



RETURN OF THIRD-COUNTRY NATIONALS

SPECIAL REPORT 2017



THE GREEK
OMBUDSMAN
INDEPENDENT AUTHORITY



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Contributors

The present Special Report constitutes the processing of material resulting from the work –investigation of complaints, interventions, on-site inspections, monitoring of the return procedures– of the team of the Independent Authority responsible for Returns, under the supervision of the Greek Ombudsman Andreas Pottakis and the Deputy Ombudsman George Nikolopoulos.

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Introduction

The management of third country nationals' mixed population flows, refugees and migrants, can be discerned in various discrete stages:

- from the first reception and their registration,
- to their dispersal throughout the country,
- the processing of their petitions,
- their incorporation into social and economic life for all third country nationals who remain,
- their relocation to other member states of the European Union for all those who substantiated a claim for family reunification or who benefited from the programme of relocation for asylum seekers in the period 2015-2017,
- or the return and/or readmission to their native countries or to Turkey, for those whose stay was not regarded as legal.

The Greek Ombudsman is present in all these stages, exercising control over the legality of the proceedings, observing at close hand the planning and implementation of the operational activity of the public services, formulating recommendations and suggestions for institutional interventions, emphasizing imperfections, gaps, malfunctions, and shortages, both political and of a managerial nature. In the Special Report published at the beginning of the summer of 2017, the Greek Ombudsman highlighted that the question of the management of migrant and refugee flows is first and foremost a political one, for Europe as much as for Greece.

With the obvious absence of common, uniform and coherent policies, the European Union continued to lean on -and to support- ad hoc agreements of dubious legal but significant political value and weight, such as the Joint Statement with Turkey in 2016. At the level of the European Union, essential conditions for saving up the necessary time were projected:

- the control of population flows
- their geographical limitation at the boundaries of the border areas of Europe
- the dilution in the case of exceptional population density
- the minimal improvement of living conditions and the abuse of the institutional context which foresees and allows administrative detention,

- maintaining a climate that is prohibitive for aspiring mobile populations and for already-settled people who lack the pre-conditions for achieving asylum.
- the intensification of procedures and operations for return and readmission.

For Greece, a discernible political principle with particular national priorities, apparently had not been fully developed. The country agreed to put into practice faithfully the priorities of the European Union, trusting that the “frozen” provisions of the existing Dublin system would not be activated until the shaping and putting into effect of new, commonly accepted, and collaboratively achievable European policies could be agreed. While these questions for Greece seem to have abated lately, the application of the Joint Statement with Turkey remained inflexible.

In 2016, two basic factors, closely linked to one another, played a dominant role in the overall depiction of the management of third country nationals’ mixed flows: on one hand, the establishment of “hotspots” on five islands in the north-eastern Aegean, after the closure of borders in the so-called “corridor” in the Western Balkans, and, on the other, the Joint EU-Turkey Statement, dated 18.3.2016.

The year 2017 was one in which the problems of implementation of these initiatives were revealed, both at the level of effective management of irregular migrants, as well as on the issue of protecting their fundamental rights.

Some of the general features depicting 2017 were:

- The overall implementation of geographical confinement measures to already saturated islands, even including individuals who belong to vulnerable groups,
- the increased detention in police stations, and outside the pre-removal centres,
- the small number of returns/readmissions compared with the influx from the maritime borders and the Evros region,
- the various problems arising from the implementation of special procedures of asylum on the borders. These affected the pace of return procedures for these persons and the guarantees for their international protection, as well as the living conditions of those people aimed at readmission.

As the national mechanism for monitoring the return of third country nationals, [based on Directive 2008/115/EC (“Return Directive”) and on Law 3907/2011, which transposed the Return Directive into Greek legislation], the Independent Authority carries out, in a systematic way, the responsibility for external monitoring of the return procedures. As recorded in this Special Report, the Greek Ombudsman carries out sample controls that result in reports,

with observations for the administration. In 2017, the Ombudsman's team visited the seven (until recently) pre-removal detention centres and involved monitors in 40 forced return operations by land, air or sea.

Simultaneously, the Ombudsman intervened on the basis of complaints in order to clarify various questions of legality in the return procedure of the complainants and to cross-reference facts on the ground, and during the pre-removal monitoring of the return operations for return and readmission. Following the entry into force of Regulation 2016/1624 of the European Union, in 2017, as the national mechanism for the protection of rights, the Greek Ombudsman's Office was called upon, to co-operate with the newly-introduced European Complaint System of FRONTEX. It is characteristic of the citizens' trust towards the national mechanism, that in all three cases where the European Complaint System resorted to the Ombudsman for collaboration, in accordance with Regulation 2016/1624, article 72.4, the respective referrals had been submitted in parallel to the Independent Authority

