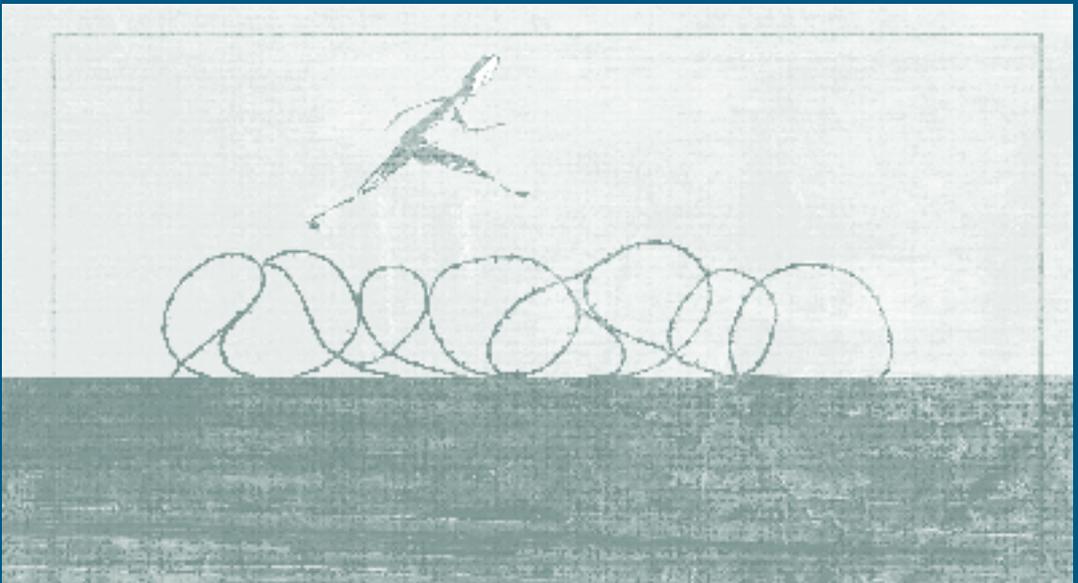


RETURN OF THIRD COUNTRY NATIONALS

SPECIAL REPORT 2020



EUROPEAN UNION
Asylum, Migration and
Integration Fund



NATIONAL PROGRAMME
ASYLUM, MIGRATION AND INTEGRATION FUND 2014-2020
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IMPLEMENTATION SERVICE
(EPIS)

RETURN OF THIRD COUNTRY NATIONALS

SPECIAL REPORT 2020

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 I. Pottakis and the Deputy Ombudsman Giorgos Nikolopoulos.

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Introduction

The year 2020 was dominated by the advent of the pandemic, creating new risks and changing the requirements of both the return procedures for third-country nationals and the external monitoring of those procedures. The primary concern of the State authorities was the necessary and appropriate measures to safeguard public health. The Greek Ombudsman contributed to this effort with its first public intervention relative to Covid-19 in March 2020, by proposing a number of measures for various vulnerable population groups, including administrative detainees awaiting return. The response by the Hellenic Police (ELAS) was immediate, with personal protection equipment, disinfections and restrictions on visitors to detention centres and police holding cells. The Ombudsman's related recommendation to reduce overcrowding at detention facilities, in accordance with the guidelines of international and European organisations, however, was not heard – an indication of the lesser importance the Greek Administration has always attached to alternatives to detention. Given the spread of the coronavirus and the progress of the return operations throughout the year, the Authority also proposed conducting coronavirus tests on all those participating in return operations, particularly those by air.

At European Union level, in the early part of the pandemic, the Commission attempted to anticipate concerns about the reasonable prospect of removal, along the lines that the suspension of return procedures for public health reasons was a temporary measure. Indeed, Joint European operations resumed within about three months of the pandemic outbreak. Nevertheless, concerning the Joint EU-Turkey Statement, Turkey suspended readmissions indefinitely, citing a need for protection against the pandemic.

The Returns Team formed by the Greek Ombudsman, as specified by the Return Directive and Law 3907/2011 on the external monitoring of forced returns procedures and operations, continued to be very active in 2020. To ensure the fundamental rights of returnees and transparency of the relevant administrative activity, Greek Ombudsman staff participated as monitors in 5 National Return Operations (NROs) (by air) to Pakistan and Georgia; 6 European Joint Return Operations (JRO-CRO) coordinated by Frontex (by air) to Pakistan, Georgia, Armenia and Afghanistan; 6 readmissions, 4 by sea and 2 by air, from Lesbos to Turkey up to March 2020 and 3 overland removal operations from Thessaloniki to Albania. Meanwhile, random inspections of procedures and conditions at administrative detention facilities were carried out with visits to the holding cells at the Thessaloniki Aliens Directorate (3 on-site) and at 2 Migration Management Departments (Thermi, Agios Athanasios), where third-country nationals are held pending return.

The high number of administratively detained third-country nationals in Greece, totalling nearly 4,000 in 2020, is of concern not only in light of the emergency, increased requirements for preventing further spread of the virus, but also due, for yet another year, to the starkly disproportionate number of returnees, which is continuously falling. This raises reasonable questions regarding the necessity of adopting and retaining for months the most onerous measure - that of deprivation of personal liberty, which according to Directive 2008/115/EC (Return Directive) is justified only to ensure that the return is implemented.

The relatively small number of returns, however, is not just limited to Greece. The European goal of intensifying the return of irregular migrants to their countries of origin does not seem to

be verified by figures available to date from Eurostat¹, which show an effective rate of returns in the EU of 29% for 2019, down somewhat from 2018 (32%)². For this reason, the New Pact on Migration and Asylum that the European Commission announced in September 2020 refers to the need to increase voluntary returns³.

In addition, Eurostat's annual statistical data confirm that the largest group of third-country nationals who are removed, both in absolute numbers and as a proportion of the total, involves citizens from Ukraine or Albania, and not countries of origin related to the sharp increase in mixed flows since 2015⁴. According to the data forwarded to the Ombudsman by ELAS, the same appears to hold true for our country. The Greek authorities return Albanian citizens at a rate of 79% of forced removals⁵.

Meanwhile, there is still pressure from the entry of irregular migrants at EU borders, though there was a 10% drop due to the coronavirus⁶; however, applications for asylum in the EU, due to measures against the pandemic, were down by 33% in the first 10 months of 2020, compared to 2019⁷. In the 3rd quarter of 2020, according to Eurostat figures⁸. Greece continued, as in 2019, to be in 4th place in absolute numbers for first application for asylum. Nevertheless, in relation to its population, it ranks 3rd amongst EU Member States.

These data help explain the overall picture of how forced returns in Greece, amounting to 3,660 in 2020 out of a total of 7,151 returns, are moving, with a steady decrease over recent years, as detailed in the relevant chapter of this report.

The European framework for exercising competence of external monitoring of returns continued in 2020 to generate increased requirements for cooperation between the Ombudsman and European bodies such as Frontex, while requests for greater transparency in European operations gained footing through the initiative of independent authorities, such as the Ombudsman and its counterparts in Member States (the "Nafplio Initiative") and the Ombudsman's cooperation in the European Ombudsman's inquiry of the Frontex Complaints Mechanism, as detailed in the relevant chapter.

Returns are the focus of the proposal announced on 23-9-2020 by the European Commission for the New Pact on Migration and Asylum. The Commission appears to be shifting solidarity

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1. Relevant Eurostat statistics are issued in the second half of the following year. Overall statistics published in 2020 refer to the year 2019. Enforcement of immigration legislation statistics - Statistics Explained (europa.eu)
 2. https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/statistics-migration-europe_en#returns.
 3. "as the most efficient and sustainable way to enhance returns", p.9, Communication from the Commission, COM (2020)609 final, Brussels, 23-9-2020, https://ec.europa.eu/home-affairs/news20200923/new-pact-migration-asylum-setting-out-fairer-more-european-approach_en
 4. In 2019, 27,200 Ukrainians were returned from the EU overall, and Albanians were in 2nd place with 15,400 returns. https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Enforcement_of_immigration_legislation_statistics#Returns_of_non-EU_citizens.
 5. For 2019, the rate of Albanian citizens comes to 82% of forced removals, returns and expulsions, while the rate was similar (83.6%) for 2018.
 6. In the first 10 months of 2020, 114,300 illegal entries were recorded at EU borders.
 7. https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/statistics-migration-europe_en#returns
 8. 14-12-2020 https://ec.europa.eu/eurostat/statisticsexplained/index.php/Asylum_quarterly_report

on issues of distributing asylum seekers amongst Member States to “return sponsorship”, a proposal which does not reduce the burden on countries of first entry, like Greece. In addition, aiming at more efficient management of the borders, the Commission is endeavouring to link the procedures for asylum and returns at the borders in a single legal instrument. This is detailed in the corresponding chapter of this report with reference to its provisions for recasting the Return Directive, which has drawn sharp criticism from the European Parliament. To safeguard the rights of those involved in rapid “pre-entry” and asylum screening procedures at the border, the Commission is proposing that Member States assign special responsibilities to independent national monitoring mechanisms, in cooperation with the EU Agency for Fundamental Rights.

These European developments signal a trend towards transition to a stricter framework for migration, asylum and returns, within which national mechanisms for the protection of fundamental rights, such as the Ombudsman, are required to remain vigilant and to continue to carry out their responsibilities in a wider scope.

Athens, March 2021

Andreas I. Pottakis
The Greek Ombudsman

1. External monitoring of forced returns in 2020

1.1. The monitoring competence in practice

The Greek Ombudsman is the national mechanism for the external monitoring of procedures for the forced return of third-country nationals to their countries of origin, as specified by the provisions of European Union law (Article 8.6 of Directive 2008/115/EC – “Return Directive”) and Law 3907/2011, which incorporated the Directive into Greek law (article 23.6). The goal is twofold: **transparency of administrative activity and protection of fundamental rights of returnee third-country nationals.**

This **specific competence has been systematically performed since 2014**, comprising a broad scope of frequent checks of national return operations by air or joint European operations with other countries to various countries, as well as forced removal operations by land, sea or air to bordering countries, pursuant to readmission agreements. It also includes visits to Pre-removal centres or other administrative detention facilities for third-country nationals.

