.recentinterventions.821099>

In 2022, two administrative practices are still applied, which the Ombudsman had already pointed out in his 2021 report¹⁵ as affecting the number of detainees and at the same time raising legitimacy concerns:

- the phenomenon of detaining third-country nationals (such as Afghan citizens), for whom there is no reasonable prospect of removal, as required by the Return Directive; and
- the detention of newcomers in the country at Pre-Removal Centres rather than at First Reception Centres, as required by law¹⁶.

15. See 2021 Special Report, pp.16-17, 27-29 <https://www.synigoros.gr/en/category/ekdoseis-ek8eseis/post/special-report-2021-on-returns-of-third-country-nationals>

16. See chapter on administrative detention below.

3. Findings of the external monitoring of third-country nationals return procedures and operations

3.1. Return operations by land

In 2022, the Ombudsman participated in

- 2 overland removal operations from Thessaloniki to Albania (Krystallopigi).

General considerations: Land operations were carried out as per the Hellenic Police planning of the operation. The Ombudsman's monitor was present throughout the process, conducting also on-site visits at the detention facilities of returnees.

The same technical issues and deficiencies were noted as those identified by the Ombudsman in previous reports. These issues relate to infrastructure (lack of space, lack of appropriate vehicles) and procedures. By way of indication, returnees were transferred locked up in cells during the operation, for no legitimate reason, considering especially that most of them had waived their rights of appeal and had indicated that they wished to return home.

Recommendations:

- the designated departure pointation should comprise a properly laid out, clean and safe waiting (rather than confinement) area, with seats, convenient access to restrooms and a separate courtyard;
- properly maintained vehicles, such as tourist buses or vans, should be used in return operations, having no confined compartments;
- returnees should undergo a preventive medical examination by a physician before the operation starts, subject to their consent;
- police escorts should be sufficient in numbers, should be wearing civilian clothes and their equipment should be restricted to means of restraint;
- the operation should be attended by an escort having certified first aid skills;
- returnees not understanding the Greek language should have access to a certified interpreter.

These issues should be considered and addressed by the Hellenic Police, so that land operations can be conducted in a manner ensuring better safeguards for the protection of citizens' rights throughout return operations and facilitating the work of the police escorts.

3.2. Return operations by air - national and European

In 2022, the Greek Ombudsman had monitors attend all return operations organised by the Hellenic Police.

- 7 National Return Operations (NROs) to Pakistan and Georgia;
- 4 Joint European Return Operations (JROs) coordinated by FRONTEX to Pakistan, Georgia and Bangladesh.

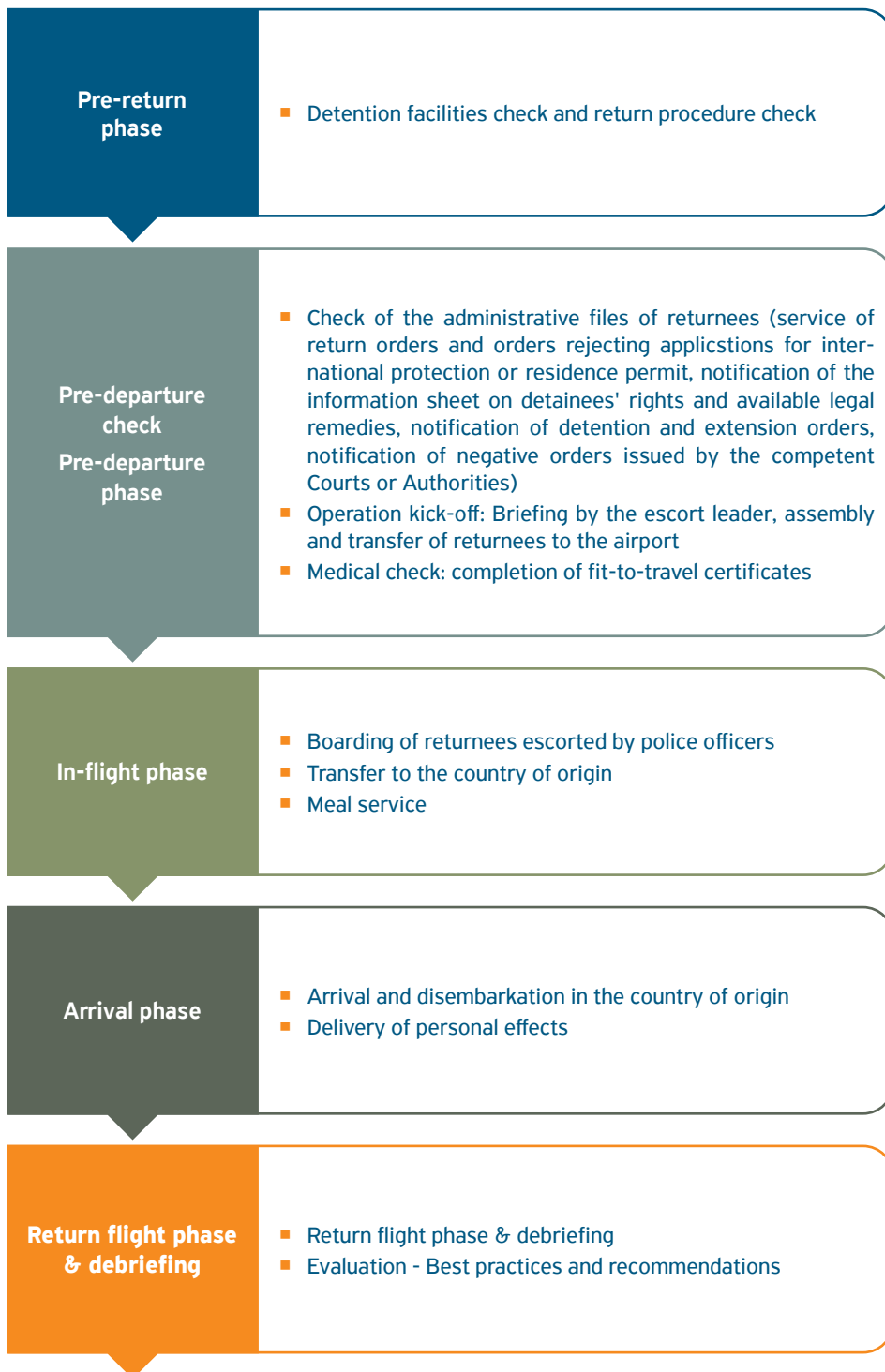
General considerations:

Both the Joint European Return Operations (JROs) organised by ELAS with the support of FRONTEX and the National Return Operations (NROs) were carried out smoothly throughout the process, from the pre-departure phase until the return and debriefing phase.

