**Annex 2**

# 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 2.2.3. Drafting recommendations as regards increasing the efficiency of the activities of the ombudsperson on elimination of detected human rights violations, control procedures over fulfilment of ombudsperson's recommendations, response to the Ombudsperson's acts of submission on elimination of detected human rights violations**

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| **Title of Document** | Recommendations on drafting of recommendations, based on individual complaints |
| **Short description of document** | The recommendations provide information on how to draft the recommendations, based on individual complaints. One group of recommendations on drafting of recommendations concerns the procedural guarantees for individuals whose rights have been violated. The second group of recommendations relies on the finding of a proper solution and reasoning of the solution and recommendation of the Ombudsperson. |
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## *Recommendations on drafting of recommendations, based on individual complaints*

### Introduction

The quality of submissions (recommendations) of the Parliament Commissioner for Human Rights according to Article 15 paragraph three of the Law on the Ukrainian Parliament Commissioner for Human Rights is key when the principle of good administration is endorsed as a guiding norm. The recommendations are the final acts of the Parliament Commissioner for Human Rights and they are aimed at presenting the results of the investigation of individual complaints. A high quality decision and submission (recommendation) of an Ombudsperson is one which achieves an effective result – fair, speedy, clear and definitive protection of human rights.

Ombudsperson and his staff investigate complaints against a wide range of government and private (commercial) organisations. Usually, these complaints are already investigated by the organisation concerned. The Ombudsperson has a reviewer role in a lot of cases. The reviewer's role is to resolve cases that go beyond this stage, where, after the organisation has given a properly considered view, differences still remain between the organisation and the complainant. Sometimes the complainant has unrealistic expectations or an incomplete understanding of his or her rights and responsibilities and wishes to persist against all the evidence. Every complaint is different and deals with differing issues. There are, however, many similarities in how they must proceed. In particular, there is no common standard of drafting of recommendations of the Ombudsperson that to carry out the role of Ombudsperson effectively, complainants must have confidence that issues will be considered impartially and on their merits and that independent judgement will be brought to bear.

One group of recommendations on drafting of recommendations concerns the procedural guarantees for individuals whose rights have been violated. These procedural guarantees must be ensured during the investigation procedures of individual complaints in the course of fact finding and collecting of evidence. The Ombudsperson must organise and conduct the proceedings actively and accurately according to the internal procedural rules, methodologies/guidelines (soft law) of the institution. The proper development of the internal proceedings is conducive to the quality of the final product – the recommendations of the Ombudsperson. Whether a decision is taken within a reasonable time in accordance with the Law on the Ukrainian Parliament Commissioner for Human Rights (Article 17) and the Law on Applications of Citizens (Article 20) can also be regarded as an important element determining the quality of such a decision.

The second group of recommendations relies on the finding of a proper solution and reasoning of the solution and recommendation of the Ombudsperson as a given, because only then the complainants, addressees of recommendations and the society as a whole may have confidence in the outcomes of the tasks fulfilled by the Ombudsperson. The starting point is that the submission (recommendation) of the Ombudsperson is not only aimed to resolve a given individual appeal against public authorities and hereby to achieve a legal certainty, but, at the same to, to promote the respect for the principle of good administration, which may prevent the emergence of other conflicts and legal disputes and to ensure a social harmony. The Ombudsperson may recognise

maladministration, if an institution fails to respect fundamental rights, legal rules or principles, such as the principle of good administration.

The outcome of the investigation procedure is to be a high quality recommendation, which will be accepted both by the individual complainant and the public body addressed as well as by the society, the procedure of drafting and issuing recommendations must be clear, transparent, and must satisfy the standards (requirements) of a "fair procedure" during the investigation of complaints. To be of high quality, the recommendations of the Ombudsperson must be perceived as a result of a correct application of legal rules, of fair proceedings and a proper evaluation of facts, as well as a result that is respected and effectively enforceable by the complainants, the public authorities and the society.

- The recommendations must be accepted both by the individual complainant and the public body addressed, as well as the whole society.
- The procedure of drafting and adoption of recommendations must be clear, transparent, and must satisfy the standards (requirements) of a "fair procedure" during the investigation of complaints.
- The content of recommendations must be perceived as a result of a correct application of legal rules and a proper evaluation of facts.

## I. Basic principles and process of drafting of recommendations

### 1. Introduction

A submission (recommendation) of an Ombudsperson must meet a number of requirements of some commonly accepted and recognised principles, irrespective of the specific features of each national system and the implementation of the principle of rule of law and right to good administration in different countries.

### 2. Clarity and structuring of recommendations

The following basic requirements are common to most drafting of recommendations after the receiving of a complaint from a complainant and carrying out some sort of 'factual and legal investigation' to identify the merits of the case and trying to resolve the complaint as quickly as possible. After the resolving of the complaint and prepraration of the recommendation, the last stage is the feeding the outcomes (recommendations) of systemic findings into best practice within the organisation. One of the preconditions for the high-quality recommendation is the compliance with the requirements for the clarity and structuring of recommendations.

The **introductory part** of the recommendation often presents difficulties to perceive information about the parties to the dispute and other persons participating in the investigation. Besides, as a rule, the introductory part often unnecessarily describes the „procedural history" of the dispute. This is mainly a citation of the previously adopted decisions of states athorities. The introductory part is filled with a huge number of facts that do not affect the resolution of a dispute (notification

numbers, etc.), transferred from written explanations or verbal explanations of the parties. Information about the parties is sometimes presented in insufficient details. It is not always easy to understand, who is the complainant and who is the infringer. Despite the fact that the introductory part itself is of informative value, the specified information should be used correctly.

Often, in the **descriptive part** the narrative of the dispute itself is reduced to a schematic exposition of its matter. At the same time, the arguments of the parties are minimized and the main focus is placed on the "procedural history" of the dispute. The outcome of such structure is that often in this part we can find only the resolutions of the previous decision of the state authorities. As practice shows, in the recommendations themselves it is very difficult to separate the descriptive part from the motives of a recommendation. The intention of the requirements for the structure is that the descriptive part should smoothly flow into the motives of a recommendation, when the Ombudsperson, after describing the relevant circumstances of a dispute and the arguments of the parties, is passing to the analysis and an independent interpretation of the law and facts. However, due the fact that the arguments of the parties are presented in rather brief manner and their examination is not complete and comprehensive, the descriptive and motivating parts of the recommendation overlap, forming simply a list of the legal background (legal provisions) and facts. Often the descriptive part contains statements of the parties or written explanations of the parties. Sometimes the style of drawing up of the descriptive part creates the impression that it is predetermination, how the matter should be solved. Thus, thin line between the descriptive and motivating parts is erased, which gives the impression for the reading persons that the Ombudsperson is allready prejudicating the claim. In description of the legal positions of the parties, the Ombudsperson should not mix the essential circumstances or legal grounds of the claimant with the position of the state authority. When presenting a huge number of details and facts that do not have direct link with the claim, the Ombudsperson often overlooks other circumstances that are more significant and important to the complaint.

