

STANDARDS FOR FORCED-RETURN MONITORING IN BULGARIA

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The issue of forced-return monitoring is a constituent part of the common European return policy, which is regarded as one of the highest priorities of the common EU migration policy.

The topic of returning third-country nationals illegally present in the Member States to their countries of origin is a key element in formulating the Union's comprehensive strategy in the area of migration. The importance of return as a tool to reduce irregular migration and migrant smuggling, as well as the issue of improving the systems for carrying out returns (voluntary or forced) are discussed in basic EU documents, such as the *European Agenda on Migration* (2015), the *EU Action Plan on return* (2015, 2017), the *EU Action Plan against migrant smuggling 2015 – 2020* (2015), as well as the *Return Handbook* (2015, 2017).

A primary objective of the EU return policy is to scale up return rates in proportion to the total number of return decisions issued through strengthening the Member States' return capacity, as well as in cooperation with and by providing support to the countries of origin and transit.

Bulgaria is among the 26 EU Member States (exclusive of Ireland and the United Kingdom) bound by *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals*.

The *National Strategy on Migration, Asylum and Integration (2015-2020)* defines the return policy as an important element of migration process management.

KEY POINTS

With a view to ensuring effective and sustainable monitoring system:

- A more detailed legal framework on forced-return monitoring should be established governing the status of the organization/s carrying out forced-return monitoring in Bulgaria.
- An independent organisation should be selected and mandated to carry out forced-return monitoring along with the Ombudsperson of the Republic of Bulgaria.
- The monitors' status as participants in a forced-return operation should be formally legislated.
- A mechanism should be put in place for timely provision of information by the MoI's Migration Directorate to the monitoring organisation(s) about (all) upcoming forced-return operations.
- Monitors should be granted access to the source documentation, to all relevant facilities and to the security area at Sofia Airport (to effectively conduct monitoring during all four phases of the return operation).

It rests on two principles-based approaches, i.e., voluntary and forced return, with priority given to voluntary return. The main objectives set out in Bulgaria's return policy relate to increasing the numbers of (a) persons returned pursuant to readmission agreements; (b) illegally present TCNs removed from the country as a whole; (c) foreign nationals removed from the country in implementation of assisted voluntary return programmes.



Implementation of the Common European Return Policy

Eurostat data indicate that as of 2017, the efficiency of return policy implementation had not improved significantly. In general, since the beginning of the migration crisis in 2014 until now, there has been no significant change in return rates, which ranged between 36 and 38 % in the period from 2014 to 2017. The only exception to this was the year 2016 when the share of effective returns rose to 46 %. The decline to return rates of 38 % in 2017 was due to the fact that the illegally staying nationals of Western Balkans countries were, to a large extent, returned in 2015 and 2016 to their countries of origin with which the EU maintains good cooperation and effective readmission agreements. There was a decrease, even though less significant, in the rate of effectively returned persons in 2017 (29.2 %) compared to 2016 (34.5 %) even if data regarding Western Balkans countries are removed from the overall 2017 return data, which is a clear indication of the difficulties faced in carrying out return operations within the EU.¹

The data on Bulgaria indicate low return rates of around 1 % over the period of 2014 to 2016, which is largely due to the fact that according to the legislative practice, a removal order (Article 41(1) of the FRBA) is issued against any undocumented third-country national found to be present within the territory of this country despite his or her stated intentions to apply for asylum. The return rate increased significantly in 2017 (67.5 %) when there was a significant drop in the number of return decisions issued (2,600). Another noteworthy achievement of Bulgaria's return policy was the change in 2016 and in 2017 in the ratio between forced and voluntary returns in favour of the voluntary returns. While in 2014 and in 2015, the share of forced returns exceeded the share of voluntary returns, in 2016 and in

2017 the voluntary returns reached a share of over 70 % of the total number of returns carried out. This trend, however, did not continue in 2018, when the share of involuntary returnees (329 persons or 56.6 % of the total number of returnees over the said period) exceeded the share of voluntary returnees (252 persons or 43.4 % of the total number of returnees over the said period)².