All issues that came up during the operations were handled properly and effectively by the escort leader, the support team and the police escorts, who were willing to discuss all matters and made efforts to effectively resolve all problems and meet the needs of returnees. Individual incidents, such as inappropriate escort behaviour or different practices of body search were promptly handled by the leaders, who offered adequate explanations and guidance.

The excellent cooperation between the Returns Coordination Office of the Attica Aliens Division and the escort leaders with the Ombudsman's monitors consistently facilitates the implementation of the operations, while ensuring that the rights of the returnees are being respected.

Stages of return operations by air:



Observations:

- As part of the pre-departure check of administrative files, an increase in the number of files of returnees was noted. For example, the list of returnees included 10 Georgian nationals (and alternates) and 20 Pakistani nationals (and alternates), and a total of 60 to 100 files per operation. This new administrative practice is intended to ensure the highest possible participation of returnees in the return operations. However, the Ombudsman notes that this operational objective could be achieved by timely informing returnees –24 hours in advance–, so that any pending or new applications are taken into account well in advance and no last-minute exclusions are made. A typical example is the exclusion of 36 nationals from a flight from Georgia to Pakistan as a result of returnees declaring their will to apply for asylum, other returnees found with Covid-19 infections, other medical conditions or other reasons. It is the Ombudsman’s consistent position that timely information of returnees ensures both their rights and the smooth conduct of the operation.
- Along with the increase in the number of returnees, notice was taken of the practice of transferring foreigners to the airport as alternates, their overnight stay at the Airport Police Station and their return to the PROKEKA of Amygdaleza the next day or their return to the detention facility on the same day (after staying for several hours in the police van). The Ombudsman considers that this practice (i) causes unnecessary discomfort to returnees, leading to intense anxiety and negative reactions due to their sudden movement and possible return, and (ii) prevents the smooth conduct of the operations, as operations fall behind schedule and returnees react negatively to their sudden movement. It is recommended that this practice be terminated and once again noted that returnees should be informed of their upcoming return 24 hours in advance.
- Since July 2022, a special Asylum Service team has been present at the Athens International Airport “El. Venizelos” throughout the operation, to handle any pending issues related to the administrative files of returnees. Asylum applications filed to the PROKEKA of Amygdaleza prior to the operation are processed expeditiously. In a letter addressed to the ELAS Migration Management Department and to the Returns and Recalls Department of the Ministry of Immigration and Asylum, the Greek Ombudsman, as the national body responsible for the external monitoring of forced return procedures in accordance with EU law, asked to be informed of the purpose of the presence of an Asylum Service team at the airport in national and joint European return operations, as well as the exact responsibilities of this team. In response to that letter, the Minister of Immigration and Asylum informed the Ombudsman that the Asylum Service “*sent out the team to the*

airport in order to examine, through qualified staff, the admissibility of potential subsequent applications as per Article 94 of Law No. 4939/2022, which are intentionally filed shortly prior to the departure of returnees, without any new evidence, for the sole purpose of postponing the deportation process". The Ombudsman will monitor this new administrative practice in order to establish how access to the right to international protection is practically ensured.

- The pre-departure check of the administrative files, which is carried out on the day before the operation, routinely demonstrates the absence of fit-to-travel certificates, which are completed at the last minute as part of the pre-departure medical check. An exception to this administrative practice is made for files originating from the Thessaloniki Returns Department. The Ombudsman recommends that the files of returnees be fully up-to-date in terms of medical history and include fit-to-fly certificates. In any situations where necessary medication is administered, it must be ensured that sufficient quantities are available, prescribed and administered throughout the operation.
- In line with the Ombudsman's previous recommendations, a separate gate is now available at El. Venizelos airport, where catered meals are offered to the returnees, as well as access to toilet facilities and payphones (or use of mobile phone devices), to help them contact their families. However, the Ombudsman noted that, as a result of delays, in certain operations there was no time to let returnees use that area, and meals were served either on board the plane or in the police van instead. There were also cases where returnees had not been served any meal until the flight departed, notwithstanding the operation leader's instructions. In certain situations the waiting areas had no restrooms, and returnees could only access sanitary installations through passenger corridors.
- It has been repeatedly noted that in the return operations to Georgia and Pakistan, interpretation services are offered to Pakistani returnees (Urdu) up to the pre-departure phase, while no interpretation is offered to Georgian returnees. Returnees to Bangladesh, however, are offered the services of an interpreter throughout the operation, including during the flight. The Ombudsman therefore notes that these three different interpreting practices fail to guarantee the right to information about the return procedures through interpretation in a comprehensive and uniform manner. Interpretation services are provided for by law, they are established as technical and operational assistance offered by FRONTEX to the competent Authorities of the Member States in the context of return procedures¹⁷, whereas

17. Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019

linguistic assistance is provided for in Article 13(3) and (4) of the Return Directive.

