ANNEX 1

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„Implementation of the best European practices with the aim of strengthening the institutional capacity of the Apparatus of the Ukrainian Parliament Commissioner for Human Rights to protect human rights and freedoms (Apparatus)“

ANALYTICAL REPORT
ON EXISTING METHODOLOGIES AND PROCEDURES TO CARRY OUT A MONITORING OF THE OBSERVANCE OF HUMAN RIGHTS, ENSURING ACTIVITIES OF THE OMBUDSPERSON IN PREVENTING SUCH VIOLATIONS

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LIST OF ABBREVIATIONS

API – Law of Ukraine on Access to Public Information

The Commissioner – Ukrainian Parliament Commissioner for Human Rights

CoE – Council of Europe

CSO – Civil society organisation

Directive 95/46/EC – Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

GDPR – Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC

EERWM – Law of Ukraine on Ensuring Equal Rights of Women and Men

ECHR – European Convention on Human Rights

LPDP – Law of Ukraine on Personal Data Protection

NHRI – National Human Rights Institution

NPM – National Preventive Mechanism

NGO – Non-Governmental Organisation

OHCHR – United Nations High Commissioner for Human Rights

OPCAT – Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

OSCE – Organization for Security and Co-operation in Europe (OSCE)

PPCDU – Law of Ukraine on Principles of Preventing and Combating Discrimination in Ukraine

UPCHR – Law of Ukraine on the Ukrainian Parliament Commissioner for Human Rights

UHUHR – Ukrainian Helsinki Union of Human Rights

UNDP – United Nations Development Programme

1. Introduction

International Lithuanian-Austrian mission of experts of this twinning activity raised its primary objective to carry out general analysis of Ukraine‘s Ombudsperson institution (The Commissioner) and conduct a more detailed analysis of the three selected areas (Data Protection, Equal Opportunities and Access to Public Information) mainly focusing on the monitoring and prevention activities. This chosen objective aims to broadly cover Ukraine’s Ombudsperson’s activity in general (to see a so called “big picture”) and also to concentrate attention on specific areas of the institution‘s activity in order to analyse them in a more precise detail. It should be stressed that the monitoring activities of the units on the rights of internally displaced persons, protection of military personnel and compliance with procedural law were not analysed.

The goal of this report is to analyse existing methodologies and procedures of monitoring of the observance of human rights and preventive measures, applied by the Ukrainian Parliament Commissioner for Human Rights, therefore the assessment is focused on preventive monitoring activities, aimed to recognise and remedy risk factors for human rights infringements at an early stage.

In pursuance for the previously mentioned objective, methods such as analysis of the documents (mostly the existing laws and draft laws as well as various international reports), analysis of the ongoing monitoring activities of the specific areas, as well as the interviews with Beneficiary’s representatives, responsible for relevant Ombudsperson activities, were used. With the aim to get as much objective information as possible about the activities of the Commissioner, interviews were also conducted with the representatives of NGO's and academics in order to find out the strengths and weaknesses of the institution, which are visible from the outside view. With the objective to make general public aware of the project and to share Lithuanian experience in the fields of data protection and equal opportunities with the Ukrainian audience, mission experts Dijana Šinkūnienė and Agneta Skardžiuvienė gave interviews to Radio Hromadske.

The general observation that was made – Ombudsperson institution in Ukraine is fairly well known, but the public is far from understanding accurately what are the concrete activities and areas this institution is engaged in. It is often mistakenly imagined that Ombudsperson for example:

- protects "human rights" such as right to a pension or entitlement to a reduced heating bill;
- has enough power to give binding instructions to the public authorities.

Neither one nor the other case is accurate, but these notions are widely spread among the general public.

International team of experts had no doubts that the Ombudsperson institution is independent both from the legislative as well as from the executive power. It could be certainly said that this is important watchdog of the ensurance of human rights and freedoms in Ukraine. On the other hand, the legal powers of the Commissioner are limited and the institution is particularly new in Ukrainian legal culture. In this context, it should be noted that upon judicial inquiry the Commissioner may give legal opinion regarding human rights. However, in practice, such inquiries are rare enough, so it cannot be said that they have a significant impact on the case law.

Another important aspect is that Ombudsperson's activities are strongly hampered by a national phenomenon – legal spam. This phenomenon presents itself every day – a huge amount of laws and draft laws are made for consideration and approval of Verkhovna Rada. Other authorized institutions (e.g. Government, President's Office, etc.) are also hampered by a sufficiently large amount of legislative initiatives. Therefore, it makes it difficult to implement an effective human rights monitoring of the draft laws, as well as to ensure that the newly adopted legislative provisions are properly adapted and adjusted to the existing legal framework.

The Commissioner's operating performance is also hampered by the lack of human and financial resources. Lack of funds creates difficulties in recruiting highly qualified professionals, as well as to fund sustainable activity. Most of the staff are engaged in essentially reactive activity responding to complaints and inquiries of citizens. As a result, such activities as analytics, strategic planning, monitoring, which are based on comprehensive and unified methodologies, and other similar proactive functions suffer greatly.

Analysing the general situation of human rights in Ukraine, the effect of armed conflict cannot be underestimated. As mentioned by the local experts, the current situation poses major challenges both in terms of the actual human rights in the affected regions (e.g. the rights of convicts located in Donbass area prisons, huge number of internally displaced persons, etc.) as well as in terms of the overall human rights "climate" in the country. For instance, as an alarming sign could be mentioned the alleged increased public tolerance to the use of torture, which is likely related to the fact that a considerable part of the population either participated in military actions or are direct or indirect victims of the conflict.

Looking at the structure of the Commissioner's Office, it could be stated that some functions are not often found in analogous ombudsperson institutions of other countries. In particular,

data protection function in other countries is usually attributed to an independent body. In addition, access to public information is also sometimes attributed to an independent body jointly with data protection, but it is not always the case (e.g. in Lithuania this function is part of the mandate of the Ombudsman). The team of experts has received information about future plans to establish a new institution – Informational Commissioner. This public body would take up the previously mentioned areas at its disposal. The need for such authority and functions, which could be attributed to this new institution, is advocated in various international reports. In this regard, the expert mission did not examine this issue in detail.

As a very positive trait should be mentioned that the Commissioner's office maintains close relations and cooperates in different areas with various national and regional NGOs. Ombudsman+ platform means that monitoring and other activities of the Commissioner's office are coordinated and implemented by the staff of the Commissioner jointly with the representatives of society or even by the latter independently. For instance, from this year monitoring of the access to public information based on new methodology will be implemented in accordance with Ombudsman+ platform. The representatives of NGOs will be able to independently verify, how national and local government comply with the requirements of the law related to the right to information. It also should be noted that this conception of joint monitoring has already been successfully applied in implementing National Prevention Mechanism. The representatives of the Commissioner carry out inspections in the closed institutions together with civic society stakeholders. National Preventive Mechanism under the Ombudsman + platform can be considered as a proven example for successful cooperation between Ombudsperson and civic society.

The team of experts have come under the impression that the concept of monitoring is widely used in a variety of contexts. Thus, it is not entirely clear what that precisely means in a particular case or context. Monitoring is referred to as different activities, such as visits to investigate the human rights situation in closed facilities/institutions, review of randomly selected draft laws, conclusions based on the information obtained during examination of complaints received, etc.

Data protection, equal opportunities and access to public information are relatively new legal institutes of the Ukrainian legal system. For that reason, the public have not fully developed the awareness of these rights and the knowledge of human rights in general is relatively low. The same applies not only to the public in general, but to a lesser extent also to civil servants or judicial bodies. Perception of privacy has been strongly influenced by the Soviet period. It is quite difficult to talk about the privacy and data protection, considering that public does not

understand the importance of these rights. For instance, the public does not understand why the creation of the global register of patients or access to all data of people's income by Ministry of Finance are contrary to the basic principles of data protection. Also, there is no conscious understanding how video recorders or CCTV should be used in public space. For example, by implementing SmartCity project, CCTV cameras are located all throughout capital city Kiev. Consequently, the information from these sources is transferred to the analytical centre. That creates a particular problem in terms of further management and storage of this information. In Equal opportunities area, the term "gender" is viewed with suspicion and the meaning is not clearly understood. Moreover, there are still "male" and "female" job lists. Nevertheless, it could be considered as minor problems comparing to structural inequality on gender basis as men occupy most of leading positions (ministers, heads of municipal government, members of Parliament, etc.). In antidiscrimination field, there are big problems with the discrimination of certain ethnic and social groups. The main problematic areas mentioned by Ombudsperson staff and NGOs representatives are the age discrimination and discrimination against people with disabilities. The biggest victim of ethnic discrimination is considered Roma minority. In particular, the most problematic regions are in Zakarpattia region, Odessa and Cherkassy where large Roma communities exist. Strong hostility is felt against LGBT community and LGBT parades. This hostility is often expressed by the leaders and representatives of biggest and most influential religious confessions in Ukraine. The fact that there is legal basis in Ukraine to legally change sex could be mentioned as a positive aspect. However, the whole procedure is fairly lengthy and humiliating in nature.

In the next chapters of this analytical report team of experts provides main findings of the mission, regarding monitoring of human rights, data protection, access to public information, equal opportunities, visibility of the Ombudsperson's Office and awareness raising of the society with regard of human rights. In the end of the report, experts draw conclusions and make preliminary recommendations, concerning previously mentioned topics.

2. Monitoring methodology

2.1 Basic concepts and definitions

The realisation of human rights is an ambitious task. It not only requires states to adopt international human rights instruments and accept human rights standards, it also requires states to respect and implement these standards in all policy fields, to protect individuals from human rights violations and to actively promote the enjoyment of human rights, that is to take measures that human rights standards are realised and accessible for all citizens. Monitoring is an important instrument in order to guarantee that states meet the human rights obligations they have under international and national human rights law and, in doing so, it is also a very important instrument to prevent human rights violations in the first place. The constant observation, collecting information and reporting on human rights violations and on the human rights situation in general to political stakeholders and to a wider public are crucial factors in preventing discrimination, torture, ill-treatment and other infringements of human rights.

While the term monitoring is used quite frequently and is a core task especially for a National Human Rights Institution (NHRI) such as the Commissioner, the actual definition and procedures of monitoring are not very well defined in international documents as well as in academic literature. Although practices of monitoring can be found in many forms, 'there is limited guidance and perhaps even discussion on the scientific quality and validity of monitoring results of NHRIs, as well as very limited guidance in identifying monitoring methodologies for NHRIs. This is problematic as it leaves NHRIs in a vacuum with no clear concepts or models for monitoring which can and often does, backfire on the credibility of NHRIs (…).'[1] *However, the transparency of and systematic selection and application of standards, methods and procedures of data collection is an important precondition for monitoring in order to be able to assess the validity, reliability and objectivity of the collected information and in order to produce high-quality monitoring results.*

It should be stressed, that there are separate monitoring methodologies in use, e.g. monitoring observance of human rights in prison or monitoring accessibility of public information.

[1] Yigen, Kristine (2016), ‚Monitoring of human rights by NHRIs as defined by international instruments', in Mayrhofer, Monika (ed.) *International Human Rights Protection: The Role of National Human Rights Institution – a Case Study*, FRAME, p. 7, available at http://www.fp7-frame.eu/wp-content/uploads/2016/08/Deliverable-4.3.pdf (accessed on 23 February 2017).

However, these methodologies have been developed in collaboration with various national and international experts and based on different criteria. A unified and comprehensive human rights monitoring methodology, that defines what monitoring is in general and what are its basic structural elements, does not exist. Another considerable weakness is lack of systematic collection of statistical data and its further analysis. As depicted in figure 1, comprehensive monitoring requires the interplay and cooperation of international, national and civil society actors:

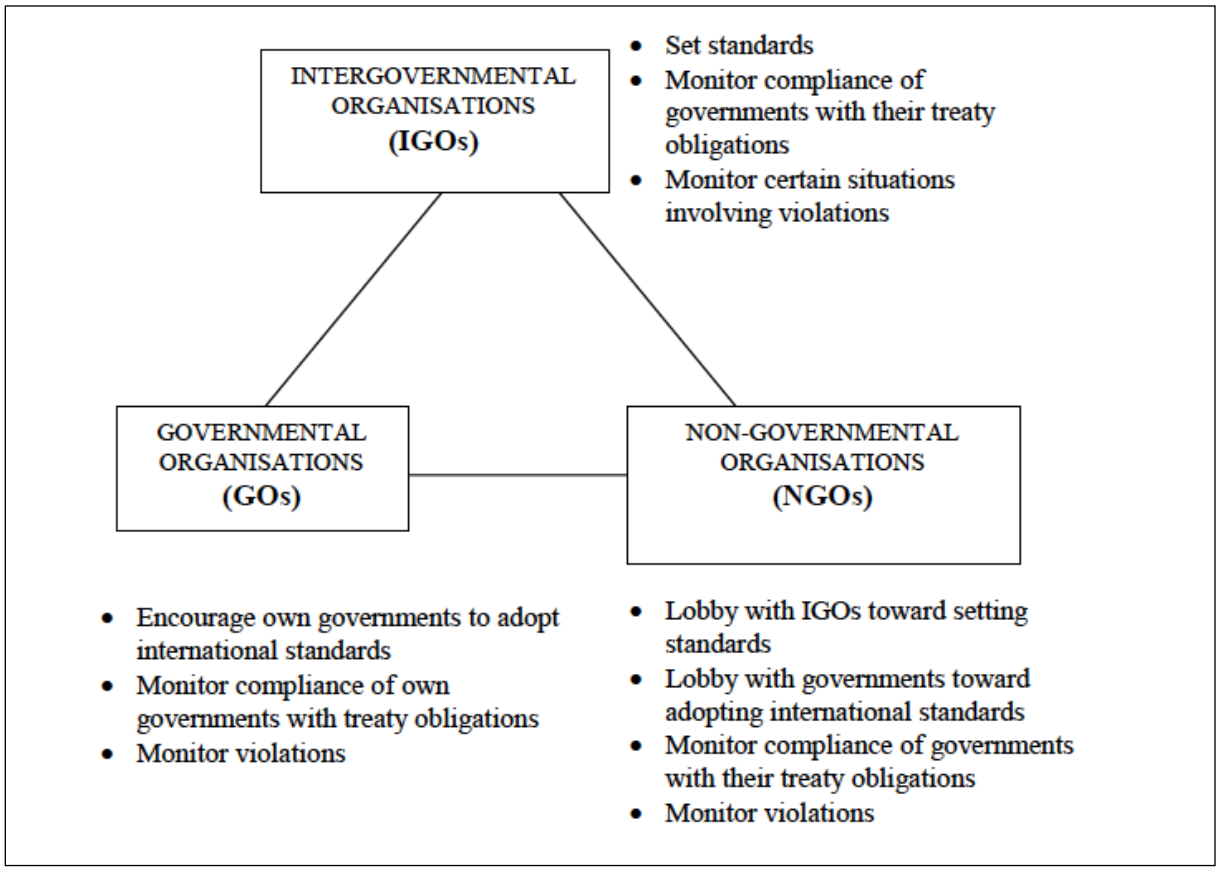

Figure 1 Overview of monitoring tasks on several levels[2]

There are several definitions of monitoring. The United Nations High Commissioner for Human Rights (OHCHR) defines monitoring as follows:

'"Monitoring" is a broad term describing the active collection, verification and immediate use of information to address human rights problems.'[3]

Another more encompassing definition conceptualises human rights monitoring as follows:

[2] This figure was taken from Guzman, Manuel/Verstappen, Bert (2003), *What is Monitoring?*, Human Rights and Monitoring and Documentation Series, Huridocs, p. 16, available at https://www.huridocs.org/wp-content/uploads/2010/08/whatismonitoring-eng.pdf (accessed on 23 February 2017).