If the descriptive part does not cover the arguments of the parties in a sufficient manner, then the **part of the reasoning** may not give their appropriate assessment. For example, if, when submitting a complaint, the complainant refers to the legal norms and laws that regulate, in his/her opinion, a current situation, the Ombudsperson must analyse these rules and state his/her arguments concerning the possibility of its (non)application to the dispute. The reasoning should provide for the interpretation of the relevant legal norms to be applied in the dispute, taking into account the circumstances and results of the fact finding during the investigation, as well as investigation of the applicable legal framework: legal principles and legal provisions, if necessary, applicable provisions of international law, the relevant court case-law. A recommendation issued by the Ombudsperson may not only need to take into account the relevant legal aspects, but also have regard to non-legal concepts and realities relevant within the context of the complaint such as, for example, ethical, social or economic considerations. Reasoning of the conclusions (assessment of the evidences and interpretation of legal provisions) and arriving at a conclusion (settlement of the complaint). It should evaluate all the relevant evidence and clearly state, which facts are established and which not, provide the summary of arguments, put forward by the complainant and the relevant institution. It should provide for interpretation of relevant legal provisions taking into account the usual principles of legal interpretation (*lex specialis v. lex generalis*; *lex posterior derogat legi*

*priori, etc.*). When it comes to analysis performed by the Ombudsperson, it should apply the above mentioned legal framework to particular set of the established factual circumstances and come to particular conclusions. Some difficulties may be related as well to the fact that the Law on Ombudsperson does not require for the complainant to indicate the legal basis of his requests, but imposes the Ombudsperson the obligation to resolve the matter in strict accordance with the rules of substantive law and to protect the human rights. This means that in some cases the Ombudsperson has to find legal justification for the request of the complainant, and sometimes there could be some contradictions with the statements of the complaint. There could be as well problems with the resoning part, that the legal grounds to be applied for the situation are nominating only at the end of the reasoning part. Often, the legal norms are indicated only at the end of the reasoning part, without connection with the facts established during the investigation of the complaint. At the same time, the legal norms are often prescribed abstractly without the direct connection to the complaint. The reasoning part must begin with an indication of the applicable law or legal grounds.

With regard to **the conclusions part,** the Ombudsperson sometimes makes significant mistakes. In particular, with a large number of complaints or countercomplaints, the Ombudsperson sometimes forgets to resolve all requests. The legal technique developed a formula that seems to protect the Ombudsperson from errors in this regard and to include in the resolution part closing statements like "in the rest to refuse to complaint". But this does not serve, because requests of the complaint can be logically connected or even flow from the previose one. The formulation of the conclusions depends on the nature of the complaint, but in any case, it should be avoided to use of ambiguous expressions ("to acknowledge the obligation", etc.) instead of using imperative prescriptions ("acknowledge the violation of rights", "oblige to do", etc.).

*Thus, it is recommended to establish the uniform model structure for individual recommendations, adopted by the Commissioner:*

- I. Introductory part - Background to an investigation/complaint:
  - I.1. Information provided by the complainant;
  - I.2. Arguments provided by the relevant institution;
- II. Descriptive part – Fact finding and analysis of the situation;
- III.Reasoning part - Analysis of facts and application of law:
  - III.1Assessment of facts
  - III.2 Interpretation of law
- IV. Conclusions of the Ombudsperson;
- V. Recommendations of the Ombudsperson (if any).

## II. Fair proceeding and fact finding

### 1. Introduction

*The general aim of this part of recommendations – to provide for general guidelines as regards procedural aspects stemming from the principle of good administration, that should be taken into account when it comes to adoption of recommendations of Ombudsperson, related to the treatment*

*of individual complaints, as well as fact finding and collection of evidence in the course of preparation of these recommendations.*

The right to good administration evolved over time and certain core principles are accepted both by the member states of the Council of Europe (further – the CoE) and the European Union.

As regards the CoE, the most important piece of soft-law is the Recommendation on Good Administration on 20 June 2007[1], by which the Code of Good Administration (hereinafter – the Code of Good Administration) was confirmed. Within the EU, in general, Article 41 of the Charter of Fundamental Rights[2] is of special relevance, whereas when it comes to activities of ombudsperson, the European Ombudsman presented the European Code of Good Administrative Behaviour (hereinafter – the European Code), first endorsed by the European Parliament in 2001[3].

The European Code helps individuals to understand their rights and by doing this it promotes an open, efficient and independent administration at the EU level. Besides, the European Ombudsperson makes it clear that it applies the principles of the European Code to its own activities. And, finally, it is applied by the European Ombudsman when examining whether maladministration has occured.

From the point of view of handling of individual complaints, the obligation to handle a case impartially, fairly and within a reasonable time by the Ombudsperson, the right of a person to be heard before a recommendation is adopted, the obligation of the Ombudsperson to give reasons to its decisions should be spelled out separately. Thus, further are provided some guidelines as regards these particular rights and obligations.

## 2. The obligation to have ones affairs handled impartially, fairly and within reasonable time

Safeguarding the impartiality in the course of decision-making process is one of the essential preconditions for legitimacy and acceptance of the adopted decisions by those, to whom they are addressed. Because of that it's no surprise that the aspect of impartiality is highlighted in all documents of the CoE or the European Union dealing with the principle of good administration.

The principle of impartiality is reflected in Article 4 of the Code of Good Administration[4]. More detailed provisions are established in the European Code establishing both the public service

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[1] See the text of the Recommendation CM/Rec(2007)7 of the Committee of Ministers to Member States on Good Administration of 20 June 2007 at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805d5bb1

[2] Art. 41 of the Charter stipulates:
1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.
2. This right includes:
(a) The right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
(b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
(c) the obligation of the administration to give reasons for its decisions.
3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.
4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

[3] See the latest version of the Code, updated in 2015, at: https://www.ombudsman.europa.eu/en/resources/code.faces#/page/1

[4] „Public authorities shall act in accordance with the principle of impartiality.
2. They shall act objectively, having regard to relevant matters only.

principles which should guide civil servants[5] as well as Article 8 dedicated to independence and impartiality[6].

Further, although not directly applicable to activities of Ombusperson, Article 6 para 1 of the European Convention of Human Rights (furthermore – the ECHR) is of particular importance, since it establishes both, the imperatives of independence and impartiality *vis-à-vis* a tribunal. Although this provision is addressed to criminal and civil judicial proceedings, the content of the principle of impartiality is, taking into account the functions of the Ombudsperson, and the personnel of the institution, *mutatis mutandis*, applicable as well in administrative proceedings. Thus, although further references to the practice of the European Court of Human Rights (furthermore – the ECtHR) speak of judges, they should be egually applicable to activities of the Ombudsperson.

Broadly speaking, impartiality could be described as the absence of prejudice or bias and its existence or otherwise can be tested in various ways. According to the jurisprudence of the ECtHR, the concepts of independence and impartiality are closely linked[7].

**Criteria for assessing impartiality**. The existence of impartiality must be determined on the basis of the following[8]:

1. ***a subjective test***, where regard must be had to the *personal conviction* and *behaviour* of a particular judge, that is, whether the judge held any *personal prejudice or bias in a given case*; and

2. ***an objective test***, that is to say by ascertaining whether *the tribunal itself* and, among other aspects, *its composition*, offered sufficient guarantees to exclude *any legitimate doubt* in respect of its impartiality.

According to the jurisprudence of the ECtHR, there is no watertight division between subjective and objective impartiality since the conduct of a judge may not only prompt objectively held misgivings as to impartiality *from the point of view of the external observer* (objective test) but may also go to the issue of his or her personal conviction (subjective test).

Thus, in some cases where it may be difficult to procure evidence with which to rebut the presumption of the judge's subjective impartiality, the requirement of objective impartiality

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3. They shall not act in a biased manner.
4. They shall ensure that their public officials carry out their duties in an impartial manner, irrespective of their personal beliefs and interests."

