

RETURN OF THIRD COUNTRY NATIONALS

SPECIAL REPORT 2021

THE GREEK OMBUDSMAN

Contributors

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

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Introduction

Migration pressures at the European Union's external borders and the —individual, rather than coordinated— reactions of EU Member States are the matters that seem to dominate the political and institutional sphere relating to the returns of third-country nationals in Europe in 2021. The issue of applying (and retaining) the legal asylum and return procedures has been raised in view of the official reactions of countries faced with a migration crisis at their borders, such as Spain in Ceuta, and notably Poland, Latvia and Lithuania on the border with Belarus. At the same time, the EU acquis and the role of FRONTEX and the national border surveillance bodies have been called into question by numerous media reports on alleged pushbacks by Balkan countries like Croatia, Bulgaria and Greece. In an effort to respond rapidly, the European Commission has proposed the adoption of emergency legislation on asylum and return procedures at the borders. This legislation is still pending, as is the initial package of arrangements under the so-called “New Pact on Migration and Asylum”, which has yet to be agreed upon by consensus by the Member States since its announcement in September 2020. In parallel with the emergency legislative measures under EU law, the Commission calls for regular controls at the borders by independent mechanisms, leaving a wide margin of discretion to Member States, which either fail to apply such mechanisms or only apply them with questionable targeting, e.g. by setting up multi-stakeholder fora instead of effective control mechanisms having proper expertise, know-how, experience and enjoying unquestionable institutional independence (e.g. Croatia).

For the European Union, however, tackling migration pressures through common, legal and transparent procedures was, and still is an essential prerequisite for its own internal cohesion. It is hardly a coincidence that it was in 2021 that the Greek Ombudsman —who has been working with the FRONTEX Complaints Mechanism since its establishment in 2016— was called upon by FRONTEX for the first time to investigate, as a mechanism for the protection of fundamental rights, (two) complaints on illegal pushbacks of third-country nationals through Evros, rather than complaints on readmissions by the Greek Authorities. Moreover, for the first time complainants have appealed to the European Court of Human Rights (in relation to an earlier case of deportation and readmission in 2016 in Turkey without an asylum request having been registered, which was handled by the Complaints Mechanism). The Greek Ombudsman has timely highlighted the weaknesses in investigations by both the Inspector General and the Hellenic Police (ELAS) with respect to the principle of non-refoulement.

Thus, there appears to be a tension that is even more intense in the relevant Member State and EU policies, arising from the dilemma: more, stricter and emergency measures or more safeguards of effective protection of the fundamental rights of third-country nationals being the subjects of return operations.

The Greek Ombudsman, as an independent authority anchored in the Constitution, is

an institutional safeguard of the right of complaint and a national mechanism for the protection of the fundamental rights of all persons. In 2021, the Greek Ombudsman has continued to responsibly carry out its mission—which in this case consists in the external monitoring of forced returns of third-country nationals, under the European Return Directive and Law 3907/2011.

In this context, and despite the restraints arising from the pandemic, in 2021 members of the Independent Authority's staff carried out sampling checks by participating in return operations conducted by air by the Hellenic Police, at national and joint European level: they participated in total in 10 return operations to Pakistan, Georgia, Ethiopia and Bangladesh and in 1 land operation to Albania. In addition, specialised officials of the Independent Authority have carried out on-site inspections at administrative detention facilities in Attica, Thessaloniki and in the Region of Eastern Macedonia and Thrace (at the Pre-Removal Centres of Tavros, Amygdaleza and Fylakio, and at 4 border posts, Migration Management Departments and other detention facilities for third-country nationals). Having systematically exercised its external monitoring duties for over seven years, the Greek Ombudsman recognises the Hellenic Police's willingness to cooperate and the improvements in its return operations, not least in response to the Ombudsman's recommendations (e.g. arranging for food for returnees, no disproportionate use of means of restraint, COVID tests to all returnees prior to the operation), while also confirming the persistence of long-standing problems in return procedures (e.g. failure to timely notify returnees of the operation, brief medical examination to confirm ability to travel, poor interpretation services in many Pre-Removal Centres). The Greek Ombudsman continues the institutional dialogue with the Hellenic Police and trusts there will be good cooperation with its officers.

External monitoring requires a continuous flow of returnee and detainee data by the Hellenic Police. As in the previous years, the summarised figures published in this Report help understand the scope of exercising the external monitoring competence. It is worth noting that the number of administratively detained third-country nationals after 2 years has dropped from 4,000 to approx. 3,000 in 2021. The Greek Ombudsman points out in all his reports that, based on the Return Directive, detention should only be applied as a last resort in ensuring removal, whereas the high numbers of administrative detainees in our country, combined with the relatively small number of returnees, raises questions as to compliance with the principle of proportionality. Forced returnees in 2021 were 3,276—a number very close to that of the previous year.

As regards the number of returnees, an assessment of the wider European picture is critical.

In its Migration and Asylum Report issued in September 2021, the European Commission recorded a significant reduction in (gross) migration inflows to Greece

(58%)¹, along with a reduction in the number of migrants present on the islands (5,000 - 3,500 already in December, based on data from the Ministry of Immigration and Asylum²). The European Commission's report further mentions that forced returns from European countries coordinated by FRONTEX are increasing, yet did not exceed 8,000 in September 2021.

Eurostat total return figures for 2020³: 70,200 returns of non-EU citizens, 51% fewer than in 2019. The 70,200 returnees (42% forced returnees) only represent a small rate of those who were the subject of a return decision in the EU (396,400) or reside illegally in EU territory (557,500). The largest groups of EU returnees in 2020 were Albanians and Georgians. In Greece, too, Albanians are the vast majority of forced returnees, amounting to 79% of total returnees in 2020 and 81% in 2021.

In this regard we note the extremely low effective return rate in the EU, as also recognised by the European Court of Auditors in its report no. 17/2021 (19% in respect of third-country nationals outside the European continent)⁴. It is therefore perfectly clear that the European Commission will insist on reviewing asylum and return procedures, integrating them into a single border screening procedure, as per the terms of the New Pact on Migration and Asylum. The French Presidency of the Council of the European Union is already moving in that direction, as detailed in the relevant chapter of this report.

In 2021, two additional issues emerged: (i) The continued suspension of readmissions to Turkey from March 2020 raises questions as to the reasonable prospect of removal of citizens of different nationalities. This prospect, however, is a precondition for the legal continuation of their detention under the Return Directive. In the extreme example of Afghan nationals, following the seizure of power by the Taliban, it is clear that the Administration should have applied properly adjusted procedures, instructing essentially the postponement of removals. (ii) The circumvention of the First Reception Service, as effected by the direct detention at Pre-Removal Centres of non-EU citizens crossing Evros or rescued at sea from August 2021, who since then have been taken to Amygdaleza, raises questions both in terms of legitimacy of the procedures and in terms of whether the general role of Pre-Removal Centres is altered, given that all new entrants are considered as detainees awaiting return.

At the European level, the Commission seems to insist on its proposal to Member States to set up independent border monitoring mechanisms in cooperation with the European Union Agency for Fundamental Rights. National mechanisms for the protection of fundamental rights, such as the Greek Ombudsman and its peers from

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1. Report on Migration and Asylum, Brussels 23.09.2021, COM(2021) 590 final. <https://ec.europa.eu/info/sites/default/files/report-migration-asylum.pdf>
 2. <https://migration.gov.gr/en/statistika/>
 3. https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Enforcement_of_immigration_legislation_statistics#Returns_of_non-EU_citizens
 4. https://www.eca.europa.eu/Lists/ECADocuments/SR21_17/SR_Readmission-cooperation_EN.pdf

other EU Member States participating in the so-called “Nafplion Initiative”, which seeks greater transparency and effective safeguards for fundamental rights in return operations⁵, still have a long way to go in exercising vigilance to ensure respect for the law and the human dignity of third country nationals awaiting return. Setting up effective conditionality mechanisms—that is, linking the approval of financing and the supply of EU resources to Member States with the respect for fundamental rights and the rule of law, drawing on the expertise and independence of the national Ombudsmen—is expected to contribute decisively towards strengthening these national institutions and bringing Member States fully in line with the EU acquis and the EU Charter of Fundamental Rights.

Athens, March 2022

Andreas I. Pottakis
The Greek Ombudsman

5. <https://www.synigoros.gr/?i=stp.en.news.575254> See also chapter 5 of this Report.