Dealing with emergencies

- On a flight to Georgia-Pakistan a returnee felt unwell and fainted inside the aircraft toilet. The back up team handled the incident promptly and professionally, ensured that the returnee had suffered no injury as a result of the fainting and notified the doctor. The doctor immediately intervened and examined the passenger, while the escort leader requested to be promptly informed so that the aircraft be instructed to return in case the passenger was in danger. The passenger recovered shortly and the operation was not further disrupted. This incident highlights the need for a physician to be present throughout the operation.
- On a flight to Georgia-Pakistan, an emergency occurred during the transfer to the airport (possible epileptic seizure according to the doctor). The doctor offered first aid and an ambulance was called to take the returnee initially to the medical centre of “El. Venizelos” airport and then to a public hospital. The returnee, however, was transferred in metal handcuffs. A decision was then made to exclude this returnee from the operation for precautionary reasons. In the same operation, a returnee was slightly injured when the police van door was opened warningly by an escort. The incident was handled immediately by the doctor and medical care was provided during the flight. Both of these incidents indicate the identified need for a doctor to be present throughout the operation and the Ombudsman’s consistent recommendation that police cage-type vehicles should not be used for the transport of returnees.

Special operational matters:

- In the Joint European Return Operation (JRO) to Bangladesh with a stop-over in Cyprus, that was organised by Greece and coordinated by FRONTEX, the use of a larger aircraft (BOEING 767-300ER) was used and better return conditions were established: more toilets for returnees, larger runways, possibility of direct flight to Dhaka after Larnaca. Brochures containing informational material were displayed on board the aircraft in a language understandable to the returnees.

on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.

Recommendations to improve procedures include the following:

- Timely notification of the return operation to returnees.
- Interpretation services available throughout the return operation.
- Timely finalisation of the list of returnees.
- Effective medical screening of all returnees.
- Prescribed medication for returnees to be available from the day before the return operation, otherwise the persons should be excluded from the operation.
- Providing returnees with basic necessities and appropriate clothing (e.g. from the PROKEKA social service).

3.3. Administrative detention facilities and procedures

According to the Return Directive (Article 15), administrative detention is aimed exclusively at implementing the actual removal and is only applied as a last resort, if alternative measures may not be applied¹⁸.

As part of the external monitoring of forced returns, the Ombudsman makes random visits to Pre-Removal Centres or other administrative detention facilities in order to check the process from issuance of a return/deportation order to its implementation. This control includes compliance with the relevant provisions of the Return Directive and Law 3907/2011 on separate detention from criminal detainees, humane treatment, due diligence in implementing the return process and access to asylum and related procedures.

In 2022, the Ombudsman visited the two Pre-Removal Centres (PROKEKA) in Attica [Tavros (7.12.2022) and Amygdaleza (8.12.2022)]. He also visited three other PROKEKA [Xanthi, Paranesti (2.12.2022) and Phylakio in Evros (3.12.2022)], and two Border Guard Departments (Tycherio and Neo Cheimonio, 3.12.2022) in the Region of Eastern Macedonia - Thrace, as well as the detention facilities of the Thessaloniki Aliens Directorate in Menemeni (10.11.2022 and 8.12.2022) and the Immigration Management Departments of Kordelio and Agios Athanasios/ Chalkidona in the same region (9.11.2022 and 7.12.2022 respectively).

The Ombudsman consistently points out that police station detention facilities should not be used for the detention of returnees, consistent with ECtHR case-law: *“Police stations are not appropriate premises for the detention of persons who*

18. For the Ombudsman’s critical remarks on Law 4686/2020, Article 51, on the reversal of the rule of applying alternative measures and detention only as an exception, see chapter 2 above.

are awaiting the application of an administrative measure. By their very nature, these premises are intended to only host persons for very short periods of time”¹⁹.

The Ombudsman’s findings in these on-site inspections are thoroughly recorded in the special report he has drafted in his capacity as a National Preventive Mechanism against Torture and Inhumane Treatment (Law 4228/ 2014 of OP-CAT). At this point it is worth making certain specific and general observations in relation to pre-return detention procedures:

Specific observations:

Detention in Attica Region

There is an increase in the number of detainees at PROKEKA compared to year 2021 (1,084 detainees in Amygdaleza in 2022 over 584 in 2021). If the reason for this increase is the need to reduce the number of administrative detainees in police stations in Attica, this is a legitimate practice. It should not, however, impair the legitimate treatment of detainees in a way that ensures that their requests are being heard and effective solutions are found to improve their living conditions (see general comment on interpretation below).

A critical issue in terms of how returnees are treated is the detention of families and unaccompanied minors in Amygdaleza. The Ombudsman found out that the practice of systematically taking sea-rescued returnees (from Pylos, Kythira, Karystos etc.) to the PROKEKA of Amygdaleza before vacancies are found in mainland accommodation facilities, is still applied in year 2022. The Ombudsman’s observation in his 2021 return report still stands: *“By-passing the First Reception Service of the Ministry of Migration and Asylum renders all third-country nationals subject to police detention from the outset, depriving them prematurely of the opportunity to undergo a vulnerability assessment by the competent services at the Reception and Identification Centres (RICs), as required by Law 4375/2016. As a side effect, newcomers detention from the outset at the Pre-Removal Centre of Amygdaleza entails a change in jurisdiction as regards their asylum requests and causes delays in the assessment of the requests of other detainees actually awaiting return. Moreover, this distorts the role of Pre-Removal Centres, which now goes beyond that of administrative detention in view of return. Such practices, which lack any clear legal basis, are not only violations of the law but further impair the fundamental rights of third-country nationals (returnees or otherwise) and lay the groundwork for considering immigrants and/ or asylum seekers as detainees in principle, i.e. deprive them as a rule of their*

19. *Horshill v. Greece*, ECtHR judgement of 1-8-2013 (application no. 70427/11), paragraph 47.

*personal liberty, in violation of the constitutional principle of proportionality*²⁰. These observations become even more imperative when it comes to minors, who were identified in large numbers at the 2022 on-site inspection in Amygdaleza. PROKEKAs are totally unsuitable facilities for them in terms of services and standards.

In respect of this issue, which had been pointed out in the previous year, the Hellenic Police responded to the Ombudsman (05.06.2022) that “*although this matter lies outside the scope of our responsibilities*”, ELAS has proper procedures in place to record and identify new entrants focusing on serving the public interest, “*considering that there are no Reception and Identification Centres (R.I.C.) in the mainland*”. Clearly, the initiative to make use of the First Reception Service in lieu of detention centres (PROKEKAs) belongs to the Ministry of Immigration and Asylum.