[5] „2**. Integrity**. Civil servants should be guided by a sense of propriety and conduct themselves at all times in a manner that would bear the closest public scrutiny. This obligation is not fully discharged merely by acting within the law. Civil servants should not place themselves under any financial or other obligation that might influence them in the performance of their functions, including by the receipt of gifts. **They should promptly declare any private interests relating to their functions**. Civil servants should take steps to avoid conflicts of interest and the appearance of such conflicts. They should take swift action to resolve any conflict that arises. This obligation continues after leaving office.
3. **Objectivity**. Civil servants should be impartial, openminded, guided by evidence, and willing to hear different viewpoints. They should be ready to acknowledge and correct mistakes. In procedures involving comparative evaluations, civil servants should base recommendations and decisions only on merit and any other factors expressly prescribed by law. Civil servants should not discriminate or allow the fact that they like, or dislike, a particular person to influence their professional conduct."

[6] „1. The official shall be impartial and independent. The official shall abstain from any arbitrary action adversely affecting members of the public, as well as from any preferential treatment on any grounds whatsoever.
2. The conduct of the official shall never be guided by personal, family, or national interest or by political pressure. The official shall not take part in a decision in which he or she, or any close member of his or her family, has a financial interest."

[7] For more exhaustive presentation of jurisprudence of the ECtHR on the subject, see, for example: Guide on Article 6 of the European Convention on Human Rights, 30 April, 2017, European Court of Human Rights: http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf

[8] Judgement of 15 October 2009, *Micallef v. Malta* (appl. No. 17056/06, para 93).

provides a further important guarantee. The ECtHR emphasizes in its practice, that even appearances may be of a certain importance or, in other words, "justice must not only be done, it must also be seen to be done". What is at stake is the confidence which the courts in a democratic society must inspire in the public. Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. Interestingly enough, the principles established in the ECtHR case-law concerning the impartiality of a court apply to jurors just as they do to professional and lay judges, as well as other officials performing judicial functions, such as lay assessors and registrars or legal secretaries[9].

In applying the ***subjective test***, as a starting point of reference, the ECtHR has consistently held that "the personal impartiality of a judge must be presumed until there is proof to the contrary" The principle that a tribunal shall be presumed to be free of personal prejudice or partiality is long-established in the case-law[10]. As regards the type of proof required, the Court has, for example, sought to ascertain whether a judge has displayed hostility. The fact that a judge did not withdraw from dealing with a civil action on appeal following his earlier participation in another related set of civil proceedings did not constitute the required proof to rebut the presumption[11].

When it comes to ***objective test***, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his impartiality. It means determining whether, quite apart from the personal conduct of any of the members of that body, there are ascertainable facts which may raise doubts as to the impartiality of the body itself. This implies that, in deciding whether in a given situation there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the person concerned is important but not decisive[12]. What is decisive is whether this fear can be held to be objectively justified[13].

The objective test mostly concerns hierarchical or other links between the judge and other actors in the proceedings which objectively justify misgivings as to the impartiality of the tribunal, and thus fail to meet the Convention standard under the objective test[14]. Therefore, it must be decided in each individual case whether the relationship in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal[15]. In this respect even appearances may be of a certain importance, because what is at stake is the confidence which the courts in a democratic society must inspire in the public. Thus, any judge in respect of whom there is ***a legitimate reason*** to fear a lack of impartiality must withdraw. In order that the courts may inspire in the public the confidence which is indispensable, account must also be taken of questions of internal organisation. The existence of national procedures for ensuring impartiality, namely rules regulating the withdrawal of judges, is a relevant factor[16]. In addition to ensuring the absence of actual bias, these

[9] Judgement of 21 June 2011, *Bellizzi v. Malta* (appl. No. 46575/09, para 51).
[10] Judgement of 23 June 1981, *Le Compte, Van Leuven and De Meyere v. Belgium* (appl. No. 7238/75, para 58 and further); *Micallef v. Malta*, para 94.
[11] Judgement of 27 November 2012, *Golubović v. Croatia* (appl. No. 43947/10, para 52).
[12] Judgement of 17 June 2003, *Pescador Valero v. Spain* (appl. No. 62435/00, para 23).
[13] Judgement of 22 June 2004, *Pabla Ky v. Finland* (appl. No. 47221/99, para 30); *Micallef v. Malta*, para 96.
[14] Judgement of 15 July 2005, *Mežnarić v. Croatia* (appl. No. 71615/01, para 36).
[15] See *Micallef v. Malta*, paras 97 and 102.
[16] For example, *Micallef v. Malta*, paras 99 - 100.

rules are directed at removing any appearance of partiality and so serve to promote the confidence which the courts in a democratic society must inspire in the public[17].

When its comes to particular situations in which the question of a lack of judicial impartiality may arise, one may differentiate between two possible situations in which the question of a lack of judicial impartiality may arise.

The first is of functional nature and concerns, for instance, the exercise of different functions within the judicial process by the same person, or hierarchical or other links with another actor in the proceedings. This aspect is of less importance to the activities of the Ombudsperson, therefore, will be ommited in these Recommendations.

The second is of a personal character and derives from the conduct of the judges in a given case or the existence of links to a party to the case or a party's representative. According to jurisprudence of the ECtHR, the principle of impartiality will be obviously infringed where the judge has a personal interest in the case[18]. Professional or personal links between a judge and a party to a case, or the party's advocate, may also raise questions of impartiality[19]. Even indirect factors should be taken into account[20]. For example, the language used by a judge may be important and demonstrate that the judge lacks the detachment required by his or her function[21].

Thus, the above mentioned jurisprudence of the ECtHR could be used as a guidance when evaluating whether there is a need to withdraw from handling of a particular individual complaint. At the same time, this guidance may be used in the course of drafting of an individual recommendation, when deciding, were there any indications pointing to the breach of the principle of impartiality by public servant, against whos decision the complaint is introduced before the Ombudsperson.

Finally, in the context of the principle of impartiality, it should be noted that the declaration of one's private inerests is of special importance, since such declaration of interests ensures transparency and increases a trust in performance of relevant functions. Thus, it is recommended to ensure that the personnel of Ombuds institution properly declares their private interests.

As regards the imperative of good administration to handle one's affairs ***within a reasonable time***, it should be noted that in some European states this imperative is established at the constitutional level, whereas in others it is provided in statutes or derived from the case-law of national courts. As a rule the term "reasonable" is translated into specific time limits for public institutions. As regards institutions of public administration, it seems that 30 days is usually treated as an adequate general time limit for adoption of a decision in the course of administrative proceedings[22].

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[17] *Mežnarić v. Croatia*, para 27. See as well Judgement of 9 January 2013, *Oleksandr Volkov v. Ukraine* (appl. No. 21722/11).
[18] Judgement 20 May 1998, *Gautrin and Others v. France*, para 59.
[19] See, for example, *Pescador Valero v. Spain*, para 27; *Micallef v. Malta*, para 102.
[20] Judgement of 10 April 2003, *Pétur Thór Sigurðsson v. Iceland* (appl. No. 39731/98, para 45).
[21] Judgement of 27 October 2016, *Vardanyan and Nanushyan v. Armenia* (appl. No. 8001/07, para 82).
[22] See the overview of statutory provisions on the issue in the field of public administration at: Principles of Good Administration in the Member States of the European Union. Statskontoret, 2005:4, p. 31-34, see: http://www.statskontoret.se/globalassets/publikationer/2000-2005-english/200504.pdf.