[3] OHCHR (2001), *Training Manual on Human Rights Monitoring, Professional Training Series 7*, United Nations Publications, p. 9, available at http://www.ohchr.org/Documents/Publications/training7Introen.pdf (accessed on 23 February 2017).

'Human rights monitoring can be defined as the systematic collection, verification, and use of information to address human rights problems or compliances. The compiled data will have to be analysed against agreed standards. These standards primarily entail the human rights obligations and commitments that the State is a party to, and thus has committed itself to live up to; as well as additional human rights provisions which have come to be recognized as customary law applicable to all authorities regardless of the State's formal acknowledgement (…).'[4]

Thus, monitoring usually contains elements of observation of the human rights situation, collecting of information, the systematizing, analysis and evaluation of this information according to a certain methodology and with reference to agreed standards, and the reporting or communication of the results of the process. There are usually two approaches to monitoring:[5]

- Violation approach: This approach focuses on the violation of recognised rights. It monitors the failures of state with regard to the respect, protection and fulfilment of human rights.
- Progressive realisation approach: This approach concentrates 'on periodic evaluations of government efforts towards the realisation of (…) rights, and comparing the progress made during each period.'[6]

Two further important aspects of monitoring that should be emphasised are the aspect of time and the importance of communication of results of the monitoring process to stakeholders. The Toolkit prepared by the United Nations Development Programme (UNDP) and the OHCHR states that '[m]onitoring (…) provides periodic and regularly-collected data, sheds light on trends, signals progress or deterioration, and suggests areas for priority action. In addition, monitoring generally is carried out over an extended period of time, and ought to be of an ongoing nature'.[7] Here then, it seems that suggestions for action, in other words, recommendations, are considered to be an essential part of the monitoring function when it comes to human rights.

[4] Jacobsen, Anette Faye (2008), *Human Rights Monitoring, A Field Mission Manual,* Leiden/Boston: Martinus Nijhoff Publishers, p. 1.
[5] Dueck, Judith/Guzman, Manuel/Verstappen, Bert (2001), *A Tool for Documenting Human Rights Violations*, Switzerland: HURIDOCS, p. 5, available at https://www.huridocs.org/wp-content/uploads/2010/07/HURIDOCS_ESF_English1.pdf (accessed on 23 February 2017).
[6] Ibid.
[7] UNDP/OHCHR (2010), *UNDP-OHCHR Toolkit for collaboration with National Human Rights Institutions*, New York/Switzerland, p. 33, available at http://www.ohchr.org/Documents/Countries/NHRI/1950-UNDP-UHCHR-Toolkit-LR.pdf (accessed on 23 February 2017).

Some authors classify the human rights monitoring of laws as a distinct form of monitoring, that involves not only the studying of existing laws but also the scrutinizing of 'bills that are being proposed, drafted, debated or passed in legislative bodies.'[8] In addition, it would also include the analysis of the implementation of these laws. However, laws can also be seen as a specific form of data and, thus, be seen as a specific monitoring field that has to follow the same steps as human rights monitoring in general.

To sum up, monitoring is a systematic collection, evaluation and analysis of data in order to observe political and social processes and evaluate the impact of law and policies and the possible violations of legal obligations and/or progress made concerning the implementation of laws and policies. Definitions on monitoring suggested by international institutions such as the OHCHR or the UNDP or laid down in different human rights instruments usually include several aspects. Firstly, they have an *input* dimension referring to the observation of as well as collection of information (data) on the human rights situation (human rights violations, developments of human rights laws, etc.). Secondly, monitoring refers to activities of *processing* data and information on human rights such as the systematisation and analysis of acquired data. Thirdly, monitoring requires activities, which are directed either to state officials, the international level or the broader public – the *output* dimension – which includes the aspects of reporting but also giving advice and drafting recommendations or any other form of intervention and follow-up activity concerning the improvement of the human rights situation.

2.2 Monitoring Steps

As depicted in Figure 2 monitoring usually comprises various phases that can be summarised in several steps or dimensions. In the following, each monitoring step will be described shortly including a short delineation of the main important aspects of each step.

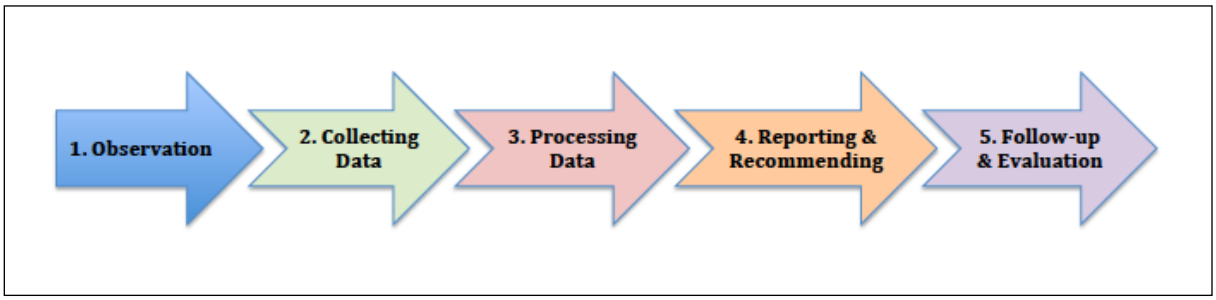

Figure 2 Monitoring Steps

[8] Guzman, Manuel/Verstappen, Bert (2003), p. 30.

2.2.1 Observation

Observing 'usually refers to the more passive process of watching events'[9] in the area of human rights. It requires the keeping track of human rights-related developments, incidents and events and is generally done over a longer period of time or in recurring time intervals.[10] The fields of human rights observation in particular and human rights monitoring in general are usually laid down in the mandate of an institution. Very often the mandate is very broad and potentially covers all fields of human rights, such as in the mandate for the Ukrainian Parliament Commissioner for Human Rights. Thus, there is very often the need to set priorities in order to be able to thoroughly concentrate on specific fields and not to exhaust the oftentimes limited resources of an institution. There are usually two ways of priority setting:

- External factors such as petitions by citizens to take action in a certain field, priorities set in the framework of international reporting obligations, specific requirements lined out by international conventions (NPM), specific urgent events, petitions or requests by civil society organisations and others. To respond to external factors means following a reactive approach to monitoring.
- Internal factors such as strategic action plans or work programs in specific fields (e.g. in the field of Anti-Discrimination) refer to a more pro-active monitoring approach. Such plans and programs should help to focus the activities over a certain period of time on specific topics in order to create high-quality results and to avoid wasting resources on the one hand and support getting a more comprehensive and systematic monitoring on the other hand.

2.2.2 Collecting data

Collecting data on human rights is a key activity in the field of monitoring and refers to the collection of information on a specific human rights event, field or topic. Human rights data contain information for describing, analysing and assessing conditions and issues of human rights and specific events in a state or society. Collecting data requires several decisions:

- *What is the objective of monitoring in a specific human rights field?*

The definition of the objective of monitoring is important as it helps to narrow down the task and as it is vital for the choice of methodology, procedures and timeframe of the monitoring process. Objectives can be to ascertain if there was a human rights violation in the context of a specific event, if a draft law is compatible with human rights standards, if the

[9] OCHCHR (2001), p. 9.
[10] Guzman, Manuel/Verstappen, Bert (2003), p. 7.

implementation of a law is consistent with human rights standards or if a certain law or policy is having the human rights impact that it is supposed to have or if the situation of specific groups, for example the living conditions of Roma or other minority groups, is meeting human rights standards.

- *What are the specific fields, topics or events (cases) of monitoring and what are the criteria or reasons for selecting specific fields, topics or events?*

The decision on the specific fields, topics or events of monitoring results from the observance phase and should further narrow down the focus of monitoring. For example, if there is a specific focus on monitoring human rights in closed facilities as in the framework of the NPM, there has to be specific events or facilities singled out for further inspections. This requires the selection of criteria on how to select those facilities. Transparent and comprehensible selection criteria should be used whenever choosing specific fields, topics or events of monitoring.

- *What is the timeframe of monitoring?*

According to the objective and fields of monitoring it has to be decided if the monitoring is done constantly, repeatedly, a limited period of time or only once.

- *What are the methods and sources of data collection?*

Data collection may include quantitative, statistical data as well as qualitative data and it may draw from primary sources, that is the direct collection of information by the institution itself, or from secondary sources, that is data collected by other institutions (such as universities, other administrative departments, NGOs, etc.). Typical sources for data in the field of human rights monitoring are,[11] for example, official statistics, censuses, administrative records, surveys, different forms of research, case studies, complaints data, petitions, juridical data, qualitative interviews with different stakeholders and victims and other persons concerned (for example in field or fact-finding missions), focus groups, policy and legal documents and others. For a comprehensive and systematic monitoring it is – depending of course on the objective of the specific monitoring effort – very often crucial to rely on several sources of data as one source of data might give only a limited picture of a certain field of human rights.[12]

[11] For a comprehensive overview and discussion of different sources in the field of equality data see Makkonen, Timo (2007), *European handbook on equality data*, European Commission Luxembourg, pp. 35-84.

[12] For example, relying only on complaint data provides only information on the reported cases of human rights violations but not on the prevalence of human rights violations in a society or state in general. People might not launch complaints because they are not aware that their rights are violated or they might have other reasons for not lodging a complaint (see Makkonen, Timo (2006), *Measuring Discrimination. Data Collection and EU Equality Law*, European Commission, Luxembourg, p. 45).

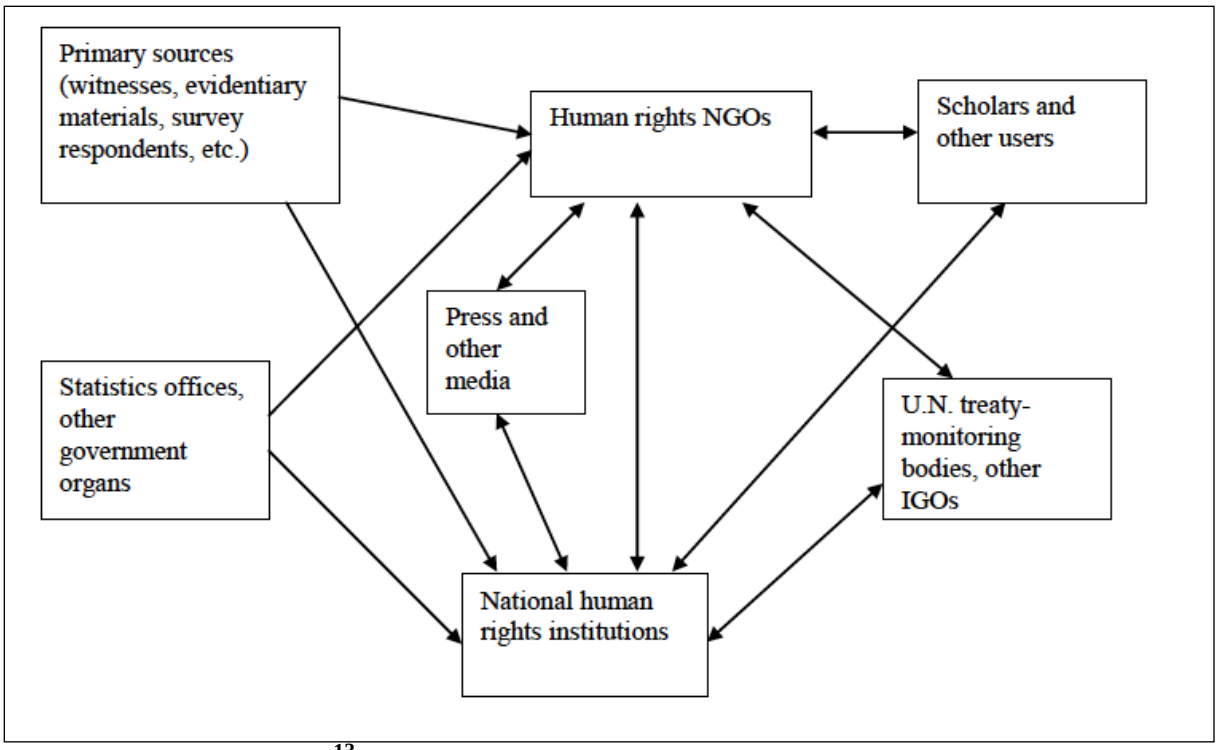

Figure 3 Sources of data[13]

There are two main 'methodologies' mentioned in the literature of human rights monitoring:[14]

- The events-monitoring methodology are case studies that focus on alleged incidents of human rights violations. This approach 'involves identifying the various acts of commission and omission that constitute or lead to human rights violations. In other words, it is a concrete form by which the "violations" approach takes shape.'[15] This approach is limited as it only focuses on specific events and, thus, does not delineate a comprehensive and systematic picture of violations of human rights in a certain field.
- The indicator-based methodology is based on the idea that specific indicators, that is a specific type of information (data) in the form of numbers, concepts or standards, gives insight on 'where something is, what direction it is leading to, and how far it is from that objective. It serves as a sign or symptom that tells what is wrong in a situation and helps in pointing out what needs to be done to fix the problem.'[16] There are qualitative and quantitative indicators. Moreover, there are indicators that focus on or indicate/measure the input, process, output or outcome. The selection of indicators is a very important task and should be done considerately and methodically as the same indicators should be used over a longer period of time in order to be able to determine changes and progress.

[13] This figure was taken from Guzman, Manuel/Verstappen, Bert (2003), p. 24.
[14] See Guzman, Manuel/Verstappen, Bert (2003), pp. 28-30
[15] Guzman, Manuel/Verstappen, Bert (2003), p. 28.
[16] Guzman, Manuel/Verstappen, Bert (2003), p. 29.

It is important to note, that both approaches are important, especially when they are used in combination. The events- or case study approach gives in-depth inside into the dynamics, process and structure of a situation and might be useful also for the indicator-based approach as they often contribute to the development of accurate indicators. The indicator-based methodology may contribute to providing a more systematic and comprehensive picture of the human rights situation in a society.

- *What are the standards concerning the process and methods of data collection?*

It is important that data are collected according to transparent and agreed standards. There are usually four main criteria, which are important standards in regard to collecting and processing human rights data for monitoring.

The gathering of data should firstly follow the principle of **objectivity and impartiality** that means that data collection should be based on scientific and/or professional principles, methods and procedures. Objectivity is also an indispensable criterion for collecting complaints data, meaning the gathering of those data should also follow standardised principles.

Secondly, when not investigating specific but monitoring systematic events the criterion of **continuity** is important. It refers to the fact that it is necessary to collect data on a regular basis and from the same sources. This enables the development of time-series and trend analysis, provided that categories are kept stable to allow for comparability.

Thirdly, the criterion of **reliability** means that the methods and procedures used in collecting, processing and disseminating data shall be selected according to established professional standards, scientific methods and principles of professional ethics so that the monitoring output reflects the observed phenomena as accurate as possible.

Fourthly, the principle of **comparability** of data refers to standardised approaches with respect to definitions, classifications and categorization principles. In order to be comparable the data has to meet the criteria of **consistency**, meaning that it shall be consistent in terms of content, terminology, procedures and period of time.

Finally, the principle of a **validity** of information has to be respected. A commonly applied test of validity is to assess whether the information is logical in itself or to compare it with other known facts, according to the commonly applied principle that information should be consistent with material collected from at least three independent sources.

- *How is the collected data documented?*

'Documentation is the process of systematically recording the results'[17] of any process of data collection, e.g. interviews, surveys, collection of petitions or complaints, fact finding missions, case studies etc. Transparent and understandable documentation of the data collected is essential for a monitoring system.