The systematic exercise of the special external monitoring competence specified by the Return Directive is part of implementing the Schengen acquis and the relevant periodic evaluation of Greece, which was already successfully conducted for external monitoring in 2016 and is scheduled again for 2021.

The extension granted in April 2020 for funding until 31/12/2022 for the action “Forced Return Monitoring and Control System 2017-2022”, by the European Asylum, Migration and Integration Fund (AMIF), with the European and Development Programmes Division (YDEAP) of the Ministry of Citizen Protection acting as the delegated authority for the programme, is critical to the continuation of the project implemented by the Independent Authority with the assistance of the European Programmes Implementation Service (EPIS) of the Hellenic Parliament.

The implementation of the action in 2020 was directly affected by the emergency measures adopted in Greece and across Europe to prevent the spread of the Covid-19 coronavirus and to respond to the impact of the pandemic outbreak.

During 2020, members of the Greek Ombudsman Returns Team visited:

- the holding cells at the Thessaloniki Aliens Directorate (3 on-site visits) and
- 2 Migration Management Departments (Thermi, Agios Athanasios), where third-country nationals are held pending return.

and took part as monitors in the following operations:

- 5 National Return Operations (NRO) (by air), to Pakistan and Georgia
- 6 European Joint Return Operations (JRO-CRO) coordinated by FRONTEX (by air) to Pakistan, Georgia, Armenia and Afghanistan
- 6 readmissions, 4 by sea and 2 by air, from Lesbos to Turkey up to March
- 3 overland removal operations from Thessaloniki to Albania.

In addition, Ombudsman staff took part as trainers in 1 FRONTEX returns training for police escorts in Lesbos, as well as 1 similar training session for ELAS in Athens. The Greek Ombudsman,

as an active member of the **Forced Return Monitoring III (FREM III)** programme, also took part in working meetings (conducted remotely in 2020) with programme partners responsible for the external monitoring of agencies in various EU Member States. The meetings were staged by the International Centre for Migration Policy Development (ICMPD), which is responsible for implementing the European Commission-funded project.

The positive points of return operations in 2020 included

- the limited used of restraints during operations and
- the individualised assessment of the need for restraints.

However, the **ongoing problems** of forced return procedures persist, and include

- the absence of language interpretation and
- failure of timely notification of third-country nationals of their removal from the country.

In addition, the Ombudsman insists on the need for physical medical examinations, rather than being conducted by interview, to determine the ability to travel of all returnees and issue fit-to-travel certificates.

Under pandemic conditions, in addition to other measures, the Ombudsman proposed to ELAS Headquarters that Covid-19 coronavirus tests should be conducted on all returnees and those participating in any capacity in the operation.

1.2. Challenges raised by the pandemic

The spread of the Covid-19 coronavirus directly resulted in suspension mainly of returns by air in Europe for a period of about 3 months, from mid-March to the end of May 2020. In Greece in particular, there was an additional suspension of implementation of the Joint EU-Turkey Statement and of readmissions from Lesvos to Turkey, with the Turkish side citing the coronavirus, from 19-3-2020 to the present time.

EU guidelines for responding to the pandemic

The Commission's communication dated 17-4-2020 "**Covid-19: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement**"⁹ proposed **practical measures for carrying out return procedures in pandemic conditions**, recognising, at the same time, that national authorities were confronted with difficulties that, amongst others, included reduced availability of staff at migration authorities, significant decrease in available commercial flights and other transport means, and restrictive entry measures imposed by third countries. Member States also faced practical challenges on how to handle **pre-removal detention** when implementing measures to prevent and protect against the risk of contagion and the spread of Covid-19. For this reason, the Commission provided guidance to support national authorities in identifying the possible measures that could be taken to ensure continuity and safety of return procedures. The Commission stressed that when carrying out return actions and procedures, the competent

9. Communication from the Commission, Covid-19: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement (2020/C 126/02) https://ec.europa.eu/commission/presscorner/detail/en/ip_20_666

authorities in Member States must take fully into account the national **health protection measures** aimed at preventing and containing the spread of Covid-19 and apply them **in a proportionate and non-discriminatory manner** to all illegally residing third-country nationals. Particular attention should be paid to the situation and needs **of vulnerable persons**. The particular situation in the third country with regard to the national health protection measures and the impact of Covid-19 should be also taken into account.

As to the availability of transport means and possible restrictive entry measures instituted by third countries,¹⁰ it is key to take **all necessary measures to minimise the health risks to those participating** in return operations, procedures and activities.

As to procedures before conducting the pre-return operation, the Commission specified that, despite the temporary disruption caused by these necessary measures, work on return should continue, in particular by **implementing those activities that can be carried out despite the restrictive measures (e.g., identification, re-documentation, enrolment in assisted voluntary return and reintegration programmes)**, to ensure readiness for when return operations can be resumed. In addition, **voluntary returns should be prioritised**, as they lower the health and safety risks of return operations, including by minimising the risks for irregular migrants and the accompanying staff involved.

In regard to cooperation with third countries, the Commission noted that they continue to have an **obligation under international law to readmit their own nationals**, and so urged Member States – with its support – to continue efforts to cooperate on readmissions/return operations.

Acknowledging that there will be cases in which returns cannot be carried out due to the measures taken to contain the Covid-19 pandemic, the Commission reminded Member States that they enjoy broad discretion **to grant a residence permit or other authorisation offering a right to stay to irregular migrants for compassionate, humanitarian or other reasons**, as provided for by Article 6(4) of Directive 2008/115/EC.¹¹

Noting that there is a **need to alleviate the consequences of such restrictions** and ensure that the measures taken during administrative procedures by the competent authorities, on the one hand, are **based on and take due account of the individual circumstances** of each irregular migrant and **guarantee the right to be heard**, in accordance with the general principles of EU law, the Commission raised **the idea of using tools that assume zero or reduced physical presence**. This approach involves **using alternative means** not requiring or reducing the physical presence of the third-country national, while maintaining **an open channel of communication and cooperation with authorities of third countries**. For this reason, the Commission proposed: using video conferencing, written exchanges or other channels for virtual and remote communication to carry out interviews, **while ensuring access**

10. FRONTEX provides regular updates on the measures taken by air carriers and third countries through the Integrated Return Management Application (IRMA).

11. Law 3907/2011 CHAPTER III, Harmonisation of Greek legislation with the provisions of Directive 2008/115/EC. Paragraph 4 of Article 21 of Law 3907/2011, as replaced by Article 10(1) of Law 4332/2015, provides that *“The competent authorities in each case may at any time grant an individual residence permit for compassionate, humanitarian or other reasons to a third-country citizen residing illegally in Greek Territory, in accordance with the provisions of Articles 19 and 19A of Law 4251/2014, as in force from time to time.”*

to interpretation and legal assistance; using Readmission Case Management Systems for contacts with third countries' consular authorities; using FRONTEX support; continuing return and reintegration counselling activities and for the enrolment in assisted voluntary return; prolonging the deadlines for enrolling in such programmes; using FRONTEX financial support to introduce adjustments to national return case management systems (RECAMAS) to register necessary information regarding returnees.

The Ombudsman's recommendations

After the onset of the pandemic, the Greek Ombudsman, **in his first public letter** of 27-3-2020 to the Government regarding necessary measures to protect against the coronavirus for **various vulnerable groups**, unaccompanied minors, those staying at Reception and Identification Centres and hospitality facilities and others¹² **particularly for administratively detained third-country nationals awaiting return, proposed the following:**

- 1. stricter hygiene and sanitary measures and implementation of Greek NHS directives at Pre-removal centres**, personal measures and distancing while transporting to protect detainees and police.
- 2. reduce overcrowding** at Pre-removal centres by exhausting all milder measures as alternatives to detention, in accordance with the European Return Directive, and
- 3. avoiding administrative detention of third-country nationals at police holding cells**, which are inadequate for long stay detention due to their limited purpose and poor conditions, **and complete avoidance of mass detentions** on ships or other enclosed spaces without the practical means to maintain a safe distance.

The Ombudsman also noted that **protection from coronavirus (and treatment) for third-country nationals**, regardless of their residence status, is **a basic constitutional application of the principle of equality without discrimination on the basis of origin or other grounds, and not just a basic requirement for public health**. The European Commission, in its guidelines for returns in April 2020, drew the attention of Member States to the need for quarantine measures against third-country nationals to be proportionate, reasonable and non-discriminatory.¹³

ELAS responded (in March and July 2020) that it applies personal hygiene, disinfection and protective measures in cooperation with medical/nursing personnel at Health Unit S.A. (AEMY), which has been working with Pre-removal centres since 2019. It also said that between March and June, both transfers and visits by individuals or agencies to police holding facilities had been restricted in general. The creation of a **health unit** for confirmed cases of administratively detained third-country nationals in September 2020 at the Amygdaleza Pre-removal centre was also a positive step.

This was the Administration's response to just one of the Ombudsman's three relevant proposals. Reduction of overcrowding, which was a proposal by the Council of Europe¹⁴ and

12. Measures to prevent the spread of Covid-19 and vulnerable population groups at <https://www.synigoros.gr/?i=kdet.el.news.643469>.

13. Ibid. 17-4-2020 European Commission guidance on returns

14. Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or

a fundamental condition for the legality of administrative holding in pandemic conditions (significant corresponding ruling by the French Conseil d'Etat of 27-3-2020¹⁵), was not accepted. In fact, administrative holding continued without significant change at police holding facilities around the country as well. The Administration's failure to apply alternative to detention measures during the pandemic gives rise to reasonable questions, in view of the above, particularly since the Return Directive mentions indicative restrictive conditions¹⁶ *“that aim at avoiding the risk of absconding, such as regular reporting to the authorities, submitting an appropriate financial guarantee, submitting documents, or the obligation to stay at a certain place”*, which were incorporated into Article 22(3) of Law 3907/2011 and to which Article 30(1) of Law 3907/2011 expressly refers as alternative to detention measures.

