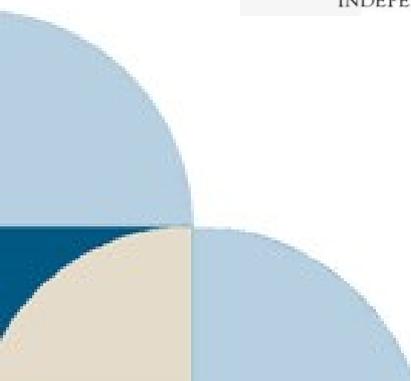




MONITORING FORCED RETURN OPERATIONS





The Ombudsman as a human rights monitor in forced return operations

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Introduction

During the last decade, EU Member States have applied diverse ways to implement their EU law obligation to set up an effective monitoring mechanism for forced return operations. This is evident in the choice of the monitoring bodies but also in the widely different mandates Member States chose to give to their monitors. That diversity has been reflected in the procedures and modalities (both administrative and financial) applied across the EU throughout the monitoring operation, from the early preparations to the last stages after the operation has been concluded and follow up actions are in order.

As for the monitoring bodies, several Member States have assigned monitoring forced return operations to State agencies (sometimes within the same administrative structure of the agency which is monitored), other countries opted for non governmental organisations or qualified individuals, while a considerable number offered the mandate to independent authorities such as the Ombudsman/National preventive mechanism (NPM). To complement the national monitoring mechanisms the EU set up a pool of monitors who can be called into action when a Member State asks for assistance to have its operations monitored (Article 51 paragraph 4 of Regulation (EU) 2019/1896).

The Ombudsman/NPM institutions involved have had the advantage of the expertise in the area of fundamental rights and had already been given tasks related to the status and rights of migrants and refugees, such as controlling procedures and inspecting facilities. The said institutions nevertheless faced considerable new challenges, most significantly having to prepare to send members of their staff to participate, most of them for the first time, in actual operations. At the same time, state bodies, mainly police agencies carrying out forced returns, would have to get used to have on board and work closely with civilians who would perform external control of their performance. To make things even more complicated, in the years that followed several operations were organised and implemented -with the assistance of Frontex- involving two or more Member States, each applying its own and, more often than not, different procedures and rules.

In 2019 the Greek Ombudsman was commissioned by the International Ombudsman Institute (IOI) to draft a report on how Ombudsman institutions in EU Member States operate as external control

mechanisms of forced return operations (ROs) of all kinds – including in readmission operations to third countries in the EU neighbourhood. The aim of the report would be to record the way different Ombudsman institutions carried out the new mandate, the modalities and procedures they needed to put in place to address situations and possible complications from their preparation for and participation in actual operations, and, if possible, by drawing conclusions, to highlight possible areas for improvements.

In the spring of 2019 the Greek Ombudsman compiled a questionnaire and addressed it to selected peer institutions across the EU. The selection was necessarily restricted among institutions that have been given the monitoring mandate by their respective national authorities and the aim was to have institutions representing Member States from most regions of the EU (ie. South, Central and North) which carry out different return operations (land, air, sea) and deal with different nationalities.

The Ombudsman institutions of Denmark replied on July 25, followed by the Czech Republic (September 30), Finland (Discrimination Ombudsman, November 17) and Spain (December 16) and the main findings of their replies as well as the findings of the Greek Ombudsman are presented in the following pages. Peer institutions from another two Member States, Poland and Latvia, were also contacted. The Polish Ombudsman confirmed that they have not been given the mandate to monitor forced return operations, while no feedback has so far become available from the Latvian Ombudsman.

| The operations

Forced return is the compulsory return, from the territory of an EU/EFTA Member State, of a third-country national to the country of origin, transit or third country (i.e. country of return), on the basis of an administrative or judicial act. A forced return operation involves mainly the returnees (ie the individuals who are to be returned), the escorts and their leader (ie the members of the State body who are mandated to perform the forced return operation), the escort leader, the monitor (the member of a state body or other organisation mandated to observe and report on whether the operation was conducted in full compliance with fundamental rights) and in most of the cases a doctor and an interpreter.

Forced return operations may be conducted by bus, boat or airplane. Those may be owned/operated by the returning State body or, alternatively, may be commercial or chartered. Depending on the participating Member States, there can be national return operations (NRO), ie involving a single Member State, or joint return operations (JRO), ie involving more than one Member States. Finally, operations may take the form of collecting return operations (CRO) whereby the returnees are handed over on the territory of the Member State to escorts provided by the country of return.

Frontex may support and coordinate Member States in carrying out return operations (notably by financing or co-financing operations from its budget, by the chartering of aircrafts and by providing technical and operational assistance to the Member States, including through the provision of experts and equipment and through the development and operation of information systems for the exchange of information). Frontex may even coordinate or organise return operations on its own initiative, as long as the Member State concerned agrees.

| What monitoring is all about

Forced return operations are subject both to the general human rights guarantees, including notably those included in the Charter of Fundamental Rights of the EU, and to guarantees prescribed specifically for operations of this kind. Regarding the latter, it is worth highlighting that most of the specific guarantees are included in Directive 2008/115/EC (the so-called 'Return Directive'), the Annex to Council Decision 2004/573/EC (Annex titled 'Common Guidelines on

security provisions for joint removals by air' – hereafter referred to as 'the Common Guidelines'), the Annex to EU Commission Recommendation C(2017) 6505 (Annex titled 'Return Handbook' – hereafter referred to as 'the Return Handbook') and the 'Twenty Guidelines on Forced Return' adopted in 2005 by the Committee of Ministers of the Council of Europe (Guidelines usually taken together with the commentary drafted by the ad-hoc Committee of Experts on Legal Aspects of Territorial Asylum, Refugees and Stateless Persons commentary that the Committee of Ministers took note of when they adopted them).