2.2.3 Processing data

Processing data refers to the process of extracting information from the previously collected and documented data. The two most important operations in this regard are the cataloguing and analysing of data. *Cataloguing* requires the systematisation and *analysing* the assessment of the acquired data according to specific national or international benchmarks and standards, i.e. national and international human rights treaties and laws. Thus, cataloguing and analysing also implies an act of *measuring* a particular social phenomenon on the basis of previously agreed indicator(s) and/or concept(s) in order to be able to relate it to a specific (human rights) aim or to specific (human rights) priorities.

The analysis of data should follow the same standards as the collection of data. This means that:

- The methods and procedures used in processing and analysing the data shall be compliant with established professional standards, systematic methods and principles of professional ethics. Thus, it might be useful to adopt guidelines that lay down how and with which methods the collected data are assessed and analysed and what are the standards against which the data is measured.
- The analysis of data should not only use standardised approaches with respect to definitions, classifications, categorization and indicators, it shall also be consistent in terms of content, terminology, procedures and methods of analysis.

There are many types of analysis including statistical analysis, descriptive analysis, sociological analysis and interpretation of interviews, document analysis, discursive analysis etc. It is important to follow standardized and transparent processes of analysis as they enhance the quality of the monitoring and in doing so, the quality of the output.

2.2.4 Reporting and recommendations

The results of the monitoring process are usually communicated to various stakeholders in forms of reports, recommendations, and awareness raising activities, educational activities and legal interventions such as the use of domestic remedies. The scope of these

[17] Dueck, Judith/Guzman, Manuel/Verstappen, Bert (2001), p. 4.

dissemination and follow-up activities is dependent on the respective mandate and/or work- or strategic plans or programme of the institution.

The most important instruments of the follow-up process are written and oral interventions in the form of recommendations and the drafting and publication of reports:

- *Recommendations* are usually directed to policy makers and representatives of the public administration. They may include specific advice on how to improve the human rights situation in a specific area or of a specific group or how to enhance the implementation of human rights law in the national context. They can include specific legal and policy advice, proposals concerning positive action and administrative measures.
- *Reporting* is a process of providing information to public authorities, politicians, the population, stakeholders or international bodies, which is based on the evaluation of a broad range of data (e.g. law, policies, qualitative and quantitative data). This requires the continuous and systematic collection of data and information. It is also closely connected to the aspects of human rights *education and awareness raising* of the broader public.

2.2.5 Follow-up and evaluation

Monitoring also requires the follow-up of the recommendations given and, depending on the mandate, may also entail sanctions or other forms of intervention in case of non-compliance with recommendations.

An important part of the follow-up process is also the evaluation of the monitoring process as such. This means to assess the quality, the comprehensiveness and the validity of the data collected and to point out shortcomings or gaps in the data, which hamper its utilisation as monitoring data.

3. Analysis of methodologies and procedures

Under present UPCHR provisions, the Commissioner has a broad mandate with respect to human rights monitoring and prevention. According to article 1 of the UPCHR, the commissioner exercises parliamentary control over the observance of constitutional human and citizens' rights and freedoms, the purpose of which, as set out in article 3 of the UPCHR, is the protection of human and citizens' rights and freedoms envisaged by the Constitution of

Ukraine, the laws of Ukraine and international treaties of Ukraine, observance of and respect for human and citizens' rights and freedoms, prevention of violations or facilitation of the restoration of the rights, facilitation of the process of bringing legislation of Ukraine in accordance with the Constitution of Ukraine and international standards, improvement and further development of international cooperation in the area of the protection of human and citizens' rights and freedoms, prevention of any forms of discrimination in relation to fulfilment of person's rights and freedoms and promotion of legal awareness of the population and protection of confidential information about a person.

Additionally, the Commissioner is granted an "A" status of a NHRI[18] – the highest status of compliance with the UN Paris Principles[19], which provide for a broad human rights mandate, including examinations of legislative and draft provisions, preparation of reports on the national situation with regard to human rights in general, and on more specific matters, expressing an opinion on the positions and reactions of the government, increasing public awareness through information, education and making use of all press organs, and other.

Within such a broad mandate, a number of human rights monitoring activities can be carried out, including monitoring draft legislation, gathering information about incidents, observing events, visiting sites, such as places of deprivation of liberty, refugee camps, etc., as well as monitoring government compliance with given advice and recommendations.

This chapter gives an overview of monitoring and prevention activities, carried out by the Commissioner, while examining it in the light of monitoring methodologies, described in Chapter 2 of this report, paying attention to strengths and weaknesses and suggesting possible solutions to make them more effective and efficient.

3.1. Monitoring and prevention activities carried out by the Commissioner

It is significant that the Commissioner has developed strong partnerships with civil society organisations as well as at national, regional and international levels in line with the Paris Principles. Based on the constructive working relations with civil society actors and international organisations, the Commissioner succeeds to accomplish a variety of monitoring and prevention activities, such as monitoring draft legislation, government policies and actions, ads and commercials, media and events, as well as carrying out monitoring visits,

[18] http://www.ua.undp.org/content/ukraine/en/home/presscenter/articles/2015/03/13/ukraine-s-national-human-rights-institution-receives-a-status-.html.

[19] Approved by Resolution 48/134 of the UN General Assembly on December 20, 1993 with regard to the status of national institutions for the promotion and protection of human rights; http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx.

thematic monitoring, follow-up and awareness raising. Each activity is further reviewed in a sub-section.

3.1.1. Monitoring draft legislation

The Commissioner carries out monitoring of draft legislation in the areas of prevention of discrimination and personal data protection, as well as national torture prevention. It involves revising of the drafts as well as participating in the sessions of the parliamentarian committees. It is done on an ad-hoc basis (in some cases through indications in the complaints and other appeals from individuals), limited mainly to four committees (the Committee on Human Rights, National Minorities and Interethnic Relations, the Committee on Family Matters, Youth Policy, Sports and Tourism, the Committee on Social policy, Employment and Pension provision, the Committee on Legislative Regulation of Law Enforcement Agencies) and performed without any developed methods, filtering the essential provisions, and also analysing them (evaluation tools).

3.1.2. Monitoring government policies and actions

In March 2016, the Commissioner approved an activity plan for the continuous proactive monitoring of activities by the governmental officials concerning the implementation of the Human Rights Strategy and Action Plan, designed to improve the activities of the state in establishing and protecting human rights and freedoms, creating an effective protection mechanism and solving systemic issues in this field[20].

With UNDP support, the Office of the Commissioner and three leading CSOs in the area of access to public information developed and presented a new methodology for the monitoring of public authorities and unified evaluation of implementation of access to public information.[21] It enables a more effective screening of access to information through equipping the monitors with a simple-to-use methodology for authorities' assessment. The monitoring methodology covers the spheres of assessment of official documents related to access to information, quality of the information request replies, the study of official websites of government agencies, as well as access to authorities' premises. Each section has its own evaluation scale. To calculate the overall level of compliance with access to information, the results are summed up in percentage for each section. As a result, the duty-bearer institutions

[20] http://dhrp.org.ua/en/news/1082-20160309-en.
[21] http://dhrp.org.ua/en/news/1420-20160831-en.

will get an assessment on following scale: unsatisfied, low, satisfied, middle, and high level of access to public information.
On ad-hoc basis, also statements of public authorities are observed to form a view of their adherence to the data protection and anti-discrimination regulations.

3.1.3. Monitoring ads and commercials

Such monitoring is carried out in order to promote effective advertising discipline context of protection of human dignity, including protection of human rights and protection against anti-social behaviour. For prevention and elimination of discrimination in job advertisements and commercials, the latter are regularly monitored to tackle potentially discriminatory phrases and identify incompliance with the legislation and commitment to equal opportunities.

3.1.4. Media monitoring

Observing the output of printed online and broadcasted media is also carried out on a regular basis. The type of sources that the Office of the Commissioner has chosen to watch and monitor is online media, main websites, social networks and blogs. In this activity, the Office of the Commissioner is also assisted with its Facebook page followers, who constantly provide information on human rights violations and effectiveness of the Commissioner's Office work.

3.1.5. Monitoring regions

Regional Offices of the Commissioner are established by the UPCHR to ensure efficient activities of the Commissioner and the implementation of personal reception of citizens in remote administrative units. Regional offices of the Commissioner operate in all regions of the country.
Among the tasks, assigned to the regional offices of the Commissioner, is monitoring the observance of human rights and fundamental freedoms and submitting proposals to the Commissioner on their improvement, also to taking measures to implement provisions of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) and ensuring cooperation of the Commissioner with representatives of civil society organizations. The jurisdiction of the regional offices of the Commissioner's work geography extends not only to the region, where the office is located, but also to the neighbouring regions. However, the conversations with the staff of the Commissioner's Office revealed, that representatives are not active in certain areas. For

example, in the field of data protection the Commissioner's representatives do not have an authority to take decisions, but only to carrying out subsidiary work, such as reception of individuals and their appeals, provision of general information, delivering administrative protocol to an offender in the region.

Monitoring in the regions is also carried out in the framework of a joint initiative of the Commissioner and the Ukrainian Helsinki union of human rights (UHUHR) called "Human rights passportization of regions"[22], where local self-government bodies are assessed on observance of social rights, children's rights and right to education in regions. As a result of this monitoring project, 25 regions of Ukraine will be evaluated on the observance on human rights and will receive "human rights passports".

3.1.6. Monitoring events

The monitoring also extends to observance of the actions and coercive measures exercised by the authorities during events, such as Pride parade, demonstrations, police operations in order to recognise and remedy risk factors for human rights infringements at an early stage.

3.1.7. Monitoring visits

Since the establishment of National preventive mechanism (NPM) in 2014, the Commissioner is implementing national torture prevention by regularly visiting places of detention. According to representatives from civil society and international organisations, met during the experts' of the Twinning Project mission, it is the most effective and transparent monitoring activity carried out by the Office of the Commissioner.

The NPM works as an "Ombudsman+", model, where monitoring visits to detention places are carried out not only by the staff of the Commissioner's Office, but also by selected and trained civil society activists, as well as individual public monitors, including journalists, who expressed a wish to participate in monitoring visits and have passed the appropriate selection. There are around 5000 detention places in Ukraine. Places to be visited are selected according to a big, or, at the opposite, inexplicably low number of complaints, alleged violations named in the complaints, media or by civil society organisations, especially from regions, also phone calls from the detained persons themselves, their relatives and advocates. There is a closed Facebook group where information on alleged violations as well as suggestions of visits to particular places are shared among the monitors.

[22] http://www.ombudsman.gov.ua/en/all-news/pr/231216-sj-valeriya-lutkovska-provedennya-pasportizatsiii-oblastej-schodo-dotrima/; http://helsinki.org.ua/en/articles/uhhru-presented-project-human-rights-passportization-of-regions-in-ternopil-town/.

The monitoring is carried out based on the algorithm, which is developed together with international and national experts. It includes checklists for all kinds of places and a mobile platform, where every monitor puts in his / her part and a united report is promptly produced. Most of the visits are carried out unexpectedly. Also, visits at a night time are exercised. Expert discussions for good and bad practices are organised. Nearest priorities identified by NPM team are psychiatry, transportation of detainees and implementation of Istanbul protocol, convoy issues.

Monitoring visits by the Office of the Commissioner are also practiced in the fields of data protection and access to public information. For example, according to information provided by the staff of the Commissioner's office, in 2016 together with NGOs monitoring visits-workshops on the observance of data protection regulation were carried out to public schools, employment agencies, social welfare and health care institutions, military commissariats. After examination of the facility, a consultative workshop was held to draw attention to the shortcomings and incompliances with legal regulations and give recommendations for improvement.

3.1.8. Thematic monitoring

In order to prevent discrimination issues, thematic monitoring is carried out. For example, joint monitoring visits with Roma rights defenders were exercised to places of residence of Roma people.

The methodology on thematic visits, called "the barometer on discrimination", was developed by the Office of the Commissioner and civil society organisations with UNDP support, in order to monitor discrimination levels in Ukraine and identify possible remedies to observe basic non-discrimination principles[23]. It equips the Commissioner's Office and civil society with tools to monitor tolerance and prejudice in society, perception of discrimination, discriminatory practices, and the effectiveness of solutions to protect against discrimination. According to the representatives of the Commissioner's Office, there is a need to develop a visit checklist on most important and sensitive issues in order to apply the same evaluation criteria in all the visits.

The NPM unit is carrying out thematic monitoring on particular issues or vulnerable groups and producing thematic reports.

The Office of the Commissioner is also taking part in the activities of treaty monitoring bodies submitting alternative reports on the fulfilment of the treaties (for example, on the UN

[23] http://dhrp.org.ua/en/news/1546-20161109-en.

Conventions of Persons with Disabilities[24], the UN Convention on the Elimination of All Forms of Discrimination against Women[25]).

3.1.9. Follow-up and prevention

Monitoring activities to see whether steps, that have been taken to improve a situation, are working, are applied by NPM unit in the form of follow-up visits on ad-hoc basis. A short follow-up visit algorithm is developed for regional offices.

In other units, the statistical data on the number of provided recommendations and their implementation is not collected. In data protection field, follow-up visits are rarely carried out. Potential follow-up and prevention carried out by NGOs and supported by donors is expected for.

3.1.10. Visibility and awareness raising

One of the main measures, applied by the Office of the Commissioner, to boost its visibility, is blogging and social media. In blog and social media posts, which reach wide and diverse audiences (including lawyers, members of the parliament, civil society, media representatives, etc.), the activities of the Commissioner are announced, achieved results are shared, the position of the Commissioner is promoted and engagement in discourse on human rights issues takes place.

The followers of the posts constantly give feedback, information on human rights violations and other issues they spotted. In opinion of the Commissioner's Office representative, responsible for communication, these followers thoroughly watch and monitor the media and events and share it with the Commissioner's Office, so there is no need for a separate analytical department on media coverage.

It should be noted, that information about the activities of the Commissioner is generally not considered as "hot" issue and therefore it rarely draws mass-media interest. In expert's opinion in this area it would be appropriate to think about the development of comprehensive long-term public relations strategy with the financial help of donors. Otherwise, it will be difficult to attract more public attention to the Ombudsperson's activities and strengthen general knowledge about the institution's mandate.

[24] http://www.ombudsman.gov.ua/en/all-news/pr/12815-es-alternativnu-dopovid-valeriii-lutkovskoii-napravlenu-komitetu-oon-z-pr/.

[25] http://www.theioi.org/ioi-news/current-news/parliament-commissioner-for-human-rights-presents-alternative-report-on-the-rights-of-women-in-ukraine.

As mentioned previously in the section, strong partnerships are developed with CSOs. They contribute to the promotion of the Commissioner's Office and its activities.

There is a participation policy, approved by the Commissioner for all departments of the Office. It includes policy on communication with NGOs and a media policy.

The website of the Commissioner gets very little attention from the audiences. It is only used to submit a complaint or by young scientists for their research work. Therefore, it is not used to share the news. According representatives of the civil society and academia, met during the experts' mission, the Office of the Commissioner is well known among the public. However, due to the lack of knowledge about its mandate, people have unrealistic expectations and load the Commissioner's Office with minor, trivial issues or issues, which are not within the competence of the Commissioner, undermining the efficiency of the Office. All stakeholders, met during the meetings, stressed a strong need in awareness raising and education of the general public on the competences of the Commissioner, as well as about human rights. There is also a great need for training initiatives with the authorities in the new mandate fields of discrimination prevention, data protection and access to public information.