1. The Greek Ombudsman as the national external monitoring mechanism for forced returns of third-country nationals

1.1 *The Independent Authority's monitoring competence*

The Greek Ombudsman:

Has special power to carry out the external monitoring provided for in EU law with regard to operations of forced return of third-country nationals to their countries of origin, by virtue of:

- Article 8(6) of the European Return Directive (Directive 2008/115/EC);
- Article 23(6) of Law 3907/2011;
- Joint Ministerial Decision no. 4000/4/57(xi) (Government Gazette 2870/B/2014);

The Greek Ombudsman:

Reviews the legality of return/readmission procedures;

Closely monitors the planning and implementation of each phase of the operations by:

- conducting on-site inspections at Pre-Removal Centres (PRO.KE.K.A.) or other detention facilities;
- reviewing the returnees' files during preparation of the operation by the Police Directorates;
- ensuring the participation of its monitors in forced return / readmission operations conducted by land, sea or air;

Has unhindered access to all detention, waiting or transit facilities and to all pertinent documents, personal files and information;

Has unhindered communication with detainees and with the staff of all services involved;

Carries out sampling checks resulting in reports containing recommendations to the Administration Authorities, which are liable to provide a reasoned response;

Publishes the findings of the control procedures in a special report, which is annually submitted to the Parliament;

Cooperates with the FRONTEX Complaints Mechanism in reviewing complaints/reports (right of direct appeal) concerning FRONTEX operations which involve bodies of EU Member States.

The Greek Ombudsman:

Ensures compliance with the legality requirements applicable to return operations, by all means appropriate and effective,

with a view to ensuring respect to

- the personality and dignity of returnees and
- the fundamental rights of returnees,
- in line with the requirements of national, EU and international law.

As in previous years, in 2021 the external monitoring of return operations, as conducted by the Ombudsman (also, hereinafter, the “Ombudsman” and the “Independent Authority”), is financed by the **European Asylum, Migration and Integration Fund** (AMIF), with the European and Development Programmes Division of the Ministry of Citizen Protection acting as the delegated authority for the programme and the Hellenic Parliament having an assisting role through its relevant agency.

The implementation of the action in 2021 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. For safety reasons, the members of the Monitoring Returns Team had no participation in any operations in the two-month period March-April 2021.

1.2. The year 2021 at a glance

In 2021, members of the Ombudsman’s Returns Team **visited**:

- the Pre-Removal Centres of Tavros, Amygdaleza and Evros;
- the holding cells at the Thessaloniki Aliens Directorate; and
- the Migration Management Department of Agios Athanasios;
- the Border Patrol Departments of Feres and Soufli,

and **participated as monitors** in the following operations:

- 2 National Return Operations (NRO) (conducted by air) to Pakistan and Georgia;
- 8 Joint European Return Operations (JRO-CRO) (conducted by air) coordinated by FRONTEX to Pakistan, Georgia, Armenia and Bangladesh (and conducted a pre-removal review in one return operation to Ethiopia);
- 1 overland removal operation from Thessaloniki to Albania.
- No readmissions to Turkey took place, either by sea or by air, due to the suspension of the EU-Turkey Joint Statement in effect since 19/03/2020.

Furthermore, the Ombudsman:

- Organised a **round-table meeting** on 29.11.2021 in Athens on “*The European framework of forced returns: developments and challenges*”. The meeting was attended by top-ranking representatives of the competent ministries, the

Hellenic Police, international organisations and civil society organisations⁶;

- Participated in May in Greece’s periodic evaluation on the implementation of the **Schengen acquis**, where members of the Ombudsman’s staff presented the external returns monitoring system to a European Commission delegation;
- Organised in October an informal meeting between its peers from other EU Member States participating in the **“Nafplion Initiative”**, with a view to enhancing transparency and upgrading human rights standards in European return operations;
- Participated (with 8 members of its staff) in the FRONTEX **pool of forced-return monitors** with regard to EU return operations;
- Cooperated with the **FRONTEX Complaints Mechanism** on 2 new pushback-related complaints forwarded to the Ombudsman by FRONTEX;
- Held **meetings with various European and international organisations in Athens** [with a delegation of the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE), a delegation of the FRONTEX Consultative Forum, the FRONTEX Fundamental Rights Officer (FRO), the representative of UNHCR Greece in Athens, etc.).

In 2021, **the European training programme for forced return monitors was completed (Forced Return Monitoring III)**, in which the Ombudsman was actively involved. In particular:

The Ombudsman is an active member of the Forced Return Monitoring (FREM) network and programme, which was implemented by the International Centre for Migration Policy Development (ICMPD)⁷. The programme, which was financed by the EU, was initiated in 2013 (FREM I) and completed in December 2021⁸.

As part of the programme, 18 members of the Ombudsman expert staff underwent training as human rights monitors in return operations involving third-country nationals and participated in FRONTEX-coordinated pilot operations. In addition, throughout the implementation of the project, 6 members of the Ombudsman’s expert staff underwent training as monitor trainers.

In 2021, in the context of the programme, the Ombudsman’s trainers participated in the following training programmes:

- Human Rights Monitors’ Training for Frontex, 15-19.3.2021 (online);
- FReM III training for new Human Rights Monitors from Moldova, 22-25.06.2021;
- Human Rights Monitors’ Training for Frontex, 16-20.08.2021 (online);
- Human Rights Monitors’ Training for Frontex, Amsterdam, 6-10.09.2021;

6. <https://www.synigoros.gr/?i=kdet.el.news.888815>

7. In 2021, all meetings of the Project Steering Group were held online due to pandemic control measures.

8. More information available at: <https://www.icmpd.org/our-work/projects/forced-return-monitoring-iii-frem-iii>

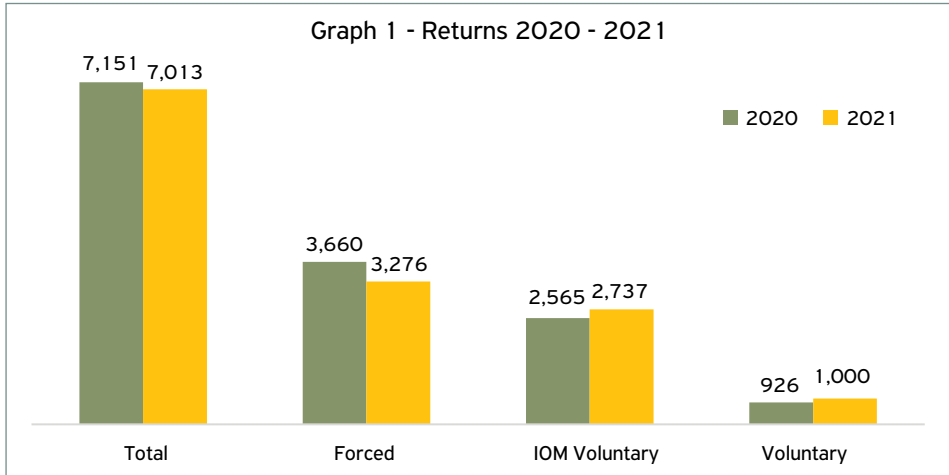
- Human Rights Monitors' Training for Frontex, Rome, 13-17.09.2021;
- FReM III training for new Human Rights Monitors from Georgia and Ukraine, 12-15.10.2021;
- Training of External Monitors of forced return operations for human rights protection institutions of the Western Balkans and Turkey⁹, Belgrade, 18-22.10.2021;
- Training of forced return Monitors' from Cyprus, Nicosia, 2-5.11.2021.

9. In the context of the European Commission-funded project "Regional Support to Protection-Sensitive Migration Management in the Western Balkans and Turkey, Phase II"

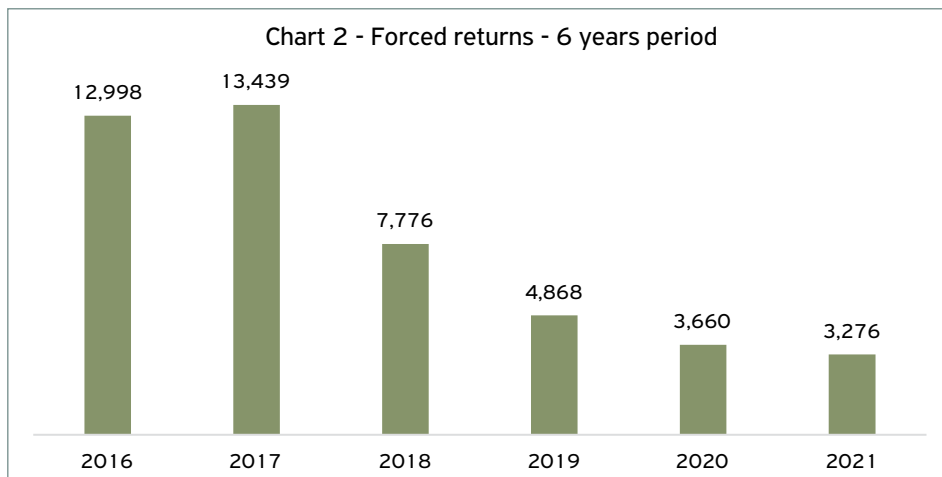
2. Information on the scope of external monitoring

2.1. Figures related to returns

Based on the data released by the Hellenic Police, there were **3,276 forced returns in 2021**, including deportations and readmissions based on bilateral agreements entered with adjacent countries (**81% Albanian citizens**), over 3,660 in 2020 (see *Graph 1*).