A major development has been the acceptance from the Headquarters of the Greek Police of the proposal by the Independent Authority for exception from actions of forced removal when pleas for preliminary injunction are submitted; that is, temporary judicial protection is truly awarded, in due consideration and respect of ongoing judicial procedures and of the fundamental constitutional right to judicial protection. The special significance of the national system of external control is based upon three basic acknowledgements:

- ➔ Illegal migration can be dealt with in accordance with the law, with limitations on freedom arising through administrative measures, but without prejudicing human dignity. Irregular migrants are bearers of fundamental rights according to the constitution, and to international and European legal rules.
- ➔ In a state that abides to the rule of law, it is not sufficient to only acknowledge that rights form an integral part of legality; legal rules and principles must also be put into practice.
- ➔ The Ombudsman constitutes a basic institutional guarantee of fundamental rights as well as of the implementation of the rules and legal principles in practice, on the basis of the Return Directive.

According to the preamble of the Return Directive of 2008, "a well-managed migration policy" is still at stake for Europe. In the last section of the present Special Report, the Ombudsman also comments on the European guidelines, that assimilate a handbook for the return of third country nationals, which were reviewed by the European Commission during 2017. This document might not have a regulatory power, it does, however offer the

underpinnings of a common orientation envisaged by the driving force of the executive branch of the European Union regarding the forced returns' operations.

Today, over and above statements by the European Commission proclaiming the elimination of the phenomenon of irregular migration, migration and refugee policies find themselves at the epicentre of publicity, both from the attempt to assure consensus towards the amendment of the Dublin Accord, and also from the individual reactions by national governments against the principle of solidarity between Member States. In the current period, in which there is a widespread feeling that European policies are transitional, national mechanisms of external monitoring of forced returns constitute a cornerstone for the protection of the fundamental rights of aliens' included in return operations, and for the transparency of administrative action. Therefore, what is at stake is of the utmost importance for the rule of law; it is to be found at the heart of the constitutional mission of Independent Authorities such as the Greek Ombudsman.

Athens, July 2018

Andreas I. Pottakis

Greek Ombudsman

1. The competence of the Ombudsman over the external monitoring of forced returns

Legal framework

The Ombudsman has a special mandate, as a national mechanism, to undertake the external control of the forced returns procedure of third country nationals back to the countries of their origin (EU Directive on Returns 2008/115/EC, article 8, paragraph 6, N. 3907/2011 article 23 paragraph 6). In this context, he undertakes sample controls at all stages of the procedure, following the issuing of the decision for the return of third country nationals, their administrative detention to secure their removal and the execution of the police operation by land, sea or air transport.

Upon the Ombudsman's recommendation, this mandate was fully activated in 2014 with the publication of the Joint Ministerial Decision (JMD), with which the adjustments for the external control of returns are specialized¹. The JMD requires a continual flow of information from all the relevant agencies concerned with the forced returns and readmissions.

The Ombudsman's office undertakes control of the legality of actions, omissions and material acts of the competent services, having at its disposal all the institutional tools that are provided in its statute. It carries out on-site inspections with unhindered access to every area of detention, departure or transit through the state. Moreover, it undertakes monitoring, with its staff, who are specially trained for this purpose, as monitors for the operations of executing decisions regarding returns. The Ombudsman directs Reports and recommendations for the improvement of the return procedures to the administration, which itself has an obligation to respond with a reasoned answer. It publicizes its conclusions in a Special Report, which is submitted to Parliament each year.

¹ JMD 4000/4/57-α' "Regulation of the organisation and functioning of the system of external monitoring of the procedures of removal of third country nationals" (Official Gazette s.B' 2870/2014).

Organisation, funding and networking

During 2017, the administrative delays in the management were solved, having previously created a gap in funding for the amounts that could have been made available from the now unified European Fund for Asylum, Migration and Integration (AMIF) to the external monitoring of returns, as is foreseen by the JMD that governs the organisation of the monitoring mandate. After a call for proposals that was published in November 2016 by the European and Development Programmes Division of the Ministry of the Interior-Section Protection of the Citizen, the Ombudsman submitted a relevant project proposal together with the European Programmes Implementation Service of the Hellenic Parliament. In this way, the problem of funding for the action (a gap existing from 1.7.2015) was solved on 13.2.2017 with funding for two years, until the end of 2018.

This significantly facilitated the operation of the special mandate of the Independent Authority. Consequently in 2017, in comparison with the previous year, the Ombudsman doubled the number of investigations by its staff in pre-removal centres, as well with the monitors' participation in land return operations and in readmissions to Turkey.

The collaboration of the Ombudsman with international organisations and with counterpart institutions on issues of exercising external monitoring continued unabated in 2017.