According to Article 17 para 1 of the Law on the Ukrainian Parliament Commissioner for Human Rights, the Commissioner shall receive and consider appeals of citizens of Ukraine, foreigners, stateless persons or persons acting in their interests, in accordance with the Law of Ukraine On Appeals of Citizens. Article 20 of the Law on Appeals of Citizens provides that "applications are considered and resolved within a maximum of one month from the date of their receipt, and those that do not require additional study, - urgently, but not later than fifteen days from the date of their receipt. If it is not possible to resolve the issues raised in the appeal within a month, the head of the relevant body, enterprise, institution, organization or his deputy shall establish the necessary time for its consideration, which shall be communicated to the person who submitted the application. In this case, the general term for resolving issues raised in the application, cannot exceed forty-five days".

While the time-limit of one month seems to be adequate in the course of administrative proceedings, a question may be raised, whether such time limit is optimal in the course of investigation of alleged maladministration and provision of individual recommendations by the Commissioner. As the interviews with representatives of the Apparatus of the Commissioner revealed[23], these investigations could be very different in terms of complexity and difficulty. As regulations of activities of other Ombudsmen reveal, usually time-limits for delivery of individual recommendations are more extensive[24]. Still, until the appropriate amendments of the relevant Law are introduced. Therefore, the experts of the project recommended to consider the necessity to amend the Law on the Ukrainian Parliament Commissioner for Human Rights in order to establish longer time-limits (for example, 3 months with the possibility of extension in complex situations) for delivery of individual recommendations by the Commissioner[25].

Still, when it comes to handling of individual complaints and adoption of recommendations in this regard, it is recommended to observe the time-limits, established by the relevant legislation.

- Impartiality may be defined as the absence of prejudice or bias in a particular situation;
- Ensure, that private interests are declared in proper and timely manner;
- Check, are there any subjective or objective grounds for recusal as regards the handling of particular individual complaint;
- In case of existance of subjective or objective grounds of recusal – withdraw from handling of individual complaint;
- In the course of handling of individual complaint, check, if there were indications pointing to the breach of the principle of impartiality by a public servant, against whos decision or

[23] Information obtained during a meeting with Mr. Bogdan Kryklyvenko, Head of the Secretariat of the Apparatus of the Ukrainian Parliament Commissioner for Human Rights on 11.09.2017.

[24] For example, according to Art. 18 of the Republic of Lithuania Law on the Seimas Ombudsmen, a complaint must be investigated and the complainant must be given a response within 3 months of the day of the receipt of the complaint, except for the cases where the complexity of circumstances, abundance of information or continuity of actions being complained about necessitates prolongation of the complaint investigation. The complainant shall be notified of the Seimas Ombudsman's decision to extend the time-limit for the investigation of the complaint. Complaints shall be investigated within the shortest time possible.

[25] See Activity 2.2.1 Mission Report: Analysis and assessment of the efficiency of activities of the Ombudsperson on elimination of detected human rights violations, control procedures over fulfilment of Ombudsperson's recommendations, response to the Ombudsperson's acts of submission to the state and local self-government bodies, their officials, on elimination of detected human rights violations, p.35-36.

inaction the complaint is addressed.

- When dealing with individual complaints and adopting recommendations, stick to the time-limit, provided by law.

### 3. The obligation to hear a person before any individual adverse measure is taken

The obligation to hear a person before any individual adverse measure is taken is either established in statutory law or derived from the case-law of courts[26]. This obligation serves several purposes. As regards a person to whom a future individual measure will be addressed, it serves as part of his/her defense rights and gives a possibility to present his/her views, objections, evidence. Such right may be exercised either in written, or in oral form. As regards an institution, drafting a decision, it provides the opportunity to clarify all relevant facts and serves as a precondition for the adoption of a reasoned decision (see below). Besides, depending on the situation, a communication of the institution with the addressee of a decision provides for an opportunity to mediate a conflict in order to settle the problem without adopting a negative decision.

Although the right to be heard is usually treated as the right of an individual in the course of administrative proceedings, the practice of communication before adopting a definite recommendation in cases of alleged maladministration exists in case of some Ombudsperson in EU member states/Council of Europe member states.

For example, Article 3 para 6 of the Decision of the European Parliament On the Regulations and General Conditions Governing the Performance of the Ombudsman's Duties provides, that if the Ombudsman establishes maladministration, he/she shall inform the institution or body concerned, where appropriate making draft recommendations. The institution or body so informed shall send the Ombudsman a detailed opinion within three months[27]. Certain provisions exist concerning settling the issue without adoption of a recommendation in the course of the investigation, performed by the European Ombudsman[28]. A similar practice is followed by the Office of the Ombudsman of Ireland[29].

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[26] See the overview of statutory provisions on the issue in the field of public administration at: Principles of Good Administration in the Member States of the European Union. Statskontoret, 2005:4, p. 35-37. For its part, Art. 14 of the Code of Good Administration provides: if a public authority intends to take an individual decision that will directly and adversely affect the rights of private persons, and provided that an opportunity to express their views has not been given, such persons shall, unless this is manifestly unnecessary, have an opportunity to express their views within a reasonable time and in the manner provided for by national law, and if necessary with the assistance of a person of their choice.

[27] Adopted by the European Parliament on 9 March 1994 (OJ L 113, 4.5.1994, p. 15), see: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31994D0262, and amended by its decisions of 14 March 2002 (OJ L 92, 9.4.2002, p. 13) and 18 June 2008 (OJ L 189, 17.7.2008, p. 25), see: http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1508493588252&uri=CELEX:32002D0262.

[28] See Decision of the European Ombudsman adopting Implementing Provisions: 5.1. If the Ombudsman considers that a complaint can be resolved, the Ombudsman shall seek a solution with the institution concerned. 5.2. The institution concerned shall reply to the Ombudsman's proposal for a solution within a specified timeframe, which shall normally not exceed three months. The precise timeframe for providing a reply shall be reasonable, taking into account the complexity and urgency of the inquiry. If the Ombudsman considers that the inquiry is of public interest, the timeframe for responding shall be as short as is reasonably possible. If the institution concerned is not in a position to provide a reply to the Ombudsman within the set timeframe, it shall make a reasoned request for an extension.

[29] *See, for example, the Executive summary of the Ombudsman investigation into the illegal refusal of Mobility Allowance to people over 66 years of age, publish in April 2011: http://www.ombudsman.ie/en/Publications/Investigation-Reports/government-departments-other-public-bodies/Too-Old-to-be-Equal-/Executive-Summary.pdf.*

Establishing such practice by the Commissioner could increase the mediatory nature of its activities and could increase the wider acceptance of findings of the Commissioner, thus increasing the effectiveness of its activities.

The same aspect is relevant in the course of evaluation of individual complaint concerning particular individual administrative act: in order to evaluate, whether it was adopted in line with the principle of good administration, one has to check, whether before its adoption the person's right to be heard was respected.

- Provide drafts of individual recommendation to concerned institutions for comments before a final recommendation is adopted with the possibility given to the institution to comment on the draft within a reasonable time limit for response;
- When evaluating whether an individual administrative act, concerning which an individual complaint is lodged before the Ombudsperson, is in line with the principle of good administration, check, if the addressee's right to be heard before the adoption of the negative administrative decision was respected.

### 4. Fact finding and collecting of evidence

The legal regulation on the Parliament Commissioner for Human Rights provides for functions, which go beyond the standard functions associated with Ombuds institutions in the EU member states. The Commissioner carries out functions, related to data protection, protection of rights of the child, assurance of equality of the rights, public information presentment and other functions. The Commissioner has been entrusted with the function to fight against systemic human rights violations in a judicial manner. The lawful implementation of all these functions is not possible without the application of a judicial remedy when rights have been violated.