In particular, return-operations-specific guarantees include the following:

- The removal of the third country national shall be based on a written decision (return decision) providing reasons in fact and in law as well as information about available effective legal remedies (appeal or seeking review). Appropriate legal and linguistic assistance should also be made available. (Article 12 paragraph 1 and Article 13 paragraphs 1 and 3 of the Return Directive)
- The principle of non-refoulement should always be observed. (Article 9 paragraph 1 of the Return Directive, Article 48 paragraph 1 and Article 50 paragraph 3 of Regulation (EU) 2019/1896)
- Coercive measures may be used only when they are foreseen by law and their application is necessary, proportionate and subject to constant re-evaluation. Coercive measures should not compromise or threaten the ability of the returnee to breathe normally. The use of sedatives to facilitate the removal is forbidden without prejudice to emergency measures to ensure flight security. (Article 8 paragraphs 4, 5 and 6 of the Return Directive, Article 50 paragraph 3 of Regulation (EU) 2019/1896, Section 3.2 of the Common Guidelines)
- Returnees shall be in a state of health which allows legally and factually for a safe removal by air. To that effect medical records shall be provided for returnees with a known medical disposition or where medical treatment is required. Member States shall ensure that appropriate medical staff is available for the removal operation. (Section 1.1.2 of the Common Guidelines)
- The escorts shall not be uniformed or armed. They shall nevertheless wear a distinctive emblem for identification purposes. (Section 1.2.5 of the Common Guidelines)
- The privacy and dignity of the returnees shall be respected especially during their stay at the departure point or their boarding. (Article 50 paragraph 3 of Regulation (EU) 2019/1896, Sections 1.1.2

and 3.2 of the Common Guidelines)

- The returnees shall be briefed in advance about the enforcement of their removal and the procedures that will be followed. Member States shall ensure that appropriate language staff are available for the removal operation. (Sections 2.1 and 3.2 of the Common Guidelines)
- Particular measures shall be taken to address the needs of vulnerable persons and serve the children's best interests. (Article 48 paragraph 1 of Regulation (EU) 2019/1896, Sections 1.8 and 10.2 of the Return Handbook)
- Returnees shall be able to lodge a complaint for ill treatment. Appropriate follow up shall be ensured. (Article 111 of Regulation (EU) 2019/1896)

Given the seriousness and the multiplicity of the return-operations-specific standards, together with all relevant general human rights standards applicable to forced returns, it is important that an independent monitoring system is in place to ensure compliance with these standards. As noted in the official Commentary to the last of the Twenty Guidelines on Forced Return adopted by the Committee of Ministers of the Council of Europe, 'effective monitoring of removal operations reinforces the accountability of those responsible for implementing' and in fact 'monitoring has contributed to making the process of removal more transparent, thereby decreasing the use of force and violence during the operations' and improving 'the implementation of international human rights standards'.

According to the European Commission's Return Handbook '[...] monitoring systems should include involvement of organisations/bodies different and independent from the authorities enforcing return (*'nemo monitor in res sua'*); public bodies, such as a national Ombudsman or an independent general inspection body, may act as monitor. However, it seems problematic to assign a monitoring role to a subsection of the same administration which also carries out return/removals [...]'

The monitoring mandate

The domestic mandate of each Ombudsman institution with regard to monitoring forced return operations can be found in the national legal provisions implementing article 8 paragraphs 4, 5 and 6 of the Return Directive (Directive 2008/115/EC of the European Parliament

and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals). Moreover, no other public or private body is charged with this task in any of the respective countries and outsourcing or assigning the task to other bodies is not legally possible.

Monitoring is understood to cover at least all phases of the RO (i.e. pre-departure, in-flight/in-transit phase, arrival phase and return-flight/return-transit phases – see Article 50 paragraph 5 of Regulation (EU) 2019/1896) and, with the exception of monitors deployed from the EU pool, the pre-return phase as well (i.e. from the time the forced-return decisions are issued until the beginning of the RO – this is standard practice in line with the training provided to the monitors with the support of Frontex and FRA, notably given that some parts of the pre-return phase, e.g. the informing of the returnees about the upcoming operation and the risk assessment of the returnees are crucial for the progress of the operation itself).

The members of the respective monitoring teams must comply with the principles and procedures generally applicable to the Ombudsman such as the principle of confidentiality. Monitors also have access to any related document and file, to buildings housing public services, such as administration or detention centres, and may ask to interview individuals or public bodies staff, in accordance with the law. In most of the cases, monitors have access to return related records and documents prior to the operation, the operational plan, etc. The national authorities are under the obligation to provide such access to information, persons and documents and to generally facilitate the work of monitors.

Given that monitors in Ombudsman institutions are public servants, the relevant disciplinary and other rules, eg on reimbursement etc, apply to their monitoring of the ROs, too.