Through this networking, the active participation of the Ombudsman continued as a constituent member of the European programme: Forced Return Monitoring (FReM)-II in the context of the European Return Fund-Community Actions of the European Commission. The International Centre for Migration Policy Development (ICMPD) is the agent of the programme FReM-II. This programme is carried out with the support of the Fundamental Rights Agency of the European Union (FRA) and FRONTEX. National mechanisms also participate since they have undertaken responsibility for the external monitoring of forced return operations in various member states, the aim being to develop common standards and refine methodological tools for external monitoring.

On 17th and 18th October 2017, the Ombudsman hosted a meeting of the European programme FReM-II for the external monitoring of forced return operations in Athens.² Over the course of these two days, the Ombudsman highlighted the particular importance of the presence of human rights monitors in the return operations for third country nationals. He referred to issues concerning independent operations and accountability,

² <https://www.synigoros.gr/?i=stp.en.news.462578>

also on a European level, of the mechanism of external monitoring.

In the context of the FReM programme, throughout 2017, staff training took place from the Ombudsman's Office in order to exercise control as monitors of returns. Furthermore, two of the Ombudsman's staff members, who were monitors of returns, assumed responsibility for duties as trainers for new staff in the EU pool of monitors for the European Border Guard- Coastguard (FRONTEX), after the relevant special training.

The Ombudsman, under the parallel remit of the National Mechanism for the Prevention of Torture and Inhumane or Degrading Treatment (OPCAT), suggested to the Council of Europe, which is involved in the advisory forum of FRONTEX, that certain acquis of the Return Directive -such as the judicial control of the continuation of detention on the basis of necessity (a strict test of proportionality), the maximum time-limit for detention of 18 months, the obligation of the authorities for due diligence for the realisation of return to end the detention, as well as the reasonable prospect of removal as a legal precondition for detention- be included in the Draft European Rules for the administrative detention of migrants, which was sent to the Independent Authority for commenting.

Moreover, on 27.11.2017, the Ombudsman organised, in Athens, a one day conference on the subject "The returns of third country nationals and the Rule of Law" with the participation of judges, police and Government officers, representatives of European and international organisations, counterpart institutions of European countries, as well as representatives of NGOs, and with funding from the European Fund for Asylum, Migration and Integration 2014-2020.³ In this conference, the challenges were discussed but attention was also given to the guarantees for the Rule of Law that the procedure of returns presents and the experience gained by the Ombudsman in the mandate of the external monitoring of returns.

³ <https://www.synigoros.gr/?i=stp.en.news.473209>

2. Facts regarding the field of implementation of the external monitoring

The external monitoring of returns in 2017 at a glance.

The Ombudsman visited:

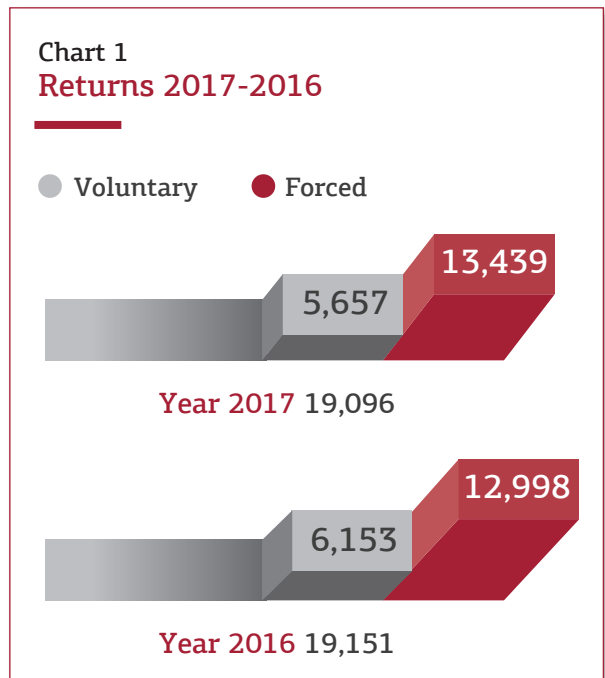
- 7 pre-removal (detention) centres, as well as
- Cells at police stations, at which immigrants are being held with a view to return.

The Ombudsman participated with his staff as monitors in 40 operations of forced returns in 2017:

- 12 Joint EU Return Operations (flights) with the co-ordination of FRONTEX, to Pakistan and Georgia,
- 26 readmissions, either by sea or by air, to Turkey, and
- 2 land operations of return from Athens and Thessaloniki, respectively, towards the Albanian border

Numerical data regarding returns

The forced returns that occurred during 2017 fluctuated approximately around the same numbers -with a small increase of 2%- in relation to the previous year. The data passed on by the Greek Police show 13,439 forced returns, including deportations and readmissions based on bilateral agreements with neighbouring countries, as opposed to 12,998 individuals recorded during the previous year (see Graph 1). Moreover, there were 5,657 voluntary



returns, that are being operated entirely by the International Organisation for Migration (IOM), which show a decrease in relation with 2015 (6153).