In awareness raising activities, the Office of the Commissioner depends on cooperation with NGOs and the support from donors, as there is no financing for promoting human rights and raising awareness allocated in the budget of the Commissioner's Office. A number of educational and awareness raising campaigns and events were held as joint efforts. For example, in cooperation with the CoE and Taras Shevchenko National University of Kyiv, an all-Ukraine student youth forum "Antidiscrimination: from apprehension to prevention" took place in November, 2016, as a platform for exchange of knowledge, ideas and experiences between students and leading international and national experts, public and community leaders on non-discrimination. [26] In cooperation with NGOs, the Commissioner runs awareness-raising campaigns on anti-discrimination in the form of advertisements and posters, and in cooperation with the CoE, a training programme for judges is developed on anti-discrimination issues. An online 5-week learning course "Access to public information: from A to Z" was developed with the support of the project of the council of Europe and in collaboration with experts from civil society organisation "Centre for Democracy and Rule of Law".[27] According to information, provided by the Commissioner, a Human Rights school in Kiev is planned to be established in cooperation with OSCE and the Academy of Labour and

[26] http://www.coe.int/en/web/kyiv/first-all-ukraine-student-youth-forum-antidiscrimination-from-apprehension-to-prevention?desktop=true.

[27] http://www.coe.int/en/web/kyiv/-/registration-on-council-of-europe-course-access-to-public-information-from-a-to-z-.

Social Relations, *inter alia*, with training programs for persons working in areas of data protection (bankers, doctors, etc.), on ECHR jurisprudence and other topics. Human rights awareness trainings, supported by international organisations, were also carried out for the police officers in the fields of data protection and access to public information: how they can provide public information, but at the same time ensure the protection of personal data.

Summing up, it must be noted, that there is a definite need in raising awareness of the public and authorities, therefore, a communication and raising awareness strategy to develop methods and tools of communication and education should be developed in order to promote human rights awareness among the general public, local communities and authorities in an effective, organised and systemic way.

3.2. General findings

To outline the methodological perspectives of the monitoring and prevention activities, carried out by the Commissioner and cooperated efforts with civil society organisations, it could be concluded, that the dimensions of the activities are truly extensive, covering various areas, from monitoring of legal drafts, actions of government, media and events to carrying out monitoring visits and follow-up activity. The monitoring activities also cover situation in the regions of the country, including field monitoring visits to the regions.

The way in which these activities help prevent or solve potentially difficult human rights issues is self-evident. The objective of monitoring in all analysed fields is mainly to ascertain if there was a human rights violation in the context of a specific publication, event or activity of the institution, also if a draft law is compatible with human rights standards or carries any potential human rights risks, or if a situation of a particular group, for example, the living conditions of Roma population, is meeting human rights standards.

The monitoring procedures are based in close co-operation with civil society organisations, as well as discussions with national authorities. Particularly strong partnership, accessibility and openness of Office of the Commissioner in cooperation with civil society considerably increases efficiency of monitoring. A number of activities were carried out as a result of a joint work: NPM visits, visits-workshops on the observance of data protection regulation and other. The monitoring methodologies, where applied, were also developed in cooperation with different actors, including international experts, academic and civil society representatives (NPM algorithms, a tool to evaluate the right to know on access to information assessment

methodology, etc.). Some of them (the barometer on discrimination and the monitoring framework on access to public information) will be tried in practice in 2017.

Reporting, as an essential element of the human rights monitoring cycle, and other forms of recommendations proposals for corrective action are used in many of the analysed areas of the Commissioner's activities. Reports issued identify shortcomings, establish responsible authorities and include proposals and recommendations for solving the human rights concerns and enhancing the implementation of human rights law in the national context.

The experts would also like to emphasize the efficiency of preventive monitoring in detention facilities, carried out by the NPM team. It is based on cooperated efforts and regular interactions with civil society, regularity of visits, visibility of the activities, data collection from various resources, as well as selection criteria on which places to visit, also monitoring and follow-up algorithms and monitoring priorities identified.

It must be noted, however, that a large numbers of complaints received by the Commissioner put a high workload on the staff and leaves little time capacity for monitoring and prevention activities. Concentration on individual problems diverts attention from solving major systemic problems, such as war conflict related issues, actions of police and security services, and other, as well as limits taking proactive and preventive role in human rights protection. Additionally, there is a need to set priorities in order to be able to thoroughly concentrate on specific fields and not to exhaust the limited resources of an institution.

Furthermore, the experts of the Twinning Project would like to draw attention to elements of methodical approach to monitoring and prevention, which could be improved.

Firstly, the sources of data collection in the monitoring and prevention process is mainly based on information from individual complaints and media. Other sources of information – statistics, administrative records, surveys, different forms of research, case studies, etc., are rarely used, qualitative interviews with different stakeholders and other persons concerned are used only when carrying out functions of NPM. For comprehensive and systematic monitoring, it is crucial to rely on several sources of data as one source of data might give only a limited picture of a certain field of human rights. Therefore, in experts' opinion, there is a need on strengthening and promoting awareness of the importance of a systematic monitoring among employees and different stakeholders. It is important that the Ombudsperson's institution sees itself as a body responsible for encouraging and advocating common standards and methods of monitoring in general and data collection in particular. To achieve this goal, the establishment of an institutional working group might be recommended to promote this issue. The working group could also be entrusted with working out a working

plan/plan of action for the institution concerning the advancement of methods, standards and knowledge of monitoring.

Furthermore, it is recommended to enhance information exchanges with the stakeholders, such as local civil society organizations, which investigate and analyse human rights violations, also with victims or witnesses of human rights violations, persons in threatened communities and organizations, community and religious leaders, organizations representing minorities, persons with disabilities and other grass-roots organizations, lawyers, journalists and other professionals, academic institutions and research centres, as well as trusted government contacts, at both local and national level and state officials, non-state actors, including members of armed groups, embassies with networks and insights about key decision makers. A first starting point could be to decide on a specific field/topic for comprehensive monitoring and to conduct a mapping exercise in order to thoroughly describe and review available data including inter alia the following questions:

- Which institutions collect what data, when and how?
- What kind of data is collected and for which purpose?
- Which (quantitative and qualitative) research is and was carried out in regard to this topic field?
- What are the gaps in the data?
- What are the problems concerning the mechanisms of data collection?
- Is the data comparable?

A thorough description and analysis of the available data could serve as a basis for identifying gaps and needs, developing common standards of data collection and indicators.

Such systematic information collection is the starting point for a clear, comprehensive understanding of the nature, extent and location of the issues which exist and for the identification of possible solutions.

Also, it is more difficult to detect violations against certain discriminated or excluded groups or persons in vulnerable situations, such as persons with HIV/AIDS, persons with disabilities, sexual minorities, through traditional channels of information gathering, or establish the context for some violations. This is why it is advisable to expand the data collection also in order to ensure access to such persons or groups and that sufficient information is gathered on possible violations against them. Systematic, reliable and focused data collection also garners the support of civil society and the community for measures to promote and protect the human rights of vulnerable groups.

Secondly, all monitoring activities are not implemented on a regular basis. For example, during the meetings with civil society representatives, they claimed disappointed of the ad-hoc reactions of the Commissioner to the statements of public authorities. In the experts' opinion, it is suggested to decide which monitoring activities have to be done constantly, which – repeatedly, and which – a limited period of time or only once.

Thirdly, some monitoring activities, such as draft law monitoring, discrimination prevention monitoring, do not have any developed methods and / or tools to refer to. For example, due to immense number of legal drafts registered every day on the one hand, and limited human resources of the Commissioner's Office occupied by solving the complaints on the other, there is a need in developing methods, filtering the essential provisions to be analysed, and evaluation tools for carrying out the analysis. Another example is media monitoring, where many tools can meet the needs for automation and time saving to properly filter, evaluate and pilot information flows.

Fourthly, the main focus of the monitoring activities carried out by the Commissioner, is on the process, leaving less attention to the results of it, i.e. monitoring the government compliance with given advice and recommendations, as well as the evaluation of the monitoring process itself.

An effective approach to a human rights problem demands a constant process of information gathering, analysis, strategic planning and action. It is suggested to see it a cyclical process, where information gathering informs the analysis, which in turn is used to create or amend a respective strategy, implement it (action) and the results of each action inform the next cycle, raising new questions, requiring additional information and analysis. Following this principle, the information gathering and analysis also help to use limited resources for maximum impact and refocus on other issue in the next round. Adequate time and resources must be devoted to each stage of the monitoring cycle, building the necessary networks for information gathering, investing the necessary time in analysis and ensuring that staff has the skills to implement effective strategies. Monitoring must be also undertaken to see whether steps, that have been taken to improve a situation, are working, and what further steps are needed. Focus on result monitoring is as important, as the monitoring process itself. An improvement of the internal information system, allowing easy access to information about the number of provided recommendations and their implementation would significantly contribute to the effectiveness of monitoring of the observance of human rights.

Finally, a lack of human rights awareness of authorities and people is also considered a big challenge to the process of improvement of human rights situation in the country. A

communication and raising awareness strategy to develop methods and tools of communication and education would greatly contribute to the promotion of human rights awareness among the general public, local communities and authorities.

1.1. Monitoring and prevention in personal data protection field

According to the article 15 of the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, the Parties agree to cooperate in order to ensure an adequate level of protection of personal data in accordance with the highest European and international standards, including the relevant Council of Europe instruments[28]. Moreover, Ukraine has ratified the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 180) of the Council of Europe and its Additional Protocol regarding supervisory authorities and transborder data flows (ETS No. 181) on 30 September of 2010[29]. As regards EU legislation, while the Directive 95/46/EC does not foresee monitoring as the task of the supervisory authority, the GDPR reflects the reality of digital era by stating that data protection supervisory authority, among other functions, should monitor relevant developments, insofar as they have an impact on the protection of personal data, in particular the development of information and communication technologies and commercial practices[30].

Article 32 of the Constitution of Ukraine guarantees right to personal and family life, as well as protection of confidential information about a person[31]. The Law of Ukraine on Protection of Personal Data (LPDP), adopted on 23 February of 2012 and amended several times (last amendment introduced on 6 December 2016), aims to protect the fundamental human and citizens' rights and freedoms, particularly the right to privacy in relation to the processing of

[28] Association agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part. Official Journal of the European Union. L 161/3, 2014; https://eeas.europa.eu/sites/eeas/files/association_agreement_ukraine_2014_en.pdf

[29] Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. Council of Europe. European Treaty Series - No. 108. Strasbourg, 1981; https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680078b37

Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data regarding supervisory authorities and transborder data flows. Council of Europe. European Treaty Series - No. 181. Strasbourg, 2001; https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680080626

[30] Article 57 (1) (i) of GDPR. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance). Official Journal of the European Union. L 119/1, 2016.

[31] Constitution of Ukraine. Adopted at the Fifth Session of the Verkhovna Rada of Ukraine on 28 June 1996. Unofficial translation; http://www.coe.int/t/dghl/cooperation/ccpe/profiles/ukraineConstitution_en.asp

personal data[32]. The article 23 (1) (12) of LPDP stipulates that one of the tasks of the Commissioner is to carry out the monitoring of new practices, trends and technologies of protection of personal data. This article also lays down other powers of the Commissioner in the sphere of protection of personal data, which are important for the monitoring and prevention of violations, for example:

- on the grounds of appeals or on own initiative to conduct on-site and off-site, scheduled, unscheduled inspections of processors and controllers of personal data;
- based on the results of an inspection, consideration of an appeal to issue binding requests (regulations), as regards the prevention or elimination of violations of the legislation on protection of personal data;
- to provide recommendations on practical application of the legislation on protection of personal data;
- to inform about the legislation on the protection of personal data, the problem of its practical application, the rights and obligations of subjects of relation connected to personal data;
- to submit proposals to the Verkhovna Rada of Ukraine, the President of Ukraine, the Cabinet of Ministers of Ukraine, other state bodies, bodies of local self-government and their officials as regards the adoption or amendment to normative legal acts on the protection of personal data.

The implementation of particular provisions of LPDP is regulated by the orders of the Commissioner. Responsible structural unit of the Secretariat of the Commissioner is the Department for personal data protection (hereinafter in this chapter – the Department) established in 2014. The main task of this Department is to ensure the implementation of the Commissioner's powers in the field of personal data protection. The Department consists of 3 units: Legal and methodological assistance unit, Control unit, Complaints response unit, with 15 employees in total (with possibility to employ 24 civil servants, but this has never happened). In 2014, when the Department was established, there were 34 positions foreseen, later this number was reduced to 24. The Department has never been working in full composition. The list of tasks of the Department is extensive[33], however, the experts of the Twinning Project observed that some of them are not carried out in satisfactory extent, because the workload of civil servants is high.

[32] ЗАКОН УКРАЇНИ Про захист персональних даних (Відомості Верховної Ради України (ВВР), 2010, № 34, ст. 481); http://zakon4.rada.gov.ua/laws/show/2297-17

[33] Available at:http://www.ombudsman.gov.ua/ru/page/zpd/info/

In this chapter will be analysed the powers of the Commissioner and the tasks and activities of the Department, related to the monitoring and prevention of violations in the sphere of protection of personal data with the particular attention to methodologies and procedures, as well as tackling problems precluding effectiveness and efficiency.

3.3.1. Draft legislation analysis

European Union legislation in the field of personal data protection foresees evaluation of draft laws as one of the personal data protection supervisory authority's functions. This kind of activity is a tool enabling due implementation of the personal data protection principles into national legislation and is increasingly gaining recognition and value in the monitoring of legislative process. At the same time, this is an effective measure enabling to prevent large-scale violations of the data subjects' rights. It should also be noted that assessment and evaluation of the draft legislation concerning personal data protection is important for proper implementation of other personal data protection supervisory functions. For example, where the law is in line with personal data protection principles, it is much easier for data protection supervisory authority to exercise its supervisory functions (complaints investigation, carrying out inspections, giving methodological assistance to data controllers and data processors, ensuring awareness raising among society, etc.). Clear provisions setting up the purposes of personal data processing, the categories of personal data to be processed, the recipients of personal data etc. are of great value for data controllers that have to apply them in their everyday activities. Respectively, it contributes to the increase of the overall personal data protection level.

The powers of personal data supervisory authority related to examination of the drafts laws are foreseen and the aim of them is disclosed in the legislation of the Council of Europe and the European Union described below.

Paragraph 13 of the Explanatory Report to the Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows (ETS No. 181) foresees that: "The supervisory authority's power of intervention may take various forms in domestic law. <…> This power could also include the possibility to issue opinions prior to the implementation of data processing operations, or to refer cases to national parliaments or other state institutions."

The paragraph 16 thereto lays down that: "The supervisory authority's competences are not limited to the ones listed in Article 1 paragraph 2. It should be borne in mind that the Parties have other means of making the task of the supervisory authority effective. <...> The

authority could also be asked to give its opinion when legislative, regulatory or administrative measures concerning personal data processing are in preparation, or on codes of conduct."

The article 28 of the Directive 95/46/EC stipulates that each Member State shall provide that the supervisory authorities are consulted when drawing up administrative measures or regulations relating to the protection of individuals' rights and freedoms with regard to the processing of personal data. The European Union legal acts adopted in the framework of EU Data Protection Reform[34] make even stronger emphasis on the compliance of the national legislation with the European data protection standards, and at the same time increase the powers of the data protection supervisory authority with regard to assessment and evaluation of the draft laws and existing legislation.

