Annex 1.

Twinning project "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)"

No. EuropeAid/137673/DD/ACT/UA

Activity 2.3.4. Developing recommendations as regards improving the existing or employing new instruments for restoring human rights, in the spheres of personal data protection, access to public information and the prevention of all forms of discrimination in particular

Document	Recommendations for improvement of the existing and employment of new instruments for restoration of human rights *vis-à-vis* the judiciary
Short description of the document	The Recommendations propose ways to optimise the results of the Ombudsperson's participation in judicial litigation by focusing on two main questions – the selection of cases for the Ombudsperson to be involved in and the manner of participation.
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RECOMMENDATIONS FOR IMPROVEMENT OF THE EXISTING AND EMPLOYMENT OF NEW INSTRUMENTS FOR RESTORATION OF HUMAN RIGHTS VIS-À-VIS THE JUDICIARY

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1. INTRODUCTION

Findings of the project indicate that ombudsman's participation in judicial proceedings plays a vital role in restoration of violated human rights. It is perhaps the most important window for the ombudsman to make his contribution in this particular stage and some of existing instruments in Ukraine can be improved by certain amendments of law and its practical implementation. Proper restoration of violated rights is important not only because of the interests of a particular victim, but also considering the effect of a precedent for later cases. Flawlessly solved cases firstly create a path to defend the rights of other victims in similar circumstances. Secondly, they have the potential to solve the ambiguities or other deficiencies of law which produces a preventive effect for the future, hence a certain number of human rights violations might be avoided altogether.

Further recommendations mainly focus on the ombudsman's role in judicial proceedings. The suggested ombudsman's participation in judicial proceedings can be most broadly categorised into two types:

- The role of a claimant or an aide to the victimised party;
- An independent advisor to the court.

The first set includes dealing with particular cases regarding actual violations of human rights, defence of public interest and the abstract judicial review of legal regulations. The second type of involvement as a neutral advisor is best implemented in the form of *amicus curiae* and is includes any significant cases concerning protection of human rights. Involvement in both abstract review and individual cases is one of the ways for ombudsman to contribute for the restoration of violated human rights and simultaneously make strategic positive influence for standards of human rights protection. These positive effects can be optimised by following guidelines on questions **when and how** the ombudsman should participate in judicial proceedings.

2. THE QUESTION "WHEN"

According to previous reports of the project, the prerogative to decide when the Ukrainian Parliament Commissioner for Human Rights (hereinafter referred to as "the Commissioner") should get involved in a particular individual case at court should be delegated to the Commissioner himself. Among other reasons, this is necessary because the Commissioner is the officer who specializes in the matters of human rights protection, therefore he possesses both high competence in these matters and a detailed knowledge of the *status quo* in macro level. This lets him make well informed decisions about which cases carry potential to make the most significant impact.

2.1. SELECTION OF INDIVIDUAL CASES

It was already stated in the report 2.3.3 that ombudsperson naturally cannot participate in every single judicial case related to violations of human rights, however, in certain cases ombudsman's intervention might contribute to improvement of judicial practice. Although, when a violation of human rights in particular case causes significant damage and/or the aggrieved person is a weaker party, then ensuring proper restoration of damages can also bear weight of public interest. Overall focus on strategic improvements bears the highest potential of significant preventive and compensatory effects.

In regard of selection of cases for the involvement several criteria are recommended to be applied. Firstly, the most general aforementioned criteria ought to be evaluated – the possible **impact of the case**. As it was already stated in the report 2.3.3, there are several factors which can indicate that a case will become an influential precedent. One of them is that the case has been assigned to a panel consisting of more judges than usual. Decisions by such panels can be regarded as bearing a stronger authority compared to the ones in the ordinary procedure. Also, the number of similar cases ought to be taken into consideration. When there are numerous unsolved cases involving analogical breaches of human rights, the first ones usually set the trend for later. Such

cases show the potential of high impact for other similar cases *posteriori* and can function as a preventive instrument *a priori*. In contrast, a case shows lesser potential of future impact when courts have recently established a clear trend in numerous analogical cases and there are only few, if any, unfinished cases. Also, legal background can be fairly relevant when, for example, amendments of law have introduced new effective preventive instruments or have changed the legal context in a way which makes the judicial case law not applicable for future cases – these and other similar factors can be a sign that the case does not meet the requirements under which the ombudsperson should be involved in judicial proceedings.