For this reason, the Greek Ombudsman during 2020 continued in its interventions regarding administrative detention to propose the above alternative measures as provided by law, as well as to examine practical measures put forth by the Commission, including: *“regular reporting to authorities through video calls, in compliance with data protection rules”*.

Finally, the Ombudsman noted that for the protection of the health and safety of everyone, returnee third-country nationals, police escorts and Ombudsman's monitors must first have been tested for **coronavirus**. Nevertheless, since mid-December 2020, ELAS has been testing only those returnees whose countries of origin (e.g. Pakistan) require testing as a condition for their return. The Ombudsman noted the contradiction between protective measures on commercial flights and joint European operations run by FRONTEX, stressing that the concern for the health of all returnees is a duty without ethnic discrimination and that the spread of the coronavirus does not distinguish between people present in an official capacity or not, particularly on long flights. The Ombudsman believed and still believes that testing of all participants in a forced return operation is a self-evident measure for protecting public health and continues his advocacy to the Ministry for Citizen Protection for this purpose.

Punishment (CPT) (20-03-2020) https://www.coe.int/en/web/cpt/news-2020/-/asset_publisher/F4MCR6Bvx1tS/content/covid-19-council-of-europe-anti-torture-committee-issues-statement-of-principles-relating-to-the-treatment-of-persons-deprived-of-their-liberty-?_101_INSTANCE_F4MCR6Bvx1tS_languageld=en_GB

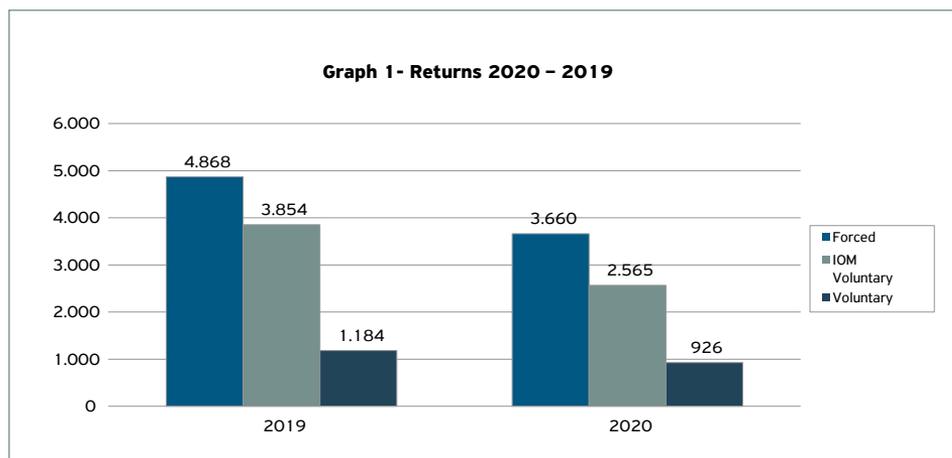
15. Conseil d'État, 27 mars 2020, Demande de fermeture temporaire des centres de rétention administrative (CRA) <https://www.conseil-etat.fr/ressources/decisions-contentieuses/dernieres-decisions-importantes/conseil-d-etat-27-mars-2020-demande-de-fermeture-temporaire-des-centres-de-retention-administrative-cra>

16. Potential for cumulative application to voluntary departure, Article 3(7) of the Directive

2. Information on the scope of external monitoring

2.1. Figures related to returns

Data released by ELAS indicate **3,660 forced returns** in 2020, including deportations and readmissions based on bilateral agreements with border countries (79% Albanian citizens), compared to 4,868 in 2019 (see *Graph 1*). As regards this reduction from the previous year (by 24.8%), it should be viewed in light of the suspension of returns throughout Europe for a period of approximately 3 months – from mid-March to end of May 2020 – due to Covid-19. During this period, Greece conducted only returns by land of Albanian citizens to the neighbouring country; the suspension in readmissions from Lesvos to Turkey, from 19-3-2020 to the present, should also be taken into consideration. From January to March 2020, there were 139 readmissions of returnees to Turkey based on the Joint EU-Turkey Statement.¹⁷



Nevertheless, the Ombudsman noted that the decrease in number of forced returns is not limited to this year but has been a consistent phenomenon for the five-year period 2015-2020 (see *Graph 2*), a fact that raises reasonable concerns about the effectiveness of the measure.¹⁸

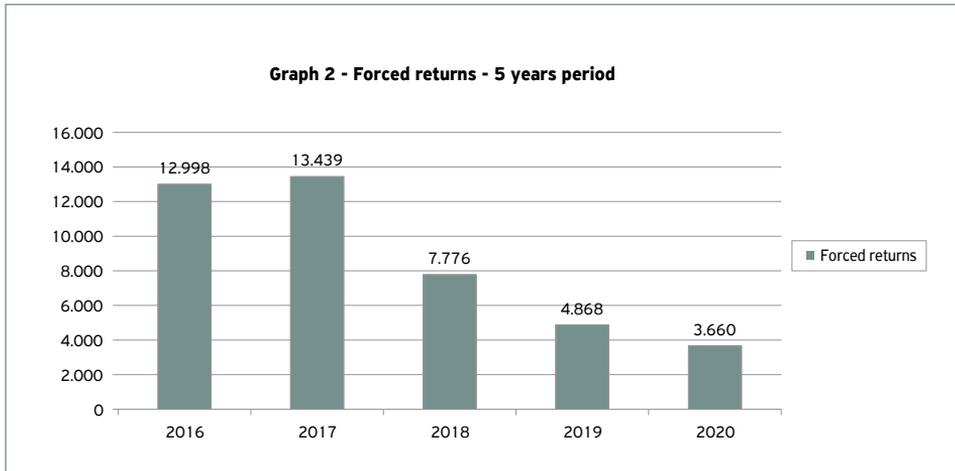
Additionally, ELAS figures include a number of returnees within the “voluntary departure” framework (returns under the Return Directive¹⁹ based on Article 22 of Law 3907/2011

17. According to the press release from the Greek Ministry of Migration and Asylum dated 19-1-2021. In the 11,300 “departures” from Greece in 2020, the Ministry counts not only the returns of irregular migrants, but also transfers of asylum seekers under the Dublin Regulation, relocations of unaccompanied minors and other relocations of asylum seekers to EU countries. <https://migration.gov.gr/etos-anaktisis-toy-elegchoy-tis-metanasteytikis-krisis-itan-to-2020/>

18. Given that, at European level, the number of returnees is far lower than the number of irregular migrants, see the introduction to this report.

19. Voluntary departure (Article 7 of the Directive)

following a return decision with a deadline for voluntary departure, holder of certificate 78a,²⁰ waiver of asylum), specifically 926 returns. Moreover, there were 2,565 returns in 2020 as part of the voluntary returns programme²¹ implemented by the International Organisation for Migration (IOM).



The Ombudsman maintains the same reservations expressed in its previous report about the extent to which “voluntary” return is the product of the returnee’s free will, given the onerous consequences of not consenting to removal, based on findings in European Court of Human Rights case law. Following the judgment in *N.A. v. Finland* of 14-11-2019,²² the ECtHR in its judgment in *M.A. v. Belgium* of 17-10-2020 reiterated that there must be a substantial prospect for exercising rights and that a written consent obtained without an interpreter present, full prior substantive information about the right to international protection and legal assistance does not change the nature of the removal as forced.²³

We note that the issue of the small number of returns does not apply only to Greece, but to the broader field of the European Union, according to Eurostat data available to date.²⁴ The EU returned 142,300 irregular migrants in 2019, with 44% comprising forced returns, while the entry of irregular migrants amounted to 718,000 persons, of whom 491,000 were issued a removal decision. Eurostat presents **a return effectiveness indicator in the EU of 29% for 2019**, somewhat lower than for 2018 (32%).²⁵ It is also interesting that, based on Eurostat’s

20. Certificate of non-removal for humanitarian reasons, as provided for in Article 78a of Law 3386/2005.

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

22. See Report for 2019, p.15.

23. Paragraph 61 of ECtHR judgment in *M.A. v. Belgium* of 27-10-2020 (application no. 19656/18).

24. Relevant Eurostat statistics are issued in the second half of the following year. Overall statistics published in 2020 refer to the year 2019. Enforcement of immigration legislation statistics - Statistics Explained (europa.eu)

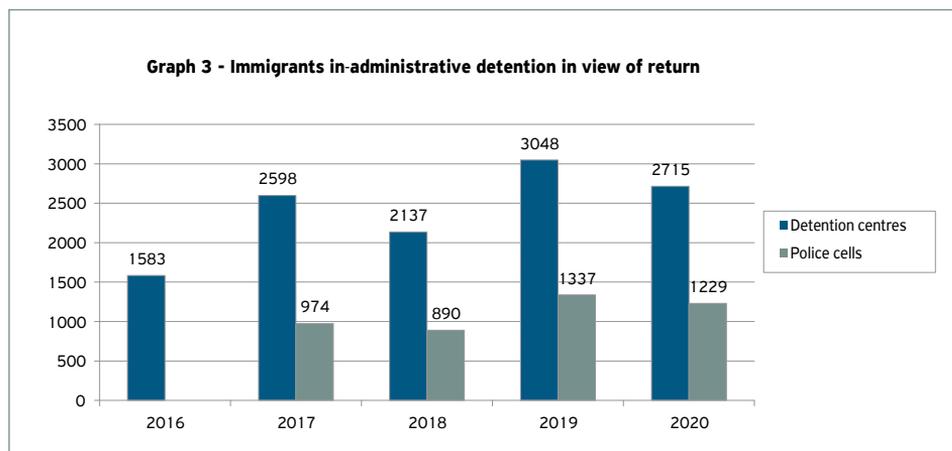
25. <https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/statistics->

annual statistical data, the largest group of third-country nationals who are removed, both in absolute numbers and as a proportion of the total, involves citizens of Ukraine and Albania, and not countries of origin related to the increase in mixed flows in 2015.²⁶

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

In 2020,²⁷ 2,715 third-country nationals were being held pending return at Pre-removal centres and 1,229 at police departments, approaching **a total of 4,000** (reduction of 10% in relation to 2019).