Intervention of the data protection supervisory authority into legislative process, including importance of the national legislation itself and the role related to evaluation of it, is regulated in detail in GDPR, which repeals the Directive 95/46/EC and shall be applicable from 25 May 2018. According to the paragraph 96 of the preamble of GDPR, a consultation of the supervisory authority should also take place in the course of the preparation of a legislative or regulatory measure which provides for the processing of personal data, in order to ensure compliance of the intended processing with this Regulation *and in particular to mitigate the risk involved for the data subject.* Therefore, the GDPR reveals the essence of the intervention of the data protection supervisory authority into the legislative process: first of all, such intervention should ensure compliance of national legislation with the principles and provisions of GDPR, secondly, the purpose of it is mitigating the risk for the data subjects. Article 36 (4) of the GDPR regulating prior consultations provides that supervisory authority shall be consulted *during the preparation of a proposal* for a legislative measure to be adopted by a national parliament, or of a regulatory measure based on such a legislative measure, which relates to processing of personal data. This article underlines importance of the possibility to intervene in the stage of the preparation of the legislative or regulatory measure. Obviously, a better way to prevent violations is not to adopt legislative measure that would be in contradiction with personal data protection principles (i.e. to apply so called *ex ante* evaluation) rather than to take *ex post* measures trying to amend or repeal it, because mere entering into force and starting to apply such legislation can cause large scale violations of the right to privacy and personal data protection. The article 57 of the GDPR listing tasks of the data protection supervisory authority lays down that without prejudice to other tasks set out under this Regulation, each supervisory authority shall on its territory advise, *in*

[34] Available at: http://ec.europa.eu/justice/data-protection/reform/index_en.htm

accordance with Member State law, the national parliament, the government, and other institutions and bodies on legislative and administrative measures relating to the protection of natural persons' rights and freedoms with regard to processing[35]. Following the wording of this article, it would be appropriate that the procedure of intervention into process of drafting of legal acts was regulated by national legislation.

Provisions similar to those described above are foreseen in the Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA[36].

Another important provision is foreseen in the article 6 (3) of the GDPR which says that the basis for the processing referred to in point (c)[37] and (e)[38] of paragraph 1 shall be laid down by Union law or Member State law to which the controller is subject. The purpose of the processing shall be determined in that legal basis or, as regards the processing referred to in point (e) of paragraph 1, shall be necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller. The article 6 (3) of GDPR discloses the content of that legal basis by stating that it may contain specific provisions to adapt the application of rules of this Regulation, *inter alia:* the general conditions governing the lawfulness of processing by the controller; the types of data which are subject to the processing; the data subjects concerned; the entities to, and the purposes for which, the personal data may be disclosed; the purpose limitation; storage periods; and processing operations and processing procedures <…>. It is obvious that the purpose of these provisions is to implement properly the principles relating to processing of personal data set forth in the article 5 of GDPR[39] into respective piece of national legislation. Also, by stating that the Union or the Member State law shall meet an objective of public interest and be proportionate to the legitimate aim pursued, this article aims to find a way to balance an interest of the data controller and the interests of the data subject, that in practice is quite

[35] Article 57 (1) (c) of GDPR.

[36] Articles 28 (2) and 46 (1) (c) of GDPR.

37 Article 6 (1) (c) of GDPR provides that processing shall be lawful only if and to the extent that it is necessary for compliance with a legal obligation to which the controller is subject.

[38] Article 6 (1) (e) of GDPR provides that processing shall be lawful only if and to the extent that it is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller.

[39] E.g. principle of lawfullness, fairness and transparency of the processing, purpose limitation principle, data minimisation principle, etc.

difficult to do without having clear regulations in the legislation. Respectively, the provisions of this article could serve as a primary background for methodology of evaluation of the draft laws related to personal data processing.

The powers of the Commissioner with regard to participation in legislative process are foreseen in the national legislation of Ukraine. Article 3 of the UPCHR foresees that facilitation of the process of bringing legislation of Ukraine on human and citizens' rights and freedoms in accordance with the Constitution of Ukraine and international standards in this area is one of the purposes of the parliamentary control over the observance of constitutional human and citizens' rights and freedoms. According to the article 23 (1) (8) of the LPDP, the Commissioner is empowered to submit proposals to the Verkhovna Rada of Ukraine, the President of Ukraine, the Cabinet of Ministers of Ukraine, other state bodies, bodies of local self-government and their officials as regards the adoption or amendment to normative legal acts on the protection of personal data. Very important provision is set up in article 6 (1) of LPDP, which says that the purpose of personal data processing must be clearly formulated in laws and other subordinate legislation, regulations, constitutive or other documents that regulate activity of the controller of personal data, and conform to legislation on personal data protection, i.e. the LPDP sets forth clear obligation for legislative bodies on which the Commissioner could rely when giving conclusions on the drafts of legal acts. The tasks related to the assessment and evaluation of the legislation are granted to the Department. The Department is empowered:

- to prepare proposals to the President of Ukraine, chairman of the Verkhovna Rada of Ukraine, the Prime Minister of Ukraine, the Prosecutor General of Ukraine, heads of state institutions, local self-government bodies, as well as draft letters and other documents of the Commissioner in order to prevent violations of human and citizens' rights, to promote their restoration and exercise control over implementation thereon;
- to monitor the current laws and regulations on their compliance with the legislation in the field of personal data protection;
- to provide expert analysis of draft laws and other normative-legal acts on matters relating to the competence of the Department;
- to prepare proposals for appeals to the Verkhovna Rada of Ukraine, President of Ukraine, the Cabinet of Ministers of Ukraine, other state bodies, local governments, their officials for the adoption or amendment of laws and regulations on the protection of personal data.

As regards the expertise of the draft laws, there is no legal obligation for legislative bodies to submit the draft laws for expertise, so in practice this activity is carried out by reviewing the websites of the Verkhovna Rada, Government, ministries, where the drafts laws are published, but it is ineffective and inefficient due to the following reasons:

- first of all, the way in which this activity is carried out requires disproportionate resources due to the huge amount of drafts the most of which are not relevant with regard to personal data protection;
- secondly, the title of the draft not always reflects the content of legal act, therefore sometimes the problems remain unidentified;
- thirdly, quite often the Commissioner's Office gets information about the draft law by mass media or by representatives of society, when it is already too late to intervene;
- fourthly, there are no deadlines foreseen for making expertise and giving conclusion on the draft of legal act, so the legislative bodies are not obliged to wait for it;
- fifthly, the legislative bodies are not obliged to consider Commissioner's conclusion. The situation is even more complicated with regard to adopted laws and other normative acts, because in such case it is much more difficult to introduce necessary amendments.

According to the information provided by the representatives of the Department, in 2016 the Commissioner submitted 26 conclusions with regard to drafts of the laws, regulations of the Government, orders of the ministers. There were also several drafts prepared by other state bodies, mainly internal regulations related to personal data processing carried out by this particular body. It could be concluded that the number of conclusions given in relation to drafts of laws and other normative legal acts in the sphere of personal data protection is relatively low (for example, the State Data Protection Inspectorate of the Republic of Lithuania issued 422 conclusions in 2016), and is significantly influenced by the fact that there is no legal obligation for the legislative bodies to submit the draft laws to the Commissioner for expertise. Furthermore, there is no procedure how this expertise should be carried out (deadlines, reaction of the legislative bodies, etc.). The discussion with the representatives of the Department revealed that re-evaluation of draft legislation rarely takes place. However, in case the conclusion to the draft of the law is provided, the Commissioner makes efforts to participate in the further process: to take part in the relevant meetings of the Verkhovna Rada, etc. The Commissioner is seeking to provide conclusions on the drafts of legal acts in the shortest possible deadlines; however, the absence of the formal deadlines does not guarantee that the legal act will not be adopted without hearing opinion of the

Commissioner. Currently the practice to inform legislative body about the fact that the Commissioner has started the expertise of the draft of legal act and that it should not be adopted without getting conclusion on it does not exist. Setting up clear deadlines for evaluation of the drafts of legal acts would be valuable and would contribute to the transparency of the process of evaluation, increase the confidence of the society with regard to the activities of the Commissioner, as well as would bring legal certainty both for the civil servants of the Commissioner's Office and for legislative bodies as regards consistency of the process.

In terms of monitoring and prevention of violations, Commissioner's intervention in the stage of preparation/consideration of the draft law would be the most appropriate way to express concerns regarding personal data protection and to give proposals on its improvement, however, taking into account what was said above, it could be concluded that the legislation of Ukraine is lacking provisions enabling Commissioner to intervene in an effective and efficient manner. Since the introduction of the legal obligation for the legislative bodies to submit the drafts of legal acts, concerning data protection, to the Commissioner for expertise, as well as setting up rules of procedure (deadlines, reaction of the legislative bodies, etc.) would require amendment of the laws of Ukraine, this problem was communicated to the experts of the Twinning Project component 1.1. that is dealing with the legislation matters.

Conversations with the representatives of the Department revealed that participation of the specialists of the Department in the inter-institutional working groups preparing drafts of legal acts concerning personal data processing is extremely rare. It could be assumed that if the obligation to submit the drafts of the legal acts related to personal data protection for the evaluation of the Commissioner was set up, the representatives of the Commissioner's Office would be more often invited to participate in the working groups. Such kind of activity would be of great importance for the prevention of violations in personal data protection field.

It should be noted, that the Commissioner also reacts to existing legislation if the provisions thereof go beyond the personal data protection principles. For example, in 2016 there were 10 cases of such reaction. Taking into account this number, as well as the number of the conclusions given with regard to draft laws (26) it could be assumed that these activities could be carried out more actively.

The assessment and evaluation of the draft laws conducted by the Commissioner's Office take place only in accordance with the specialists' legal knowledge and their inner conviction on what and in which manner should be evaluated. There is no methodology setting up the list of the criteria that should be taken into account when carrying out such expertise and describing

the procedure. Such methodology, prepared in a user-friendly manner and providing concrete examples, would be efficient practical tool ensuring consistency of the activities of the Department related to the assessment and evaluation of the draft laws and especially useful for new employees taking over this experience. In addition, such methodology could contribute to making this function more transparent, more clear and, most importantly, better quality. In consequence, the confidence in the Commissioner's conclusions would increase.

Methodology on how the draft laws should be assessed and evaluated with regard to compliance with personal data protection principles should include, but not limited to, the following aspects:

- Whether the regulation foreseen in the draft law is in compliance with the provisions of national and international legislation in personal data protection field, as well as with regard to the doctrine of law, the European Court of Human Rights, Court of Justice of the European Union practice (this is particularly important in order to ensure the quality of the conclusions of the Commissioner).
- Whether the legislative body is competent to adopt such kind of legal act regulating particular matters (for example, restrictions with regard to data subjects rights may be introduced only by law, but not by secondary legislation).
- Not only the draft of the legal act itself, but also supporting documents (explanatory memorandum, etc.) should be evaluated (usually these documents contain information that is especially important with regard to intended regulation, for example, explaining why such volume of personal data is necessary; on the other hand, provisions of these supporting documents can also be subject to evaluation).
- Whether the regulation proposed is not in contradiction or in competition with already existing legislation, and whether the secondary legislation is in line with the law (this is essential in order to ensure consistent data protection legal framework).
- Whether the proposed legislation concerns other related fields, for example, access to public information. If yes, it should be possible to involve the specialist of other competent department of the Commissioner's Office into the process of evaluation (this is important in order to ensure comprehensive approach to assessment and evaluation process).
- Whether the elements relating to personal data processing (purpose of processing, personal data to be processed, recipients, storage periods, etc.) are defined clearly and unambiguously enough (this is important in order to ensure smooth application of the legal act).

3.3.2. Notification about personal data processing

The article 9 of LPDP foresees that the controller of personal data shall notify the Commissioner of the processing of personal data, which is of particular risk to the rights and freedoms of personal data subjects within thirty working days *after beginning* of such processing. Types of processing of personal data, which are of particular risk to the rights and freedoms of personal data subjects, and categories of subjects covered with notification requirements are determined by the Commissioner. Notification of processing of personal data shall be submitted in the form and manner determined by the Commissioner. The controller of personal data is required to inform the Commissioner of any change of information subject to the notification, within ten working days since the occurrence of such changes. The information reported pursuant to this article shall be published on the official website of the Commissioner's Office in the manner determined by the Commissioner. The Order for notification of the Ukrainian Parliament Commissioner for Human Rights on processing of personal data, which is of particular risk to the rights and freedoms of subjects of personal data, on the structural unit or a responsible person who organizes the activity related to the protection of personal data during its processing as well as on publication of the mentioned information (hereinafter in this chapter – the Order) which implements the relevant provisions of article 9 of LPDP has been approved by the Decree No 1/02-14 of 8 January 2014 of the Commissioner.

Since the LPDP and the Order concentrates on the processing of personal data, which are of particular risk to the rights, and freedoms of personal data subjects, it should be noted that this approach is in line with the concept of GDPR. However, some important issues regarding effectiveness of the notification could be stressed.

First of all, LPDP says that notification shall take place within thirty working days after beginning of such processing, which, in terms of prevention of violations, means that only *ex post* intervention is possible. It could be concluded that such approach is not compatible with the meaning of prevention of violations and goes beyond the aim of GDPR, which makes emphasis on the mitigation of the risks to the rights, and freedoms of natural persons prior to the processing[40]. In the light of GDPR, the processing should be possible only after positive decision of the Commissioner was taken. With this regard article 9 of the LPDP shall be amended providing that notification procedure shall be completed and the decision of the Commissioner shall be taken prior to processing of personal data, as well as the time period

[40] See recitals 74, 77, 83, articles 35 and 36 of the GDPR.

within which the decision of the Commissioner shall be adopted. Time periods foreseen in article 36 of the GDPR could serve as an example (period of up to eight weeks of receipt of the application with possibility to be extended by six weeks).

Secondly, paragraph 1.2 of the Order defines types of personal data the processing of which is of particular risk to the rights and freedoms of subjects of personal data. These types of personal data encompass sensitive personal data as they are defined in the Directive 95/46/EC, biometric data, genetic data, location and/or path of movement of a person, categories of data related to criminal and administrative convictions. However, risky processing operations, like for example aggregating personal data processed for different purposes, large-scale video surveillance of public areas, profiling and similar are not included. The paragraph 91 of the preamble of GDPR puts emphasis on *the large-scale*[41] *processing operations* which aim to process a considerable amount of personal data at regional, national or supranational level and which could affect a large number of data subjects and which are likely to result in a high risk, for example, on account of their sensitivity, where in accordance with the achieved state of technological knowledge a new technology is used on a large scale as well as to other processing operations which result in a high risk to the rights and freedoms of data subjects, in particular where those operations render it more difficult for data subjects to exercise their rights. According to article 35 (1) of GDPR, such factors as usage of new technologies, as well as the nature, scope, context and purposes of the processing should be taken into account when assessing whether the type of processing is likely to result in a high risk to the rights and freedoms of natural persons. Therefore reconsidering the list provided in paragraph 1.2. of the Order and including the risky types of data processing corresponding to the aim of GDPR would be a step forward, enabling the Commissioner to improve the monitoring of the personal data processing and to contribute to better implementation of the task of the Commissioner to carry out the monitoring of new practices, trends and technologies of protection of personal data. The necessity of the list of exemptions from obligation to notify set forth in paragraph 2.1 of the Order should be reconsidered when setting up a new list of the risky types of data processing because such exceptions could be no longer necessary. The following kinds of processing operations could serve as examples of processing entailing particular risk to the rights and freedoms of data subjects:

- When personal data are processed for taking decisions regarding specific natural persons following *any systematic and extensive evaluation of personal aspects* relating to

[41] However, according to the recital 91 of GDPR, the processing of personal data should not be considered to be on a large scale if the processing concerns personal data from patients or clients by an individual physician, other health care professional or lawyer.

natural persons based on profiling those data (for example, calculating of credit rating using personal data from different sources).

- Processing on a large scale of special categories of personal data, or data on criminal convictions and offences or related security measures (for example, data bases owned by the state in which special categories of personal data related to entire population, or to significant part of it, are processed, such as the national register of criminal convictions and offences, national e-health system, etc.).

- Monitoring publicly accessible areas on a large scale, especially when using optic-electronic devices or for any other operations. The risk can occur in particular because the usage of such devices prevents data subjects from exercising his/her rights, and because the processing of personal data is carried out systematically on a large scale (practical example could be systematic traffic surveillance, etc.).