Forced returns are therefore **not significantly different from those of the previous year**, when there was a substantial reduction (approx. 25%) compared to the year before (see *Graph 2*). This reduction should be assessed with due regard to the suspension of readmissions from Lesbos to Turkey, which has been in effect since 19.3.2020.



The small number of forced returns is, however, a European phenomenon.

In its Reports, the Ombudsman raises reasonable concerns as to the effectiveness of the measure, based on **Eurostat data**¹⁰. The EU returned 70,200 irregular migrants in 2020, 51% fewer than those returned in 2019. 42% of those returns were forced returns. However, those who were issued with an order to leave (396,400) were five times the number of those actually returned in the EU, whereas the number of those illegally present in the EU territory in 2020 is even greater (557,500). It is worth noting that, as in the previous years, the annual Eurostat statistics for 2020¹¹ indicate that the largest national groups of returned citizens are those from Georgia and Albania, rather than from countries of origin associated with the sharp rise in mixed flows since 2015. Recognizing the low efficiency of forced returns, in its proposal for the New Pact on Migration and Asylum the European Commission¹² prioritises voluntary returns.

10. The relevant Eurostat statistics are published in the second half of the following year. The cumulative statistics published in July 2021 refer to year 2020.

https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Enforcement_of_immigration_legislation_statistics#Returns_of_non-EU_citizens

11. See, in respect of year 2019, Special Report 2020, pp. 15-16. Hereinafter, all references to Special Reports are made to the English versions of the Ombudsman's annual Reports on Return of third country nationals.

12. See 2020 Special Report, pp. 34 et seq.

The cumulative data released by the Hellenic Police¹³ include the number of returnees in the context of “**voluntary departure**”¹⁴, i.e. 1,000 returnees, and 2,737 returnees under the *voluntary* returns¹⁵ programme of the International Organisation for Migration (IOM).

The Ombudsman still has reservations as to whether the so-called “*voluntary*” returns are indeed the result of the free will of returnees, given the adverse effects of their refusal to consent to the removal, according to ECtHR case-law¹⁶.

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

In 2021,¹⁷ 2,398 third-country nationals are being detained in Pre-Removal Centres and 674 in police stations awaiting return, **i.e. 3,072 in total —significantly fewer (25%)** than the previous year.

In recent years, administrative detention data (see Graph 3), concerning detainees both in Pre-Removal Centres and Police holding cells, show that the number of detainees has risen to 3,000 from 2017 to this date, while reaching 4,000 in years 2019-2020. Conversely, **the number of forced returns has been steadily declining from 2018 to 2020** and remains invariable in 2021, raising reasonable doubts as to the necessity and proportionality of detention, which is the strictest measure applied to ensure forced return of irregular migrants.

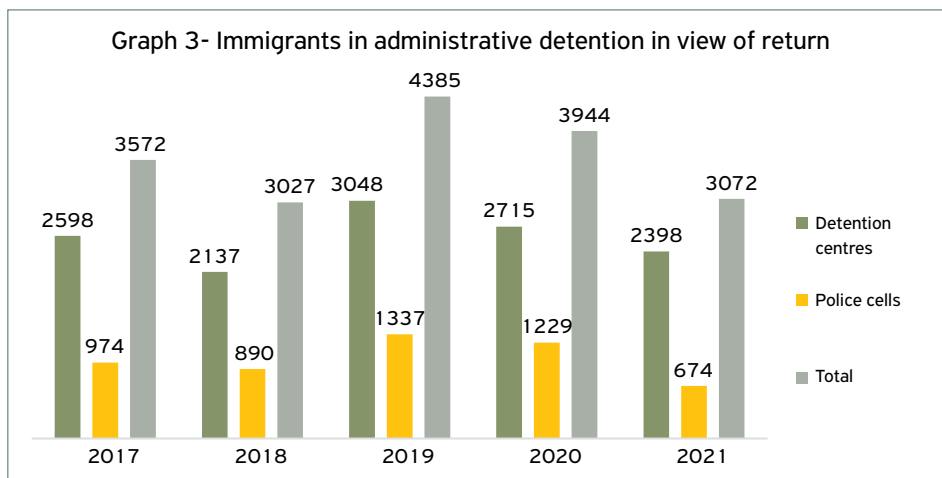
13. There were 7,013 returns in total in 2021.

14. Returns under Article 7 of the Return Directive, as well as returnees under Article 22 of Law 3907/2011, being returned on the basis of a prior return decision setting a voluntary departure deadline and holding non-removal certificates for humanitarian reasons under Article 78a of Law 3386/2005, as well as returnees who waived their asylum applications.

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

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

17. Hellenic Police administrative detention data as at 1.11.2021, year-over-year.



The Ombudsman’s remarks in its previous report for year 2020 are still of relevance: *“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 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 responded 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 recommendation¹⁸ 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”.*

In 2021, the administrative detainee figures are also affected by¹⁹:

- the phenomenon of detaining third-country nationals such as Afghan citizens, for whom there is no reasonable prospect of return, as required by the Return Directive; and

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

19. See chapter on administrative detention below.

- the administrative practice of detaining new entrants to the country in Pre-Removal Centres instead of directing them to First Reception Centres, as required by law.

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

Summary findings for 2021:

- Constant organisational improvements of operations by air;
- Individual assessment of the need to apply detention measures, based on the principle of proportionality, having due regard not to exceed the applicable measure;
- Performance of pre-flight COVID-19 diagnostic tests on all returnees;
- Deficient numbers of medical and nursing staff, psychologists, social workers;
- Unsuitable accommodation areas (in terms of capacity, cleanliness) in certain Police Stations and Pre-Removal Centres.

General recommendations:

- Timely notification of the return operation to returnees (24 hours prior);
- Presence of interpreters throughout the operation;
- Available space for doctors to examine returnees with due regard to privacy standards; suitable space for body searches;
- Thorough medical examination of all returnees; issue of individual fit-to-travel certificates for all returnees;
- Escorts and returnees undergoing a PCR Covid-19 detection test two days prior to the operation;
- Better preparation and review of the administrative files of returnees in terms of completeness (issue and service of all relevant decisions by the competent bodies, issue of documents informing returnees of their legal rights and available remedies in a language understood by them, identification documents, dismissal decisions, etc.);
- Ensuring that returnees have been informed of their rights and that procedures concerning their right to stay in the country are completed, in accordance with the applicable laws; This ensures respect for human rights (e.g. right of access to asylum, right of appeal) and eliminates all risk of cancellation of planned operations;
- Improvements in equipment (vehicles, air conditioning);
- Improvements in the conditions at the facilities and sufficient supply of materials (basic necessities, bedding, clothing, footwear, etc.);
- Release of Police Stations from administrative detention duties;
- Considering the implementation of alternatives to administrative detention, especially under the current circumstances, where measures to prevent the

spread of the COVID-19 pandemic are required (public health protection measures e.g. medical examinations, social distancing, quarantine and isolation);

- Review of detention orders where there is no reasonable prospect of return (e.g. Afghan nationals) under the Return Directive²⁰;
- Review of the practice of having new entrants detained at Pre-Removal Centres in violation of legal provisions on material reception conditions²¹ and reception/identification procedures²²;
- The non-refoulement principle, the best interests of the child, family life and state of health of illegally staying third-country nationals should always be duly considered in the context of return procedures, as required by EU law²³ and the applicable national laws.

3.1. Return operations by land

In 2021, the Ombudsman participated in 1 return operation by land from Thessaloniki to Albania (Krystallopiqi).

General considerations: The operation was carried out without problems and was completed smoothly. The same technical issues and deficiencies were identified, mainly with regard to logistical infrastructure. These issues should be considered and addressed by the Hellenic Police, so that land operations can be conducted in a manner ensuring better safeguards for the protection of returnees' rights throughout the operations and facilitating the work of the police escorts.

Positive findings:

- The daily allowance was timely paid to returnees so that they could get breakfast, should they wish to do so;
- The escort leader was courteous and carried out his duties with professionalism; organised the embarkation, disembarkation and delivery of returnees effectively and with due regard to human dignity; at no stage of the operation were the returnees restrained;
- Detention officers, police escorts and the driver treated returnees with courtesy

20. According to EU law, when it appears that a reasonable prospect of removal no longer exists, detention ceases to be justified and the person concerned shall be released immediately (Article 15(4) of the Return Directive).

21. Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast).

22. Article 39 of Law 4636/2019 "Regulations on International Protection and other Provisions".

23. Article 5 of Directive 2008/115/EU.

and respect for human dignity;

- The escort leader made sure there was a portable first aid kit in the vehicle;
- Pre-delivery controls and delivery procedures of returnees to the Albanian authorities are now shorter, which prevents potential complaints and discomfort.