Next the Commissioner can employ the evaluation of particular damage and victim's ability to properly defend his rights. This prerequisite for the involvement usually can be justified not by the expectation that the case will set a trend for future, but rather by the necessity to ensure that the rights of a particular individual are defended and the damages restored. In such cases, **where the victim can be characterised as vulnerable**, the Commissioner ought to provide legal aid and/or represent the victim in judicial litigation. However, when the Commissioner becomes involved with the judiciary for the purpose of supervising judicial acts and activities in order to prevent and detect violations of human rights by a court, this must be understood as exercising parliamentary control, therefore it must be carried out by a certain restraint with regard to the doctrine of separation of power.

Another way for the Commissioner to intervene in judicial proceedings is by **filing a claim based on the public interest** where revealed irregularities are considered to be of a systemic character. The analysis the Ukrainian legislation has shown that, in cases established by law, public authorities, local self-government bodies, natural and legal persons may apply to the court for the protection of the rights, freedoms and interests of others, or public or public interests, and participate in these cases. At the same time, the Commissioner of the Verkhovna Rada of Ukraine on Human Rights, bodies of state power, bodies of local self-government must provide documents to the court confirming the existence of valid reasons that make it impossible to independently address these persons to court in order to protect their rights, freedoms and interests. In order to protect the rights and freedoms of a person and a citizen in cases established by law, the Commissioner of the Verkhovna Rada of Ukraine on Human Rights may, ought to personally or through his representative, apply to the administrative court with an administrative suit (application). In this matter it is important to ensure that the legal remedy of this kind is not duplicated by the duties of other state authorities (for example the prosecutor). Findings of the report 2.3.1 show that in no case the Commissioner shall replace administrative authorities, on which the duty to defend public interest is placed by law. Therefore, having established that certain legal proceedings are in progress and there is no pressing need to intervene into litigation, the Commissioner shall refuse to undertake remedies for the defence of public interest. In other cases the Commissioner can use these indicators for the evaluation whether to intervene into judicial proceedings on the basis of public interest: whether the matter concerns violation of the most important constitutional values; severity of the violation and its consequences; how long has passed since the violation occurred and whether it has not lost the significance; behaviour and fault of the aggrieved persons; proportionality – whether public interest outweighs the competing values; does the particular matter fall into the field of the Commissioner's competence; the violation has systematic feature; the podania is not exercised by offender. Furthermore, the Commissioner's request to the court should not contain non-material matter – to order the infringer to stop unlawful actions and restore *status quo*. Such action by the Commissioner can substitute numerous cases, since by filing a claim instead of the victimised parties the Commissioner would initiate the creation of settled judicial case law. This ought to be carried out with a purpose to directly restore violated rights of particular individuals or to benefit the victimised parties later by simplifying their litigation as well as making it shorter.

2.2. REVIEW OF NORMATIVE ACTS

In the pursuit for substantial improvements in the field of human rights protection the Commissioner must not only address individual cases, but also the abstract judicial review of legal

normative acts. It can be either related to particular breaches of human rights, for example, initiating a case after receiving individual complaints (retrospective intervention), as well as prevention by initiating the review of a normative act as soon as illegality of a legal act becomes apparent (prospective intervention).

The Commissioner is granted the right to address the Constitutional Court of Ukraine by the Article 13 of the Law of Ukraine "On the Ukrainian Parliament Commissioner for Human Rights" (hereinafter referred to as "the Law on the Commissioner") with regard to: conformity of the laws of Ukraine and other legal acts issued by the Verkhovna Rada of Ukraine, acts issued by the President of Ukraine, acts issued by the Cabinet of Ministers of Ukraine, and legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea concerning human and citizens' rights and freedoms with the Constitution of Ukraine; the official interpretation of the Constitution of Ukraine and the laws of Ukraine.