Data on administrative detention of third-country nationals for the five-year period (see Graph 3), i.e. comparison of the corresponding number of detainees each year,²⁸ both at Pre-removal centres and police holding cells, reveals that the number of detainees has remained consistently above 3,000 from 2017 to the present, and hovered around 4,000 for the years 2019-2020. The number of forced returnees was inversely proportional and has steadily declined from 2018 to 2020. This fact raises questions regarding the necessity and proportionality of imposing detention as the most onerous measure to ensure the forced return of irregular third-country nationals.



These concerns over the potential violation of the principle of proportionality in restricting personal liberty is further supported by confinement conditions. The Ombudsman's consistent position has been that detention in cells at police departments from the aspect of living

migration-europe_en#returns

26. In 2019, 27,200 Ukrainians were returned from the EU overall, and Albanians were in 2nd place with 15,400 returns. https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Enforcement_of_immigration_legislation_statistics#Returns_of_non-EU_citizens.

27. Data on ELAS administrative detention for 1-11-2020.

28. Data reported on 1 November of each year.

conditions when detaining people for several days or months is inadequate. The occurrence of the pandemic in 2020 created additional health risks at all detention facilities and a corresponding obligation for attention by the authorities. ELAS responded²⁹ to the challenge posed by the pandemic by increasing personal hygiene and health protection measures at Pre-removal centres and police departments and, for a time, suspending transports and visits; nevertheless, the Ombudsman's recommendation³⁰ to reduce overcrowding where possible at administrative detention facilities by applying alternative measures was not followed by the Administration. In fact, in complete opposition to the Ombudsman's intention, Article 51 of Law 4686/2020 established detention as the rule, and only by exception could alternative measures be imposed instead of detention. This legislative initiative in April 2020, as the Ombudsman had pointed out in advance, reverses the rule-exception scheme provided for in the Return Directive (see Chapter 5 below).

29. See Chapter 1.2 of this report, above.

30. <https://www.synigoros.gr/?i=kdet.el.news.643469>

3. External monitoring of third-country nationals return procedures and operations

On-site visits by Greek Ombudsman staff to Pre-removal centres (or any detention facilities for third-party nationals awaiting return) and **monitoring the execution of removal operations** by participating with monitors constitute actions that form the core of the return external monitoring mechanism function in practice. The Ombudsman, **as an independent monitoring authority, is required to identify individual problems or irregularities in the returns procedure and the detention and removal conditions and to contribute, with specific observations, to improving conditions and procedures in the medium term.**

3.1. Return operations by land

In 2020, the Greek Ombudsman took part with monitors in **3 return operations** from Thessaloniki to Albania via Krystallopigi. The operations were carried out without problems and were completed smoothly. Technical issues and deficiencies related mainly to logistical infrastructure were identified.

The following **positive points** were identified in the operations:

- the monitor noted during the pre-removal check that the returnee dossiers were complete;
- the detention facility supervisors gave the daily compensation early in the morning and provided breakfast from the canteen;
- the escort leader, the police officers in the detention facility and the escorts were courteous, professional and organised the embarkation, disembarkation and delivery of the third-country nationals, who were not restrained at any stage of the operation, efficiently and with respect for human dignity;
- the escort leader made sure there was a portable first aid kit in the vehicle;
- the procedures during delivery to the Albanian authorities and the checks that precede it have been shortened and this prevents potential complaints and hardship;
- the third-country nationals had their temperature taken before departure and received a protective mask.

The following **negative points** were identified in the operations:

- all those being returned, without exception, were held in detention facilities/cells before and during the operation though it was neither necessary nor justified by some individualised need;
- the detention facility before departure at the Aliens Directorate is unsuitable as it has no yard time or beds;
- the transport vehicle has a separate isolation space where the third-country nationals sat on hard seats and remained locked up. The vehicle was worn out from many years of use, with a cracked windscreen, defective suspension, inadequate heat and broken door handle;
- The police escorts and the chief officer were in uniform and carried weapons.

- These issues should be taken into account and addressed by ELAS so that land operations can be conducted in a way that more fully safeguards the protection of citizens' rights as they return to their country, but also to facilitate the work of the police escorts.

The Greek Ombudsman **proposes:**

- creating an appropriate, clean and safe waiting area at the point of departure, rather than confinement, with seats, convenient access to restrooms and a separate yard;
- using properly maintained vehicles, such as tourist buses or vans;
- asking the third-country nationals being returned if they wish to undergo a preventive health examination by a doctor before the start of the operation;
- police escorts should wear civilian clothes and carry only restraints in terms of equipment;
- ensuring there is an escort on the operation with certified knowledge of first aid;
- providing access to a certified interpreter for persons who do not understand Greek.

3.2. Return operations by air - national and European³¹

The Greek Ombudsman in 2020 took part with monitors in **5 national return operations (NROs)** from Greece to **Georgia** and **Pakistan**, starting with the pre-departure phase to the return and debriefing phase.

During the Greek Ombudsman's years-long participation and experience with national return operations, deficiencies and organisational problems have been observed, but also greater professionalism and initiative by the competent officers for the benefit of returnees.

Briefly, the **main problems** identified in operations were as follows:

- the lack of timely notification of returnees regarding the operation (at least 24 hours prior);
- the lack of an interpreter while conducting the operation;
- the absence of a complete medical examination;
- failure to issue a fit-to-travel certificate following a medical examination;
- the unsuitability of transport vehicles (police transport buses and not tourist buses);
- no provision for meals before the flight;
- no provision for providing suitable clothing/footwear;
- body searches do not safeguard the privacy of returnees and are not conducted in a private and appropriate space (although during one operation, the female returnee was body searched in a separate area);

31. For these operations, the Independent Authority takes into account the increased requirements for vigilance relative to respecting the fundamental rights of citizens being returned to distant countries (such as Pakistan, Georgia, Afghanistan, and others) by air on a national or joint European flight. The forced removal from Greece may cause greater anxiety and confrontational reactions which the police escorts must handle in accordance with international and European rules and guidelines issued specifically for airline flights (FRONTEX Code of Conduct, the Council of Europe's 20 guidelines on forced return, the European Commission's Return Handbook, and others).

- the arrest of a third-country national/returnee who had a pre-scheduled appointment at the Decentralised Administration for a residence permit for exceptional reasons.

The **positive findings** include the following:

- the professionalism exhibited by police escorts during operations;
- the emergency cases that arose were handled with a disposition to communicate and in an effective manner by the escort leader, the support team and police escorts;
- respect for the returnee's right to apply for asylum and the returnee's exemption from the return operation until the application has been ruled upon;
- the non-generalised use of restraints, but restraint in isolated cases after individualised assessment of necessity;
- the exemption from the operation of a third-country national who had filed objections before the Administrative First Instance Court and was awaiting a ruling;
- initiative by the head of the operation to provide timely meals for returnees and particularly to provide special food for a returnee with diabetes;
- provision for measures to protect against coronavirus: the escort leader took care to distribute masks not only to escorts but also to those returnees who wanted one;
- attention to thorough documentation of personal items, placement of baggage in bags with legible labels and the name of each person.

Certain issues in national operations

Problems with organisation were noted in some operations.

Indicatively:

In a return operation to Pakistan, a returnee third-party national was not accepted due to a faulty passport and it was decided to return him to Athens without first locating his baggage. In another operation, 19 returnees were exempted from the operation the day before because they were not accepted by the competent Pakistani authorities.

In a return operation to Pakistan, the monitors noted that the operation was photographed by news media and photos showing the faces of returnees were posted on the internet, which constitutes a violation of rules set by the FRONTEX Code of Conduct for the **protection of personal data and the dignity of returnees**.

As to the issues of protection from the pandemic, the Greek Ombudsman has proposed conducting coronavirus rapid tests for both returnees and escorts before launching operations. However, instead of the medical examination and preparing a fit-to-fly certificate for returnees, only an interview was conducted with returnees and a form was filled out regarding the coronavirus after just taking their temperature.

The Greek Ombudsman took part in **5 European Joint Return Operations (JROs)** and **1 Collecting Return Operation (CRO)** – which involves escorting returnees to the point of boarding the airplane. Generally, the same findings were observed in Joint European operations as in national ones. Positive points included the **professionalism of the participants and**

the smooth conduct of the operation, while there continue to be **consistent problems, such as the lack of interpreters, the patchy interview-type examination by a doctor and failure to inform the third-country nationals in a timely manner of their imminent return to their home country.**

Certain issues in european operations

Problems with organisation were noted in some operations.

Indicatively:

The initial plan for an operation to Pakistan on 14-1-2020 was to be a Joint European operation, but the cancellation by another Member State changed it into a national operation. Nevertheless, despite this change, the operation was conducted smoothly.

The importance of selecting a highly experienced and trained person to head the operation, with regard to the prevention and effective handling of incidents with complete respect for the rights of the returnee third-country nationals, was confirmed. Also very important was the presence of a representative from the Pakistani Embassy to facilitate communication and interpretation (English and Urdu).

As to **protection from the pandemic**, a systematic failure to check for the continuous and proper use of masks was noted, and numerous police escorts and quite a few returnee third-country nationals did not wear a mask or wore it incorrectly, both within the transport vehicle and while waiting at the airport. Even more important was the failure to test third-country nationals for Covid-19, except by taking their temperature from a distance; this sometimes produced contradictory results.

In another operation, the monitor noted the **manner of examining** the returnees in the midst of the pandemic: the doctor took the temperature of each returnee, but because of the extreme heat in the examination area, the returnees were forced to exit the space and return to have their temperature taken again. Instead of a medical examination, **the doctor interviewed the returnees, but without an interpreter**, except for the voluntary participation of a returnee to facilitate the procedure.