Total numbers are provided by the Greek Police regarding the nationality of the returned persons, from which the point arises that, from the total number of 13,439 forced removal operations, during 2017, the 11,161 cases concerned citizens of Albania, in other words, a percentage of 83%.

Numerical data regarding administrative detention in view of return

Regarding the administratively detained people, the Greek Police informed the Ombudsman that on 1.11.2017 a total of 2,598 persons were being held at Pre-removal Centres, which is a number overwhelmingly much greater (by 60%) than the respective number of 1,583 detained people in 2016 (see Graph 2).

The respective number of immigrants being held for return in police cells on 1.11.2017 was 974 people, a fact that confirms the detention in interim places until a space can be found in the Pre-removal Centres, but also the great number of administratively detained people by the Greek police in total. The Ombudsman acknowledges the provision of data for detainees outside of Pre-removal centres in 2017, as an obvious example of transparency by the Greek Police. Nevertheless, he cannot but again re-emphasize that the 27% of the total number

Chart 2
Detainees in Pre-removal Centres



of administratively detained immigrants are to be found in cells in police stations, which - according to the permanent re-assertion of the Ombudsman- are not suitable for detention in view of return, because of the standard of living conditions, the total lack of access to open air etc.⁴ The Greek Police has not yet managed to keep to its three-year commitment⁵ to limit the administrative detention to special Pre-removal Centres and to not use cells in police stations for the immigrants held for return.

⁴ See Article 31 of Law 3907/11 and Article 16 of the Directive on Returns

⁵ Annual Report of the Ombudsman, 2015, section: Special Report on Returns, page 127, in Greek: https://www.synigoros.gr/?i=kdet.el.ehtisies_ektheseis_documents.356672

3. Visits to pre-removal centres- Problems with the procedure of returns

From the visits conducted by the Ombudsman in 2017 to Pre-removal Centres,⁶ problems were ascertained that had also been emphasized in the previous report regarding the Returns, in the year 2016,⁷ in relation to the Directive on Returns.

After a visit and an on-site inspection at the cells of the Aliens' Police Division in Thessaloniki, the Ombudsman highlighted to the Headquarters of the Greek Police, that while these cells are being used permanently as places of mass detention of irregular immigrants, they are inadequate because they do not fulfil the necessary precondition of access to open air as a humane condition of detention (Articles 15, 16 of the Directive on Returns).

The observations and suggestions of the Ombudsman regarding the conditions of detention of immigrants also refer to his Annual Report for 2017⁸ for the prevention of Torture and ill-treatment, based on the mandate of the Authority as a National Mechanism for the Prevention of Torture and Inhumane or Degrading Treatment (OPCAT).

The main problems that were emphasized during 2017 regarding the procedures of returns were the following:

- Inadequate information towards the detainees regarding the procedure of return, in conjunction with the complete lack of interpreters. Interpretation is important for the entirety of the rights of the detainees, even more because in the detention centres co-exist different categories of detainees,⁹ according to the reason for their detention.¹⁰
- A continuation of the phenomenon of detention for reasons of public order without sometimes the necessary, specialized reasoning¹¹, despite the non-punitive character of

⁶ Tavros, Corinth, Amygdaleza, Lesvos, Xanthi, Orestiada, Paranestion.

⁷ <https://www.synigoros.gr/?i=human-rights.en.recentinterventions.457395>

⁸ In Greek: https://www.synigoros.gr/?i=kdet.el.ehtisies_ektheseis_documents.488176, p.217s.

⁹ A differentiation of detention, according to nationality, during 2017 on the islands, appears in a Circular by the Greek Police which refers to detention according to the rate of recognition of refugee status. The differentiation of detention, according to nationality, creates reasonable doubts, does not have as its basis the Directive on Returns and also creates a problem in the individual assessment of a possible demand for international protection.

¹⁰ Some individuals are taken to pre-removal centres from the islands, for reasons of public order, some people have been arrested on the mainland for illegal stay and then consequently submit a claim for asylum etc.

¹¹ See above, footnote 7.

administrative detention, according to the case law of the European Court of Human Rights (case Saadi v UK, 2008, App. No. 13229/2003, paragraph 78).

- ➔ Detention at pre-removal centres without procedures of first reception having previously occurred. Specifically, in 2017, the phenomenon of detention of immigrants appears for a period of up to 3 months at the three Pre-removal centres in the region of Eastern Macedonia-Thrace before they are then taken into the Reception and Identification Centre (RIC) of the Evros, a fact which led the Ombudsman to emphasize to the Greek Police the explicit legal provision¹² for the reverse procedure, so that the vulnerability and the registration of the claim for asylum of the newly arrived people can be examined before they undergo the procedure of detention towards return.