However, there is no specific provision, granting the Commissioner power to initiate a judicial review of normative legal acts, adopted by lower bodies than Verkhovna Rada of Ukraine, the President of Ukraine or the Cabinet of Ministers. Currently the right to appeal normative legal acts to the court is assigned to persons to whom the act is applied and the persons who are the subject of the legal relationship in which this act will be applied.[1]

In the context of the Commissioner's right to directly address the Constitutional Court, the latter provision can be regarded as inconsistent and depriving him of an instrument of strategic developments. Accordingly, it is suggested to prescribe a special rule and, whenever there are sufficient legal grounds, actively implement it in practice – to grant the Commissioner the right to directly address the court in order to review the legality of the resolutions and instructions of the Cabinet of Ministers of Ukraine, resolutions of the Verkhovna Rada of the Autonomous Republic of Crimea; normative legal acts of ministries, other central executive authorities, the Council of Ministers of the Autonomous Republic of Crimea, local state administrations, local self-government bodies, and other subjects of power.

This is to be implemented by amending the Law on the Commissioner of the Verkhovna Rada of Ukraine on Human Rights as follows:

Article 13 *<...>* *8[2]) address the court in order to review the legality of the resolutions and instructions of the Cabinet of Ministers of Ukraine, resolutions of the Verkhovna Rada of the Autonomous Republic of Crimea; normative legal acts of ministries, other central executive authorities, the Council of Ministers of the Autonomous Republic of Crimea, local state administrations, local self-government bodies, and other subjects of power.*

Participation in these cases carry significant weight, since they deal not only with individual violations of human rights, but also include a review of acts by the legislature. This requires a thorough attention to specific nuances, which make an abstract judicial review different from individual cases. Therefore guidelines for the process of drafting the opinions to be presented in regard of normative legal act's legality.

Review of normative legal acts
• Factual context ➢ Judicial cases where a dispute concerns the reviewed normative legal act ➢ Factual relations – the plurality and spread of the reviewed normative legal act's application in life
• Legal context

[1] Art. 264 of the Code on Administrative Proceedings of Ukraine.

- Higher laws confirming the act's legality or unlawfulness
- Acts of the same hierarchical level consisting rules in regard of the disputed relations

- The aspects to evaluate
  - Does the act comply with requirements of the Constitution
  - Does the act comply with requirements of international law
  - Whether the public body adopted the act *ultra vires*

- Consequences
  - The conclusion in regard of legality
  - Is the whole rule unlawful or just a part of it applicable to a specific situation
  - Can it be described what are the right ways to redraft a normative legal act in compliance with the requirements of higher laws
  - The moment from when the act should be held unlawful – application for cases before and after the unlawfulness is recognised

3. THE QUESTION "HOW"

During the project several propositions were established for the question how the Commissioner can participate in judicial proceedings.

Besides the Commissioner's deep knowledge on the delicate matters of human rights protection, he is also in a superior position for the investigation of particular factual matters. The ombudsman usually possesses investigative powers not available to courts. The investigation by judges is strictly limited by the principles of adversarial concept of judicial procedure. Because of this courts are not allowed to initiate proceedings on their own accord and often are limited by the boundaries of dispute, which were set by the parties. The inspection of evidence is carried out within a courtroom, which sometimes makes it inevitable for the courts to draw factual conclusions based on indirect evidence (for example, in cases concerning undignified conditions of imprisonment, factual conclusions in regard of prison cells and other premises are usually drawn based on indirect evidence). The ombudsperson, on the other hand, does not have such strong restrictions and is able to make visits and in other ways actively investigate relevant circumstances. This puts him in a position which can significantly aid the court. In some instances his participation can provide well-informed grounds for the judicial decision, instead of relying solely on the testimonies of the parties. Therefore, the **Commissioner can play an active role in the collection and assessment of evidence**, with special regard to areas, not covered by the jurisdiction of judges.

An important note is that participation of the ombudsperson in judicial proceedings should not be regarded as participation of a third party. As it was already stated in the report 2.3.3, in continental European national legal systems, traditional concept of a third party in judicial proceedings is of someone with a personal interest on the outcome of the case, possibly when it can indirectly lead to violation of the third person's rights.