In another operation, significant improvements were noted in the organisation and conduct of the operation, including the ongoing, detailed and substantive updating of escorts and the monitor by the escort leader, as well as the ongoing interest of the doctor in the health status of the returnee Pakistani citizens. Nevertheless, during a body search, a special medication was found in a returnee's baggage and the doctor recommended – though the return process was underway – the returnee's exemption from the operation.

In another case, the doctor on the Greek side took the temperature of all participants before the start of the operation and filled out the epidemiological questionnaire on all returnees; however, the doctor was not on the flight, which was deemed negative during the operation debriefing.

In conclusion, the Greek Ombudsman **formulates the following recommendations** for return operations by air:

- Ensure timely notification of returnee third-country nationals of the return operation (24 hours prior);
- Ensure the presence of an interpreter at all stages of the operation;

- Locate space for the doctor to examine each returnee third-party national in private and a similarly suitable space for body searches;
- Conduct a substantive medical examination of all returnee third-country nationals and issue the necessary fit-to-travel certificate to all;
- Have escorts and third-country nationals tested for Covid-19 two days before the operation.

3.3. Readmission operations to Turkey³²

In 2020, the Greek Ombudsman took part in **6 readmissions**, 4 by sea and 2 by air, from Lesbos to Turkey **up to 19 March 2020**, since at that point, Turkey cited the need to protect against the pandemic and suspended the procedures specified in the Joint EU-Turkey Statement, continuing the suspension to the present day³³.

a) readmissions by sea (from the port of Mytilene to Dekeli in Turkey by tourism vessel specially chartered by FRONTEX)

The monitors conducted external monitoring initially at a stage prior to the operation (review of dossiers, briefing with the escort leaders from FRONTEX and ELAS) and then during the course of the operation.

The **main findings** of the sea readmissions are as follows:

Positive points:

- Generally, the competent officials were professional and courteous towards the returnees, responding to their questions and informing them of the stages of the operation;
- In an operation which involved the return of a family, the female escorts were attentive to the members of the family and there was an effort to find separate spaces for the family of returnees throughout the process;
- There was no use of restraints (Velcro) in most operations;
- There is now special attention paid to placing returnees' belongings in carry bags.

Negative points:

- Incorrect estimation of time needed to carry out required procedures, resulting in delays in the operation (for example, non-finalised list of returnees, late arrival-transport to Lesbos port, etc.);
- Incomplete administrative dossiers on returnees (documents related to the stage of examining applications for international protection by the competent Asylum authorities and lack of electronic access to electronic records for the Authority's monitors);
- Insufficient attention paid to dignified clothing and footwear of returnees;

32. The Independent Authority considers that readmissions to Turkey from Lesbos, by air or sea, present enhanced requirements for transparency and ensuring that legality is observed and that fundamental rights are protected, with respect for the principles of international law, such as the principle of non-refoulement.

33. On 14-1-2021, Greece submitted a "Request to the European Commission and FRONTEX for the immediate return of 1,450 third-country nationals who are not entitled to international protection, based on the Joint EU-Turkey Statement" (<https://migration.gov.gr/aitima-gia-enarksi-epistrofon-se-toyrkia/>)

- Non-thorough medical examination of returnees (in some cases, returnees reported conditions such as tuberculosis, without there being relevant medical records);
- Inadequate space for conducting body searches (use of a storeroom);
- Delays in issuing return decisions;
- Absence of interpreters;
- The use of Velcro restraints on returnees during the phase of starting one of the operations.

Certain organisational issues

The Greek Ombudsman has raised the issue of the importance of protecting the **right to effective remedy** several times with ELAS. The practice of untimely serving of decisions in the presence of an interpreter, so that the parties are unable to appeal a decision to remove them, where they express such an intention within the specified time, deprives the citizen of the right to appeal. For example, a case arose in a return operation that a return decision was not served, so that, while boarding was underway, a police vehicle was called to transfer the applicant from the port to the Asylum Office in Moria under police escort so he could be served the decision and then be taken back to the ship for the return. The returnee expressed the will to appeal the rejection decision, as provided for by applicable law, but ELAS informed him that he was not exempt from the operation and that he would have to communicate with a legal representative (such communication was not possible as the operation was already underway).

During the same operation, an incident of **a returnee boarding and then being returned to the departure point**, because the competent Turkish authorities refused the disembarkation, was also noted. The incident concerned a Pakistani citizen who had injured himself in the chest with a sharp object the day before the return so that he could be exempted from the operation; throughout the return, he attempted in every way possible to re-injure himself. The police escorts, after discussion with the head of the operation, placed Velcro initially on his hands, and then on his feet and finally a doctor administered an injectable sedative. The escort of the competent Turkish authorities notified them during the operation about the condition of the returnee and the Turkish authorities refused to allow him to disembark due to an open wound (ultimately, the returnee was included in a subsequent readmission operation by showing the required health card).

This case once again raises the issue of **issuing the required fit-to-travel certificates** for all returnees so they can be examined by a doctor to determine whether they are healthy enough to travel. At the same time, **the use of restraints and even more so the administration of a sedative injection** to force the returnee to cooperate – though it was deemed necessary in this case for the protection of the returnee – could place his health at risk³⁴ in the event, for instance, of adverse effects.

In another operation, **the absence of required administrative documents** in the returnees' dossiers, and particularly their readmission decisions and proof of service, proved critical to the conduct of the operation. The initial list of returnees included 28 persons. During the pre-departure control, it was found that in 2 cases, a request for withdrawal of the application for

34. See regarding the use of an injectable sedative in Special Report on Returns 2019, p.26-27 (www.synigoros.gr)

international protection had been filed with the Regional Asylum Office in Lesvos and that the dossier included a certificate from the International Migration Organisation for voluntary repatriation; an appeal had been filed in 10 cases; in another 2 cases an application for legal assistance had been filed relative to the rejection of an application for international protection in the first instance, which did not appear in the electronic system; while reports had been filed with the Greek Ombudsman about 10 cases of returnees who had filed appeals (the Hellenic Police Headquarters Readmission Unit had been informed of this). In addition, on the day on which the operation was taking place, the inclusion of a family being held at the Police Directorate in Lesvos in the operation was still pending due to the filing of legal remedies. In the end, with the exemption of two families from the return, along with other cases, the operation included 10 returnees.

It is also worth mentioning the **case of “at sea notification”**: the escort leader was informed while at sea that an appeal had been filed for a returnee and, while the returnee was notified during disembarkation, that he would not be disembarking and that he would return to Greece, 10 minutes later, upon receiving notice that the appeal had been denied, the returnee was once again notified suddenly that he would disembark as his application had been denied.

Finally, on 12-3-2020, a readmission operation was scheduled to take place with a large number (60) of returnees. Although on the previous day, pre-departure controls were conducted by the Authority’s monitors, FRONTEX ultimately cancelled the readmission operation at the last minute due to a complication in the rental of a boat to carry such a large number of third-party nationals for readmission. The following week, at the scheduled readmission of 19-3-2020, the Authority was notified in time by ELAS that the Turkish side had suspended readmissions, citing the need to take protective measures against the coronavirus.

b) readmissions by air (from Mytilene to Adana in Turkey, using aircraft specially chartered by FRONTEX)

Air readmission/return operations on 27-1-2020 and on 19-2-2020 were carried out cooperatively between the Greek authorities and their Turkish counterparts, with the assistance of FRONTEX forces. The operations were conducted smoothly from the Mytilene airport to Adana in Turkey and involved the return of Syrian citizens, in accordance with the EU-Turkey Joint Agreement. The operations were conducted without delays, with professionalism by the officers of the competent agencies, and without any particular problems.

The Greek Ombudsman proposes the following measures:

- Third-country nationals for readmission must be adequately informed of their rights and about the steps to follow in a timely manner at every phase of the procedure;
- The restraint measures should be individualised, taking account of conditions, with vigilance by the escort leader.
- Returnee dossiers should be complete and include all necessary administrative documents and related decisions (decision on the application for international protection, return decision, medical record or medical card from the First Reception Service, proof of service, and others);
- Information regarding the vulnerability of returnees or which concerns the nature of their conditions should be notified to competent police officers beforehand so that the return operation can be prepared appropriately and so that measures to protect the returnees and their escorts can be taken.

- Additional time should be allowed for the various control phases, particularly when there are families with young children amongst the returnees.
- Medical examinations should be individualised and detailed and should be accompanied by the necessary fit-to-travel certificate;
- The presence of an interpreter should be secured for all necessary languages during the pre-departure phase.

3.4. Administrative detention facilities

Due to the spread of the pandemic in 2020, on-site visits by the Monitoring Returns Team to third-party national administrative detention facilities were limited³⁵ to the holding cells at the Thessaloniki Aliens Directorate (3 on-site visits, on 20-2-2020, 12-6-2020 and 14-10-2020) and 2 Migration Management Departments in the Region of Central Macedonia (Thermi on 21-2-2020 and Agios Athanasios, Municipality of Halkidona, on 16-10-2020).