EU Policy and Practice in the Area of Forced-Return Monitoring

The obligation on the Member States to implement forced-return monitoring was introduced by *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals*. Article 8(6) of the Return Directive introduces an obligation on the Member States to provide for an effective forced-return monitoring system. According to the Return Handbook³, forced-return monitoring should be understood as an inbuilt control mechanism for national day-to-day return practices intended to ensure respect for the returnees' rights and dignity.

The Return Directive does not prescribe in detail how national forced-return monitoring systems should look like, thus leaving, in practical terms, a wide margin of discretion to the Member States. Some guidance in this regard is given by the Return Handbook, which provides the following main recommendations:

- forced-return monitoring should be understood as covering all activities undertaken by the Member States in respect of removal (from the preparation of departure, until reception in the country of return or, in the case of failed removal, until return to the point of departure);

¹ COM(2018) 301 Final.

² Official letter by the Migration Directorate of the MoI, Reg. No. 536400-22916-31.12.2018.

³ Return Handbook, C(2017) 6505, p. 42.

- monitoring systems should include the involvement of organisations/bodies different and independent from the authorities enforcing return;
- public bodies (such as a national Ombudsman or an independent general inspection body) may act as monitors. However, it seems problematic to assign a monitoring role to a subsection of the same administration, which also carries out return/removals;
- Article 8(6) of the Return Directive does not imply an obligation to monitor each single removal operation. A monitoring system based on spot checks and monitoring of random samples may be considered sufficient as long as the monitoring intensity is sufficiently close to guarantee overall efficiency of monitoring.

Forced-Return Monitoring in Bulgaria

Bulgaria introduced in its legislation the EU requirement to provide for return monitoring in 2013 when a legislative provision was enacted governing the right of the Ombudsperson and of national and international non-governmental organisations to carry out monitoring during the execution of forced-return operations (Article 39a(2) of the FRBA). There exist no detailed provisions in the national law governing forced-return monitoring and there are no provisions governing the terms and procedures for conducting such monitoring, the conditions that the monitors ought to fulfil, as well as their rights and obligations during a forced-return operation.

During the period from 16 May 2017 to 24 December 2018, the Center for the Study of Democracy together with CVS Bulgaria carried out independent monitoring of fifteen forced-return operations. In six of the fifteen removal operations monitored, our monitors conducted full-scale monitoring during all four removal phases: Pre-return, Pre-departure, In-flight, and Arrival. Nine operations were monitored partially in the course of the

first two removal phases: Pre-return and Pre-departure. The countries of destination in the return operations monitored included: Afghanistan (4 removals), Sri Lanka (3 removals), Iraq (2 removals), Egypt (2), Morocco (1), India (1), Mongolia (1), and Tunisia (1). A total of 26 males were removed in the fifteen operations, who were nationals of Afghanistan (10), of Sri Lanka (6), of Iraq (4), of Egypt (3), of Morocco (1), of Mongolia (1), and of Tunisia (1). The number of returnees in each of the fifteen removal operations monitored was either 1 or 2.

The above monitoring operations were conducted by the two non-governmental organisations under the project "*Development and enforcement of unified standards for forced-return monitoring system*", BG/AMIF – SO3 – NO1 – A1, implemented over the period from 16 August 2016 to 25 December 2018.⁴ The aim of the project was to develop *Standards for Forced-Return Monitoring in Bulgaria* and the purpose of the forced-return monitoring operations was to have the proposed documents piloted, tested, and approved. It should be noted that the two organisations have no official status as monitors and the forced-return monitoring operations during the above-noted periods were carried out within and limited to the strict framework of the projects and the financial parameters set out therein.

During the project implementation period, the organisations conducting the monitoring operations were not provided with timely and complete information about all forthcoming forced-return operations. During the above-noted period, the Migration Directorate of the MoI provided information about just 21 impending forced-return operations involving the removal of 37 returnees in total. However, the total number of involuntary returnees removed by the MoI's Migration Directorate over the same period was substantially higher – 570 persons.