Moreover, it is noted that in 2017 two new Pre-removal Centres were established on the islands¹³ in places that then create a problematic co-existence of the detention centres with the centres of first reception and identification (RICs).

The afore-mentioned increase in the number of detainees by 60% in the Pre-removal centres of the country in 2017 supplements the picture of the generalisation of detention with a view to return, despite the fact that the Directive on Returns views it as an exceptional measure whereby its implementation is subject to the proportionality principle, which prescribes "a gradation of the measures to be taken in order to enforce the return decision"¹⁴.

¹² Article 9, paragraph 1 and 14 paragraph 1, Law 4375/16.

¹³ On Kos island, with a capacity of 500 places, and on Samos where it does not function yet.

¹⁴ Decision CJEU El Dridi, C-61/11 PPU, 28.4.2011

4. External monitoring of return operations of third country nationals

Land operations of return

After two sample controls in land operations of return at the Albanian border, from Athens and Thessaloniki respectively, the Ombudsman noticed that during 2017, previous statements of the Independent Authority are still valid regarding the land operations, mainly concerning the inadequacy of the vehicles for transport¹⁵.

Amongst the inadequacies of the vehicles during 2017, it is noted that toilets do not function, as well as the completely inappropriate seats for transportation of detainees for many hours on end, the particularly narrow space for detention of the immigrants, the problematic air conditioning of the cells etc. It has not yet been possible to make permanent in all the land operations the supply of food and water for those being transported and the availability of first aid kits on the vehicles of transport. A basic recommendation by the Ombudsman remains, which is the supply of appropriate vehicles for transport of detainees or the examination of the operational ability to use tourist buses instead.

Joint European return operations (flights)

The Ombudsman participated with his staff as monitors in 12 Joint European Operations (flights from Athens international airport "Eleftherios Venizelos") with the co-ordination of FRONTEX, towards Pakistan and Georgia.

During 2017, the non-use of means of restraint without a risk evaluation for its necessity, is marked up as a significant improvement of the procedures followed, in response to the relevant observation by the Ombudsman in his previous annual report, in which he had written that the restraining of detainees was a significant problem, as it occurred mostly with metal handcuffs, as a standard procedure, without individualised assessment.¹⁶

More generally, it was noted that the procedures are carried out, in general, with

¹⁵ See note 5 above, Annual Report 2015, pages 129-130

¹⁶ See above, note 7

professionalism and dignity by the escorting police personnel.

The Ombudsman observed that the provision of food and water, the use of telephone by prepaid cards, and the protection of the privacy of the detainees are upheld in most cases, but nevertheless he emphasized that they constitute imperative rules for each operation of forced removal.

Nevertheless, the problem of a lack of previous prompt information (at least 24 hours before) provided to the detainees regarding their impending removal remains intense and it also creates a chain of further problems for the entire success of the return operation, particularly when it is combined with non-existent information for possible rights for international protection, family cohesion and so forth, thus creating disputes and/or cancellation of the operation at the last minute.

Furthermore, a more general problem is the lack of an interpreter to be supplied by the Greek authorities at the gathering point for the returnees (Aliens' Police Division in Attica).

Also, in some instances, a problem appeared regarding information of the escort with regard to the health situation of the returnees shortly before the operation.¹⁷ The Ombudsman persists with the recommendation that is reiterated in all his relevant Reports, specifically that the examination aimed at ascertaining the health situation of the returnees must, according to national law, include all the returnees, given the obligation of the Greek Police to care about their health. As we have emphasized, the filling in of a health card for every detainee, as required by the Regulation of the Operation of the Pre-removal Centres, but also their systematic medical monitoring, are still to be met at places of detention, where the responsibility to safeguard the health of the individual lies primarily with the State.¹⁸

Operations of readmission to Turkey

In 2017, the external monitoring focused on the procedure of readmission to Turkey of third country nationals, mainly from Lesbos, by either air or sea, on the basis also of the Joint EU – Turkey Statement dated 18.3.2016. The readmissions are an exceptional procedure,

¹⁷ For example, in an operation, one person suffering from AIDS and another person suffering from hepatitis C, for whom, however, a certificate attesting to their ability to travel (fit to travel) was provided by the doctor of the pre-removal centre in Tavros.

¹⁸ Special Report "Migration flows and refugee protection. Administrative challenges and human rights issues", April 2017, <https://www.synigoros.gr/?i=human-rights.en.recentinterventions.434107> p. 54

based on Article 2 of the Directive, upon which nevertheless the basic guarantees of the fundamental rights still apply.