The 3 on-site visits to **the holding cells at the Thessaloniki Aliens Directorate in Menemeni** found the following:

- The number of detainees ranges between 80 and 95 persons, confirming the standard use of these holding cells as a **de facto Pre-removal centre** without, however, their meeting the specifications (Operating regulation for Pre-removal centres, Government Gazette 118/B/21-1-2015) for yard time, while the lack of interpreters is also seen at Pre-removal centres. Given that the average length of detention is 30-45 days, this is an excessively long period of time to be held in cells without yard time. In addition, with the pandemic, the average holding time increased significantly (3 months). A positive step due to the pandemic was seen in the on-site visit of June 2020, at which time a medical unit had been established within the facility and measures had been taken to prevent the spread of the virus, without, however, conducting regular testing for the virus amongst detainees.
- Those responsible for the detention facilities make an effort to respect the rights of administrative detainees in this mass holding situation (frequent medical transports, placement of card phones and a television in the corridor, providing new blankets), and the wings have toilets, showers with hot water and heating, but no beds. The **Ombudsman proposes** that the competent Ministry find **another, more suitable space instead of the Menemeni building**, which operates under the paradox of being considered an ordinary detention facility and not a Pre-removal centre and therefore can only have built-in beds, but the building cannot structurally support them, with the result that the detainees sleep on the floor (which was clearly dirty during the first 2 site visits).
- A **large number of minor detainees** were found during all 3 site visits, which were 4 months apart (25, 57 and 24 minors, respectively). This confirms the systematic nature of the phenomenon of “protective custody” of minors amounting essentially to administrative detention until the National Centre for Social Solidarity (EKKA) can find a place at facilities

35. See the on-site visits to Pre-removal centres and police holding cells for 2019 in the Special Return Report for 2019, p.18 et seq., also the Special Report by the National Mechanism for the Prevention of Torture for 2019, p.48 et seq. on the Authority’s website www.synigoros.gr

for minors. In its comments regarding Law 4686/2020 abolishing the extension³⁶ of detention of unaccompanied minors to more than 25 days, the Greek Ombudsman reiterated the **inherent and overall problematic nature of depriving minors of their liberty** and recommended its full abolition, even when in the form of protective custody in exceptional cases, as it would be difficult to accept that detention is consistent with the obligation to prioritise the interests of minors, as mandated by the UN Convention on the Rights of the Child (Article 3 of Law 2101/1992).³⁷ Protective custody was abolished by virtue of Article 43 of the recent Law 4760/2020. Welcoming this provision, the Ombudsman noted that, based on his experience, ELAS' treatment of unaccompanied minors varies depending on their residential status in Greece and proposed a general ban on depriving unaccompanied minors of their liberty due to a lack of legitimating documents or safe/familiar accommodation.³⁸

- In the findings from site visits **at 2 Migration Management Departments (MMD), at Thermi and Agios Athanasios** of the Municipality of Halkidona, the common points relate to the following:
- In terms of conditions, the cells have toilets and showers, some light, but **no availability of yard time**. The **lack of basic services** (interpreters, sufficient bed covers, preventive medical examinations) are consistent organisational problems despite the inclination of local police personnel to find solutions.
- In terms of procedures, it was ascertained that the longest **detention time** of a detainee on the day of the site visit, which was 21-2-2020 at Thermi and 16-10-2020 at Agios Athanasios, was 17 days and 14 days, respectively. The usual detention time is a few days (followed by a Police order for voluntary return or transfer to another detention facility and/or asylum procedure).

The differences observed during these two on-site visits to MMDs were as follows:

- At the Thermi MMD, the holding cells **were filled to double their capacity** (21 persons on the day of the visit in 2 cells meant for a total of 12 persons) so that quite a few of them slept on the floor. Overcrowding is common, according to the police officers and had been confirmed during an Ombudsman on-site visit in 2019 as well. On the other hand, 9 persons were being held at the Agios Athanasios MMD, half the capacity of the holding cells.
- Given that the site visit to Agios Athanasios took place in October, **coronavirus prevention measures** were inquired about. It was found that there was provision for taking temperatures and sufficient antiseptic; specific instructions had been given by Headquarters in the event of a case, but no tests were being conducted. With the increased number of detainees, the necessary distancing to protect against contamination could not be complied with.

The above findings relative to the conditions of administrative detention and return procedures

36. The abolished provisions of Article 61 of Law 4686/20 include the fourth section of paragraph 2 of Article 48 of Law 4636/2019.

37. See the Authority's comments on the relative legislation <https://www.synigoros.gr/?i=kdet.el.news.655261>

38. <https://www.synigoros.gr/?i=kdet.el.news.728402>

confirm the Ombudsman's standing recommendation to release the police department holding cells from administrative detention (see above, Chapter 2.2). The Ombudsman would refer to the standing case law of the **European Court of Human Rights** in Greek cases: ***“police stations are not appropriate premises for the detention of persons who are awaiting the application of an administrative measure. By their very nature, these are premises intended to hold persons for very short periods”***.³⁹ The Court considers detention to be degrading treatment in violation of Article 3 of the European Convention on Human Rights, also taking account of the following conditions: the days-long duration of administrative detention,⁴⁰ limited access to yard time, lack of natural light and fresh air, heating and hygienic conditions, and overcrowding of cells at police departments.

39. *Horshill v. Greece*, ECtHR judgment of 1-8-2013 (application no. 70427/11), par.47.

40. *Ibid.* par. 46. The case at hand, for which Greece was judged in violation of Article 3 of the Convention, involved detention of 15 days at a police department; 5 of those days were under conditions of overcrowding and lack of natural light, showers and yard time.

4. The competence of the Ombudsman's cooperation with FRONTEX in the European Union law framework

4.1. Ombudsman's initiative for independent external monitoring of European return operations of third-country nationals

The Ombudsman, as a mechanism of external monitoring of returns at national level, was called in late 2016⁴¹ to participate with staff as monitors in the EU Pool of monitors of FRONTEX in dealing with European return operations. The Ombudsman is continuing to participate, assigning a sufficient number of experienced staff to the EU pool, also provided for by the current Regulation for the European Border and Coast Guard Agency,⁴² though it maintains serious reservations about this system which assigns both the operational and the monitoring responsibility of European operations to the same agency – FRONTEX. The Ombudsman's criticism⁴³ does not apply only to the lack of clear operating rules and rules for single funding of the EU monitor pool, but mainly the lack of transparency relative to the monitoring outcomes and lack of accountability, since Member-State **external** monitoring of national returns becomes an **internal** FRONTEX issue for European return operations. In practice, these are joint operations run by various Member States for which the monitor selected by FRONTEX to monitor the whole operation submits a report to that agency. **The slide from external monitoring by national mechanisms to internal monitoring of returns by FRONTEX is obvious.**

Believing that there is a serious lack of transparency and accountability at European level, the Ombudsman took the initiative for creation of an independent mechanism for external monitoring of European forced-return operations. This was named the **“Nafplion Initiative”**, for the town in which the first preparatory meetings took place between counterpart institutions of EU Member States, with institutional independence and related competence for external monitoring of national returns, with the support of the Council of Europe. The result of these meetings was the formation, at a special meeting in Rome (7-9/10/2019), of a mechanism of independent authorities for the external monitoring of European operations for the return of third-country nationals. This initiative is not just a significant opportunity to exchange views and know-how between the Greek Ombudsman and counterpart independent authorities in other Member States; it hopes to serve as a prototype of an independent and substantive mechanism to externally monitor European returns, which are elements missing from the current system in operation internally within FRONTEX.

Considering guarantees of **independent external** monitoring to be intrinsically linked to the essence and improvement of return procedures, the Nafplio Initiative aims not only at transparency but also at **standardised and stricter specifications** for the treatment of people during European returns. Some examples of the proposed intervention for the Nafplion Initiative, based on the experience of Greek Ombudsman staff who are part of the EU Pool

41. with the previously in force FRONTEX Regulation 2016/1924, Article 29.

42. Regulation (EU) 2019/1896 Article 51.

43. See Special Report on Returns 2016, p.15 et seq., Special Report on Returns 2018, p.11 et seq., www.synigoros.gr

of monitors, are the recommendations on issues such as: proportionality in using handcuff restraints, medical examinations of all those to be certified as fit for travel, protection of minors and family cohesion, substantive training of police escorts, access to department dossiers with necessary information on the administrative handling of the return (service of decisions, prior notification, completion of asylum and residence application process, medical history, etc.) and the necessary respect for any pending court judgment regarding temporary protection.

Safeguarding, through independent external monitors, of the fundamental rights of returnees and compliance with the legality of a forced procedure, such as the European forced return operations, also promotes transparency and essential institutional accountability as regards FRONTEX activity. This goal remains consistent for 2020 as well. The criticism aimed at the FRONTEX leadership by the Home Affairs Commissioner and the European Parliament also includes the delays in staffing the Office of Fundamental Rights with personnel provided for in the 2019 Regulation, namely at least 40 fundamental rights monitors who should have been hired by 5-12-2020.⁴⁴ Nevertheless, the Ombudsman believes that FRONTEX's hiring will not solve the problem of "internalising" the monitoring of its operations. All of the above goals of the Nafplion Initiative continue to be applicable in view of FRONTEX's increased activity at the borders presaged by the New Pact on Migration and Asylum.

4.2. Cooperation with the FRONTEX Complaints Mechanism

Cooperation between the Ombudsman and the FRONTEX Complaints Mechanism continued during 2020.⁴⁵ The FRONTEX Fundamental Rights Officer, as specified in the relevant European Regulation for the European Border and Coast Guard Agency (Article 111(4) of Regulation 2019/1896), shall forward to the Greek Ombudsman, as the national mechanism competent for the protection of human rights, any complaints of rights violations in FRONTEX operations in which agents of the Greek authorities are involved.

There were 4 complaints forwarded by **FRONTEX in 2020**. Three of these involved complaints relative to ELAS readmission operations to Turkey coordinated by FRONTEX, pursuant to the EU-Turkey Joint Statement of 2016, for which the Ombudsman had already intervened with ELAS based on complaints submitted to the Independent Authority on pending applications for judicial protection and subsequent applications for asylum and the applicants had been exempted from the readmission operations in question. The 4th complaint involved the failure to verify the minor status of three unaccompanied minors upon their entry into Lesbos in December 2019 at the Reception and Identification Centre. The complaint refers to acts and omissions by FRONTEX officers and interpreters while identifying the persons in question. Based on a prior report to the Ombudsman regarding the procedures for verifying the underage status of a group of minors, the Ombudsman had asked for clarification of the procedures, with a reminder of the scope of the verification procedure aiming at protecting minor status when in doubt. The relevant investigation is still pending.

