

Fundamental Rights Officer's Observations to return operations conducted in the 2nd Semester of 2018

1 July - 31 December 2018

Background and overview of activities

In accordance with Article 28 (8) of the European Border and Coast Guard Regulation (hereafter referred to as 'the Regulation'), the Fundamental Rights Officer (FRO) shall provide observations on fundamental rights covering all return operations. Her observations are attached to the Executive Director's semi-annual evaluation report to the Management Board. The reporting period is therefore adapted to the submission of the evaluation report by the Executive Director, covering the 2nd semester of 2018. FRO Observations from the first semester of 2018 (January- June 2018) were shared with the Member States' Direct Contact Points on Returns, Member States' return monitoring bodies and monitors from the pool of forced return monitors (hereinafter referred to as 'the pool').

The pool, as foreseen in Article 29 of the Regulation, became fully operational on 7 January 2017. As set forth by Article 28 (3) of the Regulation, at least one forced-return monitor from the pool or from the national monitoring system of the participating Member State, shall be present throughout the entire return operation from the pre-departure phase until the hand-over of the returnees in the third country (TC) of return, with the aim of ensuring that the fundamental rights safeguards are in place. The mechanism acts *de facto* as a **subsidiary guarantee** to the Member States' (hereinafter referred to as 'MSs') obligation to provide an effective forced-return monitoring system, as per Article 8(6) of the Return Directive 2008/115/EC. Prior to the enactment of the Regulation, the Agency and the FRO have constantly encouraged MSs to enhance the systematic use of their national monitoring bodies in all return operations. The strengthening of national monitoring mechanisms would have a positive direct impact on the overall capacity to monitor return operations, both at national and European level.

As foreseen in Article 36 (4) of the Regulation, the forced-return monitors shall be provided with a specific training covering all the aspects regarding fundamental rights, especially concerning the use of force and means of restraints, and access to international protection. In the period from 1 July to 31 December 2018, FRO team was actively engaged in the following activities supporting return matters:

- On 16-17 August, FRO was engaged in the Coordination Meeting between Frontex and ICMPD on the Forced-Return Monitoring II (FReM II) Project. The objectives of the meeting were to coordinate the finalisation of the Forced-Return Monitoring III (FReM III) proposal and pending deliverables of the Forced-Return Monitoring II (FReM II) project in view of the FReM II closing conference and 5th project steering group (PSG) meeting (23-24 October 2018, Nuremberg, Germany) with the participation of Frontex European Centre for Returns (ECRET) - FRO did not attend due to an extended sick leave.
- On 11 September, FRO presented the 'Update on Forced-return monitoring reports in Frontex return operations' in the 1st half of 2018, during the 49th Meeting with Direct Contact Points in Return Matters (DCP) in Vienna.

- On 10 October 2018, a FRO team member delivered a presentation of FR in return activities delivered in the course of familiarisation visit of the representatives from Gambia.
- On 12 October 2018, a FRO team member delivered a speech at the AMIF Conference “The National Guarantor and the protection of fundamental rights in forced return operations: a survey over two years of monitoring activities” in Rome.
- On 18 October, a FRO team member participated and monitored the implementation of the readmission operation from Greece to Turkey in Lesvos.
- On 26 November 2018, a FRO team member delivered a speech at the international conference on “Monitoring returns strengthening fundamental rights” in Athens. The conference was organized by the Greek Ombudsman Office, with the support of the Asylum, Migration and Integration Fund (AMIF).
- On 27 November 2018, a FRO team member delivered a presentation at the Workshop on harmonization of procedures related to medical assistance in return operations in Frontex HQ.
- On 14 December 2018, a FRO team member provided a presentation on “Conditions for action and good practices” during the IPCAN Seminar on the Police conduct of law enforcement services in their relationships with migrants in Europe in Paris.
- On 18 December 2018, FRO team members participated and monitored the implementation of a joint return operation to Gambia, organised by Germany.

Observations of the Fundamental Rights Officer

In the present Observations FRO provides an overview of the **findings and conclusions** from the **85 reports submitted by the forced-return monitors** activated from the pool and **21 reports received from national monitors**. FRO also highlights examples of **good practices** for the consideration of both the Management Board and the Executive Director as well as **recommendations** to act upon in order to ensure fundamental rights compliance during the Agency’s return activities.

In line with the Regulation, complemented by the Guide for Joint Return Operations by Air co-ordinated by Frontex, FRO has the mandate to monitor any return operation as part of the overall support to the Agency monitoring system of FR. In exercising of the mandate, FRO team members participated and monitored two operations (return and readmission) in the period concerned. The observations collected in the course of both missions are included and complement the present report whereby FRO monitoring activities do not replace the MS’ obligation to monitor forced return operations.