- When public authorities or bodies intend to establish a common application or processing platform or where several controllers plan to introduce a common application or processing environment across an industry sector or segment or for a widely used horizontal activity (practical examples could be e-commerce platform, e-Government portal, etc.).

Thirdly, according to paragraph 2.1.1. of the Order, the data controller is exempted from the obligation to notify when the sole purpose of the processing is to keep the registry in order to provide information to the public, when such registry is open to the public in general. Taking into account the sensitive character of personal data it could be concluded that such kind of exemption, the purpose of which is to disclose information (including personal data) to the public and which is open to the public *per se*, is not in line with the provisions of the article 8 (1)-(6) of the Directive 95/46/EC, articles 9 and 10 of GDPR and the concept of the prevention of violations in personal data protection field.

Fourthly, the Order does not foresee the in-depth examination of notifications. Following paragraph 2.8. of the Order, there are only formal backgrounds (the application form is not consistent with the requirements set out in Annex 1; the application contains incomplete and obviously inaccurate information; information provided in the application does not contain information that would indicate that the holder of personal data is carrying out the processing of personal data, which is of particular risk to the rights and freedoms of subjects of personal data) when application is deemed to have not been filled and *may not be accepted for consideration*, but the procedure of in-depth consideration of the application is not defined. The procedure of notification ends in publishing the relevant information on the official website of the Commissioner's Office, without sending any notice to data controller

irrespectively what kind of solution was done (e.g. to accept or to refuse application). As regards European Union practice, the article 36 (2) of GDPR foresees that if the supervisory authority is of the opinion that the intended processing referred would infringe this Regulation, the supervisory authority shall, within period of up to eight weeks of receipt of the request for consultation, *provide written advice to the controller and, where applicable to the processor, and may use any of its powers referred to in article 58 of GDPR.* In addition to information foreseen in paragraph 2.4. of the Order and depending on the circumstances of the processing, the data controller should be obliged to submit for consideration, at least with the request of the Commissioner, relevant documentation (or drafts of it), like for example internal regulations regarding personal data processing, code of conduct, contract on the disclosure of personal data, description of the functioning of information system, including data security measures, etc. Actions of the employees of the Department and issues to be taken into account with regard to examination of the application and additional documentation should be defined.

Fifthly, the Order foresees that information contained in application following paragraph 2.4. of the Order, as well as information mentioned in the paragraph 5.3. about the structural unit or person responsible for personal data processing (in terms of GDPR, the data protection official) shall be published in the relevant sections of the official website of the Commissioner. The possibility to make search as regards paragraph 2.4. of the Order is provided[42] on the website, however, the website section "Information about the structural unit or a responsible person who organizes the activity related to the protection of personal data during its processing" foreseen in paragraph 5.3. of the Order does not exist. The representatives of the Department explained that information changes quite often and the problems with updating it on the website may occur, so, if somebody is asking, the details about this structural unit or a responsible person are provided by phone. As for EU legislation, it should be noted that GDPR makes emphasis on the significance of the role of the data protection official with regard to implementation of the data subjects' rights. According to article 13 (1) (b) and article 14 (1) (b) of GDPR, the contact details of the data protection officer, where applicable, should be provided to data subject when implementing the right to be informed. Following article 38 (4) of GDPR, data subjects may contact the data protection officer with regard to all issues related to processing of their personal data and to the exercise of their rights under the GDPR. In order to make it easier to get in contact with the data protection officer, the article 37 (7) of GDPR obliges the controller or the processor *to publish*

[42] Available at: http://www.ombudsman.gov.ua/ua/page/zpd/check-info/

the contact details of the data protection officer and communicate them to the supervisory authority. Taking into account what was said above, publication of the updated information about the data protection officer, including his/her contact details should be ensured.

3.3.3. Methodological assistance to data controllers and data processors and awareness raising

Providing methodological assistance is important for personal data protection supervisory activities, because it enables to provide explanations and to clarify the requirements to which the data controllers and the data processors should adhere to. If carried out successfully, this kind of activity makes positive influence on the general level of personal data protection in the society and ensures effective prevention of violations. It can also serve as monitoring tool giving possibility to get information about ongoing processes, applicable practices, and usage of new information and communication technologies. Provision of methodological assistance is inherent to data protection supervisory authority and may be provided in different ways, depending on the allocated resources.

Importance of methodological assistance is reflected in the Council of Europe and the European Union legislation.

Paragraph 13 of the Explanatory Report to the Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows (ETS No. 181) foresees that: "<…> The supervisory authority should have the power to inform the public through regular reports, the publication of opinions or any other means of communication". The paragraph 14 thereto lays down that: "Whilst contributing to the protection of individual rights, the supervisory authority also serves as an intermediary between the data subject and the controller. In this context, it seems particularly important that the supervisory authority should be able to provide information to individuals or data users about the rights and obligations concerning data protection<...>." According to the paragraph 16 thereto, the authority could also be asked to give its opinion on codes of conduct.

Methodological assistance and awareness raising becomes more and more important function of the data protection supervisory authority. Whilst the Directive 95/46/EC does not concentrate on such tasks (article 27 (1) only sets forth that the Member States and the European Commission shall encourage the drawing up of codes of conduct intended to contribute to the proper implementation of the national provisions adopted by the Member

States pursuant to this Directive), the GDPR pays much more attention and regulates this function in more detailed manner. According to the article 57 of the GDPR, without prejudice to other tasks set out under this Regulation, each supervisory authority shall on its territory:

- promote public awareness and understanding of the risks, rules, safeguards and rights in relation to processing. Activities addressed specifically to children shall receive specific attention;
- promote the awareness of controllers and processors of their obligations under this Regulation;
- upon request, provide information to any data subject concerning the exercise of their rights under this Regulation and, if appropriate, cooperate with the supervisory authorities in other Member States to that end;
- encourage the drawing up of codes of conduct pursuant to Article 40 of GDPR and provide an opinion and approve such codes of conduct which provide sufficient safeguards, pursuant to Article 40 (5) of GDPR.

Following the Article 23 (1) of LPDP, the Commissioner has the following powers directly related to the provision of methodological assistance in the sphere of protection of personal data:

- to provide recommendations on practical application of the legislation on protection of personal data, to explain the rights and obligations of the relevant persons upon request of subjects of personal data, processors and controllers of personal data, units or persons responsible for the organization of the protection of personal data, other persons;
- to cooperate with units or responsible persons that according to this Law organize the work related to the protection of personal data during their processing; to disclose the information about these units and responsible persons;
- to provide the conclusions concerning the draft codes of conduct in the sphere of protection of personal data and changes thereto upon requests of professional, self-government and other public associations or legal entities;
- to inform about the legislation on the protection of personal data, the problem of its practical application, the rights and obligations of subjects of relation connected to personal data[43].

The Department is also carrying out activities related to making recommendations on practical application of personal data protection legislation, clarifying the rights and obligations of the data controllers, data processors, data subjects. There are 3 phone numbers

[43] Available at: http://www.ombudsman.gov.ua/ru/page/zpd/

dedicated for inquiries on personal data protection and 2 "hot line" phone numbers published on the Commissioner's Office website section "For applicant"[44]. All civil servants of the Department are in charge to provide consultations. There is also an e-mail address on the same section on the website. Although it is not indicated that applicants can use it in order to get information about personal data protection, in practice this e-mail is used for giving consultations.

It was revealed that there is no methodology, describing the process of consultations provided by phone and e-mail (for example, what is the legal power of such consultations, what steps should be taken if the question received by phone is complicated and the civil servant does not know the answer, to what kind of questions the answer cannot be given by phone or e-mail; the deadlines for providing consultations by e-mail, etc.). It is upon particular civil servant to decide how to deal with the questions received by phone or e-mail. In conclusion, this kind of activity lacks systematic approach that impedes ensuring uniform and good quality consultation (especially taking into account constant staff turnover).

No data on consultations provided by phone and e-mail are collected in structured manner and no statistics are prepared, so the possibilities to exploit consultations for monitoring activities are limited. In practice, if the civil servant detects problem, he/she informs the Head of the Department, however, this would be only single-source information. There are no guidelines how the information received in course of providing consultations should be collected, analysed and used for further actions (for example, as a reason for scheduled or unscheduled inspections). Unclear processing of information precludes proper preventive activity.

There is no frequently asked questions and answers (FAQ) section on the website of the Commissioner's Office, such kind of activity is not carried out, although recognized to be useful. In the Twinning Project experts' opinion, publishing answers to frequently asked questions would be helpful for data controllers, data processors and data subjects, as well as would contribute to ensuring uniform and good quality consultations. Regularly renewed and updated taking into account the latest developments of the legislation, the frequently asked questions (FAQ) section of the website would be comfortable and easily accessible tool of methodological assistance, at the same time contributing to the awareness raising of the wide society.

Although the section of the website „Explanations and recommendations" exists[45], but no recommendations, guidelines, explanations as regards application of the personal data

[44] Available at: http://www.ombudsman.gov.ua/ru/page/applicant/

[45] http://www.ombudsman.gov.ua/ua/page/zpd/obrobka/roziasnenia-ta-recomendation/

protection legislation and practices are provided. The representatives of the Department explained that in the old version of the website there were several recommendations, but they are no longer relevant. Currently there are no resources to carry out this kind of activity. The similar situation is with the section "Explanation of legal acts"[46], which provides some information of general nature that could not be considered as methodological assistance. One of the functions of the Commissioner is to carry out the monitoring of new practices, trends and technologies of protection of personal data. Development of information and communication technologies raises new questions and problems for personal data controllers and processors relating to implementation of personal data protection principles. At the same time, this is a challenge for data protection supervisory authority, because the absence of clear guidelines makes more difficult to exercise other kind of activities (to provide uniform consultations, to resume findings of inspections, etc.). For example, the rapidly growing usage of video surveillance systems in public and private sector poses serious risks to privacy, but there are no guidelines on uniform application of personal data protection principles in this particular area. Municipality of Kiev has started to implement project "Smart City" without consultations with the Commissioner. In the Twinning Project experts' opinion, guidelines giving advice on the practical implementation of personal data protection principles in various sectors would be of great value for the data controllers and data processors.

As regards cooperation with units or persons responsible for personal data processing, the special training course is prepared and trainings take place quarterly in the framework of Personal Data Protection School that was established in 2015 in cooperation with the European Parliament. The training courses are also provided for different target groups (police, judges etc.). The experts of the Twinning project did not have possibility to evaluate the content of the training program and materials, so they are not able to give conclusion on its usefulness, however, representatives of NGOs pointed out that the information provided is of general nature and therefore it's practical value is limited.

The Department evaluates and gives conclusions on the drafts of regulations, codes of conduct and other documents prepared by data controllers and related to personal data processing, however, the Department receives only few of them. As regards contracts on personal data processing and disclosure, attorneys are quite often consulted by phone, but the drafts of these documents are not submitted for evaluation.

[46] http://www.ombudsman.gov.ua/ua/page/zpd/zakonodavstvo/normativno-pravovi-akti/

The representatives of the Department mentioned a problem of limited perception of the right to privacy and personal data protection among society. People do not understand that right to personal data protection is for their, but not for state institutions benefit, at the same time it is very common to know everything about everyone. State institutions do not realize why they should minimize the extent of personal data collected in the course of exercising their functions. Relatively higher understanding is among business because there is an interest to protect confidential information about clients. Therefore, the comprehensive strategy on awareness raising would be useful.

Summing up, the methodological assistance provided to data controllers and data processors is not sufficient and not systematic. There is no methodology the civil servants of the Department could rely on when giving consultations by phone and by e-mail, no systematic measures are taken in order to ensure consistent and satisfactory quality consultations.

There is a lack of methodological assistance such as recommendations and guidelines giving advice for data controllers and data processors on the practical implementation of personal data protection principles in various sectors (video surveillance, personal data processing in employment context, etc.). Finally, the possibilities to provide information on the website of the Commissioner's Office are not exploited enough.

In order to improve the quality and efficiency of methodological assistance to data controllers and data processors and of awareness raising, the relevant sections of the website of the Commissioner's Office could be improved, providing more user-friendly information, for example, answers to frequently asked questions (FAQ). Other kinds of methodological assistance, such as preparing and publishing summaries of the results of the inspections, investigated complaints, relevant court decisions, explanations related to application of personal data principles etc. should be developed paying special attention to its content. Also, more attention should be paid for processing of information received in the course of providing consultations and for exploitation of it for monitoring purposes. Additionally, in order to improve understanding of the society with regard to the right to personal data protection, steps should be made to create and to implement comprehensive awareness raising strategy.

3.3.4. Inspections as a tool of monitoring and prevention

The peculiarity of the right to personal data protection is that this right can be violated not only by the policy makers, public administration, but also by private entities processing personal data in the course of their business (e-commerce, banks, insurance companies,

private hospitals, telecommunications companies, etc.). Following the article 23 (1) (2) of LPDP, the Commissioner is empowered on the grounds of appeals or on own initiative to conduct on-site and off-site, scheduled, unscheduled inspections of processors and controllers of personal data in the manner defined by the Commissioner. Procedure for control exercised by the Ukrainian Parliament Commissioner for Human Rights over the observance of legislation on personal data protection is approved by the decree of the Commissioner of 8 January 2014 No. 1/02-14 (hereinafter – Procedure for control).

Since the complaint in most cases reflects only the single case, the scheduled inspections are more important in terms of monitoring and prevention. The scheduled inspections are carried out according to the annual or quarterly plans approved by the Commissioner which are published on the website of the Commissioner's Office[47]. For example, only public sector data controllers appear in the plan for the year 2017. No transparent rules are defined in the Procedure for control relating selection of the data controllers to be included in the plan (for example, what kind of information should be analysed and what criteria should be taken into account). In terms of monitoring and prevention of violations, not only the single data controller or processor but also larger groups of them (schools, hospitals, banks, etc.) could be included in the plan of scheduled inspections in order to get more general view on the situation in particular sector. Later this information could be used for preventive purposes – preparing summaries (without naming concrete data controllers or processors) of the established violations and publishing them on the website of the Commissioner's Office or otherwise communicating to other data entities operating in the same sector. Taking into account the problems detected with regard to processing of information acquired when fulfilling other tasks of the Department, this could be considered as systematic shortcoming related to monitoring and prevention activities.

Following the article 23 (1) (3) of LPDP, the Commissioner is authorized to obtain at his/her own request and have access to any information (documents) of processors or controllers of personal data which are necessary to control the ensuring of protection of personal data, including the access to personal data, relevant databases or files, restricted information. It should be noted that access to relevant databases or files is very important since the vast majority of data processing operations are carried out using different kinds of information and communication technologies, however, taking into account that there is no information and communication technologies specialists in the Department, the efficiency of the access to databases and reliability of the information received is doubtful. This could seriously hinder

[47] Available at: http://www.ombudsman.gov.ua/ua/page/zpd/kontrol/plan-provedennya-perevirok/

monitoring of the real situation and prevention of violations. Besides, there are some shortcomings in the procedures that impede smooth fulfilment of the tasks related to the inspection. For example, following paragraph 2.2 of the Procedure for control field inspection shall be based on the authorization letter issued by the Commissioner in writing for a fixed term, however, the content of this letter is not regulated in detail, and it practice it does not indicate concrete data controller to be inspected by civil servant. Presentation of such letter and service ID card does not prove authorization to carry out particular inspection, therefore it happens that the powers of the civil servant are challenged by the data controller.

There are also monitoring visits that combine inspection and methodological assistance, carried out in the framework of the project "Human rights passport of the regions" implemented together with Ukraine Helsinki Group. The purpose of such visits is to monitor data processing carried out by the data controller, to detect shortcomings and to explain how they should be removed, as well as to inform about the best practices. This kind of activity is welcomed, however, only 6 such visits took place in 2016.