44. Article 110(6) Regulation (EU) 2019/1896. For related criticism, see <https://www.politico.eu/article/frontex-chief-fabrice-leggeri-under-fire-from-eu-commissioner-ylva-johansson/>
<http://crimenewstime.de/frontex-scandals-plunge-europes-border-agency-into-turmoil/>

45. See Return Report 2019, p.30

As regards complaints **from previous years**, FRONTEX closed the case of a complainant who was readmitted despite awaiting temporary judicial protection, regarding which the Ombudsman had submitted an opposing recommendation to ELAS in November 2019.⁴⁶ After completing the investigation, FRONTEX noted that ELAS had not provided further clarifications that they had requested to explain the applicable regulatory framework (report CMP 2019/00016). In the case of Syrian citizens included in a readmission on 20-10-2016, the Ombudsman, following a long correspondence,⁴⁷ notified FRONTEX and ELAS of the conclusion of the case that had been submitted to the Independent Authority, with critical observations about the delay and the Administration's investigative process, which confirmed the untimely recording of the statement of will for asylum by the parties without police culpability (reports CMP 2017/00001 and CMP 2018/00005).

In November 2020, the Ombudsman was called to take part in the **European Ombudsman's inquiry**⁴⁸ into the effectiveness and transparency of the FRONTEX Complaints Mechanism. As part of this, **the Ombudsman had the opportunity to reiterate the reservations** it had expressed relative to structural issues of transparency and accountability since the formation of this Mechanism, which operates within the same body it is mandated to monitor.⁴⁹ Besides, that was the reason the Greek Ombudsman entered into the "Nafplion Initiative" with counterpart institutions and the support of the Council of Europe.⁵⁰ The Ombudsman also referred to systemic operating problems of the FRONTEX Complaints Mechanism observed through experience of working with it, such as the fact that state agencies involved do not always respond in a timely, complete and transparent manner to the Fundamental Rights Officer and the Ombudsman. The Ombudsman believes these issues should constitute regulatory requirements. An EU mechanism that monitors compliance with the EU Charter of Fundamental Rights should not base its operation on "soft law"-type regulations.

46. The view of the Ombudsman is presented in detail in its previous report, *ibid*.

47. See in regard to this case the Ombudsman's Return Reports for 2016, p.14-15, 2017, p.21-22, and 2018, p.10 (www.synigoros.gr)

48. Strategic inquiry 1-5-2020/MHZ.

49. See relevant criticism in the Return Report for 2016, p.16, year 2017, p.22-23, year 2018, p.11, year 2019 p.9.

50. See Chapter 4.1 of this report, above.

5. Developments in domestic law

Detention in view of return in Law 4686/2020 on migration

Article 51 of Law 4686/2020 (96/A/12-5-2020) amended the provisions of Article 30 of Law 3907/2011 “for reasons of legislative consistency”, according to the explanatory memorandum. Nevertheless, in the proposed provisions, the Greek Ombudsman noted⁵¹ a critically important change in the wording and in the content of the regulation, which could potentially infringe not only upon the rights of third-country nationals but also the transposition into Greek legislation of the provisions of the Return Directive (Directive 2008/115/EC).

Specifically, Article 30 of Law 3907/2011 provided that “*third-country citizens who are subject to return procedures, in accordance with paragraph 1 of Article 21, are detained to prepare for their return and carrying out of the removal procedure **only** in cases where it is not possible to effectively use sufficient but less onerous measures, such as those specified in paragraph 3 of the Article*”. The provision constituted correct harmonisation of Greek domestic law with Article 15 of the Return Directive. Conversely, Article 51 of Law 4686/2020 resulted in **complete reversal of the rule** and the exemption, where **detention becomes the rule** in violation of EU law and fundamental rights and only by derogation can alternative measures be imposed, as it stipulates that third-country citizens subject to return procedures **are placed in detention** to prepare for return and for carrying out the removal process.⁵²

The Greek Ombudsman has frequently noted the importance of using **alternatives to detention**, such as regularly appearing before the authorities, paying a financial guarantee, the requirement to remain in one place, etc., as consistently emphasised by the **Council of Europe and the European Commission**,⁵³ since living conditions, the unsuitability and capacity of detention facilities and the suspension of return operations – resulting in long-term detention – make it imperative to evaluate individual cases (see also Chapter 1 of this report relative to pandemic-related challenges).

51. For the Ombudsman’s comments on the draft law in general, see <https://www.synigoros.gr/?i=kdet.el.news.655261>

52. The Ombudsman also noted the preamble to the Directive (par.16): “*The use of detention for the purpose of removal should be limited and subject to the principle of proportionality with regard to the means used and objectives pursued. Detention is justified only to prepare the return or carry out the removal process and if the application of less coercive measures would not be sufficient.*”

53. Webinar on Alternatives to Detention (<https://emnbelgium.be/news/webinar-alternatives-detention-emn-belgium>), organised by the European Migration Network (EMN) Belgium and the Return Expert Group (REG) 15 December 2020, as a follow-up to the Conference on Effective Alternatives to the Detention of Migrants organised by the Council of Europe, the European Commission and EMN in April 2019.

6. Developments in the European Union

6.1. The European Parliament on the European Commission's proposal to recast the Return Directive

The Greek Ombudsman has been following the progress in the proposal to recast the European Commission's Return Directive since the Return Handbook was reviewed in 2017. The Commission's proposal for a Recast Return Directive in 2018 and the Council's formulation of a partial negotiating position in 2019⁵⁴ resulted in a stricter return system framework, placing the guarantee of fundamental rights at stake.

In 2020, in addition to the Commission's communication on the New Pact on Migration and Asylum (see below), there were developments in the amendment of the Directive. Specifically, pursuant to the **resolution on the implementation of the Return Directive**,⁵⁵ **the European Parliament** called on the Commission to assess the Directive's implementation, which had been expected since 2017.⁵⁶ It reiterated that it was important to adopt an **evidenced-based common approach** that would guide **coherent policy-making and well-informed public discourse**, calling on the Commission to urge Member States to collect and publish **qualitative and quantitative data** on the implementation of the Return Directive.⁵⁷

The comparability of data collected undoubtedly presents deficiencies and issues of transparency. Furthermore, however, the European Parliament noted that the effectiveness of the Return Directive should not be measured just **by referring to the return rate**, but by the **sustainability of returns** and the **application of fundamental rights safeguards, respect for procedural guarantees and the effectiveness of voluntary returns** as well.

As for return decisions and voluntary departure, the European Parliament recalls the key principle enshrined in that Directive that **voluntary returns should be prioritised over forced returns as more sustainable, less costly and cumbersome for States, and more apt to respect the fundamental rights** of the person concerned; it calls on the Commission to continue considering voluntary returns as the preferred option over forced returns;

As for procedural safeguards, the European Parliament stresses that the Return Directive requires return and entry-ban decisions and decisions on removal to be **individualised, clearly justified with reasons in law and in fact**, issued in **writing**, and complete with information about **available remedies and the relevant deadlines (in a language the**

54. See Greek Ombudsman, Special Report on Returns 2017, p.23-26, Special Report on Returns 2018, p.27-33 and Special Report on Returns 2019, p.34-38 at www.synigoros.gr

55. European Parliament resolution of 17 December 2020 on the implementation of the Return Directive: 2019/2208(INI) https://www.europarl.europa.eu/doceo/document/TA-9-2020-0362_EN.html

56. The Commission has assessed the implementation of the Return Directive once (in 2014). In 2017, it issued a recommendation on making returns more effective and published a Return Handbook; in 2018, the Commission presented a proposal to recast the Return Directive to achieve a more effective and coherent return policy (see Greek Ombudsman, Special Report on Returns 2018, p. 27-33 and Special Report on Returns 2019, p. 34-38 at www.synigoros.gr).

57. Particularly data on entry bans and detention, as these are the data categories currently not being collected by Eurostat.

person understands). At the same time, it is necessary to guarantee **the right to effective remedy**, including by providing proper and accessible information and legal aid, including appropriate funds for the provision of legal assistance. **The principle of non-refoulement is binding on Member States in all circumstances.**

The Parliament notes that the Return Directive allows for **the enforcement of a removal to be temporarily suspended, pending a review of a decision relating to return**, and underlines the need to ensure such suspensions in cases where there is a risk of refoulement.

Procedural safeguards also provide Member States with the potential to grant an **autonomous residence permit on compassionate, humanitarian or other grounds** to a third-country national residing irregularly on their territory.⁵⁸ Such granting of residence permits could help to prevent protracted irregular stays, reduce vulnerability to labour exploitation, and facilitate individuals' social inclusion and contribution to society. This would also help to get people out of administrative limbo where they may be stuck, while the goal remains to prevent onward irregular movements of persons subject to a return decision.

As for entry bans, the Parliament expressed concern about the widespread automatic imposition of entry bans, which in some Member States are enforced alongside voluntary departure. This approach risks reducing incentives for voluntary return. An entry ban should not be automatically applied, but should instead be based on an individual assessment.

As to detention and the risk of absconding,⁵⁹ the Parliament stresses that despite the differences in the transposition into national legislations of the definition of the "risk of absconding", in order to ensure compliance with the Return Directive, due consideration needs to be given to the individual circumstances of the person involved when identifying a risk of absconding to justify detention; it underlines the need for harmonisation in the definition and implementation of objective criteria to establish the risk of absconding. It also stresses that, in line with international human rights law, **detention must remain a measure of last resort and be prescribed by law, necessary, reasonable and proportional to the objectives to be achieved**; it notes that it must last for the shortest time possible and that the decision to impose detention must always be based on an assessment of the individual circumstances, in which the interests of the individual concerned have been taken into account.

Finally, the European Parliament once again highlights the importance of **independent external monitors and**:

- calls on the Commission to ensure that Member States and FRONTEX have monitoring bodies in place that are supported by a proper mandate, capacity and competence, a high level of independence and expertise, and transparent procedures;
- stresses that return monitoring should encompass all phases of return operations, with adequate resources;
- calls on the Commission and Member States to make use of existing independent monitoring bodies, such as national and international organisations and national human rights institutions, by cooperating with or designating them as forced return monitoring

58. Article 6(4) of the Return Directive.

59. Article 3(7) of the Return Directive states that *the "risk of absconding" means the existence of reasons in an individual case, which are based on objective criteria defined by law, to believe that a third-country national who is the subject of return procedures may abscond.*

systems;

- urges the Commission to ensure the establishment of a post-return monitoring mechanism to understand the fate of returned persons, where legally and practically possible, with particular attention to vulnerable groups, including unaccompanied minors and families.