The current legal regulations on the Parliament Commissioner for Human Rights provide for several forms of response to human rights violations: "подання", "припис", "протокол" and others. When adopting such documents, the Commissioner, has, among the other things, to collect necessary evidence, to appreciate them and on the basis of collected evidence to adopt appropriate decisions. However, so far there are no specific requirements as to the form, content, and method of collecting data. In order to be able to use the data gathered in the course of legal/judicial proceedings, it would be necessary to establish requirements for the data collected by the Commissioner's Apparatus in accordance with the requirements for judicial evidence set out in Chapter 5 of the Civil Procedure Code (CPC) of Ukraine[30], since the acts adopted by the Commissioner or his/her authorized representatives must be based on law and facts, they must be substantiated both from the point of view of collected evidence and applicable legal provisions.

Therefore, it is important not only that such an act is adopted in accordance with the established procedure, within the limits of competence granted by legal acts, but also that it is based on a legal and factual analysis of the concrete situation. Such analysis is subject to the CPC of Ukraine, the essence of which is – the proper assessment of the evidence that has been collected by appropriate entities in an appropriate manner.

[30] See: http://www.wipo.int/wipolex/en/text.jsp?file_id=187649#LinkTarget_3251.

The purpose of collection of the evidence is to establish the truth in a particular case which is presented to the court or any other subject. It serves to establish the likelihood of a fact; more precisely, it must be established that it is more likely that something did indeed happen than it did not happen.

Only the relative truth is ascertained – the truth is what looks more probable. The court must not ascertain the absolute truth, but thoroughly examine the substantive circumstances of the case, based on the evidence available. The issue of the sufficiency of evidence is related to the question, whether the court is fully convinced of the fact that it is enough for it to be more faithful or unbelievable? The positive answer to the question, when the court's conviction is already sufficient to properly assess the evidence in the case, depends on the complexity of the dispute, the accuracy, clarity, amount of evidence, the degree of interest of the complainants in the outcome of the case, etc. The prevailing standard of proof may be very different in different types of proceedings (criminal, administrative, civil), but in general it's the recognition of such a court's conviction that there is no doubt to any person who understands intelligent and living circumstances that there is a presence or absence of a relevant circumstance.

In assessing evidence, it is important to set the relationship between evidence, certainty, admissibility and sufficiency. This should be done by the Commissioner. If the dispute is held in a court, the court of first instance decided that evidence in a specific case was sufficient to establish its convictions, and then a higher instance court in order to annul such a judgment would have to refute the analysis and assessment of the evidence provided by the court of lower instance. Therefore, submission of evidence in the procedure established by the CPC is possible in courts of appeal and cassation courts.

Besides, in essence, the same rules are *mutatis mutandis* applicable in situations, when the Ombuds person deals with complaints as regards the acts or inaction of the administrative authorities.

### 4.1. Subjects of evidence

The evidence in the courts of general jurisdiction involves a large number of different persons in the process of proceedings (court, parties, witnesses, experts, process participants, etc.), but subjects of evidence are only persons who have both the right and the duty to prove certain circumstances – parties and persons involved in the proceedings. In cases of administrative or criminal infractions, if the person commits a violation, the state institution has the duty to prove that the person actually committed the violation.

The court has the right to suggest parties to consider various issues, to refine their arguments, to provide additional evidence, to specify the burden of proof (in order that the parties from the beginning would understand what circumstances are being disputed and what needs to be proved), etc., it legally contributes to the promptness and concentration of the process. Own-initiative evidence is collected by the court only in exceptional cases.

It needs to be emphasized that there is no obligation of the court to collect the evidence, because the court cannot become a lawyer of one of the parties and collect evidence useful to it, despite of the fact that the party itself can provide such evidence. Therefore, even in defense of the

public interest, there is no reason to believe that all the necessary evidence will be collected by the court.

On the other hand, when it comes to administrative proceedings, at least in some European countries administrative courts tend to be more active when it comes to establishment of facts, relevant to particular cases. In administrative proceedings courts sometimes (for example, when it's needed to protect the public interest) may decide to investigate facts, which were not indicated by the parties. This is so, because administrative acts, adopted by public institutions, must always be based on relevant legal provisions. For example, the administrative court may decide, that the act was adopted in the breach of the essential procedural requirements and to annul it, although the parties have not submitted such arguments (for example, by adopting the act public institution exceeded its powers, failed to get approval of the state institution, approval of which was required by law, etc.). It does not mean the absolute obligation on the part of a court to rise and evaluate all sort of versions, if there are no clear violations of breaches of legal acts, but, in cases of obvious breaches it may do so. Thus, depending on particular situation, the court might decide to establish relevant facts by itself, or, on the other hand, decide, that the public authority failed to substantiate its administrative decision and thus breached the principle of good administration (the obligation to motivate its decision).

The Commissioner and his/her Apparatus may take part in the process as a plaintiff or as a defendant. As a plaintiff, when contesting human rights violations, and as a defendant, when the Commissioner's decisions are contested. Also, the Commissioner and his/her Apparatus may participate in the case as an institution, when providing a conclusion or specialist opinion as regards the dispute. In all cases, the Commissioner and his/her Apparatus involved in the proceedings have a procedural obligation to provide evidence to the court.

Each party must prove the circumstances which it refers to as the ground of their claims and objections, except as prescribed in Ukraine's CPC Article 61 Grounds for dismissal of proof. The parties are entitled to justify suitability of the concrete evidence to prove their claims or objections. Therefore, the institution of the Commissioner, when participating in the trial, has the duty to prove the merits of its claim or to respond to the demands made.

Basically, the same rules are *mutatis mutandis* applicable in situations, when the Ombuds person deals with complaints as regards the acts or inaction of the administrative authorities.

### 4.2. The matter of evidence

The matter of evidence includes a whole set of circumstances/facts relevant to the case (based on the requirement and rejection and other relevant circumstances of the case). Correct definition of the matter of evidence is of crucial importance, because only establishment of all relevant facts allows to decide, which legal provisions are applicable in particular case. It should be noted as well that the matter of evidence is dependent on legal regulation in particular context, since the legal regulation defines which circumstances are important for particular situation, and which are irrelevant. The facts forming the matter of evidence, may be classified the following way:

1. Legal facts of a substantive legal nature which give rise to, change or terminate the subjective rights and duties of the parties to the dispute;

2. Previous facts/proven facts, i.e. the facts indicated in the law or any other facts, on the basis of which the court concludes that there are significant circumstances (for example, the fact that the obligation was fulfilled);
3. Facts of procedural nature on the basis of which procedural rights of parties to the dispute are formed, changed or terminated.

Relevant, significant circumstances of the case, i.e. the determination of the matter of evidence are directly related to the adoption of a reasoned and fair decision in the dispute. As a rule, the matter of evidence is explicitly indicated in the court judgment, this aspect is essential, because only when the relevant facts are established one may correctly apply the relevant legal rules, applicable to particular dispute.

**4.3. Collection of evidence**

Although the evidence subjects are parties, in the cases provided by law, the evidence may also be collected by the court on its own initiative. As regards, for example, administrative proceedings, administrative courts tend to be more active in situations, related to protection of public interest, when protection of fundamental rights is at stake or when it's clear, that the weaker party to the proceedings has difficulties in realizing its procedural rights. Further, there may be situations, when the possibilities of certain groups of persons to collect evidence are limited (for example, prisoners). The same could be said about the activities of the Ombuds institution. On the one hand, as a rule, the evidence will be provided by the complainant and the public institution, which actions or inactions are the subject of investigation of the Ombuds person, but this does not mean that it may not collect the evidence by itself. Once again, provisions of the CPC as regards the collection of evidence may be used as a source of inspiration.