⁴ The implementation period for this project was 24 months. The project was temporarily suspended by the responsible authority for a period of five months from 30 March 2018 to 9 September 2018.

The common characteristic of all removal operations monitored was that the risk in each of them, according to the risk assessment carried out by the escorts, was low. Hence, the proposed recommendations were formulated on the basis of monitoring low-risk operations, which means that the monitors have no insight as to forced-return operations assessed as high-risk.

No incidents were reported in the course of the monitoring operations and it could be summarised that in all 15 removals monitored the escorts demonstrated professional conduct and well-intentioned attitude while respecting the returnees' rights and dignity. In addition, in the course of the operations monitored, the escort leader and the escorts assisted, within the limits of their powers, the monitors as regards obtaining information and clarifications on questions that arose during the operations.

In accordance with the principle of monitoring adopted, as agreed with the MoI's Migration Directorate, the monitors were not officially introduced to the returnees and were not allowed to converse with them, except with the escorts' specific permission. Thus, in the vast majority of operations, the monitors did not engage in conversation with the returnees at any moment during the removal process.

Recommendations

Optimising Opportunities for Effective Forced-Return Monitoring

In order to ensure immediate and effective monitoring of **Phase One** of a forced removal operation, it is recommended that:

- The authority responsible for carrying out the removal operation should grant the monitors access to the source documentation contained in the returnees' personal files, incl. the outpatient medical record of the medical examination;
- The monitors should be granted the opportunity to attend the contact talk. It should

become an established practice with the escorts to introduce the monitor(s) to the returnee(s). Consideration should be given to the possibility of standardising the time for holding the contact talk (e.g., no later than 48 hours before the commencement of a forced-return operation) as a possible approach to ensuring that it would be properly and effectively monitored. It is also advisable that the monitors should be informed of the contact talk no later than 24 hours prior to conducting it so that they could make timely arrangements for attending, particularly when the contact talk is held elsewhere in the country;

- Consideration should be given to the possibility of having the monitors wear special identification badges indicating their function in the removal operation in a language the returnees understand;
- The organisation mandated to act as a monitor should ensure the attendance of monitors in those monitoring stages, which, according to the procedural practice of the authority executing the removal operation, are conducted in the days preceding the start of the operation or in the early parts of the day before the returnees are handed over to the escorts;
- With a view to achieving synchronisation with the international standards applicable to this area, it is recommended that the monitors definitely attend the escort briefing;
- Where removal operations commence at the SHTAF in the town of Lyubimets, the monitors should start the monitoring process at the said SHTAF in Lyubimets.

In order to ensure immediate and effective monitoring of **Phase Two** of a forced removal operation, it is recommended that:

- The monitor(s) should be granted the possibility to maintain good visual contact with the returnee(s) inside the means of transportation used to conduct the transfer from the place of accommodation (detention) to the place of departure;

- Regardless of the type of monitoring operation (full-scale or partial), the monitors should be granted official access to the security area at Sofia Airport (with a view to ensuring proper and effective monitoring of Stage 6 of Phase 2 and of Stage 1 of Phase 3). Granting such access could be justified by granting the monitors an official status and by elaborating a mechanism for contacting the airport authorities and/or the General Directorate Border Police (GDBP) with the assistance of the Mol's Migration Directorate. For the purposes of ensuring proper and effective monitoring, access should be granted also to:
 - the premises of the GDBP at the airport;
 - the vehicle used to transfer the returnee(s) to the aircraft;
 - the aircraft.

In order to ensure immediate and effective monitoring of **Phase Three** of a forced removal operation, it is recommended that:

- With a view to effectively conducting the monitoring during the stages of the first and the second flight, where applicable, the monitors should be granted the possibility to maintain good visual contact with the returnees and should be assigned seats aboard the aircraft in immediate proximity to their seats, as well as to the escorts' seats. It is advisable to elaborate a procedure according to which the airline when informed by the escort leader of an upcoming forced-return operation, should assign seats not just for the escorts and for the returnee(s) but for the monitor(s) as well.