The basic observation by the Ombudsman, obtained from the 26 readmissions in which he was involved, is that the problems that he had emphasized in his previous annual report¹⁹ continue to be relevant, and specifically:

- The lack of timely information to the citizens of Syria or other third party countries of the fact that they are to be included in an operation of readmission to Turkey.
- The lack of individualised assessment for the necessity or non-restraining with handcuffs. Without replacing the Greek Police in its operational judgement, the Ombudsman persists upon proportionality and the re-examination of the means of restraint during the operation of removal.
- The oversight of supply of a certificate of medical examination for the ability to travel ("fit to travel").
- The lack of completeness of the service file, which accompanies the detainees, according to the police division responsible, as regards the procedure and outcome of a possible petition for international protection (rejection in the second degree, notification etc) and the linked problem of the lack of interconnectivity of the data of the catalogue for readmission with the decisions of asylum.

Nevertheless, the good co-operation of the police authorities with the Independent Authority brought some gradual improvements to the procedure, such as the inclusion of a health card for the immigrants held for readmission from the Moria detention centre, the emphasis upon the need for completeness of the file of those being transported from other police divisions towards Lesvos and so forth.

Also, regarding a key question about the legal guarantees in the procedure of readmission, the Police Headquarters agreed with the Ombudsman's view that when an application for a temporary judicial order and an injunction order is notified to the Police together with an application for judicial review against the rejection of a demand for asylum in the second degree, the readmission will not actually be carried out, so that the pending judgement by a judge for temporary protection should not be pre-empted. And this commitment was upheld without exception during 2017.

5. Co-operation with the complaints mechanism of FRONTEX

The EU Regulation 2016/1624, regarding the conversion of FRONTEX into a European Coast Guard-Border Guard²⁰, aims at the reinforcement of the competence of FRONTEX in the management of the external borders of the European Union and foresees a Mechanism of Complaints that operates under the responsible officer for fundamental rights at FRONTEX.²¹ In the Mechanism of Complaints, those who have been afflicted have the right of direct recourse, both for actions by the officers of FRONTEX during its operations, as well as for the involved officers of the Member States, which are called upon to investigate the events causing complaint and to refer the results within the deadline of six months to the European agency, while the complaint is communicated simultaneously to the respective national mechanism for the protection of rights, namely the Ombudsman.

FRONTEX has already addressed itself to the Greek Ombudsman as a national mechanism for the protection of rights, thus activating this provision of the Regulation²² regarding a mechanism of examination of complaints, in three cases during 2017, regarding incidents in readmission. It is characteristic of the trust of citizens towards the national mechanism, that, in each of these three cases, respective complaints to the Ombudsman had already been submitted.

The first case that was referred for examination to the Greek authorities in 2017, by the mechanism of complaints of FRONTEX, concerned a five-member family of Syrian citizens with underage children, who were found on 20.10.2016 being held at Adana, Turkey, after an air readmission from the island of Kos, while the operation initially had as a sole starting point the island of Lesbos. They cited that they had expressed the wish to seek asylum in Greece. The claimants to FRONTEX invoked the infringement of the right of access to asylum, of the rights of children, protection from "non refoulement" and from torture, inhumane or degrading treatment, based on the European Charter of Fundamental Rights.²³

The Greek Police cited the commencement of an investigation from 9.11.2016 with a press release by the (then Under Minister) of Migration Policy and his counterpart for issues of

²⁰ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R1624&from=EN>

²¹ Art.72 of the Regulation 2016/1624

²² Art.72 para.4 of the Regulation 2016/1624

²³ Case CMP 001/ 2017

Protection of the Citizen at the General Inspector of Public Administration, who, however, did not respond to the Ombudsman's request for a specific timetable for investigation and information of the results. In October 2017, FRONTEX made public to the Ombudsman its letter to the Greek authorities, in which it emphasized that the six month deadline had expired from the conveyance of this first complaint to the European Complaints Mechanism and in turn it asked for information and a timetable for completion of the investigation by the General Inspector of Public Administration. Beyond the question of the infringement of the procedures of the European Complaints Mechanism, the Ombudsman emphasized to the Greek authorities that the issue of readmission of 20.10.2016, which had been ongoing for one whole year, manifestly exceeded any reasonable limit of internal investigation by the Administration. The report by the General Inspector of Public Administration was submitted finally in June 2018, but nevertheless without coming to a conclusion regarding any actions or omissions by the Greek Police, and citing the lack of competence of the General Inspector of Public Administration. The Ombudsman asked from the relevant Ministries for a thorough and urgent investigation of the case so that any grey areas in impressions of a lack of transparency should be eliminated regarding the readmissions.

The other two cases that were communicated by the European Complaints Mechanism to the Ombudsman concerned impending readmissions to Turkey, of an Iranian citizen on 27.4.2017²⁴ and a Pakistani citizen on 15.5.2017²⁵, respectively. Both of them, beyond the right to asylum and the protection against removal, also cited an infringement of the right to an effective remedy and fair trial. The Ombudsman informed the relevant agents that in the respective complaints that had been submitted directly to him, in which he had timely intervened, he had a positive response from the Migration Management Police Division, which finally exempted the complainants from the readmission due to their pending applications for temporary judicial protection.