In cases where the Commissioner is not taking the role of a claimant or an aide to the victimised party, his stance is neutral, meaning that he is serving as a provider of expertise or special factual information, not available for the judges to access directly. This role is best reflected in the form of ***amicus curiae***, which is most coherent with the prevailing European concept of judicial procedure. This is to be implemented by amending the Law on the Commissioner of the Verkhovna Rada of Ukraine on Human Rights as follows:

Article 13
<...>
8^3) participate in judicial proceedings as amicus curia by providing opinions in regard of the claims by the parties.

Findings of project show that the Commissioner's participation in judicial proceedings as *amicus curia* can be defined by these characteristics:

- Seeking to develop the law in a particular way – perhaps contributing an alternative view;
- Providing evidence that wouldn't otherwise be used, such as the Commission's own research or inquiry findings;
- Comparing the law in different countries;
- Highlighting the relevance of international law – including human rights treaties and the decisions of international courts.

The involvement in judicial proceedings as *amicus curiae* can be best implemented by providing a written opinion and, if it is appropriate in the context of the proceedings, an oral presentation of the aforementioned opinion. The Commissioner's opinion can take form of a legal document consisting of a description of facts, law and their synergy.

***Amicus curiae* opinion structure**
• Introductory part ➢ The court being addressed ➢ Time and date ➢ Name of the officer submitting the opinion ➢ Number of the judicial case, names of the parties
• Presentation of facts ➢ Chronological description of relevant factual circumstances ➢ The evidence supporting existence of the ascertained factual circumstances ➢ Emphasis on the circumstances disputed by the parties and reasons why certain allegations by the parties are to be rejected
• The law ➢ References to applicable international and Ukrainian law ➢ Includes statutory law and judicial case-law with emphasis on relevant principles revealed by courts
• Application of law in present case ➢ Reasons for interpretation law ➢ Legal measures suggested to be invoked ➢ If possible, a rule to be revealed for future similar cases ➢ The proposal which claims of the parties are justified and which are to be rejected

The description of facts can add the biggest value, when it includes a description of relevant factual circumstances with a description of evidence supporting existence of the ascertained factual circumstances. This is necessary so that the court is informed about how strongly different parts of the disputed circumstances are supported and for the judges to be able to draw well-informed conclusions. The part on relevant law must be drafted with a thorough consideration for which legal rules can be applied. This includes both a critical view on the claims by the parties and a research of statutory law and judicial case-law for rules and principles which might have not been detected by the parties. The part on application of law in present case regards legal interpretation for the present, the rule for similar cases in the future and the conclusions – how the law should be applied, which legal measures should be invoked. This usually can include a proposal to compensate pecuniary and/or non-pecuniary damages, order an act to restore violated rights *in integrum*, declaring an act of a public body as unlawful and etc. The conclusions usually are limited by claims of the parties, therefore should directly explain which claims of the parties are justified and which are to be rejected.

4. SUMMARY OF RECOMMENDATIONS

Overall the recommendations on how the Commissioner can maximise the contribution to restoration of violated rights besides the already existing instruments, can be summarised as follows:

- **Recommendation 1:** The Commissioner must be permitted by law to enter a judicial case on his own initiative.
- **Recommendation 2:** In the selection of judicial cases concerning human rights protection to get involved in, the Commissioner must employ a wide variety of criteria including (but not limited to):
  - the possible impact of the case for later similar cases and for the prevention of future human rights violations;
  - severity of a particular human rights violation and the vulnerability of the victim;
  - the public interest.
- **Recommendation 3:** One of the encouraged ways for the Commissioner to participate in individual cases is by filing claims with a purpose to directly restore violated rights of particular individuals or to later benefit the victimised parties by simplifying their litigation as well as making it shorter.
- **Recommendation 4:** The Commissioner must be granted the right to directly address the court in order to review the legality of the resolutions and instructions of the Cabinet of Ministers of Ukraine, resolutions of the Verkhovna Rada of the Autonomous Republic of Crimea; normative legal acts of ministries, other central executive authorities, the Council of Ministers of the Autonomous Republic of Crimea, local state administrations, local self-government bodies, and other subjects of power.
- **Recommendation 5:** Positive effects of participation in judicial proceedings can be improved by the Commissioner taking an active role in the collection and assessment of evidence.
- **Recommendation 6:** The Commissioner's participation in judicial proceedings, when he is not taking the role of a claimant or an aide to the victimised party, is best reflected in the form of *amicus curiae*.