3.4. Monitoring and prevention in access to information field

3.4.1. Legal framework

Access to public information is regulated by The Law of Ukraine On Access to Public Information[48] (API, 2011). In accordance with the provisions of API, Parliamentary control over the observance if human rights related to access to public information shall be exercised by the Commissioner, temporary investigative commission of the Verkhovna Rada of Ukraine, and National deputies of Ukraine. Moreover, public control over the provision of access to public information by information providers shall be exercised by deputies of local councils, civil organizations, community councils, citizens individually through appropriate public hearings, public examinations etc. Consequently, there is a number of different organizations, institutions and even individual citizens, which are entitled to exercise this function.

In Commissioner's Office, the implementation of the right to access to public information is delegated to the Department for drafting of constitutional appeals and observance of the right to access to public information (hereinafter in this chapter – the Department). The Department is in charge to exercise the following tasks related to monitoring and prevention of violations:

[48] Закон України Про доступ до публічної інформації (Відомості Верховної Ради України (ВВР), 2011, № 32, ст. 314); http://zakon4.rada.gov.ua/laws/show/2939-17

- monitoring the observance of human rights and freedoms, rights of citizens, in the field of constitutional and administrative law and making proposals to the Commissioner for taking measures of parliamentary control in order to secure these rights and freedoms;
- participating in the preparation of proposals for the development of draft laws and, on behalf of the Commissioner, preparing draft laws and drafts of other normative legal acts, aimed at preventing violations of constitutional rights, including the right to information, or facilitating their restoration;
- carrying out the expert analysis of drafts of normative legal acts on issues within the competence of the Commissioner's Office;
- examining the applications of citizens and people's deputies on issues within the competence of the Commissioner's Office, preparing proposals for initiating an investigation of cases of violation of human rights and freedoms, rights of citizens, in the field of constitutional and administrative law;
- carrying out registration, handling, analysis, examination or verification, if necessary with visit on the spot, appeals of citizens and people's deputies to the Commissioner within the competence of the Commissioner's Office;
- on the assignment of the Commissioner, participating in inspections of the observance of constitutional rights, including the right of access to public information, in state and local authorities, enterprises, institutions, organizations, regardless of their ownership, also in enterprises and institutions, which are controlled by or subordinated to them[49].

According to the representatives of the Commissioner, API could be labelled as "progressive" law and it provides sufficient legal safeguards, which are necessary to ensure effective implementation of this right. Nevertheless, in the Twinning Project experts' opinion, there are other legal and practical obstacles, which make it difficult to ensure right of access to public information. First of all, there are some discrepancies between provisions of API and other Ukrainian laws, in particular LPDP and Law on Information[50] (1992). Secondly, the control mechanism cannot be regarded as effective, because powers delegated to Commissioner are not sufficient. In case of violation, representatives of the Commissioner have a right to draw up administrative protocols, but they are not entitled to participate in court proceedings or to appeal against court decisions. On the other hand, it is important to stress the area where the right to information is ensured to an extreme extent. According to Ukrainian legislation,

[49] http://www.ombudsman.gov.ua/ru/page/informright/informatsiya-pro-pidrozdil/
[50] Закон України Про інформацію (Відомості Верховної Ради України (ВВР), 1992, N 48, ст.650); http://zakon2.rada.gov.ua/laws/show/2657-12

refusal to provide information to a journalist is a criminal offense. In some Ukrainian experts opinion that could also be supported by the Twinning Project experts such provision is too restrictive, disproportionate and perhaps even anti-constitutional.
The representatives of the Department are engaged in different activities (monitoring of the websites of public bodies, obtaining information based on the examination of complaints, field visits and access to publicly accessible facilities and the public meetings, etc.), but systematic approach to monitoring activity does not exist.

The Commissioner or the representatives of the Department participate in law drafting process, but such participation is quite rare and merely fragmentary. The considerable problem is related to regulations issued by state bodies in the field of access to public information which sometimes goes beyond the provisions of API. Main reasons for that are the same as in other spheres analysed: enormous flow of draft laws by various public bodies, lack of legal obligations to inform Commissioner's Office about the draft laws containing to human rights (incl. right to access to public information) and the shortage of human and financial resources of the Office. Thus, analysis of the legislation in the light of right of access to public information usually is carried out when the particular legal act is actually in force. That means limited possibilities to prevent possible infringements.

3.4.2. Handling appeals of citizens and monitoring visits

The Department receives petitions of citizens, who claim that their right of access to public information was violated and make investigations about the conditions of the case. Effectiveness of the activities of the Department is limited because of the juridical obstacles, which were mentioned beforehand, as well as the lack of financial and human resources. In order to get an impression of the workload, it should be mentioned that according to the data provided by the representatives of the Department in 2016 year it received about 3500 complaints (petitions by the citizens who claim that their right to public information were violated) regarding alleged infringements of the right of access to public information. Considering that the Department has 17 employees (two of them dealing with constitutional appeals), the number of complaints seems to be huge and paralyzing activities of the Department to a large extent. Therefore, it could be assumed that activity of the Department in the sphere of the access to public information is mostly reactive.

After examining the complaint, if violations are detected, the civil servants of the Department have a right to write down administrative protocol, which will then be examined in the court. The judicial process, however, is not efficient, because the representatives of the Department cannot take part in the process as a party and do not have the right to appeal. This right can be exercised only by a person whose rights have been violated. Thus, the main problem of the legislation is that the institution which issued the protocol is not a party of the court proceedings. In addition to this, there is a 3-month limitation period for the application of administrative liability, which is considered to be too short and often is terminated when the proceedings are due.

Another problem worth mentioning, that it is not possible to end the administrative procedure without writing down protocol of administrative violation when the institution has solved the situation, but the applicant still wants to challenge the authority. Public bodies have an obligation to respond to the request of a person and to provide information within 5 days period which in some cases seems to be too short, however, failure to comply with the deadline serves as a formal background for administrative liability. In such case, an administrative protocol must be produced and that creates additional tension between the Commissioner'Office and authorities which may not want to cooperate in future.

The Department has the practice to carry out inspections, if there are many complaints about particular institution. According to the data provided by the representatives of the Department, in 2016 there were about 10 of such inspections, but for a lack of human resources it was not possible to perform them repeatedly. Moreover, this problem makes it difficult to carry out inspections or to perform monitoring activities in regions, especially in remote areas. Administrative protocols also should be handed in person. Consequently, the activities of the Department are mainly limited to Kiev area. Civil servants of the Department visit public bodies in other regions, if they see that certain bodies have problems with regard to access to public information based on the information obtained from the investigation of complaints or external sources. After the analysis of the situation the representatives organizes workshop/training for the staff of the institution, explaining the legal base and main problems in the field of the access to information. Another kind of the Department's work is unexpected visits to public bodies. Also, efforts are being made to inform the authorities how they can improve the access to public information by sending informational letters.

3.4.3. A new methodology for monitoring activities

It is important to note a new tool of monitoring which is intended to make an objective assessment regarding the implementation of the provisions of API by public authorities. The Department together with the experts of the field and representatives of NGOs have developed a new methodology under the platform Ombudsman+ (there is memorandum between the Commissioner's Office and several NGOs concerning the establishment of such platform), which will be implemented in 2017. It should be noted that before there was no unified tool; each civil society organization had its own methodology for assessment of the right of access to public information.

Monitoring using this methodology should be based on two main principles – objectivity and legality. According to this methodology everyone will be able to examine how well the authorities implement this law.

The methodology consists of four parts:

- implementation of the standards necessary for access to public information in official documents of authorities;
- access to public information through the providing of necessary information responding to inquiries;
- access to public information through publication on official websites;
- ensuring conditions, as well as direct access to public information in premises of authority.

Each of the above mentioned methodological parts could be conducted separately aiming to monitor situation in specific area or *in corpore* in order to make a comprehensive assessment of overall situation in particular institution. Each part has its own evaluation scale. In order to calculate overall level of compliance with the law, monitors should sum up results of all four parts. According to overall result, public authority will get an assessment on following scale, indicating the level of access to public information, which is based on the percentage of compliance with the requirements of the law:

- unsatisfied (0-20 per cent)
- low (21-40 per cent)
- satisfied (41-60 per cent)
- middle (61-80 per cent)
- high (81-100 per cent)

Each of the four methodological parts is equally important and the maximum number of points in each part could not exceed more than 25 per cent of total points. Methods of

monitoring and criteria of evaluation are clearly provided in the methodology and depend on the specifics of each part. E.g. evaluating official websites, qualitative and quantitative characteristics are determined using several criteria: completeness, relevance, accessibility and availability of information, etc.

Based on the results of the monitoring, a rating will be drawn on agencies according to their openness. For now, there are no plans which institutions will be examined on the basis of this methodology, but it is believed that first of all it should be the central regional authorities. The application of the methodology depends on the funding of NGOs. The methodology is intended for public use. Therefore, it could be said that the monitoring function partly will be transferred to NGOs, which will fulfil it in future. The Twinning Project experts concluded that strengths and weaknesses of the methodology could be evaluated in future, when it will be applied in practice. At the moment, there is no possibility to provide such evaluation as well as no need to develop another alternative monitoring methodology, which will duplicate the existing one.

3.4.4. Awareness raising in the area of access to public information

The Department is engaged in various public awareness activities, e.g. provides training and seminars on personal data protection and access to public information, which include various target groups - soldiers, police, journalists, civil servants. Nevertheless, there are still major problems regarding public perception of API not only among general public but also among professionals.

Generally, it could be said that the main obstacle for efficient implementation of the access to public information in Ukraine is post-soviet institutional culture (this feature was also underlined by the representatives of the Department). That means that public authorities tend to be closed and reveal as less information as possible. They often refuse to disclose even the information which is obviously public or there is no doubt about public interest to know. Data protection is one of the most commonly used arguments to refuse reveal information about public persons. In addition to the institutional culture, another problem is that it is not clear (not only for civil servants but also for the judiciary), what is the substance of principle of proportionality and how it should be applied in balancing the right to know (freedom of information) and privacy or data protection. Even for judges sometimes it is difficult to evaluate circumstances of the cases concerning public interest and right to know on the one side and privacy and data protection on the other. That creates additional obstacles for the successful implementation of the right to information. Thus, there is need not only for the

basic awareness raising concerning this right among general public, but also for the more nuanced approach regarding the balance of different and even conflicting rights among the judiciary and civil servants. In order to contribute to the positive changes in this sphere, the team of the experts of the Twinning Project indicated the need of guidelines for civil servants and judiciary on balance of right to privacy and right of access to public information.

3.5. Monitoring and prevention in non-discrimination field

3.5.1. Legal framework

According to article 3 of the UPCHR, article 10 of the Law of Ukraine on Ensuring Equal Rights of Women and Men and article 9 of PPCDU the Commissioner shall monitor and prevent any form of discrimination. In order for this duty to be carried out effectively, the Strategy of Activities in the Sphere of Prevention and Counteraction to Discrimination in Ukraine for 2014 – 2017 has been approved on 15 November 2013 by the order No 23 / 02-13[51] of the Commissioner. In accordance with the common goal, the strategy provides for 5 strategic goals, the achievement of which should ensure proper control over the observance and reduction of violations of legal guarantees of equality and non-discrimination, in particular with respect to minority groups in society:

- compliance of the national legal framework and judicial practice on equality and non-discrimination with international and European standards;
- effectiveness of the system for monitoring compliance with legal standards of equality and non-discrimination in the activities of state bodies and private law;
- effectiveness of responding to individual or systemic manifestations of discrimination and ensuring the restoration of rights;
- effectiveness of the system of promoting the principles of equality and non-discrimination by informing and raising awareness on this issue;
- the functioning of strategic national and international coalitions to promote the principles of equality and non-discrimination.

Structural unit of the Commissioner's Office, Department for observance of the rights of the child, non-discrimination and gender equality (hereinafter in this chapter – the Department) is directly responsible for preventing and combating discrimination. The Department has 3 structural units: Sector for gender equality, Division for analytical and informational work on

[51] Available at: http://www.ombudsman.gov.ua/ru/page/discrimination/activities/strategy/

prevention of discrimination, Division for non-discrimination. It should be noted that each of the structural units is engaged in the monitoring activities. Sector for gender equality is engaged in monitoring gender inequality, i.e. it analyzes the information appearing in mass media, analyses the draft laws registered in the Parliament as well as the legislation adopted or drafted by the Government. Currently this sector has 3 employees. Division for analytical and informational work on prevention of discrimination analyzes legislation and draft legislation, which may be discriminatory on all grounds provided, except for the existence of potential discrimination based on sex. At the moment, the division has 3 employees. Division for non-discrimination analyses the information appearing in the mass media, assesses the information on the possible discrimination submitted by citizens, NGOs. Currently, the division has 2 employees. The said 3 structural units currently employ 9 people in total (including Head of the Department), although there is a possibility to have 16 employees. It should be noted that from the moment the work of employees of the divisions was distributed according to the grounds of discrimination (i.e. from 2015 onwards), the improved results of the ongoing monitoring of the information appearing in mass media became immediately obvious: in 2014 a total of 22 cases of the Commissioner's initiative on possible discrimination have been identified compared to about 50 cases in 2015 and 68 cases in 2016.
According to the information provided by the representatives of the Department, 303 applications regarding possible discrimination (not related to gender), 67 applications regarding domestic violence and 8 applications regarding possible discrimination based on gender were received in 2016. It should be noted that the applications involve not only complaints but other inquiries as well.

3.5.2. Draft legislation analysis and expertise regarding court cases

The Commissioner carries out monitoring of draft legislation in the area of prevention of discrimination. It involves revising of the drafts as well as participating in the sessions of the parliamentarian committees. It is done on an ad hoc basis (in some cases through indications in the complaints and other appeals from individuals) and is limited to five committees of the parliament and performed without any developed methods. It should be stressed that the Department mostly focuses on direct discrimination; less attention is given to indirect or structural discrimination.
According to the representatives of the Commissioner’s Office, 7 conclusions on the draft laws, which contained signs of discrimination were prepared in 2015; there were fewer such conclusions in 2016, but there were 2 constitutional submissions related to the rights of

people with mental disabilities and the rights of religious organizations to peaceful assembly prepared as a result of the monitoring of existing legislation.

It should be noted that the legislative monitoring does not follow any systematic method, because the number of drafts laws is huge. The Ministry of Justice is the main body responsible for the legislative examination from the gender perspective. Analysis of the activities of the Ministry of Justice in 2015-2016 showed that the work performed by the Ministry of Justice is also fragmentary; there is no further follow-up of outcomes, whilst The Department puts an effort to monitor the legislation or draft legislation and describe the results of the monitoring, that is, whether or not their conclusions have been taken into account. Neither the Ministry of Justice nor the Commissioner's Office has methodology which would enable it to carry out this work in a systematic manner. It is important to note that the most effective way of monitoring the drafts of laws regarding possible discrimination would be if a mandatory legislative coordination with the Commissioner during the Government's drafting of the said draft laws would be established in the law.

At the court's request, the Department is also providing expert opinions on the assessment of possible discrimination in the context of circumstances of the case. It should be noted that there is a lack of clarity on how such expert opinion must be provided. Accordingly, the guidelines on preparing expertise for courts would be helpful for the Commissioner's Office, especially with regard to new employees. Another problem is that most of the lawyers representing the parties in the discrimination cases are unaware of the opportunity to ask the court to refer to the Commissioner for the expert opinion, and therefore it is difficult for the Commissioner to develop case law.