Detention in the Region of Eastern Macedonia - Thrace

A critical issue is the practice of systematically detaining individuals crossing Evros river at the PROKEKA of Fylakio²¹ before offering First Reception Services. The Ombudsman found the PROKEKA of Fylakio unsuitable for the detention of families and minors. The assertion of the Reception and Identification Centre of Fylakio that they are unable to directly absorb aliens crossing the border not only delays the relevant procedures (vulnerability checks, etc.), but distorts the very nature of PROKEKAs at their core. In their aforementioned reply, the Hellenic Police also invokes reasons of public interest for detaining newcomers at the PROKEKA before forwarding them to the RIC of Fylakio. As one clearly observes, it appears that this practice is perpetuated, although the number of entrants crossing the land border remains known²².

In Thrace, an issue that needs further scrutiny is the entrant registration process and how long entrants stay at Border Guard Stations, as some discrepancies were identified with the register of detainees (Border Guard Department of Tycherö).

Detention in Thessaloniki

In 2022, the detention facilities of the Thessaloniki Aliens Directorate in Menemeni were still used as a de facto Pre-Removal Centre (PROKEKA), while the applicable yard-time requirements of the Return Directive were not met.

20. 2021 Special Report, p. 29 <https://www.synigoros.gr/en/category/ekdoseis-ek8eseis/post/special-report-2021-on-returns-of-third-country-nationals>

21. and/or Xanthi and at Border Guard Stations.

22. Approx. 6,500 arrivals at the Evros RIC in 2022, over approx. 5,000 in 2021, according to data supplied by the Ministry of Immigration and Asylum <https://migration.gov.gr/statistika/>

A characteristic indication of the poor understanding of the Ministry of Citizen Protection of how the rights of detainees are being impaired is that, despite the Ombudsman's repeated recommendations year after year, the Ministry has still not found another suitable facility to replace the facility in Menemeni - which, not to mention, is only allowed to have built-in beds, as it is considered a mere police detention facility rather than a PROKEKA. Built-in beds would however jeopardise the building's statics and detainees have to sleep on the floor as a result.²³

General observations

a) A key issue identified in relation to administrative detention is the poor understanding that the duration of detention depends on the **due diligence** of the police authorities in implementing return procedures. Characteristically, the Ombudsman has received several responses from the police authorities that they will consider lifting the detention after a period of six months²⁴. The Ombudsman points out that due diligence is a legal prerequisite of detention according to the Return Directive (Article 15).

The Ombudsman's visits to PROKEKAs have mainly indicated that faster processing of asylum applications and faster identification of the cases where repatriation is not possible is a solution that will ensure effective protection of the rights of returnees and efficient operation of the detention system.

The general issue arising with respect to Afghans, which is also stated in complaints of other administrative detainees addressed to the Ombudsman, is that keeping foreigners in detention for several months when there are no return operations under way and when readmissions to Turkey have been suspended since March 2020, is inconsistent with the Directive's requirement of a real prospect of removal as a legal prerequisite of the detention (see also CJEU Kadzoev C-357/09) in accordance with the principle of proportionality²⁵.

b) The **lack of interpretation services** is a critical issue in all PROKEKAs, because it impairs all rights of the detainees, mainly the right of detainees to be adequately informed about the detention process and the procedures to be applied, the identification of vulnerable persons, etc.

It is noted that, under the contracts with Health Units SA ("AEMY"), PROKEKAs have been supplied with interpreters to assist the medical and social services

23. See 2020 Special Report, p. 25 <https://old.synigoros.gr/?i=human-rights.en.recentinterventions.821099>

24. F.325862, detainees at the PROKEKA of Kos.

25. F.292704, F.302349.

teams, yet they fail to cover the main languages spoken by the detainees. Attica Region's PROKEKAs rely on FRONTEX interpreters in particular for return operations. A good practice was identified in Thrace, where Turkish-speaking police officers from the local Muslim minority are used to communicate with detainees and have a better understanding of their cultural needs.

A persistent deficiency is that detainees are still not fully capable of communicating at the PROKEKAs with adequate support from interpreters. This is a matter of both substance and legality, linked to the linguistic assistance for legal aid for detainees [Article 13(3) of the Return Directive] and with the translation of the main elements of return decisions, to allow for effective appeal [Article 12(2) of the Return Directive].

4. Developments in the European returns framework

4.1. Recommendations for regulatory and strategic changes

Returns in the New Pact on Migration and Asylum

A key structural element in establishing an effective EU return system is the 2018 proposal for a recast of the Return Directive²⁶, which lays down specific measures aimed at linking asylum and return procedures effectively, in particular as regards the adoption of return decisions after the end of the legal stay, appeals against return decisions following a final decision rejecting an application for international protection and return procedures at the border. However, no agreement on this proposal has been reached up to this date; the level of effectiveness of return procedures therefore varies among the Member States, as it largely depends on national rules and capabilities, as well as on their relations with specific third countries.

In this context, a set of legislative proposals addressing, among others, return²⁷ issues was presented along with the new Pact on Migration and Asylum²⁸, and *“the establishment of an effective and common EU system for returns is a key parameter of a well-functioning and reliable immigration and asylum system, as well as of the integrated approach of the new Pact on Migration and Asylum”*²⁹.

Overall, the new procedure at the border, the appointment of a Return Coordinator, the enhanced role of the European Border and Coast Guard Agency (FRONTEX), the solidarity mechanism, the cooperation with third countries and new programmes, such as the Return Sponsorship, are the new EU tools for increasing returns and applying a more effective operational strategy for returns.