Recommendations:

There are two main recommendations:

- properly maintained vehicles, such as tourist buses or vans, should be used in return operations, having no confined compartments;
- police escorts should be sufficient in numbers, should be wearing civilian clothes and their equipment should be restricted to means of restraint;

Further recommendations:

- The designated departure location should comprise a properly laid out, clean and safe waiting (rather than confinement) area, with seats, convenient access to restrooms, a separate courtyard and a smoking area;
- Returnees should undergo a preventive medical examination by a physician before the operation starts, subject to their consent;
- The operation should be attended by an escort having certified first aid skills;
- Returnees not understanding the Greek language should have access to a certified interpreter.

3.2. Return operations by air —national and European²⁴

In 2021, the Ombudsman had monitors attend 2 national return operations (NROs) from Greece to Georgia and Pakistan, from the pre-departure phase to the return and debriefing phase.

General considerations: The national removal operations to Georgia and Pakistan were conducted smoothly throughout the process. The issues that arose during the operations were handled properly and effectively by the escort leader, the support team and the police escorts.

24. In these operations, the Independent Authority takes into account the increased requirements for vigilance as regards the need to respect the fundamental rights of citizens being returned to distant countries (e.g. Pakistan, Georgia, Afghanistan, etc.) by air on national or joint European flights. Forced removal from Greece may cause substantial anxiety and confrontational reactions, which the police escorts must handle in accordance with international and European rules and specific flight guidelines (FRONTEX Code of Conduct, the Council of Europe's Twenty Guidelines on Forced Return, European Commission's Return Handbook, etc.).

Positive findings:

- In line with the Ombudsman's earlier recommendations, proper spaces were available as waiting areas and physical / medical examination areas, meeting all privacy requirements, in cabins adjacent to the Pre-Removal Centre of Amygdaleza.
- Among the positive findings was also the presence of a (FRONTEX) translator-interpreter at the Pre-Removal Centre of Amygdaleza during the pre-removal phase; arranging for a meal at the waiting area; and the transportation of returnees to the airport with professionalism and courtesy, not using any means of restraint.
- All returnees departing from the Pre-Removal Centre of Amygdaleza had undergone molecular testing for COVID-19 by the National Public Health Organization (NPHO).

Recommendations:

- The pre-removal review of administrative files, which is carried out one day prior to the operation, invariably reveals the absence of fit-to-travel certificates.
- The necessary fit-to-travel certificate was replaced by a medical examination conducted through questions posed to returnees by the physician.
- It is imperative to carry out separate control and boarding procedures at El. Venizelos Athens Airport with respect to returnees. Despite the escort leader's instructions, returnee control procedures were conducted simultaneously with regular passenger controls. Body searches at the airport should not be carried out in spaces that are visible and accessible to other passengers. For this reason, the Head of Athens Airport Police Directorate should ensure through proper checks that the available space meets the above requirements.
- One returnee was instructed by the escort officer to take off his/her clothes for the purpose of a body search. Body search procedures should only require returnees to take off their clothes in exceptional situations, as a last resort, if no milder means are available (portable detector, walk-through metal detector, etc.)²⁵.

In 2021, the Ombudsman took part in 8 European Joint Return Operations (JROs), the Organising Member States (OMS) being Greece, Austria and Switzerland.

25. As part of his duties, the Ombudsman checks compliance with the principle of proportionality on the part of the competent authorities, including avoidance of excessive measures, especially when forced measures are applied, as per the applicable regulations.

The destination countries were Georgia, Pakistan, Armenia and, for the first time, Ethiopia and Bangladesh.

General considerations: Most operations were completed as planned and the escorts demonstrated professionalism and complied with escort and security protocols. The problems identified in respect of timely notification of returnees, medical examination and interpretation (critical aspects of return operations and of the protection of the rights of returnees) have not been eliminated.

Positive findings:

- Returnees were received at the Special Aliens' Reception Facility in Amygdaleza, at a temporary detention facility comprising two separate spaces for the physical and medical examination of returnees;
- Arranging and planning to offer returnees a meal at the Airport lounge;
- Returnees were transported to the airport with professionalism, courtesy, not using any means of restraint throughout the process; personal belongings and luggage were properly treated;
- COVID-19 protection masks were made available to all returnees and all returnees underwent a molecular (PCR) test for COVID-19 by care of the NPHO;
- The escort leader and the representative of the Returns Office of the Attica Aliens Directorate took immediate action to handle all issues that arose at the waiting room at "Eleftherios Venizelos" airport.

Recommendations:

- The pre-removal review (i.e. the review of the administrative files of returnees) showed that an asylum process termination order had been issued in respect of one returnee due to untimely renewal of the applicant's card. In his observations on both Law 4636/2019²⁶ and Law 4686/2020²⁷, the Ombudsman has pointed out that this procedure —whereby the applicant's request is considered as tacitly revoked— entails a risk of exclusion from the asylum procedure of persons in need of international protection.
- One return operation from Greece to Georgia and Armenia involved a large number of escorts (59 people in total: police escorts, doctors, nurses, monitors, trainees), although the number of returnees was very limited (9 returnees in total, 1 of whom was returned to Armenia). The Ombudsman has pointed

26. See, in this regard: "Observations on the draft law of the Ministry of Migration and Asylum on international protection", p. 11, at <https://www.synigoros.gr/?i=kdet.el.news.608123>

27. See, in this regard: "Observations on the draft law of the Ministry of Migration and Asylum on migration law improvements", p. 6, at <https://www.synigoros.gr/?i=kdet.el.news.655261>

out that failure to timely notify returnees of the operation (at least 24 hours in advance) has an adverse impact on the administrative planning of the operation, as returnees often apply for international protection as soon as they gain knowledge of the operation and may be eventually excluded from it, thus disrupting the overall planning of the operation. Timely notification of returnees not only ensures the right to information but also facilitates better operation planning.

- Absence of interpreters: interpretation, as a procedural safeguard, is considered significant throughout the return operation, as it is inextricably linked to the returnee's right to information. The practice of having compatriots of returnees serve as interpreters fails to ensure accurate and valid communication between the Authorities and the returnees. It appears that this issue was partially resolved in late 2021, with the placement of interpreters at the Amygdaleza Pre-Removal Centre by FRONTEX. The Ombudsman has repeatedly raised the issue of interpretation, both in his Special Reports²⁸ and in his comments on draft laws concerning asylum and migration procedures²⁹, pointing out that the interpretation safeguard must be strictly observed, as required under the Return Directive, which includes translation and interpretation in the procedural safeguards³⁰.
- In one situation, a returnee was instructed by the escort officer to remove his clothes during a body search, although he clarified that he was not wearing any underwear. The representative of the Returns Coordination Office clarified that this type of practices are inconsistent with the FRONTEX Code of Conduct for Returns and should therefore be avoided.

Special operational matters:

In 2021, return operations to Bangladesh and Ethiopia were scheduled for the first time. In regard of these operations the following are pointed out:

- The return operation to Ethiopia concerned 2 citizens, one of whom was excluded from the operation just the day before, whereas on the day of the operation the other returnee submitted a statement expressing his will to apply for asylum and was also excluded from the operation. As a result, the OMS escort leader

28. By way of indication: p. 23 of the 2018 Special Report; p. 22 of the 2019 Special Report; pp. 23, 25 of the 2020 Special Report.

29. See, in this regard: "Observations on the draft law of the Ministry of Citizen Protection on international protection" and "Observations on the draft law of the Ministry of Migration and Asylum on migration law improvements", available at <https://www.synigoros.gr>

30. Article 12(2) of Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals. "Member States shall provide, upon request, a written or oral translation of the main elements of decisions related to return, as referred to in paragraph 1, including information on the available legal remedies [...]", at <https://eur-lex.europa.eu/legal-content/EL/TXT/PDF/?uri=CELEX:32008L0115&from=EL>

was informed that the operation was cancelled only after the plane had already arrived to Athens.

- There was one incident where a returnee hurt himself and received medical care from the doctor of the operation. An ambulance was called and the returnee was excluded from the operation. Moreover, during the flight one returnee felt sick and lost consciousness for a short period of time. The medical team of the organising country intervened and offered him medical assistance. The Ombudsman notes that emergencies may not be ruled out and that timely notification of returnees and finalisation of the list of returnees are critical for the smooth completion of each operation.
- The presence of media in a return operation to Bangladesh created tension among the returnees. The Ombudsman has noticed in the context of a previous operation with media coverage³¹ that posting photos of returnees (whose facial features are identifiable despite the use of a protective mask) is a violation of the rules of personal data protection applicable under the FRONTEX codes of conduct.

Protection from the pandemic

Since 2020, the Ombudsman³² has highlighted the challenges of the pandemic that was caused by the spread of the COVID-19 Coronavirus, having drafted (i) proposals for protection measures intended to protect vulnerable groups and administratively detained third-country nationals who are subject to return procedures and (ii) proposals for uninterrupted continuation of return procedures, in line with the proposals of the European Commission.