According to the information provided in the Frontex Evaluation Report on Return Operations in the 2nd Semester of 2018, a total of 180 return operations were co-ordinated by Frontex, out of which 119 were physically monitored. Notably, during the reporting period, all of the Agency’s supported Collecting Joint Return Operations had on-board a forced-return monitor from the pool or from a national monitoring system of the participating MSs through the entire return operation, as foreseen in Article 28 (3) of the Regulation.

In general terms, FRO notes that there are no Serious Incident Reports submitted by participants in the operations. However, there have been a number of **incidents reported by the monitors**, which triggered follow up and are underlined in this report. FRO wishes to express concern over the different understanding of incidents among the participants and encourages the authorities of the MS as well as the Agency to use, especially in training activities, the Observations of the FRO for training purposes of escorts and escort leaders so that all participants in the operation share a common understanding of when an incident can negatively impact fundamental rights.

1. Preparation of return operations

As provided in Article 4 of the *Code of Conduct for Return Operations* (ROs) and Return Interventions (RIs) (hereinafter “the CoC”) *coordinated or organised by Frontex*, the Agency shall ensure that ROs and RIs are to be conducted in a humane manner and in compliance with fundamental rights. In order to achieve this goal, there is a need to provide sufficient and adequate safeguards already in the preparation phase of the RO and/or RI. The comments by the forced-return monitors related to the preparation of the operation that should be taken into consideration are the following:

- In accordance with several monitoring reports received, a proper briefing about the whole operation was missing in numerous return operations. As stipulated in Article 16 the CoC, prior to the start of the operation, **forced-return monitors should be informed about the number, origin and vulnerabilities and/or special considerations of returnees.** FRO underlines that in detailed briefing escort leader should inform the participants of return operations about the list of returnees, seating plan, embarkation and in-flight procedures, movements on board, access to the toilettes, hand-over of personal belongings, and the security, including use of coercive measures. Furthermore, FRO recommends to provide the monitor with an estimated time and location for the briefing as soon as contact is established. This would allow the monitor to choose suitable flights or other transport so as to arrive on time for the briefing and the rest of the pre-departure phase.
- In some reported cases, the Implementation Plan was not available to the monitors before the operation. In one case it was reported that only after intervention of Frontex staff the Implementation Plan and other relevant documents were shared with the monitor. In this context FRO recommends **the Implementation Plan should be distributed in advance**, at least 2-3 days ahead of the return operation.
- As provided in the Guide for Joint Return Operations by Air co-ordinated by Frontex, the gender and age of the returnees, as well as the experience and the language skills of the forced-return escorts should be taken into account when assigning them to the return operation. In accordance with some monitoring reports received, there is a recurrent need to **increase the number of female forced-return escorts**, to ensure adequate escorting in operations when women and families with children are to be returned. The presence of a female officer in this situation is a basic standard. In other reported cases, female escorts were not enough in numbers by comparison to the amount of pregnant women and children to be returned. FRO agrees with the monitors that the presence of female officers should be ensured throughout all phases of the implementation of an operation involving women and children as to ensure the effective protection of the Charter of Fundamental Rights of the EU, especially the rights to privacy, integrity and human dignity and to ensure that potential gender specific needs are identified and addressed. According to Frontex standards, a female returnee should be escorted by at least one female escort. In accordance with the Guideline 18 of the Twenty Guidelines of the Committee of Ministers of the Council of Europe on Forced Return, “Member States are encouraged to ensure that at least one escort should be of the same sex as the returnee”. This may facilitate the communication between the returnee and the escort. In certain situation it may help preserve the dignity and intimacy of the returnee. The Frontex Implementation Plan also provides that “escorts of the same gender of the returnee are advised to jam the toilet door open and to observe the returnee”.
- In accordance with monitoring reports received, it was noticed a lack of a proper ventilation system in the waiting room in the airport. It was also observed the temperature should be adequate in the room where the returnees are located in the pre-departure phase as it increases discomfort among the returnees as well as participants.
- As reported, in one operation there was a need of recording on video some elements of return operation by one of the present monitor. Pursuant to Article 13 of the CoC, any form of recording during a JRO is possible only when specifically agreed between relevant MS, Frontex and the company operating the means of transport, and in compliance with applicable data protection legislation. However, the above-mentioned requirement was not addressed in advance from the side of monitoring institution. In sum and as underlined by FRO the information regarding **recording of the return operation should be requested and agreed in advance to the MS participants and returnees**, which was apparently not the case. Likewise, escorts and returnees should be informed in advance about planned media coverage in all cases. FRO notes that this situation may be clearly viewed as an interference with the right to privacy of the returnees and participants, and the rights of the child in case those are involved, and should be avoided and discussed before preparation of flights.