The monitors

As regards the number and the qualities of human rights monitors for forced return operations in these Ombudsman institutions, there is some variation:

a) In Finland, there is a team of four monitors, all of them senior officers of the Non-Discrimination Ombudsman. All monitors have been selected on the basis of their interest in and availability for the

task and have received special training by the EU funded project for Forced Returns Monitoring (FReM). They work as monitors part-time (the rest of the time they work on different discrimination-related cases). All expenses are covered by the state budget. Monitors have access to confidential information and are bound by a duty of confidentiality. Private actors have access to certain information if they have the power of attorney.

b) In Denmark, five senior officers of the Monitoring Department work as monitors part-time. In addition, they are part of the National Preventive Mechanism (NPM) team and they handle cases falling under the mandate of the Monitoring Department of the Danish Ombudsman. The selected officers have as a minimum a university degree in law. All monitors have been selected on the basis of their monitoring skills and their interest in the task. They have access to confidential information and are bound by a duty of confidentiality. Three of the monitors have received special training by the EU funded project for Forced Returns Monitoring (FReM) and are also part of the EU pool of monitors.

c) In Spain, there are eight monitors, part of the National Preventive Mechanism (NPM) team. The latter falls under the Ombudsman. The staff of the Spanish NPM works full time in the NPM tasks and, additionally, monitors ROs. They also have administrative support staff (2 people). There is also one additional staff member, the International Relations Director, with wide experience in monitoring flights who participates in these monitoring activities as well. The monitors are selected according to their previous training. The selection is made in accordance with the Law of the Ombudsman. The institution promotes, to the extent possible, training both nationally and internationally. Two out of the 8+1 monitors have also received training from the FReM Project. These two members are also part of the European Pool, although they have never monitored a flight in such capacity, because of the reasons stated in page 12. Some of them are experts in migration issues which provides added value when monitoring the repatriation flights.

d) In the Czech Republic, monitoring is assigned to the Ombudsman institution's Division of Supervision over Places of Detention (this Division being the NPM). Two members of this Division work as monitors full-time, other members could also monitor at any time and in fact some have already done so. Three members of the Division are also part of the EU pool of monitors and another one is qualified to join it. Two monitors are also trainers of monitors. Selection of

monitors is based on prior experience and interest in the NPM activities. All monitors have received FReM training and are encouraged and supported to attend FReM workshops etc. Monitors are always deployed in pairs.

e) In Greece, the respective team consists of twenty part-time monitors, all staff of the Ombudsman. Each one of them also works on case files falling under the general mandate and the various special mandates of the Greek Ombudsman to receive complaints about mainly public sector bodies. There is a coordinator and a deputy coordinator. Whenever necessary, information is shared via email, often using the team's specially designated mail list. Monitors are selected among the Ombudsman institution's senior investigators on the basis of voluntary availability and interest in monitoring. All monitors have received FReM training and attend training updates whenever available.

The independence of all five Ombudsman institutions is legally guaranteed: in Finland, by the of Non-Discrimination Ombudsman Act; in Denmark, by the Parliamentary Ombudsman Act; in the Czech Republic by the Act on the Public Defender of Rights; in Spain by art. 54 of the Spanish Constitution and by Organic Law 3/1981, of April 6, on the Ombudsman; and in Greece by the Constitution and by Law 3094/2013, as amended by Law 4443/2016.

In Finland and in Spain, travel and accommodation expenses are paid for by the Ombudsman institution, while in Denmark they are paid for by the police. In the Czech Republic and in Greece, expenses are paid for by the Ombudsman and compensated at least in part by the EU Asylum, Migration and Integration Fund.

In Denmark, a set of internal guidelines have been developed with the aim of ensuring the independence of the monitors. According to the guidelines, the monitors are not to spend time together with the police more than absolutely necessary when travelling back from concluded ROs. Besides ensuring that the monitors do not develop close ties with the police, the guidelines also seek to ensure that the public perceive the monitors as being independent from the police.

Before the operation

- **Preparing for monitoring missions**

The preparation for the monitoring of any RO begins at the point in time when the Ombudsman institution is informed about the RO. The competent police division notifies the Ombudsman institution (usually a designated contact person within the institution) about upcoming operations, typically also providing basic information about each operation (e.g. country/-ies of destination, date, number and possibly age of returnees). Additional information is provided on request, often via email or by phone.

Monitors usually do not contact in advance the facilities where returnees are held, unless it is necessary for the monitoring mission.

Ombudsman institutions evaluate the quality of communication with police authorities at this stage as satisfactory, but sometimes the institutions are not notified early enough to prepare for the monitoring mission. This is especially the case in the Czech Republic, where the Ombudsman institution is not always notified early enough to process the necessary documents for the monitors to acquire the needed visas, given that some embassies are located outside the country. Moreover, there is no legal provision about how early the Ombudsman institution should be notified about upcoming ROs.

The limited resources of Ombudsman institutions make it necessary for each such institution to be selective about which ROs it will monitor. The selection is based on such factors as the risk of use of coercive measures and the presence of vulnerable groups in the RO.

After the Ombudsman institution notifies the competent police division and/or immigration authority that it will monitor a particular RO, further information is given to the Ombudsman institution by the Administration either *sua sponte* or at least on request. Among such information are the contact details of the escort leader and of possible other contact points, with whom monitors may communicate at any point to ask for updates or any other information.

Data provided by the police at the minimum:

- Names, surnames of returnees
- Dates of birth
- Nationalities
- Health condition (whether/when the returnees are medically examined)
- Place(s) of detention
- Time and date of the RO

- Information about what will precede the journey
- Travel info

In the Czech Republic, in particular, the police usually provide additional information, such as the returnee's respective address in the country of residence and the country of return and the time and date of their estimated departure from the respective detention centres. In Denmark, the police makes the entire police file on each returnee available, including e.g. the risk assessment of the police and the information exchanged with the authorities in the country of return.