From the outbreak of the pandemic, the Ombudsman identified a systematic failure to ensure the unfailing and proper use of protective masks. Many escort officers and returnees wore no masks or wore them incorrectly, either inside the transportation vehicles or at the airport waiting area. Even worse, returnees were not tested for Covid-19 through proper diagnostic testing. In many operations, returnees were only remotely temperature-tested, often with contradictory results.

In the two-month period March-April 2021, no external monitoring was instructed by the Ombudsman, because, in respect of both national and joint European operations that were scheduled to take place in that period, the Returns Office of the Attica Aliens Directorate had informed the Authority that no diagnostic tests were being conducted on returnees prior to the operation unless that was required by their country of origin (in that case Pakistan —but not Georgia).

31. See, in this regard, 2020 Special Report, p. 20.

32. See, in this regard, 2020 Special Report, Chapter 1.2 Challenges raised by the pandemic (pp. 10-13).

The Ombudsman expressed his disagreement with this practice of the Hellenic Police. By letter dated 1.4.2021 addressed to the Minister of Citizen Protection, the Independent Authority requested that a previous test be performed on all passengers of each flight, i.e. on all returnees, regardless of nationality, including on the officials, as a necessary measure to protect the health of all passengers (returnees, police escorts and monitors), in line with the regulations applicable to passengers of commercial flights.

Indeed, as of mid 2021, the Hellenic Police (through the services of the NPHO) started to perform PCR tests on all returnees, in line with the earlier recommendations of the Ombudsman.

In fact, for reasons of public health and for the safety of all individuals involved, on a flight to Pakistan a returnee was excluded from the operation, although he held a negative test, on the basis of the doctor's assessment (based on the returnee's temperature and myalgia) that he could be having COVID-19 symptoms on board.

The **Ombudsman** proposes that a free molecular test (PCR) be conducted on all individuals involved in the operations (returnees, escorts, doctors, interpreters, monitors, etc.) and clearance to participate only be granted in case of a negative result. At the same time, high-protection masks (FFP2 or N95 masks) should be made available to parties involved, in line with the instructions of the competent authorities³³.

3.3. Readmission operations to Turkey

No readmission operations to Turkey were carried out neither by sea nor by air in 2021, as Turkey has suspended the procedures provided for in the EU-Turkey Joint Statement since March 19, 2020 and has maintained such suspension in effect throughout 2021.

In its 2021 Report for Turkey the European Commission notes that³⁴ *“Problems arose over implementation of the Statement due to Turkey’s unilateral suspending returns of irregular migrants and rejected asylum seekers [...] from March 2020 onwards [...]”* and *“The Commission and Greece have repeatedly called on Turkey to resume return operations in line with the commitments made under the EU-Turkey Statement. The resumption of returns to Turkey remains key to effectively fight irregular migration and human smuggling networks in the region.”*

33. By way of indication: Joint Ministerial Decision no. Δ1α/Γ.Π.οικ.81558/29.12.2021 “Emergency Measures to protect the Public Health against the Risk of further Spreading of COVID-19 Coronavirus throughout Greece”.

34. European Commission, Commission Staff Working Document, Turkey 2021 Report, available at https://ec.europa.eu/neighbourhood-enlargement/turkey-report-2021_en

The Ombudsman points out that the suspension of the EU-Turkey Joint Statement as of March 2020 due to the pandemic –for 2 years now– has made return operations to Turkey impossible. This has created legal uncertainty to third-country nationals in respect of whom all procedures to assess applications for international protection have been completed and who are no longer considered asylum seekers, therefore no longer lying within the scope of protection under the applicable legislation. The **Ombudsman**³⁵ has proposed that these third-country nationals be given an opportunity to file subsequent applications for international protection to be considered on the merits, so that they are offered effective protection of their fundamental rights³⁶.

3.4. Administrative detention facilities and procedures

In the context of external monitoring of forced returns, the Ombudsman carries out sample controls from the date a return/deportation order is issued until it is thoroughly implemented. Such control includes visits to Pre-Removal Centres and other administrative detention facilities as well as checks for compliance with the relevant provisions of the Return Directive and Law 3907/2011 on the separate detention of returnees from criminal detainees, humane treatment, due diligence in conducting return operations and termination of detention, as, according to the Directive, detention is only applied to secure effective implementation of the return and only serves as a last resort, when there are no other available alternatives.

In 2021, the Ombudsman visited the two Pre-Removal Centres in Attica, i.e. Tavros (1.11.2021) and Amygdaleza (4.11.2021), as well as the Pre-Removal Centre of Fylakio in Evros (8.11.2021); 2 Border Patrol Departments (Soufli and Feres, 9.11.2021) in the Region of Eastern Macedonia and Thrace, as well as the detention facilities at the Thessaloniki Aliens Directorate and the Migration Management Department in Agios Athanasios (9 and 10.12.2021, respectively).

As a preliminary remark, the Ombudsman insists on its firm position that police detention facilities should not be used to detain returnees, in accordance with ECtHR case-law: ***“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 premises are intended to only host persons for very short periods of time”***³⁷.

During its visits, the Independent Authority has witnessed that efforts are being made to improve **detention conditions** (better cleanliness, painted detention facilities at the Pre-Removal Centre of Tavros, new cabins and library at the Pre-Removal Centre of Amygdaleza, renovation at the Pre-Removal Centre of Fylakio, etc.). The

35. Pursuant to Article 86 of Law 4636/2019.

36. See also proposals in Chapter 3.4. on administrative detention.

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

absence of interpreters (an issue partly addressed in Attica by FRONTEX) and the non-supply of telephone cards by the police authorities remain unresolved issues at Pre-Removal Centres. The capacity limits of Pre-Removal Centres are observed. However, the proposal made last year by the Ombudsman with a view to reduce overcrowding at the detention facilities as a necessary precaution against COVID-19 Coronavirus, has not been answered³⁸. COVID-19 vaccinations on administratively detained third-country nationals only began in October 2021, when a small rate of detainees at the Pre-Removal Centres of Attica were vaccinated. At the same time, the lack of temporary social security numbers (AMKA) prevents the vaccination of detainees at the Pre-Removal Centre of Fylakio.

The Ombudsman re-tables its proposal to reduce overcrowding at detention facilities by applying alternatives to detention, in order to keep distances between detainees, and recommends a rapid expansion of the vaccination program to all detainees held at Pre-Removal Centres. The Ombudsman's findings in these on-site inspections are included in more detail in its special report in the capacity of National Preventive Mechanism against Torture and Inhuman Treatment (Law 4228/2014-OPCAT).

With regard to **the return procedure**, the Independent Authority has made the following general remarks to the Police Authorities:

The first issue relates to the identified detention of Afghan nationals beyond three or even six months. We note, however, that no returns of Afghan nationals have taken place after August 2021, based on data provided by the Hellenic Police.

Given the current situation in Afghanistan after the Taliban seized power, continued detention becomes problematic, when the condition for a reasonable prospect of return is not met, in accordance with the Return Directive (Directive 2008/115/EC, Article 15(4), Law 3907/2011, Article 30(4)³⁹). See also relevant UNHCR Recommendation of 17.08.2021⁴⁰.

38. See 2020 Special Report, pp. 12 et seq.

39. "When it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 no longer exist, detention ceases to be justified and the person concerned shall be released immediately".

40. <https://www.unhcr.org/gr>

At the same time, Afghans were the largest national group of asylum seekers in the European Union in September 2021⁴¹. The current general situation in Afghanistan is extremely volatile, as insecurity and violence are currently prevailing, as stated in a recent report of the European Asylum Support Office⁴². **The Ombudsman proposes that the leadership of the Hellenic Police should consider instructing the issue of removal postponement acts** in respect of Afghan nationals, as a short-term solution⁴³.

The general issue raised also in complaints of administrative detainees to the Ombudsman is that detaining them for several months is not consistent with the Directive's requirement for an actual prospect of removal as a condition of the legitimacy of the detention (see also ECJ, Kadzoev C-357/09) in accordance with the principle of proportionality, in situations where no operation is carried out for their return to their country of origin, considering in particular that readmissions to Turkey have been suspended since March 2020. According to the Return Directive⁴⁴ ***“When it appears that a reasonable prospect of removal no longer exists for legal or other considerations [...], detention ceases to be justified and the person concerned shall be released immediately”***⁴⁵.

The **Ombudsman therefore proposes** that the authorities should consider lifting the administrative detention in situations where there is no reasonable prospect of removal⁴⁶ and/or should consider using alternatives to detention, if necessary, consistent with the applicable laws (F. 292704, F. 302349)⁴⁷.