In order to ensure immediate and effective monitoring of **Phase Four** of a forced removal operation, it is recommended that:

- With a view to effectively conducting the monitoring during the stage of handing the returnee(s) over to the competent national authorities in the country of return, the monitors' status as participants in a forced-return operation

should be formally legislated (either in the *Foreigners in the Republic of Bulgaria Act* or in a regulation). Such legitimisation would facilitate effective monitoring during the handover of returnees to the competent national authorities in the country of return. It is appropriate to supply the monitors with a formal document allowing them to make themselves known to the national authorities in the country of destination if needed;

- With a view to achieving synchronisation with the international standards applicable to this area, it is recommended that the monitors be granted the opportunity to acquaint themselves with the escort leader's debriefing memorandum.

Execution of Forced-Return Operations in Conformity with the Duty to Respect the Returnees' Fundamental Rights and Dignity

- Appropriate measures should be taken to ensure that the returnees are informed of the impending removal operation as early as possible (by conducting the so-called "contact talk"). Informing the returnees immediately prior to the start of the forced-return operation should be avoided.
- The monitors ought to be introduced to the returnees. While introducing the monitors, their function and prerogatives in the course of the operation ought to be explained to the returnees in a language they understand. It is appropriate to develop and put in place an introduction procedure – whether the introduction should be done by the escort leader or by the monitors themselves following an announcement and an invitation by the escort leader; what information about the monitors should be provided; whether the returnees should be allowed to ask questions during the introduction, etc.
- The returnees should be provided in advance with information about the nature of the fingerprinting procedure, as well as about

who has access to the database of fingerprints stored in the Automated Fingerprint Identification System (AFIS). Practice has shown that some third-country nationals feel concerned about this procedure and it is, therefore, advisable, that they should be duly informed of it.

Establishing a Forced-Return Monitoring Mechanism

- A more detailed legal framework on forced-return monitoring needs to be established (Article 39a(2) of the FRBA) governing the status of the bodies and/or organisations carrying out forced-return monitoring within the meaning of *Directive 2008/115/EC* and of the *Foreigners in the Republic of Bulgaria Act*, including but not limited to:
 - legal provisions governing the terms and procedures for selecting monitoring organisations and their mandate, as well as the conditions that the monitors themselves ought to fulfil;
 - provisions laying down the procedures for conducting forced-return monitoring;
 - provisions governing the monitors' rights, duties, and responsibilities prior to, during, and upon the conclusion of a forced-return operation, including the confidentiality requirements.
- It is recommended that another independent organisation should be selected and mandated to carry out forced-return monitoring along with the Ombudsperson of the Republic of Bulgaria. Consideration should be given to the possibility of having more than one organisation with the mandate and authority to carry out monitoring with a view to ensuring the greatest possible transparency and independence.
- It is necessary to ensure sustainability of forced-return monitoring by providing targeted funding to the organisations mandated to act as a monitor. Targeted funding would be a better funding approach than the current project-based approach.
- A mechanism should be put in place for timely provision of information by the Mol's Migration Directorate to the monitoring organisation(s) about (all) upcoming forced-return operations. Such a mechanism would allow the monitoring organisation(s) to select which operations to monitor, thus guaranteeing overall efficiency of monitoring.
- The signing of a confidentiality declaration by the monitors and by the employees of the monitoring NGO who have access to information related to the forced-return operations monitored could provide the necessary peace of mind as regards the non-disclosure of the foreign nationals' personal data. Such declaration would serve as a guarantee of non-disclosure of information, which relates to the recommended provision of access to the foreign nationals' documents, including the medical examination records, with a view to ensuring more comprehensive monitoring of the documentary part of the removal procedure.
- It is necessary to provide training for every forced-return monitor. It is recommended that the monitors should be included in the training exercises for escort police officers conducted by the Mol's Migration Directorate with a view to gaining practical knowledge of the nature of the escorts' job and the technology of all stages of the forced-return operations.