In national ROs coordinated by Frontex, all communication with Frontex is carried out by the national police. In ROs in which a monitor participates as a member of the EU pool of monitors, Frontex representatives contact the monitor directly and send them information about the escort leader and/or other contact points in the organising Member State. The monitor then communicates with the relevant authorities of the organising Member State – no longer with Frontex, except in rare cases (e.g. for visa problems).

However, in case monitors request information from police forces of other MSs, they occasionally encounter issues as regards especially data about the vulnerability of the returnees.

In national operations, monitors are assigned to missions on the basis of their availability, workload, the number of ROs they have monitored, the destination and the working language of the RO and the challenges that might be expected during the RO.

Additional travel insurance and vaccination of monitors are either arranged by the Ombudsman institutions (in Finland, Denmark and the Czech Republic – in Spain there are medical tests for the Ombudsman staff every year and vaccination is covered by the public health system) or is left to the monitors to decide (Greece).

In certain Member States such as Spain and occasionally in Greece, the monitoring staff has access to service mobile phones and tablets while in Spain they have also access to a telephone translation system, and other technological applications.

- **Pre-return phase**

In the pre-return phase, staff of the respective Ombudsman

institutions/NPMs may visit detention centres or other facilities in which returnees are held. Such visits may not always be considered as part of the RO-monitoring (in Denmark for example) they do take place nonetheless under the general Ombudsman/NPM mandate. The Ombudsman staff is expected to check the documentation related to the RO and may interview any detained returnee and, whenever necessary, the detention facility staff or police officers involved. The Ombudsman staff has access even to medical and criminal-record documents and may obtain copies. Prison/detention-facilities staff and police officers shall provide any related information and assistance requested by the Ombudsman employee. Visits to detention facilities may also be conducted on the basis of the NPM mandate at any other point in time.

In the Czech Republic, the Public Defender of Rights, by exercising the above mentioned powers, contributed to the resolution of a number of issues pertaining to the operation such as better preparation of the RO, issuing of fit-to-travel documents for returnees, provision of internet access etc.

A recurrent systemic problem noted by both the Finnish and Greek Ombudsman institutions is that prospective returnees in those countries may be given very short notice about the upcoming return, leaving little or no time for them to contact relatives or friends in either the country of departure or the country of destination. In Spain, it has been noted that prospective returnees coming from police stations not only are often not allowed to gather their belongings or even to minimally organise their departure before the operation, but also are not medically checked before the operation and do not have medical documentation (while those coming from special, aliens detention centres do). Moreover, the Spanish Ombudsman notes that there are shortcomings in the detection of victims of human trafficking, who are sometimes wrongfully included in ROs.

During the operation

- Pre-departure phase

In the pre-departure phase, the Ombudsman/NPM staff invariably monitors the activities that take place where the returnees are gathered to be searched and wait before the transit begins. The monitor may also monitor the pickup of the returnees from their places of residence or from the prisons or the places of detention, as well as to monitor their transportation from the said places to the

place where they are searched and the subsequent transportation to the bus, aeroplane or boat.

The monitor pays particular attention to the use of force or the application of any coercive measure on a returnee, to body searches and searches of their luggage, to whether water and suitable food is provided, to whether officers interview the returnees or at least explain the stages of the operation to them at its very beginning, and to whether special needs of vulnerable groups are met.

Recurrent human rights violations noted by the Czech, the Greek and, in cases, the Finnish and Spanish Ombudsman institutions are the following:

- Use of restraints is not always based on an individualised (and continuous) risk assessment. In fact, in Greek readmission operations, for example, all returnees are handcuffed from the end of their body search until they board the readmission boat.
- Occasionally the returnees are not given enough time to retrieve belongings from places outside the detention facilities.
- Occasionally escorts walk returnees wearing handcuffs in parts of airports or sea ports where they are visible to outsiders.
- Occasionally returnees are not informed either before or during the RO of the existence of complaints mechanisms.

The Spanish Ombudsman has also noted that often the returnees are not given access to officially held information that they request, Except for Greece where only handcuffs may be used, a great variety of additional restraints are used across Member States. Spanish escorts may choose to use holding bands, which are withdrawn after the take off, their Danish counterparts may use plastic strips, restraint belts and helmets, while Czech authorities may apply body cuffs, foot cuffs and even measures to prevent spatial orientation. In Finland escorts have access also to body-cuffs, helmets, spit-masks, plastic ties, and fabric stripes. All respective legal instruments regulating the use of force, coercive measures and restraints provide for full respect of fundamental rights and the principles of legality, proportionality and necessity. It appears that in the majority of cases in the said Member States the escorts did not need to use force or restraints.

Unaccompanied minors are not subject to return operations in Spain, Greece, while in most Member States surveyed the protection of

members of vulnerable groups could be improved especially regarding ways to identify vulnerabilities and deployment of more female escort officers to address the needs of female returnees in particular during body search.

In the Czech Republic a universal system of medical check up resulting to a fit to travel document applies. In Greece, Spain, Denmark and Finland medical checks are not applied to all returnees and quite a few returnees depart without any document having been issued regarding their fitness to travel.

- **In-transit phase**

Recurrent human rights violations noted by the Ombudsman/NPM institutions surveyed are more or less similar to the violations and incidents observed in the pre departure phase, namely regarding access to information, access to a complaint mechanism as well as the use of coercive measures and restraints with respect to the principles of legality, necessity and proportionality. Certain cases regarding access to adequate water and food were reported by the Ombudsman/NPM institutions in Greece and the Czech Republic, while Czech monitors have repeatedly complained that the police regularly prevent them from travelling in the same vehicle with the returnees.