The filing, collecting and submitting of facts and evidence begins with initiating a case to court. According to Ukraine's CPC para 1 of Article 131 Submission of evidence "[t]he parties shall submit their evidence or notify the court about it before or during the preliminary court session on the case. The evidence shall be submitted within the period fixed by the court, respectively the time required for submission of evidence". Para 2 of the same Article stipulates: "The evidence submitted with violation of the requirements established in part one of this article shall not be accepted if the party would not prove that the evidence were not submitted in time for valid reasons."

The concept of evidence is set out in Article 57 of the Ukraine's CPC: "1. The evidence is any actual data on the ground of which the court determines the presence or absence of circumstances that establish the denial and claims of the parties, and other circumstances relevant to solving the case. 2. This data are defined on the basis of the explanations of the parties, third parties, their representatives examined as witnesses, testimony of witnesses, physical evidence, including sound and video recordings, statements of experts."

Evidence must be collected strictly in accordance with the legal regulations. The Court shall not take into account the evidence obtained with violation of the procedure established by law. Thus, before deciding, whether to rely on particular piece of evidence, one must evaluate its admissibility, e. i., whether it was collected in accordance with laws.

Ukraine's CPC Article 51 defines the persons who are not entitled to examination as witnesses:

"1. The following persons are not entitled to examination as witnesses:

1) incapable physical persons, and persons who are registered in or undergo medical treatment at residential psychiatric facility and are not able to perceive circumstances that are relevant to the case correctly or to testify because of their physical or mental defects;

2) Persons obliged by law to keep in secret information that had been entrusted to them in connection with their official or professional status – examination of such information;

3) The clergy – about the information they obtained during the confession of believers;

4) Judges, people's assessors and jurors - about the circumstances of discussion of the issues that arose during the approval of decision or sentence in a courtroom.

2. The persons who have diplomatic immunity cannot be examined as witnesses without their consent, and representatives of diplomatic missions – without the consent of a diplomatic representative."

Therefore, these persons cannot be questioned as witnesses during the investigation.

In certain cases, where physical persons are involved, they have a right to refuse to testify. This principle would be applicable to the Commissioner too. Article 52 of the CPC stipulates the following: "1. A physical person has the right to refuse to give evidences concerning himself, family members or close relatives (spouse, father, mother, stepfather, stepmother, son, daughter, stepson, stepdaughter, brother, sister, grandfather, grandmother, grandson, granddaughter, adopter or adopted, guardian or trustee, the person under the guardianship or trusteeship, family member or close relative of these persons). 2. A person who refuses to testify shall notify the reasons for refusal. Such persons may not be required to provide explanations."

Article 65 of the CPC of Ukraine defines material evidence: "2. The material evidence is also magnetic, electronic and other media that contain audio-video information about the circumstances that are relevant to the case". Therefore, it may be reasonable to use video or audio recordings, which are stored on electronic devices, in conducting an analysis of the circumstances. This may be particularly significant in the context of a legal dispute over the right to personal data protection or the right to access to public information.

Article 64 of the CPC of Ukraine specifies written evidence: "1. Any documents, acts, reports, official or personal correspondence or extracts from them, which contain information about the circumstances relevant to the case [are] considered to be written evidence. 2. The written evidence is usually submitted in the original. Therefore, the collection of evidence should aim to obtain original documents or duly certified copies of them."

The main requirement for such evidence submission is to receive them without violating the law (Article 59 (1) CPC) and the fact that the evidence must be relevant to solving the case (Article 57 (1) CPC) at hand. Such evidence shall not violate the privacy of the person. This person's right to private life is not absolute, but the recorded private life of a person can be shown or announced only in accordance with the law (Article 186 CPC).

When collecting evidence it must be avoided to gather and submit evidence to the court that is not related to the case, since the court shall not take into consideration the evidence that is not

related to the matter of evidence. Thus, when deciding to collect or accept the evidence, one may take into account the relation of the information to the subject matter of the dispute. For example, if there is a request to hear a particular person as a witness, one must clearly indicate, what kind of information, relevant to the case, such person could provide.

Article 61 of the CPC of Ukraine establishes circumstances that do not require to be proved: "2. The circumstances the court acknowledged to be in the public domain do not require to be proved. 3. The circumstances defined by court decision in civil, commercial or administrative case that has come into legal force, shall not be proved when considering other cases involving the same person or persons relevant to whom these circumstances were defined. 4. The sentence in a criminal case that came into force of law or court decree in the case of administrative violation are of mandatory enactment by the court that is considering the case of civil legal consequences of actions of the person who was invoked a sentence, or a court decree on issues whether these actions occurred, and whether they were committed by this person." It is therefore advisable to assess and rely on such circumstances in a trial in the first place.

In the judicial process, it is necessary to make effective use of the possibilities established by the CPC which allows the necessary evidence to be collected and protected when necessary. Article 132 of the CPC of Ukraine refers to court order on collecting evidence: "1. The court where a case is reviewed, shall instruct the relevant court to carry out specific proceedings if it is necessary to collect evidence outside its territorial jurisdiction", Article 133 of the CPC refers to securing evidence: "1. If the persons involved in the case consider that the submission of required evidence is impossible, or they have difficulty in submitting the evidence, they are entitled to file the statement on securing of these evidence", Article 137 of the CPC refers to vindication of evidence: – "1. The court upon the petition of the parties and others involved in the case shall vindicate such evidence that arise the complexity in obtaining of the persons involved in the case", Article 139 of the CPC deals with the storage of physical evidence: "2. The physical evidence that could not be delivered to the court shall be kept at the place of their location according to the court decision; they should be detailed and sealed and, if necessary – photographed", Article 140 of the CPC refers to reviewing evidence at their location place: "1. Physical and written evidence that cannot be delivered to the court, shall be examined at their location place".

- The purpose of collection of evidence – to establish the relative truth - what is more probable in particular situation;
- The evidence could be defined as any actual data on the ground of which the institution determines the presence or absence of circumstances that establish the denial and claims of the parties, and other circumstances relevant to dealing with particular investigation;
- The subjects of evidence are parties and persons involved in the proceedings; besides, institution handling the dispute may be subject of evidence as well;
- The matter of evidence is a set of circumstances/facts relevant to the case. This set is basically predetermined by legal regulation applicable to particular situation.
- Check the linkage of the evidence with the matter of evidence, their admissibility and sufficiency in the course of particular investigation.

## III. Reasoning of the recommendations

### 1. Introduction

The recommendations must in principle be reasoned. The quality of a recommendation essentially depends on the quality of its reasoning. Proper reasoning is an imperative the necessity of which should not be traded in the interest of speedy proceedings and decisions.

The obligation to state reasons in writing for adopted decisions is at the core of the principle of good administration and is generally accepted among the EU Member States[31]. The obligation ensures the observance of the principle of legality, requires to perform due diligence both in collecting all necessary data, facts that are relevant in order to adopt a decision as well as to substantiate it by relevant legal framework[32]. Basically, the requirement to state reasons imposes the obligation to provide the factual and legal basis as well as considerations made that led to the adoption of a particular decision. Arguments and the reasoning are describing the logic that lead to the adoption of the particular decision and recommendation.