26. Proposal for a directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast) [COM (2018) 634 final of 12.9.2018].

27. Communication from the Commission on a New Pact on Migration and Asylum [COM (2020) 609 final of 23.9.2020].

28. The main binding legislative proposals relate to an amendment of the 2016 proposal for a Regulation establishing a common asylum procedure, the proposal for a Regulation on asylum and migration management, the proposal for a Regulation establishing screening controls, the proposal to amend the Eurodac proposal and the proposal for a Regulation dealing with emergencies and force majeure in the migration and asylum fields, in an effort to establish a new legislative framework that puts into practice an integrated asylum and return management approach.

29. Policy document “Towards an operational strategy for more effective returns” [COM (2023) 45 final of 24.1.2023].

EU law amendment procedures

At the political and institutional level, the political agreement reached in 2022³⁰ on a common roadmap between the European Parliament and the rotating Presidencies of the EU Council laid the foundations for more effective dialogue on the Pact, encouraging the conclusion of negotiations by February 2024 (before the European elections) on all pending legislative agendas related to asylum and migration management, including the proposal to recast the Return Directive³¹.

To speed up return procedures, in early 2023 the European Council³² called on Member States to mutually recognise return decisions and prioritise the need to enhance returns and readmissions by all diplomatic means to other countries, including by visa restrictions on third countries that fail to cooperate in returns.

At the European Parliament, the rapporteurs filed draft reports on all legislative proposals accompanying the 2020 Pact, as well as proposals on the recast of the Return Directive that was proposed in 2018. The Parliament then decided to initiate discussions with the Member States on a number of legislative proposals and authorised the commencement of negotiations between the EP and the Council on the following agenda that was put to vote: Regulation establishing a screening control, regulation on asylum and migration management, regulation on dealing with emergencies and force majeure³³. It is noted, however, that work on the new legislative framework on returns should be taken forward in order to reach an agreement on a proposal for a recast of the Directive, as prescribed in the Pact.

In its Report³⁴ on the progress achieved and key developments in the migration and asylum fields, in 2022 the European Commission a) initiated a number of infringement procedures related to non-compliance with national laws and practices with EU standards and procedures; and b) noted the increase in

30. Joint Roadmap of the European Parliament and Rotating Presidencies of the Council on the organisation, coordination, and implementation of the timeline for the negotiations between the co-legislators on the CEAS and the New European Pact on migration and asylum <https://www.europarl.europa.eu/resources/library/media/20220907RES39903/20220907RES39903.pdf>

31. For the European Parliament's critical remarks on the recast of the Returns Directive see Return Report 2020 p. 32 et seq. <https://old.synigoros.gr/?i=human-rights.en.recentinterventions.821099>

32. See Peak Summit Conclusions 09.02.2023 <https://data.consilium.europa.eu/doc/document/ST-1-2023-INIT/en/pdf>

33. European Parliament: Asylum and migration: Parliament confirms key reform mandates, <https://www.europarl.europa.eu/news/en/press-room/20230419IPR80906/asylum-and-migration-parliament-confirms-key-reform-mandates>

34. Communication from the Commission on the Report on Migration and Asylum [COM (2022) 740 final of 6.10.2022].

forced returns, the important role of the Return Coordinator and the High Level Network, the progress made with regard to voluntary returns and integration of returnees; and political emphasis the Commission gives to readmission in the context of external relations, thus enhancing returns to countries such as Bangladesh and Pakistan.

At operational level, FRONTEX, as a key factor in the returns field, supports Member States throughout the process, having a leading role in coordinating the operations. At the same time, in March 2022 the Return Coordinator took up duties and called the first meeting of the High-level Committee³⁵ on 08.09.2022, with a view to further developing national policies and legal frameworks - including improvements to how asylum and return procedures are practically linked with each other- by eliminating return impairments, strengthening national capacities, eliminating awareness gaps and improving cooperation between Member States and FRONTEX.

At Council level, the Migration Committee of the Parliamentary Assembly, noted in a Declaration³⁶ the importance of European solidarity in facilitating the reception of migrants and refugees. Resolution 2416 (2022)³⁷ pointed out that the Pact poses risks to unlimited access to international protection and risks relating to procedural safeguard violations, and expressed concern that European solidarity is seen as an emergency mechanism that is used to address reception and integration needs, whereas the Pact can be seen as an opportunity for solidarity -among States and towards migrants- that respects the European Treaties and the rules and values of the Council of Europe.

Aiming at an operational strategy for more effective returns

As negotiations on the revision of the EU legislative framework on asylum and migration continue, the Commission has presented its new operational strategy for more efficient returns³⁸, aiming primarily at reinforcing the execution of return operations so that:

35. The High Level Network on Returns is composed of representatives of all Member States and FRONTEX and chaired by the EU Returns Coordinator.

36. Council of Europe, Parliamentary Assembly, Committee on Migration, Refugees and Displaced Persons "European solidarity: a priority for the EU Migration and Asylum Pact", AS/Mig/Inf (2023) 03.

37. Council of Europe, Parliamentary Assembly, Resolution 2416 (2022) «European Union Pact on Migration and Asylum: a human rights perspective», 24/01/2022.

38. Policy Document "Towards an operational strategy for more effective returns", [COM (2023) 45 final of 24.1.2023] https://home-affairs.ec.europa.eu/system/files/2023-01/Towards%20an%20operational%20strategy%20for%20more%20effective%20returns_en.pdf

- the total number of effective returns increases, in particular with regard to returns to third countries where there are no major political obstacles, based on the targets set by Member States,
- returns are carried out faster, supporting the integrity and reliability of national asylum systems and preventing irregular border crossings; and
- returns are sustainable and consistent with European values and fundamental rights.

In this context, the Commission has identified four focal points which could form the basis of the operational strategy:

1. Targeted actions to address urgent needs and obstacles in a coordinated manner.
2. Increasing the efficiency of the overall return system by speeding up the process and eliminating gaps.
3. Promoting return and reintegration counselling as key elements of the EU return system, both for voluntary and forced returns.
4. Digitising return management procedures and improving data analysis.

The annex³⁹ to the Operational Strategy Policy Document sets out the main proposed actions to reach these four objectives, as well as the targets and indicators that could be used to monitor progress.