It has been generally acknowledged that the way the in-transit phase is conducted bears many similarities with the pre departure phase, while it is noted that the operation is generally more uneventful after the departure.

- **Hand-over phase**

Very few incidents have been noted regarding possible violations of fundamental rights during the hand-over phase. Certain cases have to do with challenges to the right to complain and access to information.

Finnish monitors have observed risks to the right to dignity in particular when the returnees have not been provided with adequate clothing and shoes and the right to health raising the issue of safeguarding the continuity of the medication and treatment a returnee has received in the country of prior residence and may need to receive in the country of return. Spanish monitors noted the problems faced by certain returnees who would need to continue their travel from the airport to their home town or even to their home country.

All parties surveyed noted the absence of or, in specific cases, the limited only cooperation with Ombudsman/NPM or other institutions in the country of destination regarding the treatment and well-being of returnees after their return. Spanish monitors sought and acquired the cooperation of their local counterparts in cases of returnees with vulnerabilities.

After the operation

- Monitoring reports

In all the Member States surveyed write a report on each and every RO monitored, even where there is no specific obligation foreseen in domestic law. In some Member States a specially designated template is used to draft the monitor's report.

In all cases, with the exception of the Czech Republic, the reports are meant as internal documents, are addressed mainly to the head of the institution, and may include both positive and negative observations, assumptions, conclusions, and recommendations. There are no formal requirements such as counter signing/validation of the report or any strict timeframe. The head of the institution may use the monitor's findings and recommendations in their annual report or to formulate the institution's observations and proposals to the competent public body regarding the protection of fundamental rights in return operations.

In the Czech Republic, there is a formal internal procedure with specific requirements, standards regarding both content and structure, and timeframes whereby the monitor provides the facts and the Ombudsman drafts the final conclusions and recommendations and signs the report which is addressed to public bodies concerned. Before that, another member of the team called "guarantor" evaluates the report and makes sure that the findings and reasoning are in line with the Ombudsman's views and previous reports.

- Following-up on the report's findings and recommendations

In the Czech Republic, Greece and Spain, the public bodies concerned are expected to reply within a set timeframe addressing the Ombudsman's findings and recommendations. If there is no adequate response or no response at all, the Ombudsman may take

the issue up to a higher level or, where there is such a mandate, may consider asking for a disciplinary investigation to be launched against the officers concerned. Alternatively the Ombudsman may choose to draw the attention of the general public or include the issue in their annual report. The Spanish NMP may also refer information to the Migration Area of the Spanish Ombudsman to initiate a specific investigation. They can even take the issue before the General Prosecutor to initiate the criminal proceedings foreseen in art. 502 of Penal Code.

In Denmark and Finland, should there be a case of disagreement with the Ombudsman's findings, there appears to be a preference to continuing the investigation on the general issues and engaging in a critical dialogue with the competent authorities. In individual cases the Danish Ombudsman uses the normal Ombudsman tools, which means that Ombudsman may criticise, issue recommendations or otherwise state his opinion in a case and propose changes of the procedures or case processing in connection with the cases on forced returns.

In all Member States surveyed, the public bodies responsible for the return operation seem to respond generally positively to the Ombudsman's recommendations, with the exception mainly of cases where they lack the necessary resources to implement the changes requested. On the other hand, extensive and unjustified use of detention, restraints and coercive measures seem to be the main issues that the competent authorities have been reluctant to address in the Czech Republic and Greece.

- **Complaint mechanism, assessment of monitors' work and possible disciplinary proceedings**

Member States participating in the survey have put in place divergent national complaints mechanisms whereby the returnee may submit grievances regarding violations of their fundamental rights. In Finland complaints are submitted to the Parliamentary Ombudsman who is responsible to investigate the cases. Criminal charges may apply in serious cases. The Spanish and Greek Ombudsman institutions may receive such complaints through their monitors taking part on the return operation. The Danish Independent Police Complaints Authority handles investigation of criminal cases against police officers and considers and decides complaints of police misconduct. Finally, in the Czech Republic, the Ombudsman may not receive or handle such complaints and the

returnees may complain to the Police or to the General Inspection of Security Forces (GIBS).

The monitors' work and performance is assessed mainly internally, and the monitors are subject to the general evaluation and disciplinary proceedings of their institution. Where monitors are assigned to third parties they are not covered by any special immunity.

Besides these complaints mechanisms established by Member States, there exists the Frontex complaints mechanism, provided for by Article 72 of Regulation (EU) 2016/1624 and Article 111 of Regulation (EU) 2019/1896. Complaints submitted under this mechanism are handled by the Frontex Fundamental Rights Officer, who is expected to forward all admissible complaints to the Executive Director and those complaints that concern members of Frontex teams to their home Member States. According to the Regulation, complaints should be properly followed up and the Frontex Fundamental Rights Officer should report on the complaints mechanism in his/her annual report, which must include not only the number of complaints received and the types of fundamental rights violations involved and the operations concerned, but also the follow-up measures taken by Frontex and Member States. Although the Regulation provides on the one hand that the standardised complaint form shall be made available both on Frontex's website and in hardcopy during all Frontex activities and on the other hand that Frontex shall ensure that information about the possibility and procedure for making a complaint is readily available, in practice the returnees neither receive or see any copies of the complaint form nor are informed about the complaints mechanism either before or during the operation.

- **Publicising conclusions and recommendations**

The observations, conclusions and recommendations of the monitors are included in the Ombudsman institutions annual reports. The Greek Ombudsman also issues a special report every year on monitoring returns and makes it available in English and Greek. Further to the annual report the Spanish Ombudsman and the Ombudsman of the Czech Republic publish respectively the main findings of each operation or the actual report without identification of persons involved, on their website, shortly after the operation.