- As reported, in one operation there were not many seats left empty, which can create some difficulties in potential handling of situation with medical emergency.
- In one case the poor labelling of luggage of returnees was observed, which can create some tensions during the procedure of hand-over and should be avoided.
- In one reported case, the mandate of Frontex representative was observed not to be clearly defined, e.g.: his/her tasks and role in case of potential incidents.

2. Communication and right to information

With regards to Article 6 of the CoC, the competent authorities of the MSs as well as the other participants shall seek cooperation with each person being returned, at all stages of the return operation. Following the observations received, there are still some issues that should be taken into consideration to improve communication between returnees and participants of return operation, as highlighted by the forced-return monitors. Namely:

- In accordance with number of monitoring reports, in several operations no interpreters were present during the flight or the hand-over in the Third Country. FRO recommends the increasing involvement of interpreters throughout all phases of forced-return operations to be carried out, which results clearly in the returnees' better understanding of the procedures as well as lower anxiousness and possible aggressive reactions of the persons during the operations. FRO further suggests ECRET to take steps to gradually report about the exact number of interpreters in return operations in their bi-annual Evaluation Report and encourage their presence as a means to enhance cooperation and communication during return operations, depending on the language requirement, when needed. FRO recommends that depending on the assessment of escorts and returnees needs and language skills the MS should provide with the suitable interpreters. During the hand-over of personal belongings to the returnees, an interpreter and medical personnel should be present in order to avoid any potential misunderstandings.

3. Medical issues

The presence of medical staff (doctor, nurse or paramedic) should be ensured in all operations coordinated or organised by Frontex pursuant to Article 14 of the CoC. It remains as one of the key aspect of guarantee for fundamental rights in the work of all participants in return:

- In accordance with one monitoring report, information of medical cases was provided at very short notice from the MS national authorities to the doctor on board.
- In accordance with one monitoring report, the national authorities of MSs did not use "fit-to-travel" forms. As already raised in the *Fundamental Officer's Observations to return operations in previous semesters*, national authorities are to set up the rules on issuance of fit-to-fly certificate, ideally as a mandatory requirement, in line with the CPT standards.
- As noticed, in one flight unnecessary information was announced about the medical situation of some returnees containing some sensitive information that could, in the monitor's opinion, potentially put into risk returnees in their countries of origin.
- In some reported cases, it was noticed the absence of a paramedic as a back-up to the doctor, which was considered as a potential risk to returnees as well as to participants. In some cases, there were no doctor or paramedic in detention center. In another reported case, a doctor was present at all phases, but was not aware of the medical records. In this regard FRO recommends all crucial medical information should be shared with the doctor of the operation. The doctor should examine the returnees at the pre-departure phase.
- In one reported case the sedative was given to the returnee (Valium) to make him calm.
- In accordance with a monitoring report, the monitor was not allowed to receive the information about medical state of returnees. Pursuant to Article 16 of the Code of Conduct, the monitors must have the unimpeded access to all relevant information concerning the return operation. Therefore, it is recommended that medical confidentiality is not used to exclude monitor from any information about the medical conditions of returnees or not allow to enter without specific reasons to the areas where the medical staff is active.

4. Right to privacy and property of persons returned

In the 2nd semester of 2018, forced-return monitors reported about the incidents that allegedly might result in a violation of the right to property of the persons pending removal, as follows:

- As noticed in some monitoring reports, valuable personal belongings should not been placed in the baggage hold of the aircraft. They should be stored in the sealed envelope or a plastic bag and marked with the name of returnee, and kept by the respective escort. FRO would recommend to strengthen luggage handling procedures in the upcoming revision of the Guide on JROs currently ongoing within the Agency. This element has been already highlighted by FRO in her observations covering the 1st semester of 2018.

5. Treatment of vulnerable groups

In the preparation and throughout the implementation of operations, special consideration should be given to vulnerable persons such as children, disabled persons, elderly people, pregnant women, etc. Some observations provided by the forced-returned monitors include:

- In general, as a good practice, it was observed and recommended to let children play with toys and games. The establishment of a mobile playroom for children in the return terminal of the airport should be arranged for return operations, in particular with a high number of children to be returned. In this context FRO recommends to provide an adequate special care for families with children, including diapers and baby food to be accessible prior to embarkation as well as during the flight, which is a good practice to be followed.
- Some forced-return monitors observed lack of individual treatment to be guaranteed for families with children and reported that families with children should have been enabled to board the aircraft separately and should have been seated separately from other returnees. FRO considers as a good practice, that vulnerable persons shall board the aircraft separately and shall be seated separately from other potentially violent returnees.
- As reported, it was observed that the unaccompanied minors have been returned in two operations, which is not in accordance with Frontex general rules on conducting return as well as in contradiction to the Annex I of the Implementation Plan. Reported incidents were conducted in accordance with national law, but in contradiction with Frontex procedures. On the basis of those incidents a specific safeguard tool on unaccompanied minors was introduced into FAR system. FRO appreciates the development in this regard and at the same time recommends to continue a strong policy on raising awareness on a protection of the best interest of the child taking into account that unaccompanied minors are not allowed in return operations organised or coordinated by Frontex.