These include a joint focused effort to be carried out on a quarterly basis for the purpose of implementing returns to third countries identified as priority destinations, in the context of the implementation of the EU readmission agreements and arrangements and the continuity of the mechanism described in Article 25a of the Visa Code⁴⁰.

At the same time, in the context of addressing longer-term and structural needs, improved efficiency is impaired by specific factors: **i)** ensuring that decision to end legal stay is immediately followed by a return decision; **ii)** eliminating the gap in the transition from voluntary to forced returns; **iii)** addressing procedural gaps and obstacles related to the different roles of authorities and actors responsible for different phases of the return process; **iv)** mutual recognition of return decisions; **v)** developing a more coherent approach to identify risks of absconding and deficient capabilities; using effective alternatives to detention more effectively etc.

39. Annex to Policy document “Towards an operational strategy for more effective returns” [COM (2023) 45 final of 24.1.2023].

40. Consolidated text: Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), Article 25a Cooperation on readmission.

Lastly, given that the fact that there is no regular flow of reliable data with regard to returns is a major weakness that needs to be addressed, the Commission points out that it is imperative to ensure that each Member State has a digital return case management system in place, which can be linked to other Information Technology (IT) systems related to the return process. Achieving interoperability between IT systems related to the return process and using other tools⁴¹ in parallel with the actions of FRONTEX -which will complete the analysis of deficiencies for all Member States by the end of 2023 and will then prepare and implement a full digitisation plan, in cooperation with the Member States (by 2026)- is bound to contribute to more efficient management of returns and improved data analysis.

Returns and Schengen area

Linking returns with the area of freedom, security and justice of the Member States, the Commission states that introducing an efficient and common EU system for returns is key in achieving the strategic objective of creating a fully functional and resilient Schengen area⁴² and counterbalancing the absence of internal border controls, and is therefore an integral part of the Schengen policy cycle and part of the European integrated border management.

After the implementation of Regulation (EU) 2018/1860⁴³, Member States are required to enter a return alert in the Schengen Information System promptly after a return decision is issued, and are therefore now able to immediately ascertain whether a third-country national apprehended by the competent authority is subject to a return decision issued by another Member State. Mutual recognition of return decisions is intended to significantly speed up the return procedure and make it more efficient⁴⁴.

41. Such as the Reintegration Assistance Tool (RIAT) and the existing Readmission Case Management System (RCMS) that is in place with third countries, the second-generation Schengen Information System (SIS II), the new functionalities of the Schengen Information System concerning the creation of alerts on persons for whom return decisions have been issued.

42. Communication from the Commission to the European Parliament and the Council “A strategy towards a fully functioning and resilient Schengen area” [COM (2021) 277 final of 2.6.2021]. The Schengen area relies on three main pillars: 1) effective management of external borders; 2) measures offsetting the absence of internal border controls (common visa policy, return policy, police cooperation methodologies, various IT systems and associated data protection requirements); and 3) robust governance, including an efficient evaluation and monitoring mechanism, and high preparedness.

43. Regulation (EU) 2018/1860 of the European Parliament and of the Council of 28 November 2018 on the use of the Schengen Information System for the return of illegally staying third-country nationals (OJ L 312, 7.12.2018). The new SIS (Recast) became functional across the Schengen area on 7 March 2023.

44. Commission Recommendation (EU) 2023/682 of 16 March 2023 on mutual recognition of return decisions and expediting returns when implementing Directive 2008/115/EC of the European Parliament and of the Council.

Other relevant developments

The year 2022 was marked by the lack of consensus at the EU Council in December on the proposal for a regulation on the instrumentalisation of migrants from other states⁴⁵, i.e. the creation of artificial migration pressures on EU Member States. The European Commission's proposal for a regulation, which is aligned with the emergency measures already announced for the three countries bordering Belarus, allows for an extension to asylum procedure deadlines⁴⁶, an expansion of special border procedures, fewer reception requirements for asylum seekers and a special expedited return procedure⁴⁷. The “instrumentalisation” issue and how it is handled is still a subject of political controversy within the EU and reflects the tendency to introduce derogations from normal asylum, return, etc. procedures in the form of exceptional - yet permanent - regulations.

Protection of fundamental rights

Return operations are inherently susceptible to violations of fundamental rights, e.g. returns of individuals to countries tolerating serious human rights violations, ill-treatment of returnees during the return process or exchange of sensitive information or personal data. First and foremost, there is a constant risk of violation of the principle of non-refoulement⁴⁸, considering in particular the different asylum systems applied by Member State⁴⁹.

However, the effectiveness of the European return system depends not only on the number of returnees but also on the protection of their fundamental rights. The Pact on Migration and Asylum provides that all necessary safeguards will be put in place to ensure that each person is individually assessed and that basic safeguards will be strictly applied, with due regard to the principle of non-refoulement and the fundamental rights of returnees. These safeguards include the establishment by Member States of an independent border monitor-

45. Proposal for a Regulation addressing situations of instrumentalisation in the field of migration and asylum, [COM (2021) 890 final of 14.12.2021].

46. But not a suspension of the asylum recording procedures referred to in the Legislative Act of 2.3.2020 (GG 45/A).

47. See critical remarks of the Ombudsman in Return Report 2021 pp. 32-33 <https://www.synigoros.gr/en/category/ekdoseis-ekBeseis/post/special-report-2021-on-returns-of-third-country-nationals> and ECRE remarks <https://ecre.org/ecre-policy-paper-quo-vadis-eu-asylum-reform-stuck-between-gradual-approach-mini-package-deals-and-instrumentalisation/>

48. According to international human rights law, the principle of non-refoulement guarantees that no one should be returned to a country where he or she could be subjected to torture, cruel/inhuman/degrading treatment or punishment or other irreparable harm.