In Greece, Spain and the Czech Republic a special event (ie

conference, round table etc) is held to present the report on monitoring forced returns. The Greek and Spanish Ombudsmen present their reports to their respective national parliaments.

Frontex pool of monitors

All five institutions have nominated monitors to the Frontex pool foreseen in the relevant EU Regulation. Currently there are 8 from Greece, 3 from Denmark, 3 from the Czech Republic, 2 from Finland and 2 from Spain. In the last three years, monitors from the Czech Republic have participated in 10, from Finland in 4 and from Denmark in 3 operations in their capacity as members of the pool. During the same period Greece and Spain have refrained from participating in any such operation, mainly due to the respective Ombudsmen reservations regarding not only financial (costs involved which are not or may not be reimbursed) but also institutional considerations (notably lack of independence and accountability).

More specifically, the pool of monitors has been constituted and is managed by the Agency itself on the basis of Article 29 of Regulation (EU) 2016/1624 and Article 51 of the new Regulation (EU) 2019/1896, an Article very much like Article 30 of Regulation (EU) 2016/1624 on establishing a pool of forced-return escorts. There is lack of transparency both concerning the way monitors are selected and assigned to operations (the monitor volunteers but needs to seek approval to participate as a pool member in an operation) and concerning the exact handling of the monitoring reports, which, according to Article 28 of the same Regulation and Article 50 of the new Regulation (EU) 2019/1896, are submitted to the Frontex Executive Director, the Fundamental Rights Officer and to the competent national authorities of all the Member States involved in the given operation. Article 51 of the new Regulation (EU) 2019/1896 stipulates that Frontex constitutes the pool 'after taking due account of the opinion of the Fundamental Rights Officer', but at the same time Article 110 provides on the one hand for the placement of all monitors of the pool under the Fundamental Rights Officer's 'hierarchical supervision' and on the other hand for the recruitment of at least 40 monitors directly by the Agency by 5 December 2020, thus further internalizing the monitoring mechanism.

The institutions of the monitors who actually participated in operations as members of the pool normally bear the cost of the regular salaries paid and man-hours lost from regular office duties as the said monitors need to be absent from work for a period of 3-5

days. Fares and accommodation costs are normally covered or reimbursed by the Member State which uses the services of the monitor or by Frontex.

The issues of transparency, accountability and independence of the monitor in the framework of the pool as well as the financial aspects of the monitor's deployment have caused serious concern to the monitoring institutions. Certain Ombudsman/NPM institutions active in forced returns monitoring have launched an initiative to address those issues by forming an independent external control (monitoring) mechanism complementary to the pool. The "Nafplion mechanism" was inaugurated in Rome in 2019 with the active involvement of the respective institutions from the Czech Republic, Finland, Greece and Spain and the support of the Council of Europe.

Only the Ombudsman of the Czech Republic, from the institutions participating in the survey, has been asked by Frontex or other EU institutions and agencies to participate in coordinating meetings, contribute observations/proposals or otherwise take part in a consultation regarding the participation of their staff to the pool of monitors. All institutions, nevertheless, participate in 'lessons learned'-meetings in the framework of the EU funded project for Forced Returns Monitoring (FReM). Representatives from Frontex and FRA also participate.

No staff member from the said Ombudsman institutions has been subjected to disciplinary procedures regarding their participation in a RO as members of the pool. Furthermore, no staff member has been removed/excluded from the pool or has been subject of a request by Frontex to have them withdrawn.

No Ombudsman institution officially receives the report of the monitor assigned to a RO as a member of the pool, or is otherwise involved in the drafting/communicating or follow up to the said report. The Ombudsman institutions receive twice a year a report by the Fundamental Rights Officer of Frontex regarding the main overall findings in ROs monitored by members of the pool.

COVID-19 and forced returns monitoring

The extraordinary measures enacted and implemented in most of the Member States of the EU as well as in third countries due to the outbreak of the coronavirus affected forced return operations and the deployment of monitors. As a number of countries closed their

borders or imposed strict travel restrictions, the majority of EU Member States either suspended forced return operations altogether or drastically limited their number and destinations. At the same time monitoring organisations also had to take measures to protect their staff from unnecessary exposure to risk. In those cases where return operations are possible, as for example land operations from Greece to Albania, the monitoring institution continues to receive prior notification and may still deploy monitors.

Concluding remarks

- Different bodies following diverse rules and procedures have been asked to monitor forced return operations, across the EU. This report presents similarities and differences in monitoring forced return operations as performed by the Ombudsman institutions of the Czech republic, Denmark, Finland, Greece and Spain;
- Standard rules regarding confidentiality, remuneration, disciplinary procedures but also regarding access to documents and information continue to apply;
- There is a lot of diversity in the way the respective teams of monitors have been organised, eg 20 Greek part time monitors independent from the NPM team, 8 Spanish full time monitors part of the NPM team;
- Good cooperation with the organising state body and access to information and documents at the preparatory stage is key to effective human rights monitoring;
- Practical aspects such as vaccination, visas, access to international mobile phone and tablet/laptop are not always addressed in time;
- The institutional independence of the Ombudsman/NPM institutions involved is guaranteed by law, there are however many outstanding issues regarding financial independence;
- The Ombudsman/NPM institutions involved may cover also the pre return phase (i.e. from the time the forced-return decisions are issued until the beginning of the RO). Main findings include lack of medical documentation and failure of the organising authorities to inform the returnees of the operation;
- At the pre departure phase main problems include unjustified use of restraints and failure to give returnees sufficient time to notify relatives and collect belongings;
- In-transit phase findings include failure of organising authorities to provide access to a complaint mechanism, unjustified use of restraints and occasionally monitors prevented by police officers to have access to returnees;
- At the hand-over phase risks to the right to dignity and the right to health have been observed (inadequate clothing, not safeguarding the continuity of the medication) as well as the absence of or the limited cooperation with Ombudsman/NPM or other institutions in the country of destination;
- Different procedures and practices apply regarding the monitoring reports and the possible follow up;
- Even though all institutions have nominated monitors to the Frontex pool, there are concerns regarding independence, accountability

and financial procedures.