The statement of reasons makes it easier for the applicant to understand and accept the decision. Firstly, it obliges the Ombudsperson to respond to the submission of the applicant, to identify the legal provisions the decision is based on and to point out legal and other provisions justifying the decision; secondly, it enables society to understand the functioning of the Ombudsperson. The reasons must allow not only the direct addressees but also a wider target audience to follow the chain of reasoning which resulted in the Ombudsperson's recommendation.

The reasoning must reflect the Ombudsperson's compliance with the principle of good administration (namely the respect for the right to a fair trial). Especially when recommendations of the Ombudsperson address public authorities with the capacity to restrict individual freedoms (e.g. arrest warrants), or when recommendations affect the rights of individuals or any assets, an appropriate statement of reasons is required.

The statement of reasons must respond to all issues raised by the complainant no matter whether they are contained in one or more than one submission raising issues pertaining to one and the same violator of rights. This is an essential safeguard, because it allows the complainant to ensure that his/her submissions have been carefully examined and therefore that the Ombudsperson has taken all issues taken into account.

The statement of reasons should not necessarily be long, as a proper balance must be found between conciseness and the proper understanding of the recommendation.

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[31] See the overview at: Principles of Good Administration in the Member States of the European Union. Statskontoret, 2005:4, p. 44-48.

[32] For example, Art. 8 paras 1 and 2 of the Law on the Public Administration of the Republic of Lithuania provide: 1. An individual administrative act must be based on objective data (facts) and the norms of legal acts, and the sanctions applied (withdrawal of a licence or authorisation, temporary prohibition to engage in particular activities or to provide services, fine, etc.) must be reasoned.
2. An individual administrative act must contain clearly formulated established or granted rights and duties, and specify the appeal procedure.
In the jurisprudence of the Supreme Administrative Court of Lithuania the obligation to state reasons is treated as the essential procedural requirement, the failure to observe it may lead to the annulment of an administrative decision solely on this ground.

In terms of content, the recommendation of the Ombudsperson includes an examination of the factual and legal issues, which rests with all evidence (documents) and at the heart of the complainant and the public authority disputed. When examining factual issues, the Ombudsperson may have to address objections to the evidence, especially in terms of its admissibility.

Examining the legal issues entails applying the rules of national and international (European) law and "soft law". The reasoning should refer to relevant provisions of the Constitution or relevant national and international (European) law. Where appropriate, reference to national or international (European) case-law, including references to good practice of Ombudspersons of other countries, as well as to legal literature, should be made.

## 2. Examination of factual issues (assessment of the evidence)

Evidence assessment shall be defined as a cognitive process resulting in the identification of truth. It is the essential part of the process of proof collection interrelated with its other elements. Evidence is the data collected in legally defined ways. Only data confirming or denying a single circumstance affecting the truthful outcome of the decision may be referred to as evidence.

The European Court of Human Rights has emphasized the importance of evidence assessment to the judicial process multiple times by pointing out to the provisions of para 1 of article 6 of the European Convention on Human Rights and Fundamental Freedoms as obligations to the national courts to carry out thorough assessment of presented explanations and arguments[33].

The essence of evidence assessment shall be disclosed in accordance with the general provisions of evidence assessment. Principle of free assessment of evidence is based on the absence of formal quality or quantity criteria applicable to an officer executing the investigation. Evidence assessment is of informal character. The collected proof has no predefined value. Therefore, no evidence shall be treated as superior to other and so on.

**Evidence assessment shall be based on comprehensive and objective analysis of all circumstances.** It means that all circumstances shall be taken into consideration no matter whether they support or contradict the position of the applicant / plaintiff. Each piece of evidence shall be analysed individually and in relation to other evidence. The conclusions of the case shall be based on the entirety of the evidence. The assessment of the entirety of the evidence shall be followed by drawing all possible conclusions based on facts forming the essence of the subject matter of the case.

The officer conducting the investigation must assess the evidence in accordance to his or her inner belief, applicable law and legal consciousness.

The results of the evidence assessment shall be presented in a document form provided by the applicable legal acts.

**Evidence assessment consists of determination of its tangibility, eligibility, credibility and sufficiency.**

[33] *Hirvisaari v. Finland.* < http://www3.eurolii.org/eu/cases/ECHR/2001/559.html >.

The collected and analyzed evidence shall confirm or deny the circumstances affecting the outcome of the case under consideration. The relation between the contents of the evidence and subject matter of the case is referred to as the tangibility of the evidence.

The eligibility of the evidence defines its form rather than contents. For example, in certain cases, individual agreements, facts of disability or mental health issues, permissions have certain predefined formal expression such as written and notarized contracts, written and signed certificates, expert and doctoral commission conclusions and so on. The eligibility of evidence may also require strict methodology and process of information and data acquisition.

**Credibility and sufficiency of the evidence**. During the assessment whether the collected evidence is sufficient for the settlement of the case, the officer has to ensure that collected data will enable him to make conclusions, prove the absence or existence of certain facts, and do not contradict the drawn conclusions. Besides, evidence assessment regulations foreseen in legal documentation, in his attempt to come to unbiased conclusions, the officer has to apply the principles of logic.

Evidence assessment is based on the rule that the existence of certain factual circumstances may be stated upon the absence of material doubts on their existence. The officer may form the conclusion regarding the existence of certain circumstances when the entirety of collected data allows the presumption of the existence of the fact.

**Generally known facts.** Certain facts are generally accepted and may not be reasonably denied (such as laws of Physics). Generally, such facts do not require additional proof or evidence. The explanation of such facts shall resemble the generally known information.

**Inner credibility of evidence**. Inner credibility is comprised of such phenomena as completeness, concreteness and consistency of data. How complete the information should be and how much information is sufficient in particular situation? Usually, the more information is collected, the more comprehensive picture of the situation is formed.

The requirement of concreteness is met by presenting very personal individual circumstances, details on how the event was experienced and perceived. Usually, the consistency means that the data presented does not have discrepancies, contradictions or inadequate versions. If personal explanations contradict other evidence, additional explanations shall be required.

Other evidence consists of statements of related individuals and witnesses, documents issued by relevant institutions, expert opinions, etc.

**Formulation of conclusions on evidence credibility should take into consideration the following circumstances:**

The course of events is considered logical if it looks credible and may happen to a rational person.

Conclusions on doubtful credibility of facts should be based on reasonable arguments and objectively grounded decisions. The investigating officer shall present clearly formulated reasoning of the decision on insufficient credibility of the evidence.

**Assessment of documentation.** The assessment of collected documentation shall take into consideration the fact of its existence, its contents, form, character and issuer.

The documentation should be assessed in regard to the following criteria:

Criterion of relevance defines whether the document has links to concrete fact.

It is important to take into consideration the following aspects: whether the information in the document is consistent, whether it does not contradict oral explanations of a person, whether it is precise, whether the document directly refers to one of material facts of a case.

The form of a document is important from the point of view its authenticity. It may hold expert opinion or comparison with control material.

The character of a document defines whether an original or a copy is presented, whether there are visible changes to it. Usually, in the course of document assessment, original documents are more valuable.

In certain cases, it is important to identify the author of a document. Upon demand, the investigating officer should determine the professional qualification, objectivity and relevant experience of the author.

The assessment of the documentation should be carried out in the context of other evidence used to determine and to prove a certain material fact, as well as within other aspects of credibility assessment. The document should be assessed on equal grounds with other evidence. Documents should not be treated as useless without explanation what objective evidence (with referral to a source of information on its credibility and other related evidence) allowed to draw such a conclusion.