49. Gkliati, M. (2022). The EU Returns Agency: The Commissions' Ambitious Plans and Their Human Rights Implications, *European Journal of Migration and Law*, 24(4), 545-569. doi: <https://doi.org/10.1163/15718166-12340140>

ing mechanism⁵⁰, in line with the guidelines of the Fundamental Rights Agency (FRA) on the establishment and independent functioning of this mechanism⁵¹.

4.2. European operations and transparency matters. The Ombudsman's cooperation with the FRONTEX Complaints Mechanism

The general issue of transparency in European return operations has been raised by the Ombudsman and his counterparts in other Member States' national external monitoring mechanisms for forced returns, since the previous European Regulation that granted FRONTEX reinforced powers and responsibilities⁵². The basic problem still exists under the current Regulation [(EU) 2019/1896]: the monitoring of operations is not assigned to an external mechanism but rather, to observers selected by FRONTEX which report to the latter. For this reason, the Ombudsman continues to work with his counterparts from independent institutions in other Member States to enhance transparency in European operations, as part of the networking initiative he has undertaken ("Nafplion Initiative")⁵³, which is supported by the Council of Europe.

Maintaining this reservation on the need for external and independent monitoring also at European level, the Ombudsman continues to participate (with 8 staff members) in the FRONTEX EU Pool of Monitors for European forced return operations, and has close cooperation with the FRONTEX Fundamental Rights Officer, who has already reinforced the staffing of the Office with 40 fundamental human rights monitors, as required under the Regulation referred to above (Article 110). After the OLAF report was issued, making critical remarks on interference of FRONTEX officials in the investigations of the Fundamental Rights Office related to FRONTEX activities in Greece, FRONTEX committed in a relevant communication to practically reinforce the independent functioning of the Office⁵⁴.

50. The Pact provides that "To guarantee effective access to asylum procedures and respect for fundamental rights, Member States, working closely with the Fundamental Rights Agency, will put in place an effective monitoring mechanism, already at the stage of the screening as an additional safeguard". See proposal for a Regulation of the European Parliament and of the Council introducing a 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, [COM (2020) 612 final of 23.9.2020].

51. See section 4.4 below for the FRA's 2022 Guiding Principles.

52. Regulation (EU) 2016/1924.

53. For thorough information on this initiative see Return Report 2020 pp. 28-29 <https://old.synigoros.gr/?i=human-rights.en.recentinterventions.821099>

54. <https://frontex.europa.eu/media-centre/news/news-release/statement-of-frontex-executive-management-following-publication-of-olaf-report-amARYy>

The Ombudsman, as a constitutional authority with the mandate to protect fundamental rights and as the national mechanism responsible for ensuring such protection in the field of returns, cooperates also with the FRONTEX Complaints Mechanism. In the context of the Complaints Mechanism, the FRONTEX Fundamental Rights Officer notifies the Ombudsman, as required under the European Regulation cited above [Article 11(4)], of any complaints on fundamental rights violations committed by national officials in the context of FRONTEX operations.

In 2021, the Ombudsman received two (2) complaints from the FRONTEX Complaints Mechanism on illegal pushbacks at the border of Evros, and five (5) similar complaints in 2022⁵⁵. The 2021 cases are still pending. In the first case (CMP 2021-00004), the Ombudsman has forwarded for the second time the relevant preliminary administrative investigation report to the Hellenic Police to supplement the investigation. In the second case (CMP 2021-00018), which in fact concerns a FRONTEX interpreter, the Ombudsman's own investigation is under way. The five (5) complaints forwarded by FRONTEX in 2022 also concern pushbacks of individuals of various origin (Syria, CMP 2022-00001 and CMP 2022-00040, Afghanistan CMP 2022-00034, Turkey CMP 2022-00042 and Cuba CMP 2022-00040) through Evros river, raising in particular issues of ill-treatment, removal of moneys/movable and personal property, illegal detention, informal return to countries where there is a risk of persecution and violations of the right to non-refoulement and international protection and similar violations of the EU Charter of Fundamental Rights.

All these complaints are investigated by the Ombudsman in his capacity as the National Mechanism for Investigation of Arbitrary Incidents by law enforcement officers, which has triggered an official investigation of the reported incidents by the Hellenic Police⁵⁶. The Ombudsman monitors the Police investigations, assessing their completeness or deficiencies, and reserving the right of its own investigation, as prescribed by law⁵⁷. The Ombudsman notes that thorough

55. Two of which were already under investigation by the Ombudsman, to whom the relevant complaints had been submitted separately.

56. For more information about the much larger amount of complaints that are being investigated by the Ombudsman for illegal pushback of foreign nationals at land or sea borders, on the basis of complaints filed by the purported victims directly to the Ombudsman, see the relevant chapter of the 2021 special report of the National Mechanism for Investigation of Arbitrary Incidents p. 77 et seq. [https://www.synigoros.gr/en/category/ekdoseis-ek8eseis/post/special-report-or-national-mechanism-for-the-investigation-of-arbitrary-incidents-\(emidipa\)](https://www.synigoros.gr/en/category/ekdoseis-ek8eseis/post/special-report-or-national-mechanism-for-the-investigation-of-arbitrary-incidents-(emidipa))

57. For more information about the National Mechanism for Investigation of Administrative Misconduct, see Article 1 of Law 3938/2011, as replaced by Article 56 of Law 4443/2016 [now Article 188(1) of Law 4662/2020, GG A 27/07.02.2020].

and impartial investigation of similar complaints by the State Authorities is an essential requirement of the rule of law⁵⁸.

4.3. Guidelines for independent border monitoring mechanisms

According to the European Commission's proposal⁵⁹, EU Member States are encouraged to establish effective mechanisms to monitor respect to fundamental rights at the EU borders. To ensure such effective monitoring, the Commission has asked the EU Fundamental Rights Agency (FRA) to issue guidelines to Member States. FRA issued a relevant Guideline⁶⁰ in 2022, according to which national border control mechanisms should meet the following conditions, expressed in the form of eight (8) key markers⁶¹:

- Full independence and autonomy to carry out their work.
- A broad mandate to monitor all aspects of border operations at any time.
- Sufficient powers to have unimpeded access to monitor operations and records as and when the need arises.
- Relevant multidisciplinary legal knowledge and expertise on fundamental rights and migration at its disposal to handle a broad range of situations such as dealing with children, handling vulnerable people.
- Adequate resources and funding to work effectively.
- The ability to be transparent and report on its work, including making recommendations.
- The capacity to work together with existing monitoring mechanisms.
- The duty to be consulted and informed by national border and migration authorities as they themselves carry out their own work.