Annex

Questionnaire sent to Ombudsmen institutions

Introduction - purpose and scope

This questionnaire is about the role of Ombudsman institutions in all kinds of forced return operations (ROs) -joint (JRO), collect (CRO) or national (NRO), irrespective of means of transportation (airplane, boat or bus), commercial or chartered. It covers return operations to the country of origin of the migrant, and readmission operations to third countries in the EU neighbourhood.

Mandate and role in various phases of the RO

- 1) What is your institution's mandate relating to forced returns (including possible access to procedural stages before the return operation)? Please cite the relevant legal basis (eg the "Returns Directive" and/or mandates regarding the NPM, Children rights, Health Ombudsman etc) and procedural provisions (including provisions on transparency, accountability, reporting, etc.), where applicable.
- 2) Are other public or private bodies charged with human rights monitoring of forced returns in your jurisdiction? If so, please cite relevant legal basis.
- 3) Is your institution allowed to assign/outsource the monitoring of particular ROs to other bodies, or persons outside your institution? If so, please specify what body or bodies (public, NGO etc.) and what powers, if any, your institution has related to them.

Pool and qualities of monitors

- 4) What is the number of human rights monitors in your institution? Do they constitute a separate team? If so, please specify the organization and structure, if applicable, of the team. Are they assigned as full-time or part-time monitors? How, if at all, is information about prospective and past ROs shared among the monitors?
- 5) How are prospective monitors in your organisation selected? What kind of training, if any, do they receive before and after they are assigned as monitors?

6) Please specify what elements, if any, relating to the composition, structure, organisation, meetings etc. of your institution's group of monitors and to the qualities of the monitors you consider of particular importance for the performance of their tasks.

7) Are there legal provisions or principles (eg. budgeting expenses, obligation of confidentiality, access to documents/information etc) that are applicable to your institution but not to NGOs or other private actors, either generally or as regards immigrants/prospective returnees in particular?

Preparation stage

8) How is your institution informed about a future RO?

9) Please describe the level of communication, prior to the RO, between your institution and the public body which serves as escorts to the RO (eg. police, immigration service etc). Please evaluate the quality and efficiency of communication.

10) Please specify the level of communication, prior to the RO, between your institution and Frontex and/or bodies acting on behalf of Frontex. Please evaluate the quality and efficiency of communication.

11) Describe the procedure according to which a human rights monitor is assigned to a particular RO?

12) Is information provided to the monitor prior to the RO by the competent state authorities, Frontex etc. adequate? Please state positive and negative points, where applicable.

13) Has sufficient equipment (eg mobile phone, international sim card, credit card, vest, etc) been made available to the monitor prior to the RO? Please state positive and negative points.

14) Is there a policy/procedure regarding vaccination and health/travel insurance? Please specify.

15) Is there a particular policy/procedure in your institution regarding remuneration, travel/accommodation expenses, subsistence cost etc of the monitor? Please specify.

Monitors' independence

16) Are there sufficient legal safeguards regarding the independence of the monitors and your institution? Please cite the relevant legal provisions.

17) Who covers the expenses and remuneration of the monitors? Is any part of the funding or any of the equipment or means of transport necessary for the work of monitors provided for by third parties?

Pre-return phase

18) What powers (eg information, investigation, intervention etc), if any, does your institution have with relation to the prospective returnees from the time they are given the 'return decisions' until the beginning of the RO?

19) What powers, if any, does your institution have to visit places where prospective returnees are detained or hosted? How often are such powers exercised, if applicable? What major systemic issues, if any, has your institution identified relating to such places of detention/hospitality?

20) What powers, if any, does your institution have to check the administrative files or other data of returnees prior to the RO, esp. relating to their fitness-to-travel, vulnerability and individual risk assessment?

21) What recurrent systemic problems, if any, has your institution identified regarding the pre-return phase of the ROs monitored so far?

Pre-departure phase

22) Please describe the kinds of places and the kinds of activities monitored in a typical RO in your jurisdiction.

23) From the experience of the ROs monitored so far, please specify the kinds of fundamental rights violations or risks of such violations observed in the pre-departure phase of the ROs. Please note the stage (body searches, luggage handling, transportation to the means of transport, boarding etc.) and the context or kind of situation(s) in which such violations or risks have been observed, where applicable. You may use for reference the following indicative list of fundamental rights and relevant principles:

- Principle of *non-refoulement*
- Principles of legality, proportionality and necessity
- Right to life
- Prohibition of torture and inhuman or degrading treatment or punishment (and principles of legality and proportionality regarding any use of force)
- Right to dignity (including to suitable clothing, to humane conditions in waiting areas, means of transport etc.)
- Right to liberty and security (including right against the disproportionate use of means of restraint)
- Right to access to food and water
- Freedoms of conscience, expression, and religion (including right to

have access to food that respects one's religion)

- Access to information (esp. information about the RO, as well as access to telephone for informing family or friends)
- Right to health and right of access to medical services
- Children's rights and rights of other vulnerable persons
- Right to family unity
- Right to property
- Right to personal data protection and privacy
- Right to non-discrimination
- Right to good administration (especially the right to complain)

24) Please specify the coercive measures foreseen in your jurisdiction and the rules for their use.