These proposals of the European Parliament reaffirm, firstly, the need for **further guarantees of the fundamental rights of returnees in the recasting of the Return Directive**, in the same vein as the comments the Ombudsman has already made in its 2018 report;⁶⁰ and secondly, the **importance of the Greek Ombudsman's initiative for independent and substantive monitoring of return procedures by authorities and monitors with guaranteed independence**, which FRONTEX does not possess as an implementing mechanism for European returns (see above for this initiative in Chapter 4.1 of this report).

6.2. The European Commission's New Pact on Migration and Asylum

The European Commission on 23-9-2020 introduced a New Pact on Migration and Asylum⁶¹ which aims at *"a fairer, more European approach to managing migration and asylum. It aims to establish a cohesive and sustainable policy, introducing a humane and effective long-term response to current challenges of irregular migration..."*⁶²

- **The first key element** of the New Pact is the linking of **asylum and return procedures** in a single piece of legislation that will ensure **pre-entry screening at the borders** to increase the overall effectiveness and consistency of the asylum-migration system.⁶³
- **The second element is a new solidarity mechanism** amongst Member States which will allow the financial support of returns as a solidarity measure instead of relocating the asylum seekers.
- The foregoing are accompanied by additional guarantees for vulnerable groups and particularly minors, better management of asylum-migration, promotion of voluntary returns, a strengthened role for EASO as the European Asylum Support Office and for FRONTEX with a greater coordinating role, the Commission's appointment of an EU Return

60. See Greek Ombudsman, Special Report on Returns 2018, p.28-29 at www.synigoros.gr

61. Commission communication (COM/2020/609 final), 23-9-2020, https://ec.europa.eu/home-affairs/news20200923/new-pact-migration-asylum-setting-out-fairer-more-european-approach_en

62. See related communications on the Council of Europe's New Pact, www.coe.int joint UNHCR - IOM statement of 22-9-2020, <https://www.unhcr.org/news/press/2020/9/5f69deff4/unhcr-iom-call-truly-common-principled-approach-european-migration-asylum.html> and the more critical voice of the European Council on Refugees and Exiles (ECRE) noting that the New Pact focuses on returns <https://www.ecre.org/the-pact-on-migration-and-asylum-to-provide-a-fresh-start-and-avoid-past-mistakes-risky-elements-need-to-be-addressed-and-positive-aspects-need-to-be-expanded/>

63. According to the data included in the Pact text, *"On average, every year around 370,000 applications for international protection are rejected and are referred to the return procedure; this represents about 80% of the total number of return decisions issued each year", while "Inefficient procedures can cause hardship and dysfunction in the European asylum and migration management system [...] Lack of integration between procedures can mean that authorities lose track of someone between a negative asylum decision and a return procedure"* (Ibid. New Pact on Migration and Asylum: The European Commission's New Pact on Migration and Asylum: Questions and Answers)

Coordinator who will provide support to coordinate consistent EU policy on returns, supported by a new High Level Network for Returns and a new operational strategy. Also announced were the integration of IT systems, improvements to the Schengen Borders Code, a coordinated approach to search and rescue to avoid criminalising humanitarian activity, a blueprint for crisis preparedness and management, flexible agreements with third countries and related funding instruments, while the integration of migrants is underrepresented in the Commission's relative action plan.

We note that even the distribution of the financial burden, through the "return sponsorship" announced by the Commission, will have to secure the consent of States such as the Visegrad countries, which oppose the implementation of solidarity measures for asylum seekers.⁶⁴

We also note that the migrant screening phase at external borders and accelerated procedures for reviewing applications for international protection harbours risks for fundamental rights, particularly where those involved are in a grey zone without having been granted access to the country. The inherent risk in fast-track procedures at the border is that any doubt would favour return (in dubio pro redito).

- The Commission, in the proposal to monitor screening, provides for **independent monitoring to safeguard fundamental rights** throughout the procedure. **Member States** are to establish an **independent monitoring mechanism** for which the Fundamental Rights Agency (FRA) will offer the relevant guidelines. The new mechanism shall also monitor **compliance with the principle of non-refoulement**, as well as with the national rules on **detention** where they are applied during the screening.

We believe this safeguard is important. As a national mechanism for the protection of human rights, **the Greek Ombudsman** oversees compliance with **procedural guarantees** for asylum seekers for a **fair asylum procedure**, such as the right to be informed of their rights, obligations and consequences of non-compliance with their obligations, as well as the right to a hearing by personal interview, to interpretation, to free legal assistance and representation. At the same time, having experience as an external monitoring mechanism in return operations of third-country nationals, the Ombudsman notes the importance of ensuring the **transparency, accountability and the effective independence of the body monitoring border procedures, as proposed by the Commission**. The protection of **fundamental rights and compliance with substantive guarantees** at all stages of the asylum procedure, including the border procedure, such as personal freedom, access to the international protection process, children's rights, family reunification, right to effective remedy, are all critical to establishing transparency and **legality** of the desirable integrated asylum and return procedure at the borders.

In the New Pact, the Commission proposes **a package of legislative provisions, including six Regulations** for adoption by the Council and the European Parliament by mid-2021⁶⁵.

The proposed Regulation for common asylum procedures⁶⁶ belongs in this package of

64. See the Ombudsman's survey in 2019 on the relocation programme prepared as part of the International Ombudsman Institute (IOI) <https://www.synigoros.gr/?i=kdet.el.news.554612>

65. For the European Asylum Support Office, Asylum and Migration Management, the introduction of screening, minimum requirements for granting international protection, recasting of asylum procedures and Eurodac.

66. "establishing a common procedure for international protection in the Union and repealing Directive

legislative measures and is part of a **comprehensive approach** to migration and asylum, according to its preamble:

*“Although the number of irregular arrivals to the Union has dropped dramatically by 92% since 2015, there are still a number of **structural challenges, which put Member States’ asylum, reception and return systems under strain**. These include an increasing proportion of applicants for international protection who are unlikely to receive protection in the EU with a resulting increased administrative burden and delays in granting protection for those in genuine need of protection as well as a persistent phenomenon of onward movement of migrants within the EU”. The aim of this proposal is “the seamless **link between all stages** of the migration procedure, from the arrival and outcome of an asylum application to, as the case may be, the return.”*

Important to the return procedure are mainly two measures in the proposed Regulation:

Article 35a - The provision for **issuing a return decision as part of the same act**, or at the same time as the decision rejecting the application for asylum (subject to appeal before the same court or tribunal and within the same judicial proceedings and the same time-limits (Article 53).

Articles 41 and 41 a - Consolidated screening procedure at external borders resulting in accelerated return procedures. Specifically, a **pre-entry phase** is established consisting of **screening** during which migrants will be registered and screened to establish identity and health and security risks. Migrants will then be referred to the appropriate procedure, be it asylum, refusal of entry or return. Finally, it will be determined whether an asylum application should be assessed without authorising the applicant’s entry into the Member State’s territory in an asylum border procedure or in a regular asylum procedure. Where an asylum border procedure applies and determines that the individual is not in need of protection, a return border procedure will follow.

- Persons subject to this procedure are not authorised to enter the Member State’s territory and should be **kept at the external borders, or in their proximity, or in transit zones**; however, where Member States are unable to keep them in those locations, they can use other locations within their territory. Third-country nationals and stateless persons subject to the procedure can be granted a period for voluntary departure not exceeding 15 days, without prejudice to the possibility to voluntarily comply with the obligation to return by departing from a border area or transit zone at any moment.
- The border procedure for carrying out the return cannot exceed 12 weeks, starting from when the person concerned no longer has a right to remain. This period of time is additional to the 12 weeks of the border procedure to review applications for international protection. In any case, the maximum period of detention of 18 months under the Return Directive shall apply. Detention may be enforced to facilitate and ensure return.
- Unaccompanied minors and minors below the age of 12 and their family members are subject to the border procedure only if they are considered to be a danger to the national security or public order of the Member State.

The Greek **Ombudsman notes that the proposed provisions of Articles 41 and**

41a refer to the Recast Return Directive under negotiation, in regard to which the Commission, in its announcement of the New Pact, urges the European Parliament and Council to complete negotiations by mid-2021. This makes it clear that, in order to circumvent the reactions noted to the adoption of the Recast Directive or to narrow the margin of Member State discretion for potentially more favourable procedures, the Commission is endeavouring to introduce, through the proposed Regulation, a strict border procedure framework and criteria that will be immediately enforceable for all Member States. The above provide a new perspective on the thoroughly detailed criticism of the proposed Recast Return Directive (see previous chapter).

Conclusion

The Greek Ombudsman responded with a deep sense of responsibility to the requirements of the external monitoring of forced returns during a year marked by the unexpected outbreak of the pandemic, which created new risks in safeguarding the health and safety of returnees and detainees awaiting return. There were new areas of consultations with the competent authorities to find working solutions and adopt necessary preventive measures, such as the Authority's recommendation to conduct coronavirus testing on all those taking part in return operations and to reduce overcrowding at administrative detention facilities.

At the same time, the summary findings of return operation external monitoring show a lasting tendency, creating a need for the competent ministry to respond to structural problems in the process (lack of interpretation, lack of timely notification of returnees, large number of administrative detainees at detention centres and at police departments in unsuitable conditions, and non-use of alternatives to detention, etc.).

The European framework for exercising competence of external monitoring of returns continued in 2020 to generate increased demand for cooperation with European agencies such as FRONTEX, while requests for greater transparency in European operations gained footing through the initiative of independent authorities, such as the Ombudsman and its counterparts in Member States. The New Pact on Migration and Asylum announced by the European Commission presages a consolidated border asylum and return procedure, making independent monitoring even more necessary to protect the fundamental rights of third-country nationals and to ensure the transparency of activities by competent state authorities.