41. Followed by Syrian and Iraqi nationals. Eurostat, Asylum quarterly report, 15.12.2021 https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Asylum_quarterly_report#Main_trends_in_the_number_of_asylum_applicants

42. See EASO, Afghanistan Security Situation Update (September 2021) https://coi.euaa.europa.eu/administration/easo/PLib/2021_09_EASO_COI_Report_Afghanistan_Security_situation_update.pdf. “It is yet to be seen whether the Taliban intend to adhere international obligations signed by Afghanistan during the last 20 years, including most international conventions on human rights, or if these agreements will be considered invalid”.

43. Insofar as the State fails to consider more generic solutions, e.g. re-introducing the granting of a residence permit for humanitarian reasons, which was recently abolished by Law 4825/2021 (see Ombudsman's observations on the relevant draft law published on 30.08.2021: <https://www.synigoros.gr/?i=kdet.el.news.851675>).

44. Article 15 of Directive 2008/115/EU, as transposed by Article 30 of Law 3907/2011.

45. Accordingly, recital 16 of the Return Directive introduces the principle of proportionality as a rule that should be governing return procedures and states that “[...] *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*”. That is, it should only be applied if there is a reasonable link between the detention, as a forced measure, and the purpose it serves, namely the return/removal. However, a link of this nature does not exist if the detention is ineffective or more onerous in terms of intensity, scope and duration compared to what is essentially required to achieve its intended purpose (return/removal) or if such purpose may no longer be achieved.

46. By way of indication: Regular appearance before the authorities, deposit of a financial guarantee, restriction on leaving a specific location, etc. See, 2020 Special Report p.13.

47. <https://equal-rights.org/en/news/greek-ombudsman-calls-for-release-of-19-persons-who-are->

The second issue concerns the detention in a Pre-Removal Centre prior to the First Reception Service. More specifically, new entrants crossing the borders through Evros have been systematically detained at the Pre-Removal Centre of Fylakio. Immigrants rescued in the Aegean or the Ionian Sea or Crete have been systematically taken to the Pre-Removal Centre of Amygdaleza since September 2021 and are channelled to various inland accommodation structures after several weeks or even months, in violation of the provisions of Law 4375/2016 on First Reception services.

By-passing the First Reception Service of the Ministry of Migration and Asylum renders all third-country nationals subject to police detention from the outset, depriving them prematurely of the opportunity to undergo a vulnerability assessment by the competent services at the Reception and Identification Centres (RICs), as required by Law 4375/2016.

As a side effect, newcomers detention from the outset at the Pre-Removal Centre of Amygdaleza entails a change in jurisdiction as regards their asylum requests and causes delays in the assessment of the requests of other detainees actually awaiting return.

Moreover, this distorts the role of Pre-Removal Centres, which now goes beyond that of administrative detention in view of return.

Such practices, which lack any clear legal basis, are not only violations of the law but further impair the fundamental rights of third-country nationals (returnees or otherwise) and lay the groundwork for considering immigrants and/or asylum seekers as detainees in principle, i.e. deprive them as a rule of their personal liberty, in violation of the constitutional principle of proportionality.

4. Developments in domestic law

4.1. Exceptions from the Return Directive under Law 4825/2021

The Ombudsman submitted to the co-competent Ministries and the Greek Parliament a detailed opinion on the draft law on “*Reform of Deportation and Return Procedures of Third-Country Nationals, Regulations on Residence Permits and Procedures for Granting International Protection Status, etc.*”⁴⁸, —now Law 4825/2021 (Government Gazette 157/A/4-9-2021). The Independent Authority’s comments with specific regard to returns consisted briefly in the following:

a) Deportations and returns. Article 1 seeks to exclude from the application of Articles 16-33 of Law 3907/2011 (i.e. from the chapter harmonising national law with the Return Directive (Directive 2008/115/EC) deportation procedures concerning third-country nationals being subject to entry ban, arrested for crossing the borders illegally, etc. This independent provision stipulates (para. 2) that these deportation procedures are governed by the previously effective Law 3386/2005 on illegal entry of aliens.

However, such exception from the scope of the Return Directive is provided for in the Directive itself (Article 2) and has already been integrated in Article 17 of Law 3907/2011. Its rewording in an independent provision disregards the fact that the Return Directive stipulates⁴⁹ that, with regard to third-country nationals excluded from its scope, the minimum safeguards of respect to fundamental rights, including the principle of non-refoulement, shall continue to apply. This leaves room for misinterpretation of the new provision in violation of EU law (Article 2 and Article 4(4) of the Return Directive) and the provision should therefore be deleted or incorporated in Article 17 of Law 3907/2011.

b) Voluntary departure. Article 3 provides that the voluntary departure deadline granted by migration services, which may not exceed 25 days (instead of 30, as applied previously), may be extended at the request of the person concerned up to 120 days instead of one year. Such drastic reduction of this limit to three months is bound to cause disruptions to the school routine of minors and seems to be inconsistent with the guidelines of the Return Directive, which requires Member States to have due regard to the best interests of children and respect their family life.

Furthermore, Article 7 introduces a presumption as to the tacit rejection of applications for extension of the voluntary departure deadline, unless they are addressed within 15 days. This creates a risk that the grounds for extension may not be substantially assessed and may be rejected without reasoning, contrary to the

48. <https://www.synigoros.gr/?i=kdet.el.news.851675>

49. Article 4(4) of the Return Directive, corresponding to Article 19(2) of Law 3907/11.

principles of good administration.

c) Detention and deportation procedure. The fact that Article 34 of the Law provides that, in the context of the deportation procedures referred to in Law 3386/2005, administrative detention is only implemented at the Pre-Removal Centres referred to in Law 3907/2011, is a step forward. In practice, however, the “*specialised detention facilities*” where detention is to take place as a rule, as referred to in the Return Directive (Article 16), are insufficient and a large number of third-country nationals are being held in police stations. The Ombudsman insists on his firm position that detention in police stations is inconsistent with the legal duty of the Administration Authorities to ensure decent living conditions for administratively detained third-country nationals⁵⁰. Furthermore, the Ombudsman insists on its observation submitted at the time Law 4686/2020⁵¹ was being passed, that the amendment of Article 30(1) of Law 3907/2011, whereby detention is the general rule and alternatives to detention are merely the exception, departs from the Return Directive which imposes the exact opposite rule, i.e. the applicability of the principle of proportionality to all restrictions on personal liberty.

d) Postponement of removal by the police authorities.

Article 72 (10) of the Law abolishes the possibility of granting applicants for international protection a residence permit for humanitarian reasons (Article 22 of Law 4375/2016), as same is established in Article 6 of the Return Directive, which provides that procedural safeguards include the right of Member States to grant an **autonomous residence permit for compassionate, humanitarian or other reasons** to a third-country national staying illegally on their territory. As underlined by the European Parliament⁵², granting residence permits could help to prevent protracted irregular stays and reduce vulnerability to labour exploitation and may 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 is still to prevent onward irregular movements of persons subject to a return decision.

It is noted that, following the abolition of the right of Member States to grant residence permits for humanitarian reasons to applicants for international protection, the police authorities are now solely empowered to postpone the removal for humanitarian reasons pursuant to Article 24 of Law 3907/2011 (Article 9 of the Return Directive). This power becomes even more critical at present, when return orders to Turkey as a safe third country for the assessment of applications for international protection cannot be implemented, as the applicants in limbo may be faced with severe humanitarian risks.

50. See 2020 Special Report, pp. 17 and 27.

51. Ibid.

52. 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.

5. Developments in the European returns framework

5.1. EU law amendment procedures

On the part of the European Commission, the proposals for amendments to the institutional framework of returns followed the political developments at the **border with Belarus**. In order to help Latvia, Lithuania and Poland deal with the emergency situation at EU's external borders, on 1.12.2021 the Commission proposed a series of emergency and temporary measures on asylum and returns⁵³, valid for 6 months, introducing simplified and faster national procedures, among others for the return of third-country nationals whose applications for international protection have been rejected.

At the same time, **Greece** is among the 12 countries⁵⁴ that signed a letter to the European Commission in October 2021, requesting a revision of the Schengen Borders Code with a view to introducing common standards for the surveillance of the Union's external borders and effective preventive measures against illegal crossing of borders to counter increased flows and attempts to instrumentalise migrants or abuse the legal framework on international protection⁵⁵. The **Council of Europe's** Commissioner for Human Rights has warned that efforts to adapt the legal framework should not lead to legalisation of pushback practices and elimination of important safeguards for asylum seekers at the borders⁵⁶.

On 14.12.2021, the Commission proposed an amendment to the Schengen Borders Code, including a proposal for a Regulation against the **“instrumentalisation” of migrants** from other countries⁵⁷, i.e. the creation of artificial migration pressures in EU Member States.