The co-operation of the Ombudsman with every expert national and European agent who aims towards a substantive investigation of complaints and to the decisive safeguarding of fundamental rights, as arise from the above cases, is a given fact. Nevertheless, as regards the provisions for external monitoring of the EU Regulation 2016/1624, the Ombudsman maintains the reservations that he had set down in his previous report²⁶, both for the European Mechanism of Complaints, as well as for the development of a European pool of monitors, in which indeed the Ombudsman, as a national mechanism of external monitoring of returns,

24 Case CMP 003/2017

25 Case CMP 010/2017

26 <https://www.synigoros.gr/?i=human-rights.en.recentinterventions.457395> p.15s

participated in 2017 with 8 members of his staff. The analytical critique by the Ombudsman can be summarized into the handing-over of the monitoring of forced returns, by national -external, and with reliable institutional independence- mechanisms of monitoring, to FRONTEX, as a single, both executive and monitoring, body for European returns.

6. The revised Handbook on Returns of the European Commission

In September 2017, the Handbook on Returns, which the European Commission had published in the year 2015²⁷, was revised²⁸, so that specific, common guidelines towards the Member states would exist for the implementation of the procedures of the Return Directive.²⁹

The effectiveness of the system of returns constitutes the primary goal of the revision of the Handbook. The effectiveness always constituted the explanatory reason for this initiative by the European Commission. In the revised Handbook, nevertheless, it brings upon specific results, of a quasi normative character, thus shrinking the margin of interpretation of the Directive on Returns by the authorities of the member-states.

A characteristic example is constituted by the measures for detention, which, in general, in the Handbook, are systematically organised from the point of view of preconditions, so that a wide margin of discretion should not remain in the member states to decide about their implementation, despite the fact that, according to the Directive³⁰, detention is an exception when other, less onerous, alternative measures do not apply.

A basic precondition for detention is the risk of absconding.³¹ It presupposes an individualised assessment based on objective criteria that must be foreseen in law according to the

27 C (2015) 6250- https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/return_handbook_en.pdf

28 27th September 2017 (Commission Recommendation No. C (2017) 6505)-https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170927_recommendation_on_establishing_a_common_return_handbook_annex_en.pdf

29 Directive 2008/115/EC <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32008L0115>

30 Article 15 para.1 of the Return Directive

31 Article 15 para.1.a of the Return Directive

Directive.³² The Handbook includes a list of criteria for inclusion into the domestic, legal framework but it also innovates in relation to 2015, proposing five additional criteria to be adopted as legal presumptions by the member states (paragraph 6.1 of the Handbook). The decisive difference is evident, the subscription of at least one of the criteria of the second list regarding the risk of absconding, constitutes sufficient evidence for bringing upon the result, the placement in detention, which is no longer subject to co-appraisal.

The Commission, in the revised Handbook, incites the Member states from now onwards (paragraph 14.1) to make use of detention when the terms of Article 15 of the Directive are fulfilled, something which relocates the centre of weight of the Directive from the rule of alternative measures towards the exception, namely detention.

Moreover, in the Handbook, the Commission recommends that the detention of underage minors should not be forbidden by the laws of the member states (paragraph 16). Starting once again from the fact that in the Directive this is not forbidden (article 17), the centre of weight is once again relocated, through the interpretation, to the exclusion of forbidding it. We note that the view of the Ombudsman is steadily against the detention of minors, because by definition the detention does not coincide with the best interest of the child, which is the decisive criterion of any measure related to minors, according to the International Convention on the Rights of the Child.³³

As regards the return of minors, erasing one word, the word "only" in the second paragraph of Article 10 (paragraph 10) of the initial Handbook, is characteristic, albeit at first sight irrelevant: "Return is {only} one of the options to be examined when identifying a durable solution for unaccompanied minors". The Handbook of 2015 highlights that other options also exist, not just one, namely the return, while its amendment confirms that the return of minors has the character of a sustainable solution. A point that is more important, in substance, is that the revised Handbook (paragraph 10), starting from the observation that return of minors is not prohibited by the Directive (article 10), proposes that it should be clear in the law of member states that, if a special permission to stay is not foreseen, then the member states are obliged to produce a decision of return for the minors, which constitutes a precondition of any subsequent postponement of removal.