25) What is the frequency and level of the use of physical force in the pre-departure phase of the ROs monitored so far?

26) What challenges, if any, regarding particular needs of vulnerable returnees and children, has your institution identified in this phase of the monitored ROs? Please specify noting different vulnerabilities, where applicable.

27) Are all returnees medically checked and provided with 'fit-to-travel' documents prior to departure?

In-transit phase

28) From the experience of the ROs monitored so far, please specify the kinds of fundamental rights violations or risks of such violations observed in the in-transit phase of the ROs. (please refer to the list under q.23)

29) What is the frequency and level of the use of force and coercive measures in the in-transit phase of the ROs monitored so far?

30) What challenges, if any, regarding particular needs of vulnerable returnees and children, has your institution identified in this phase of the monitored ROs? Please specify noting different vulnerabilities, where applicable.

Hand-over phase

31) From the experience of the ROs monitored so far, please specify the kinds of fundamental rights violations or risks of such violations observed in the hand-over phase of the ROs. (please refer to the list under q.23)

32) What is the frequency and level of the use of force and coercive measures in the hand-over phase of the ROs monitored so far?

33) What challenges, if any, regarding particular needs of vulnerable returnees and children, has your institution identified in this phase of

the monitored ROs? Please specify noting different vulnerabilities, where applicable.

34) Does your institution co-operate in any way with Ombudsman/NPM or other institutions in the country of destination regarding the treatment and well-being of returnees after their return?

Monitoring reports

35) Is the monitor required to write a report on each and every RO monitored?

36) Does the report also include positive/negative points, assumptions, conclusions, and recommendations?

37) Is the report signed, counter-signed or otherwise approved/validated by someone other than the monitor?

38) Is the monitor required to use a specific template? If so, please provide a copy.

39) Is there a particular timeframe regarding drafting, submitting, validating, forwarding etc of the report? Please specify.

40) Which parties within your institution and which other state or non-state authorities or other actors of your Member State, other Member State, third country, or European/international body receive, for action or information, the monitoring report?

Following-up on the report's findings and recommendations

41) How, if at all, does your institution follow up on the report's findings and recommendations?

42) Does your institution have the mandate to trigger or initiate judicial, disciplinary, administrative or other proceedings relating to the findings of a report? Is your institution involved in any other way in such proceedings?

43) What means, if any, does your institution have for the future elimination or reduction of fundamental rights violations observed in ROs?

44) How responsive are state authorities and EU institutions (eg Frontex) to observations made in monitoring reports issued by your institution?

Complaint mechanism, assessment of monitors' work and possible disciplinary proceedings

45) Is there a complaint mechanism regarding the conduct of persons involved in the RO? If so, please specify.

46) Are there internal and/or external evaluation procedures to assess the quality of monitors' work? If so, please specify. In case your institution is allowed to assign monitoring to third parties (private bodies or individuals), are these monitors subject to any kind of evaluation? If so, please specify.

47) Are monitors subject to your institution or any other state body's disciplinary proceedings for allegations of misconduct? If so, please specify. In case your institution is allowed to assign monitoring to third parties, are these monitors subject to any kind of disciplinary proceedings?

Publicizing conclusions and recommendations

48) Are conclusions or recommendations publicized in regular reports? If so, please specify (frequency, whether they are reports special to monitoring or of a more general subject etc.)

49) Are reports' conclusions or recommendations presented in the course of a particular/public event? If so, please specify. Are conclusions or recommendations publicized on the press or media? If so, please specify.

50) Are state bodies and EU institutions (eg. Frontex) responsive to observations made in monitoring reports issued by your institution? Please specify.

Frontex pool of monitors

51) Has your institution nominated or considered nominating monitors to the Frontex pool foreseen in Regulation 2016/1624? Please specify number of monitors, year of first nomination/participation, and number of operations monitored so far under the Frontex pool mandate.

If the answer to the question above is negative

52) Please specify the reasons and concerns involved.

If the answer is affirmative, please proceed to the few remaining questions below

53) Has your institution been asked to reserve or make available any administrative (eg. additional procedures, man hours etc) or fiscal (fees, expenses etc) resources to facilitate your monitors' participation to the Frontex pool?

54) Does your institution recover the resources above? Please specify

procedure and timeframe.

55) Is there within your institution a procedure whereby a member of your staff also member of the pool is authorized to take part in a particular JRO as requested by Frontex? Please specify.

56) Has your institution been asked by Frontex or other EU institutions and agencies to participate in coordinating meetings, contribute observations/proposals or otherwise take part in a consultation regarding the participation of your staff to the pool of monitors? Please specify where applicable.

57) Has any of your staff been subjected to disciplinary procedures regarding their participation in a RO as members of the pool? What was the outcome?

58) Has any of your staff been removed/excluded from the pool or has your institution been asked to withdraw them? If yes, what were the reasons and the procedure followed?

59) Does your institution receive the report of the monitor assigned to a RO as a member of the pool? Is your institution otherwise involved in the drafting/communicating or follow up to the report?

60) Does your institution receive reports by the Fundamental Rights Officer or the Consultative Forum of Frontex regarding the ROs monitored by members of the pool?