The proposed Regulation allows for an extension of asylum procedure deadlines⁵⁸ and an expansion of special border procedures, favouring the implementation of the emergency measures already announced in relation to the three countries bordering Belarus. It also allows for reduced reception conditions with regard to asylum seekers

53. COM(2021) 752 final, 1.12.2021, based on Article 78(3) of the Treaty on the Functioning of the European Union.

54. Together with Poland, Hungary, Lithuania, Latvia, Estonia, Bulgaria, Cyprus, Austria, Denmark, the Czech Republic and Slovakia.

55. Joint letter dated 7-10-2021 https://www.politico.eu/wp-content/uploads/2021/10/07/Joint-letter_Adaptation-of-EU-legal-framework-20211007.pdf

56. 21-10-2021 <https://www.coe.int/en/web/commissioner/-/european-states-must-stand-up-against-pushbacks-and-the-attempt-to-legalise-them?inheritRedirect=true&redirect=%2Fen%2Fweb%2Fcommissioner%2Fthematic-work%2Fmigration>

57. “addressing situations of instrumentalisation in the field of migration and asylum”, COM(2021) 890 final, 14.12.2021.

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

and introduces a special expedited return process. The expedited return procedure described in Article 4 of the proposal departs from the standard procedure, yet special safeguards are introduced (principle of non-refoulement, best interests of the child, family life and the state of health of returnees). However, one reasonably observes that, with regard to expedited return procedures, the proposal introduces exceptions from and makes reference to provisions and rules of treatment outside the scope of the existing EU law, namely refers to provisions which have not yet been enacted and are still pending, such as the proposal for a Recast Return Directive, which has been criticised by the European Parliament exactly for the limited safeguards it seeks to introduce with respect to human rights.

Most importantly, in 2021 there was no progress in accepting the Commission's proposals both for a **Recast Return Directive**, which has been pending since 2018⁵⁹, and a regulation on common asylum procedures⁶⁰, which is a focal point of the **New Pact on Migration and Asylum** of 23.9.2020 and establishes a common procedure both for entrant screening at the EU's external borders and the return at the borders. In fact, the proposed Regulation introduces a set of common procedures and uniform criteria which, if adopted, will be directly applicable to all Member States, in order to eliminate reactions to the recast of the Directive and circumvent the Member States' discretion to introduce more favourable procedures⁶¹.

Analysing further the proposed Regulation regarding the "pre-entry screening" of entrants, by letter dated **8.2.2022**⁶², the French Presidency of the Council of the EU, recently proposed a clear **legal framework**: Any one entering the country illegally should⁶³, in the context of the screening process⁶⁴ at the borders,⁶⁵ be considered not to have yet entered the country, even if such screening takes place inside the border (near the border or further inland) and should therefore be **exempt from the Return Directive** (Article 2(2) of Directive 2008/115/EC). This would also have an impact on detention, which, under the applicable Directive (Article 15) is not the rule but rather, merely an exception.

Following the above, one reasonably wonders if the Return Directive will remain an empty shell, as the exceptions are bound to have a far wider scope than the rule itself.

59. See 2018 Special Report, pp. 27 et seq., 2019 Special Report, pp. 33 et seq. and 2020 Special Report, pp. 32 et seq. for the Ombudsman's comments and the European Parliament's extensive remarks in its resolutions regarding the fundamental rights of returnees, www.synigoros.gr.

60. "establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU", EUR-Lex - 52020PC0611 - EN - EUR-Lex (europa.eu)

61. See thorough reference in 2020 Special Report, pp. 34-37.

62. Document dated 8.2.2022, <https://euobserver.com/migration/154340>.

63. Anyone crossing the border illegally, being arrested in a rescue operation and anyone applying for asylum at points of entry at external borders or in transit zones.

64. Four-point check: a preliminary health check, a vulnerability check, an identity check and a security check.

65. Within a strict 5-day time frame (which may be extended up to 10 days in exceptional circumstances).

5.2. European operations, FRONTEX and the Nafplion Initiative for independent external monitoring

The Ombudsman, as the national external monitoring mechanism for forced returns—a competence provided for by EU law—has an institutional cooperation with FRONTEX, as required by the relevant EU Regulation since late 2016⁶⁶. Such cooperation consists (i) in the participation of Ombudsman's staff in the FRONTEX pool of forced-return monitors, for the purpose of monitoring European return operations and (ii) the communication of complaints from the FRONTEX Complaints Mechanism involving Greek administration authorities.

The Ombudsman still designates a sufficient number (8) of experienced staff to participate in the European pool of monitors, while maintaining strong reservations⁶⁷, as FRONTEX remains solely responsible both for coordinating and monitoring European return operations.

Aiming to address the substantial deficiency identified in terms of transparency and accountability at European level, the Ombudsman has taken the initiative to set up a mechanism with its peers from other EU Member States, to act as independent external monitor of European forced return operations. This initiative was named the “**Nafplion Initiative**” after the city where the first preparatory meetings were held with the support of the Council of Europe.

The specific objectives of this initiative for common and stricter rules that will ensure the effective protection of the rights of returnees in the context of European return operations are thoroughly set out in the Ombudsman's previous report⁶⁸. **Transparency and the required level of institutional accountability in all FRONTEX actions**, in light of FRONTEX's new enhanced role in return operations, remain the basic issues.

However, FRONTEX 's activities at EU's external borders and the need to ensure transparency and legality in the actions of state institutions at the borders of each country by independent monitoring mechanisms, as provided for in the European Commission's New Pact on Migration and Asylum, create new grounds for cooperation between the Ombudsman and its peers from other countries, in the context of the Nafplion Initiative, and raise new challenges in this regard, as illustrated herein below.

66. Under the previously applicable Regulation (EU) 2016/1924, Article 29 and Article 72(4) and the currently applicable Regulation (EU) 2019/1896, Article 51 and Article 111(4).

67. See thorough analysis in 2016 Special Report, pp. 15 et seq., 2018 Special Report, pp. 11 et seq., 2020 Special Report, pp. 28 et seq.

68. 2020 Special Report, pp. 28 et seq.

5.3. Cooperation with the Frontex Complaints Mechanism on readmission and pushback investigations

According to the Regulation on the European Border and Coast Guard Agency (Article 111(4) of Regulation 2019/1896), the FRONTEX Fundamental Rights Officer, acting in parallel with the Greek authorities (from which it expects a response within six months, the Hellenic Police acting as a focal point in this regard), forwards to the Ombudsman, as the national mechanism for the protection of human rights, any complaints received by the FRONTEX Complaints Mechanism regarding violations of rights in the context of FRONTEX operations.

It is worth noting that in 2021, FRONTEX forwarded to the Ombudsman (for the first time in five years, i.e. since the Complaints Mechanism became operational) two cases that relate to illegal pushbacks through Evros, rather than readmissions (complaints CMP 2021/00004 and CMP 2021/00018).

The Ombudsman informed FRONTEX that both cases lay within his special powers as the National Mechanism for the Investigation of Arbitrary Incidents, as they raised issues of illegal pushback, which constitutes an infringement of personal liberty where the statutory arrest and detention procedures failed to apply, even more so if the complainant's stay in the country is legitimate or invokes violations of international protection rules or abusive conduct on the part of the police.

In that capacity, the Ombudsman requested immediate and thorough investigation of the complaints by the Hellenic Police, reserving the right to conduct its own investigation. In the first case, the findings of the preliminary administrative investigation were forwarded to the Ombudsman, who referred the investigation file to the Hellenic Police with specific recommendations for supplementary investigation. With regard to the second complaint, which actually came from a Frontex interpreter, on 1.12.2021 the Ombudsman announced⁶⁹ that it had initiated its own investigation under its special mandate. The Hellenic Police responded by ordering an administrative investigation, which the Ombudsman monitors closely, reserving his own rights. The addition of the two FRONTEX cases to the pushback cases under investigation by the Ombudsman, as the National Mechanism for the Investigation of Arbitrary Incidents, is of particular interest. The added value offered by the complaints addressed to the National Mechanism⁷⁰ is that the victims now feel confident to support their complaints; the National Mechanism carries out a formal investigation to establish the validity of the complaints; and, in this case, there is room for cooperation with the FRONTEX Fundamental Rights Officer (FRO).

69. <https://www.synigoros.gr/?i=stp.en.news.892136>.

70. See, with regard to the pushback cases under investigation by the National Mechanism for the Investigation of Arbitrary Incidents, the 2021 Special Report of the Mechanism (www.synigoros.gr)

With regard to previous years' FRONTEX complaints, it is noteworthy that, in a case regarding the readmission of a Syrian family on 20.10.2016, in respect of which the Ombudsman, after a series of related recommendations to the authorities involved, submitted his final comments in 2020 on the delays in the investigation and the investigation findings by the Inspector General and the Hellenic Police, **a relevant application was filed to the European Court of Human Rights (LHM v. Greece)**⁷¹,

Apart from the Hellenic Police Headquarters, the Ombudsman notified FRONTEX that, in addition to the fact that the Inspector General failed to impute any responsibility on the staff of the Ministry of Migration and declared herself incompetent to investigate police omissions, the Sworn Administrative Investigation file that was closed by the Hellenic Police and subsequently its summary forwarded to the Ombudsman, confirmed that many statements of entrants expressing their willingness to apply for asylum were not timely recorded, however no liability was imputed on police officers in this regard (complaints CMP 2017/00001 and CMP 2018/00005). We expect that these phenomena will be avoided in the future, in those cases where the Ombudsman has direct access to all police investigation files in its capacity as the National Mechanism for the Investigation of Arbitrary Incidents.