The more general picture that arises from the review of the Handbook is that the system of returns is becoming more strict. The deadlines are shortened, as for example for voluntary

³² Article 3 para.7 of the Return Directive

³³ See the recent opinion of the Ombudsman to the draft Law 4540/2018, in Greek, p.3: <https://www.synigoros.gr/?i=kdet.el.news.495164>

returns, which they are recommended (paragraph 6) to be subject to the minimum foreseen time of 7 days according to Article 7 paragraph 1 of the Directive (which allows for 7 to 30 days), while the guarantees of rights are demarcated, as for example the suspensive effect of the appeals:

The revised Handbook (paragraph 12.4) recommends to the member states to proceed to provide ipso jure suspensive effect in appeals against return decisions only in two instances, these being the invocation of non- refoulement (of the non-return for reasons of international protection) because irreparable damage to life or serious risk of grave and irreversible deterioration of the state of health are at stake and not for other reasons. The Handbook mentions noticeably the other reasons for which automatic suspensive effect is not justified and that is the case of appeals related to medical care, familial cohesion, or the best interests of the minor.

Finally, the Handbook recommends the use of exceptional procedures at the borders, in other words the exceptions that are foreseen from the normal procedure of the Directive, for example because of agreements for readmissions (article 2, paragraph 2.a). It is noteworthy, through the interpretation of the rule that the derogation from the rule should be recommended, but this would be a logical paradox only and not a paradox from a political viewpoint. The justification of the Handbook (paragraph 2.1) is exactly the use of exceptional, more effective procedures "in the case of frontline Member States experiencing significant migratory pressure"

This "significant" factor of pressure constitutes, of course, an evaluative judgement, sufficiently vague, for which no criteria or measures for weighing up are provided.

The question then arises, following the above, as to whether some content is left behind in the clause regarding the maintenance of possible, more favourable measures which do not come into conflict with the binding nature of the content of the Directive (article 4), if the binding content is interpreted according to the guidelines of the Handbook.

The total picture of the Handbook seems to be governed by the logic that the entrenchment of rights and guarantees clashes with the effectiveness of returns. This opinion underestimates malfunctions in the system of returns, such as the outlay and the time consuming character of the procedures of return, the degree of co-operation of the countries of origin or readmission, the malfunctions of the administrative mechanism on issues of co-ordination and capacity of the competent services from the point of view of staffing and a clear regulatory framework of operation, and so forth. These malfunctions, speaking from the

experience gained by the Ombudsman as a national mechanism of external monitoring, as has been analysed above, can, if they are solved, have a catalytic role to play in the effectiveness of returns. This is in contrast to, for example, the increase in administrative detention, regarding which the Ombudsman in 2017 already posed the question as to whether it covers weaknesses in the administrative mechanism.³⁴

The revised Handbook did not however constitute a surprise. From 7.3.2017, a Recommendation of the European Commission had preceded it, on the reinforcement of the effectiveness of returns³⁵, regarding which the Ombudsman observed, already in April 2017³⁶, that it creates a new field for the expansion of administrative detention. The Recommendation foresaw the obligation of the member states to align the potential of administrative detention with the real needs, applying Article 18 of the Directive on Returns for exception based on emergency circumstances (paragraph 10.c of the Recommendation). Also, it foresaw the obligation of member states to not exclude the detention of minors when it is strictly necessary for the safeguarding of return, in cases where they are unable to implement effectively less onerous measures (paragraph 14). The Ombudsman had already mentioned that the Commissioner for Human Rights of the Council of Europe had expressed his concern for the expansion of administrative detention in Europe following this Recommendation.³⁷

³⁴ Special report of April 2017, see above note 18, p.61.

³⁵ https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170302_commission_recommendation_on_making_returns_more_effective_en.pdf

³⁶ see above note 18, p.77

³⁷ <http://www.coe.int/en/web/commissioner/-/europe-s-duty-to-avoid-detaining-migrants>

Conclusion

The Independent Authority continues on its mission with complete dedication, determined to further reinforce and constantly expand its dynamic and active role as a national mechanism of external monitoring in operations of return/readmission, according to Directive 2008/115/EC, which did not cease to constitute a key point of the migration policy of the European Union again during 2017. The attempt at intensification of returns is evident from the revised handbook of the European Commission that is analysed above. In parallel, the relative procedures reveal, nevertheless, various challenges for the implementation of the fundamental rights in practice.

At the level of the national mechanism, the external monitoring revealed also during the year 2017 the permanent problems that operations of forced returns produce, but also the gradual improvement of specific parameters of the followed procedures by the Greek Police, both in Joint European flights from Athens as well as in readmissions from the sea borders to Turkey. This positive outcome, in a difficult field of control of borders for fundamental rights, constitutes tangible proof that the function of the Ombudsman as a national mechanism for monitoring of procedures and operations of forced returns, and also as an agent of protection of fundamental rights, can contribute decisively to the necessary transparency of administrative action, the implementation of international, EU and national legislation and to guaranteeing respect for fundamental rights.