6. Use of force and means of restraint

Article 7 of the CoC reflects the international and European standards on the use of force and means of restraint, which can be applied only in accordance to necessity, legality and proportionality principles, or in response to an immediate and serious risk. Any decision to use coercive measures has to be based on an individual risk assessment. The use of force require the application of specific techniques employed by trained staff, who is also submitted to periodical refresher training sessions, otherwise, although the mission of carrying out a forced repatriation is accomplished, potential risks to the physical safety and dignity of returnees might exist.

- In several reported cases, the means of restraints were not used in accordance with principle of necessity and proportionality, for instance body-cuffing for considerable amount of time with no further explanation, but only a generic ‘assessment of authorities for a risk of potential violence’. In this regard FRO strongly recommends not to use restraints as a precaution measure, especially when they are on children, as this usage should always be based on a solid individual risk assessment.
- As noticed in some monitoring reports, the list of authorised/forbidden restraints was not provided to the monitor. According to FRO, more attention should be paid in this regard to Article 7.4 of the CoC referring to the proper and in advance distribution of the list of authorised

restraints. During some CROs, there were no presence of the TC monitors. FRO continues to encourage the presence of TC monitors together with the MS or forced return monitor from the pool, as an additional safeguard to ensure the follow up of possible incidents with the TC authorities. Accountability is a matter of concern in this hypothetical challenging situations.

- As reported, the used means of restraints did not match the items defined in the Frontex Implementation Plan.
- In accordance with some monitoring reports, at several occasions there were escorts' hands placed over the face of returnee (even up to 7 escorts holding one returnee being in body-cuffs and repeatedly deprived of vision and had a pressure applied on his face). According to the monitor's training it is not acceptable for the escorts to use such practice.

7. Basic needs

- Whenever feasible, monitors suggest that returnees should be provided with food and freely available drinking water upon their request, and without long break between deliveries. According to some monitors, waiting time and delays may affect the operation. In some cases, no food and water was provided during the pre-departure phase, irrespective of the time and the duration of the procedure. In one situation, The PMS escort-leader provided water to all, at his expense.

8. Hand-over procedure

- The monitor identified a judicial risk in making the handover on the territory of Third Country instead of at the door of the aircraft. In the mentioned case the handover took place in the Third Country airport terminal.
- The monitor reported that in one case the escort leader gave a list of returnees to the authorities of Third Country with information regarding personal risk assessment and the reasons of their leaving of Member State. Such situation can create potential risks on the returnee side in their country of origin. In this regard, FRO recommends a proper preparation of documents and procedures in the hand-over procedure.

9. Complaints mechanism

- As noticed in numerous monitoring reports, there were no Frontex complaint forms available during the return operation. Information to be provided to returnees on the Frontex complaints mechanism was generally missing. In one return operation, a complaint was submitted to Frontex regarding alleged violation of fundamental rights of a returnee (types of allegation: human dignity (Art. 1 of the EU Charter); prohibition of torture and inhuman or degrading treatment or punishment (Art. 4 of the EU Charter). In this regard, FRO recommends to guarantee the availability of complaint forms and information leaflets in operational areas, if available in the language spoken by the returnee. Furthermore, FRO addresses the importance of the duty to inform imposed on escort leaders and Frontex staff about the right to submit a complaint.

10. Further observations from monitors and FRO

- Some questions addressed in the FRO Observations covering 1st semester of 2018 are still considered to be valid, i.e.: several monitoring bodies addressed and asked about the possibility to deploy two monitors from the pool to operations where there are many returnees or long-haul flights are foreseen. Another recurrent suggestion was to extend the mandate of the pool of monitors to cover all MSs participating in a JRO, and not only the contingent of the MS requesting a monitor, to ensure a European monitoring component to the pool. Further discussion was also advisable on the sharing of the report from a pool monitor -requested by a MS- to the monitoring bodies of other MS that take part in that operation.
- Following certain monitor's observation from a flight, FRO recommend a good practice to allow returnee to use the interactive media when they are available on the plane.