In two meetings held in 2021 with the new **FRONTEX Fundamental Rights Officer (FRO)**, the Ombudsman had a fruitful discussion on the structural problems of the FRONTEX Complaints Mechanism, the need for more efficiency and transparency in investigations⁷² and the prospects for more substantial cooperation with the Ombudsman and its peers from other Member States, *inter alia* by drawing on the Nafplion Initiative (see chapter 5.2 above) and the points raised by the Initiative on the identified deficiencies in relation to the safeguards for the rights of returnees and the need for accountability in case of violations of those rights.

5.4. The European Commission's proposal on the independent monitoring mechanism at the borders

In September 2021, the European Commission pointed out the imperative need for the establishment of an independent and reliable monitoring mechanism at the borders in Greece, with a preventive and investigative role with regard to human rights violations:

71. See, with regard to this case, the Greek Ombudsman's Special Reports of years 2016, pp. 14-15, 2017, pp. 22-23, 2018, p. 11, and 2020, p. 30.

72. See Greek Ombudsman's detailed comments in its 2020 Special Report, p. 30.

“A key part of this work is an independent and credible monitoring mechanism being developed by the Commission and the Greek authorities that will help prevent fundamental rights violations at the borders and ensure that procedures are in place to effectively investigate any allegations of such violations. This should be followed up EU-wide through the Commission proposal on the Screening Regulation to establish an independent monitoring mechanism for all Member States at the external borders.”⁷³

This was preceded by statements of the EU Commissioner for Home Affairs, that Greece must meet its obligations, based on numerous media reports on illegal pushbacks at sea (and other) borders⁷⁴.

In the context of the relevant parliamentary control procedure, the Greek government responded, through the Minister of Migration and Asylum, that an independent border monitoring mechanism was not considered necessary⁷⁵. In particular, it was stated such monitoring lays within the powers and scope of the *“independent judicial authorities and the principles of justice”* and that establishing an independent border monitoring mechanism was not a national obligation of Greece. There was only a relevant Commission proposal in place, to set up a mechanism in respect of asylum procedures, which would depend on the adoption, at EU level, of the relevant Regulation contained in the New Pact on Migration and Asylum that was announced by the Commission on 23.9.2020.

We note, however, that the New Pact on Migration and Asylum includes, as a basic proposal, a single asylum and return procedure at the borders. The common asylum procedures described in the proposed Regulation include pre-entry screening of all new entrants at the borders and expedited return procedures⁷⁶.

The independent monitoring mechanism at the borders is provided for in Article 7 of the proposed Regulation⁷⁷, and is intended to monitor the screening and detention of new entrants and secure their fundamental rights, making explicit reference to the principles of non-refoulement and free access to the asylum procedure.

73. Report on Migration and Asylum, Brussels 29.09.2021, COM(2021) 590 final. <https://ec.europa.eu/info/sites/default/files/report-migration-asylum.pdf>, p. 9.

74. Refugee repulsion: EU Commission blocks payments to the Hellenic Coast Guard – DER SPIEGEL
The EU is arming the Turks and says no to the Greek Coast ... geopolitiki.com Aug 30, 2021 *“Greece has requested additional funding for border management, especially in the Aegean.” EU Home Affairs Commissioner Elva Johansson stated [...] “We have said that such a payment should be linked to the establishment of the mechanism for the control of fundamental rights.”*

75. Greek Parliament Transcripts of the Plenary Session of 29.9.2021, p. 20882-3 <https://www.hellenicparliament.gr/UserFiles/a08fc2dd-61a9-4a83-b09a-09f4c564609d/es20210929.pdf>.

76. See chapter 5.1 herein and chapter 6.2, pp. 36 et seq. of the 2020 Special Report.

77. Article 7 of the proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, COM(2020) 612 final <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52020PC0612>.

The Fundamental Rights Agency shall issue general guidance for Member States on the setting up of such mechanism by the member states and its independent functioning. In June 2021, the Council of the EU proposed the following: “*For this purpose Member States may resort to **already existing national fundamental rights monitoring mechanisms which foresee safeguards that ensure their independence***”⁷⁸.”

At the same time, **the European Parliament** in its resolution of July 2021 on the Functioning of the Schengen Area notes “*the lack of adequate monitoring mechanisms to ensure respect for fundamental rights and the rule of law in the management of external borders*” and calls on the Member States “*to ensure that their national monitoring bodies are effectively established and able to fulfil their role, with sufficient resources, an appropriate mandate and a high degree of independence*”⁷⁹.

Article 7 of the European Commission’s proposal for a Regulation establishing an independent monitoring mechanism at the borders by Member States received positive reviews as a safeguard of the fundamental rights by international organisations and European government agencies networks⁸⁰.

All actors agree that the **prerequisites** for an effective monitoring mechanism at the borders are: (a) the mechanism’s effective operational independence from the governments; (b) transparency, to be ensured by the mechanism’s public reporting; (c) the mechanism enjoying a broad range of investigative and other powers in investigating human rights violations at the borders; (d) the involvement of appropriate, adequate and specialised staff; and (e) adequate financial resources. Field experience is also important for existing mechanisms.

The European Council’s Committee for the Prevention of Torture (CPT) also makes substantial recommendations on the investigating methods of the independent

78. Recital 23 of the Council screening regulation compromise 1022/21 of 25.6.2021, <https://www.statewatch.org/media/2978/eu-council-screening-regulation-compromise-10222-21.pdf>.

79. European Parliament, Resolution on the Annual Report on the Functioning of the Schengen Area (2019/2196(INI)), 8.7.2021, point 18. Resolution (europa.eu)

80. OHCHR and UNHCR, Joint Consultation on Independent National Monitoring Mechanisms proposed in the EU Pact on Migration and Asylum, February 2021, <https://europe.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=2596&LangID=E>

Recommendations to the EU Presidency, UNHCR, December 2021 <https://www.refworld.org/pdfid/5ff4799d4.pdf>

CPT 30th General Report, May 2021, pp. 15-16, <https://rm.coe.int/1680a25e6b>

European Network of National Human Rights Institutions (ENNHRI), Opinion, 10.3.2021 <http://ennhri.org/our-work/topics/asylum-and-migration/opinion-on-independent-human-rights-monitoring-mechanisms-at-borders-under-the-eu-pact-on-migration-and-asylum/>

Moreover, a 10-point document dated 14.9.2021 addressed to the Greek Government by the UNHCR along with the OHCHR and the ENNHRI

https://www.unhcr.org/gr/wp-content/uploads/sites/10/2021/09/10-points_EN.pdf

monitoring mechanism at the borders (including, among others, unannounced visits, access to all files, recording procedures, video footage and motion detection systems for each category of migrants who are being repulsed or detected electronically by security bodies and attendance of operations by monitors of the mechanism).

In a joint consultation on the New Pact, the Office of the High Commissioner for Human Rights (OHCHR) and the United Nations High Commissioner for Refugees (UNHCR)⁸¹ referred explicitly to the need to expand the mechanism's role, so that it includes pushbacks, detection and rescue practices, as well as mass deportations, which often take place outside or near the borders, in any case before a screening of new entrants, often by violence exercised by government officers or other parties.

A joint statement⁸² made by the European Council for Refugees and Exiles (ECRE) with other NGOs includes proposals for the imposition of political and financial sanctions on any Member States that fail to cooperate with the mechanism, disregard its findings or fail to set it up.

81. OHCHR and UNHCR, *ibid.*

82. Joint Statement of ECRE and other NGOs: Turning rhetoric into reality: New monitoring mechanism at European borders should ensure fundamental rights and accountability, 10.11.2020 <https://ecre.org/turning-rhetoric-into-reality-new-monitoring-mechanism-at-european-borders-should-ensure-fundamental-rights-and-accountability/>

Conclusion

At a time when the EU moves fast towards a stricter migrant returns framework, the European Commission points out: *“Independent and effective monitoring systems can enhance the protection and guarantee the respect of returnees’ fundamental rights and dignity during return operations”*⁸³. This is true insofar as there is strong political will on the part of the Member States to really put their trust in constitutionally-anchored independent authorities.

83. European Commission, Enhancing cooperation on return and readmission as part of a fair, effective and comprehensive EU migration policy, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0056&qid=1647599983733&from=EL>. Commission Communication, Brussels 10.02.2021, COM(2021) 56 final.