In these guiding principles to Member States, the FRA recommends that this role should be comprehensive in scope; supported in terms of both human and

58. See also ECtHR judgment *B.Y. v. Greece* of 26.1.2023, whereby the Court condemned Greece for violation of the procedural part of Article 3 ECHR as a result of deficient investigation of the refoulement potential of a Turkish citizen in 2013, in a case where the substantive violation was not solidly established.

59. In the New Pact on Migration and Asylum, 23.9.2020, Communication from the Commission [COM (2020) 609 final of 23.9.2020], https://ec.europa.eu/home-affairs/news20200923/new-pact-migration-asylum-setting-out-fairer-more-european-approach_en

60. European Union Agency for Fundamental Rights, Establishing national independent mechanisms to monitor fundamental rights compliance at EU external borders: practical guidance, Publications Office of the European Union, 2022, <https://data.europa.eu/doi/10.2811/03425>

61. <https://fra.europa.eu/en/news/2022/8-key-requirements-monitoring-fundamental-rights-eu-external-borders>

financial resources; and that it should build on the existing mandate and expertise of the national mechanisms, such as the Ombudsman, offering the most independence safeguards⁶².

The FRA guiding principles for national border monitoring mechanisms reinforce, now also from the EU side, the remarks made by international organisations (UN, Council of Europe) on the need for independence, transparency, broad responsibilities, specialised staff and adequate resources of the national mechanisms that will be required to carry out independent border monitoring operations⁶³. Thus, it becomes clear that internal bodies of the Administration, whether individual agents or administrative committees, fail to meet the basic “external monitoring” requirement of substantive guarantees of independence from the governments, as the Ombudsman has pointed out in a letter to the Minister of Immigration and Asylum⁶⁴.

It is noted that, in their March 2023 amendments to the proposed Border Screening Regulation, the LIBE Committee of the European Parliament highlighted the need for independent national border monitoring mechanisms, making specific reference to national Ombudspersons, at every stage and beyond the screening process, including border surveillance, detention, etc., with broad powers of access to all places, persons and files⁶⁵.

62. <https://fra.europa.eu/en/news/2022/establishing-independent-and-effective-national-border-monitoring-mechanisms-expert>

63. For information on the prerequisites for independent border control mechanisms on which the UNHCR, the Office of the UN High Commissioner for Human Rights (OHCHR) and the Council of Europe’s Committee for the Prevention of Torture (CPT) converge, see Return Report 2021 pp. 38-39 <https://www.synigoros.gr/en/category/ekdoseis-ek8eseis/post/special-report-2021-on-returns-of-third-country-nationals>. See also 2022 annual CPT Report, paras. 101-105 <https://www.coe.int/en/web/cpt/-/the-council-of-europe-anti-torture-committee-cpt-calls-for-an-end-to-illegal-pushback-practices-and-for-increased-safeguards-against-ill-treatment>

64. In his letter dated 29.07.2022, the Ombudsman requested Government to reconsider his participation in two committees of the Ministry of Immigration and Asylum, assigned with the appointment of a fundamental rights officer at the Ministry and with the monitoring of border procedures / implementation of border legislation, in order to ensure the independent constitutional role and the scope of the Independent Authority and also the scope of the aforementioned administrative committees. <https://www.synigoros.gr/en/category/grafeio-typoy-and-epikoinwnias/post/the-ombudsman-s-reservations-regarding-his-participation-in-committees-of-the-ministry-of-migration-and-asylum>

65. <https://www.europarl.europa.eu/news/en/press-room/20230327IPR78519/new-rules-on-screening-of-irregular-migrants-and-faster-asylum-procedures>

Conclusion

Constitutional guarantees of independence and accountability to the Parliament, transparent operation, power to monitor every procedure and access to every evidence, qualified staff and experience in investigating issues of migration, police and asylum, are key features of the Ombudsman as the National External Monitoring Mechanism for Forced Returns, and key prerequisites of any national border monitoring mechanism that EU Member States are required to establish⁶⁶, in line with the guidelines of the FRA and the European Parliament.

66. A last minute development: in the Council of Justice and Home Ministers on 8-9.-6.2023 an agreement was reached about two basic components of the New Pact on Asylum and Migration, the Regulation proposals on Asylum and Migration and on Asylum procedures. <https://www.consilium.europa.eu/en/meetings/jha/2023/06/08-09/>

Abbreviations

AEMY	Health Units SA
BGD	Border Guard Department
CPT	Council of Europe's Committee for the Prevention of Torture
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECRE	European Council for Refugees and Exiles
ECRI	European Commission against Racism and Intolerance
ELAS	Hellenic Police
EMIDIPA	National Mechanism for the Investigation of Arbitrary Incidents
EU	European Union
F	File
FRA	European Union Agency for Fundamental Rights
FRONTEX	European Border and Coast Guard Agency
IOM	International Organisation for Migration
IT	Information Technology
JMD	Joint Ministerial Decision
JRO	Joint Return Operation
KED	Closed Control Facility
L.	Law
LIBE	European Parliament's Committee on Civil Liberties, Justice and Home Affairs
MMD	Migration Management Department
NGO	Non-Governmental Organization
NPM	National Preventive Mechanism against Torture and Ill-treatment (Law 4228/2014-OPCAT)
NRO	National return operation
OHCHR	Office of the High Commissioner for Human Rights
OPCAT	Optional Protocol to the Convention Against Torture
PROKEKA	Pre-Removal Centre

RIC

Reception and Identification Centre

UNHCR

United Nations High Commissioner for Refugees