3.5.3. Thematic monitoring, monitoring events and related preventive activities

According to the information provided by the representatives of the Department, the biggest victim of ethnic discrimination is considered Roma minority. In particular, the most problematic regions are in Zakarpattia region, Odessa and Cherkassy where large Roma communities exist. In order to prevent discrimination issues, thematic monitoring is carried out. For example, joint monitoring visits with Roma rights defenders were exercised to the places of compact residence of Roma people.

Strong hostility is felt against LGBT community. Despite the war and the economic crisis in Ukraine, one of the biggest alleged problems in late spring is the assembly of LGBT community, because the LGBT community does not have the equal opportunity to exercise the right to freedom of expression, especially of peaceful assembly without facing

institutional barriers or engaging in tedious legal battles. The representatives of the Commissioner take a part in LGBT assemblies and monitor possible violations of the human rights. According to the information provided by the representatives of the Department, for example, in Kiev the distance of the assembly is about 500 meters and it takes about half an hour, but every time this assembly attracts radicals who are against this assembly, and those who support it. A problem is that such assemblies are not governed in Ukraine by any legislation.

In the framework of joint project “Passportization of regions”, comprehensive inspections of regions are carried out. The regions are selected by the highest number of petitions received. Within the framework of such visits the representatives of the Commissioner’s Office analyze the decisions of local authorities in order to find out if there is or there is no discrimination, study infrastructure and facilities for people with disabilities, hold meetings with local government authorities to sum up and discuss findings of monitoring or prepare written responses. Special references are prepared on the results of such monitoring visits.

A comprehensive report is expected to be prepared and the “passports” of all 25 regions of Ukraine are to be elaborated. Such activities have already been implemented in Kharkiv, Zaporizhhya regions and some other Eastern regions.

The representatives of the Department informed that there is no normative methodology on carrying out field monitoring visits on antidiscrimination. Kharkiv Institute developed the methodology "barometer of discrimination" in 2016 (financed by UNDP), the Commissioner’s Office will start to test it this year. It is planned to develop checklists to harmonize and carry out monitoring visits using the same issues and criteria. “Barometer of discrimination” is a complex methodology and there is a need for a check-list with detailed indicators so that employees had a clear list of questions on discrimination issues wherever they go with a monitoring visit. As regards methodology for anti-discrimination, analysis of legislation and assessment of practice has been prepared in 2016 with the support of Council of Europe (analysis was conducted by Neil Crowley). The representatives of the Department shared the view that this methodology is complicated and difficult to apply in practice, therefore there is a need for simpler and more user-friendly methodology, e.g. short checklist.

3.5.4. Awareness raising in non-discrimination filed

The Department is also engaged in informational and educational activities. Firstly, the information is published in the Institution's website, where not only the general information is provided, but also the violations identified and the positive achievements are described, as

well as the Commissioner's position on various matters of public interest, such as the matters regarding the processions, Roma people, Syrian refugees. Secondly, the information-oriented activities are carried out, for example, the informational campaigns have been organized in cooperation with NGOs for the second consecutive year: videos on discrimination have been created as well as the poster campaign, which focuses on all 5 main grounds: health status, gender, sexual orientation, place of residence. The posters were put up in Kiev as well as in Kharkov, Odessa, Cherkasy, Lvov. The poster campaign continues this year, this time involving representatives of the police. Last year a forum for students was organized for the first time, which was attended by about 400 students from 72 universities. The Forum took place from 4 to 5 November and was attended by international experts on discrimination issues. Furthermore, the Department organizes trainings. Last year, it held a two-day training in several regions: Odessa, Lviv, Kharkov, Kiev and Vinnytsia. Trainings takes place in different regions every year, are aimed at different audiences, e.g., teachers, workers of local government as well as regional coordinators of the Commissioner's institution. The trainings include questions on the grounds of discrimination: gender, LGBT, nationality, race, health status, place of residence, as well as trainings on the legislative analysis. Trainings in other regions will be taking place this year.

Despite the general observation that the Ombudsperson institution in Ukraine is fairly well known, the public is far from understanding about the discrimination, e.g., how to recognize direct or indirect discrimination. Despite the positive changes in those divisions of the Department, including the distribution of work of the employees according to the grounds of discrimination, it should be noted that the Commissioner's activity in the non-discrimination field should be largely focused on improvement of the public's perception of equal opportunities in order to make the society aware of it. That will help to encourage civil society to inform about possible infringements. Otherwise, it could result in unjustified and disproportionate expansion of the Department's human resources, which would not ensure the effective work aimed at implementation of equal opportunities in Ukraine.

According to the information provided by the representatives of the Department, there is discrimination on the grounds of gender and age in job advertisements, also sellers or producers of goods do not ensure that information about goods or services would be non-discrimination. In order to address this problem there is a need to develop tools for increasing awareness in different target groups about non-discriminatory practices. In this context, it would be useful to prepare info sheet for employers on antidiscrimination in job advertisements, including clear information on what discriminates and what does not.

4. Conclusions and recommendations

1. The main strengths of the Commissioner in monitoring of the observance of human rights and preventing their violations is a broad mandate and "A" status as a NHRI, variety of operating activities, definite objective, a strong partnership, including joint planning and implementation of activities, with civil society, donors and other stakeholders, as well as developed monitoring methodologies, such as NPM algorithms, monitoring tools on access to public information and barometer on discrimination. The NPM unit, for example, is very efficient in carrying out preventive monitoring of places of detention. However, concentration on individual problems in a large numbers of complaints diverts attention from solving major systemic problems and limits taking proactive and preventive role in human rights protection, also relying on sources of information, limited to individual complaints and media, might give only a limited picture of a certain field of human rights.

2. In order to improve the efficiency and effectiveness of carried out activities, there is a need to set priorities and periodicity of monitoring activities in order to be able to thoroughly concentrate on specific fields and not to exhaust the limited resources of an institution, strengthen and promote information exchanges with the stakeholders and expand the data collection to ensure access to vulnerable persons and groups, develop missing monitoring methods and tools and ensure implementation of all monitoring cycles, from information gathering to the impact of taken action. Finally, a lack of human rights awareness of authorities and people is also a big challenge requiring a strategic plan to address it.

3. Following steps and actions would significantly contribute to the efficiency and the effectiveness of monitoring of the observance of human rights and prevention of their violations:

3.1. Setting-up an inter-departmental working group at the Apparatus of the Ukrainian Parliament Commissioner for Human Rights that is responsible for developing a monitoring work plan in order to unify and enhance the methods, standards and approaches of monitoring and, in the long run, ensure a more systematic monitoring, including awareness raising within the institution of the importance of common standards and methods of human rights monitoring as well as the importance of establishing a more systematic form of monitoring;

3.2. Strengthening the system of monitoring to encompass all its steps and cycles, from information gathering to the impact of taken action;

3.3. Setting priorities in monitoring activities in order to be able to thoroughly concentrate on specific fields, create high-quality results and avoid wasting resources on the one hand and support getting a more comprehensive and systematic monitoring on the other;

3.4. Establishing periodicity of every monitoring activity;

3.5. Strengthening and promoting information collection and exchanges with all stakeholders, in order to ensure that sufficient and accurate information is gathered on possible violations, as well as to ensure access to vulnerable persons or groups;

3.6. Discussing and developing reliable monitoring indicators;

3.7. Discussing and developing common concepts, terms and categories for human rights monitoring to ensure better common understanding and enhance collective action;

3.8. Developing guidelines and monitoring tools for collecting, processing and analysing information enabling better fulfilment of monitoring and prevention activities in the fields of personal data protection, anti-discrimination and access to public information (detailed suggestions are provided for in further sections on recommendations for the selected areas);

3.9. Improving the internal information system, allowing easy access to information about the number of provided recommendations and their implementation;

3.10. Draw up a communication and raising awareness strategy to develop methods and tools of communication and education would greatly contribute to the promotion of human rights awareness among the general public, local communities and authorities.

4. One of the tasks of the Commissioner is to carry out the monitoring of new practices, trends and technologies of protection of personal data. The Commissioner is assisted by the Department for personal data protection when exercising powers related to the monitoring and prevention of violations in the sphere of protection of personal data. However, it was observed that on the one hand, some of the functions are not carried out in satisfactory extent, on the other hand, the effectiveness and efficiency of the activities may be improved.

4.1. There is a lack of provisions in the legislation of Ukraine enabling Commissioner to intervene in an effective and efficient manner in the stage of preparation/consideration of the draft of legal act. Introduction of the legal obligation for the legislative bodies to submit the drafts laws to the Commissioner's Office for expertise, as well as setting up rules of procedure (deadlines, reaction of the legislative bodies, etc.) could significantly contribute to the improvement of the situation. Since it would require amendment of the laws of Ukraine, this problem was communicated to the experts of the Twinning Project component 1.1. dealing with the legislation matters.

Currently the assessment and evaluation of the drafts of legal acts conducted by the Commissioner take place only in accordance with the specialists' legal knowledge and their inner conviction on what and in which manner should be evaluated. As regards internal measures enabling to improve this activity, the methodology on carrying out expertise of the drafts of laws would be useful tool. Prepared in user-friendly manner it would be of practical value for civil servants and would ensure consistency of this kind of activity.

4.2. Approach with regard to notification of personal data processing taken in the Article 9 of the LPDP is close to that of GDPR (e.g., notification concerns types of processing of personal data which are of particular risk to the rights and freedoms of data subjects), however, the opportunities given by notification are not exploited efficiently enough for prevention of violations in the field of personal data protection. Main shortcomings are that the notification shall take place within thirty working days after beginning of the processing (e.g. when information systems are established, relevant devices installed and personal data are already processed), the types of personal data the processing of which is a subject of notification concentrates only on the categories of personal data, there is no in-depth examination of information provided in notifications.

In the Twinning Project experts' opinion, the processing should be possible only after the positive decision of the Commissioner was taken (i.e. notification shall take place prior to processing of personal data). With this regard article 9 of the LPDP shall be amended. Such approach would also enable examination of the implementation of the principles privacy by design and privacy by default by the data controller. A new list of the risky types of data processing taking into account such factors as usage of new technologies, the nature, scope, context and purposes of the processing, the procedure of in-depth examination of the application, kinds of the decisions to be taken by the Commissioner with regard to application (approval, rejection and backgrounds of it, denial of such type of processing, right of appeal against the decision, etc.) including obligation to notify decisions to data controller should be set up. It should be noted that these issues are reflected in the Draft Law of Ukraine "On personal data protection" prepared in cooperation with CoE experts.

The exemption of the obligation to notify provided in paragraph 2.1.1. of the Order of notification approved by the Decree No 1/02-14 of 8 January 2014 of the Commissioner as far as it relates special categories of personal data should be reconsidered in the light of the provisions of article 9 (1) and (2) of GDPR.

Publication of updated information about the structural unit or person responsible for personal data processing (including contact details) on the official website of the Commissioner's Office should be ensured.

4.3. The article 23 (1) of LPDP lays down powers of the Commissioner related to providing recommendations on practical application of the legislation on protection of personal data, explaining the rights and obligations of the relevant persons, as well as giving information about the legislation on the protection of personal data. Methodological assistance to data controllers and data processors is provided in different ways (consultations by phone, e-mail, conclusions on codes of conduct, relevant sections on the website of the Commissioner's Office), however, it is not sufficient and not systematic. Recommendations or guidelines giving advice on practical implementation of personal data protection principles in various sectors (video surveillance and other) would be of great value for the data controllers and data processors, therefore this kind of activity should be developed. Other kinds of methodological assistance, such as preparing and publishing summaries of the results of the inspections, investigated complaints, relevant court decisions, explanations related to application of personal data principles etc. should be developed paying special attention to its content. The relevant sections of the website of the Commissioner's Office should be improved, providing more user-friendly information, for example, answers to frequently asked questions.

4.4. It was revealed that there is no methodology describing the process of consultations provided by phone and e-mail, no data on consultations provided by phone and e-mail are collected in structured manner and no statistics are prepared, so the possibilities to exploit consultations for monitoring and preventive activities (for example, as a reason for scheduled or unscheduled inspections) are limited. Such methodology could also contribute to ensuring consistent and satisfactory quality consultations.

4.5. The scheduled inspections of data controllers and data processors is important tool in terms of monitoring and prevention. The procedure for control exercised over the observance of legislation on personal data protection is approved by the decree of the Commissioner, however, it could be improved in several aspects, for example, indicating in the authorization letter concrete data controller or data processor to be inspected by particular civil servant, setting clear rules and criteria of selection of the data controllers to be included in the plan of inspections. Possibility to include larger groups of them (schools, hospitals, banks, etc.) would enable to get more general view on the situation in particular sector and to take wide range preventive actions. The steps should be taken in order to ensure participation of

information and communication technologies specialist in the inspection when personal data processing is carried out using automated means.

5. As regards monitoring and prevention in the sphere of access to public information, the Commissioner‘s Office together with the experts of the field and representatives of NGOs have developed a new methodology under the platform Ombudsman+, which will be implemented in 2017 and is intended for public use. The Twinning Project experts concluded that currently there is no need to develop another alternative monitoring methodology.

The Commissioner‘s Office is engaged in various public awareness raising activities, nevertheless, there are still major problems regarding public perception of API not only among general public but also among professionals. The civil servants and the judiciary do not understand what the substance of principle of proportionality is and how it should be applied in balancing the right of access to public information and privacy or data protection. That creates additional obstacles for the successful implementation of the right to information. Thus, there is need for the more nuanced approach regarding the balance of different and even conflicting rights among the judiciary and civil servants. In order to contribute to the positive changes in this sphere, the team of the experts of the Twinning Project indicated the need of guidelines for civil servants and judiciary on balance of right to privacy and right of access to public information.

6. As regards monitoring and prevention of violations in the sphere of non-discrimination, there is wide range of activities implemented by the Commissioner’s Office: investigating complaints, examining draft laws, providing expert opinions regarding cases related to antidiscrimination investigated by courts, carrying out thematic monitoring, monitoring events, as well as large scale activities in the sphere of awareness raising. Nevertheless, some areas still need improvements that could contribute to effectiveness and efficiency of the activities in this field.

6.1. The problems related to the examination of the drafts of laws in the area of non-discrimination are similar to those found in personal data protection field, i.e. lack of provisions in the legislation of Ukraine enabling Commissioner to intervene in the stage of preparation/consideration of the draft of legal act and absence of clear methodology how such expertise should be carried out. In addition, guidelines on preparing expertise for courts would be of practical value for civil servants of the Commissioner’s Office and could contribute to the quality of the expert opinion.

6.2. Comprehensive inspections, including regions, are carried out in the area of antidiscrimination, however, there is no normative methodology on carrying out field

monitoring visits. There were several attempts (Kharkiv Institute developed the methodology "barometer of discrimination" in 2016 (financed by UNDP), which will be tested this year, analysis of legislation and assessment of practice has been prepared in 2016 with the support of Council of Europe), however, there is a need for a check-list with detailed indicators so that employees had a clear list of questions on discrimination issues wherever they go with a monitoring visit. Such check-list would also enable to systematize information regarding situation in antidiscrimination field and to prepare more structured reports.

6.3. The Commissioner's Office is also engaged in informational and educational activities. The thorough information, including Commissioner's position on various matters of public interest is published on the Commissioner's Office website, various information-oriented activities are carried out in cooperation with NGOs (videos on discrimination, poster campaign, etc.), trainings also take place. Despite the general observation that the Ombudsperson institution in Ukraine is fairly well known, the public is far from understanding about the discrimination, e.g., how to recognize direct or indirect discrimination. There is discrimination on the grounds of gender and age in job advertisements, also sellers or producers of goods do not ensure that information about goods or services would be non-discriminatory. In order to address this problem there is a need to develop tools for increasing awareness in different target groups about non-discriminatory practices. In this context, it would be useful to prepare info sheet for employers on antidiscrimination in job advertisements, including clear information on what discriminates and what does not.