Evidence on health or mental state are very concrete data presented by qualified professionals. The investigating officer is not expected to make conclusions regarding health state or present opinion on prescribed treatment. At the same time, a doctor is not expected to present opinion regarding evidence credibility or other legal issues. The reports on health and psychological issues should hold sufficient information on professional qualification of the medical expert and the methodology applied in order to be able to independently evaluate their credibility.

**Personal testimony.** Usually, personal testimony (of an applicant or witness) requires most complex assessment. It depends on a number of circumstances affecting the contents of the testimony such as age, health state, occupation, education and other personal traits as well as circumstances due to which he or she got hold of facts under investigation, time lapse between the facts and the personal testimony at court hearing. It should be investigated if personal testimony does not contradict other collected evidence (written evidence, expert opinions, generally accepted knowledge). It is challenging to assess the contradicting testimony of witnesses in cases where they are the only evidence at hand. Such contradictions shall be accurately eliminated by the analysis of facts under investigation.

In the process of assessment of data of personal testimony, it is important to assure that person discloses all facts and is asked to clarify contradicting data. It is necessary to pay attention to obvious discrepancies, information gaps, credibility and consistency issues. In addition, it should be noted whether a person has special needs, i.e is disabled, does not speak local language, has behavior issues and so on.

In the assessment of personal testimony, individual factors and circumstances should be taken into consideration, as they may cause data discrepancies. They may include personal memories,

traumatic experiences and post-traumatic disorders, other psychological and health issues, cultural background, religion and beliefs, sexual orientation, sexual identity and so on.

***Pay attention to individual factors and circumstances which may cause discrepancies in personal testimony***

Verbal testimony is the main evidence presented by a person. In the assessment of its credibility, investigating officer should determine whether a person is capable to memorize and present facts and whether the presented information has been properly acquired and comprehended. This process is influenced by a number of factors.

***Memory***

The officer should make realistic assumptions on the depth of long-term memories. The methodology used at the inquiry has obvious effect on the nature and volume of acquired information. For example, the questions with suggestions should be avoided at the inquiry.

***Psychological and health issues***

A person may experience difficulties due to his or her health issues, addictions, mental disorders, depression, abuse of drugs or alcohol.

***Age***

The age factor may play a crucial role in the assessment of testimony credibility. It is especially important in cases with minor children or when minor children are questioned as witnesses in cases on their parents. Testimony of children may be inconsistent, have misleading expressions or statements overheard from surrounding adults. The age factor is very important in the assessment of dates of claims as well as the time of event under investigation. In certain circumstances, age related discrepancies may appear in testimonies of senior people.

***Education***

The level of education may affect persons' ability to observe and memorize events, as well as to present adequate data or comprehend the questions. Short and vague answers, confusion in dates and distances may suggest persons' limited vocabulary, limited general knowledge, inability to comprehend and define abstract concepts as well as a failure to realise the need to present comprehensive information.

***Culture, religion, beliefs***

Cultural background, religion and beliefs of a person affect his or her identity definition, comprehension of social and power relations, as well as the ability to understand, explain and portray information. These factors may influence the aspects of dates, family definitions and so on. These factors are tightly connected to education, age, native language, sex, social status and tradition.

***Sexual orientation and sexual identity***

These issues are very sensitive and require specific knowledge, separate attention as in such cases personal testimony is related to very subtle and personal issues. It is essential to avoid any assumptions in regard to behaviour and appearance of persons with minor sexual orientation.

***Sex***

Sex has biological definition as well as involves a number of society expectations on the behaviour of men and women, on power balance between them, on their roles and adequate characteristics. Social roles of genders affect the self-comprehension as well as the behaviour, attitude towards social and political life, methods of persecution and damage which may differ in accordance to the sex of a victim and a perpetrator.

***Avoid presumptions and stereotypes***

People tend to define newly met persons according to stereotypical memorizing schemes.

***Adopted decision should take into consideration all evidence related to all aspects for each material fact***

The investigating officer should not make conclusions on the credibility of material facts based on separate evaluation of concrete evidence. Each document or verbal fact should be treated at its own level of importance. The assessment of the entirety of all evidence and related circumstances will determine their quality and relevance to the decision, therefore, it will affect the value assigned by the investigating officer. Once the investigation of all evidence related to all material facts and after determination of their value to the case is finished, the investigating officer should make a decision, which evidence support the facts and which are contradictive. After investigation of related evidence, the investigating officer will be able either accept or reject the material facts to the case.

***The material facts may be accepted if:***

Personal testimonies are sufficiently comprehensive;

Consistent;

Match the information presented by other persons and witnesses;

Match the concrete and generally accepted information;

Credible within the context of individual and general circumstances;

Supported by credible documents and other evidence (i.e. based on credibility and relevance of such documentation).

***Rejected facts:*** Presented facts may be rejected if within the general context of individual and general circumstances (bearing in mind possible negative outcome regarding credibility) personal testimony on a fact is insufficiently comprehensive, consistent and credible and /or contradicts other credible objective evidence.

***Doubtful circumstances***

The evidence which are essentially reliable (sustainable and credible) and do not contradict neither general, nor specific case-related information, however, are not supported by proper documentation and other evidence and has doubtful associations shall be subject to additional assessment before it is finally accepted or rejected.

- Only after having properly evaluated the evidence, the situation can be correctly understood and the most suitable decision can be made;

- Usually provided documents and explanations form the main part of the evidence. However, when evaluating the evidence, the entirety of it has to be taken into account. Any contradiction of evidence has to be logically explainable;
- Evaluation of evidence is based on the idea that lack of factual circumstances can be established only when there is no doubt that any such circumstances do not exist at all. At the same time, it can be established that a fact exist when from the entirety of evidence it can be said that it is more likely that the fact exists than that is does not;

## 3. Interpretation and application of legal rules

### 3.1 Interpretation of the law

The interpretation of the law helps to establish the true meaning of the law provisions. Therefore, the interpretation of the law is an integral part of the legal argumentation. The word "interpretation" is often understood as the definition of the meaning of a particular phenomenon, i.e. as a cognitive process. In general terms, the interpretation of the law is a process in which the law interpreter (and Ombudsperson as well) has to choose one of several possible solutions. It consists of the following stages:

• the choice of applicable law;
• determining whether the legal norm is in force;
• determining the necessity of interpretation, i.e. the applicable law is clear or not
• clarification of the true meaning of the applicable law;
• the choice of the meaning of the only meaning of the clarified legal norm, i.e. the meaning of the applicable law is consistent with the actual facts of the case (also known as legal assessment or legal classification);
• the adoption of a reasoned interpretative act.

The following methods of interpretation are distinguished: • linguistic; • systemic; • historical; • teleological; • precedentic; • the intention of the legislator; • comparative; • general principles of law; • analogue;• logical.

Each method of interpreting the law is subject to certain rules. For example, linguistic law interprets language-based linguistic rules; the logical interpretation method is based on the rules formulated by the logic, and so on. It is difficult to apply methods and rules for interpreting law because they are not usually enforced by law. Only a small number of national laws regulate several rules for the interpretation of law. For example, Article 4 of the Civil Code of the Republic of Latvia defines not only the main methods for interpreting the code, but also the order of their application: first of all, the norms of the code must be interpreted in terms of the direct meaning of the word used, then the systematic and lawful methods are applied[34]. According to the legal doctrine and the analysis of case law, it can be argued that more or less the ten different legal methods of interpretation are agreed upon.

Getting legitimate and fair decisions is guaranteed by having a good knowledge of these methods and rules and their correct application. Therefore, in practice, one must have a good

[34]Civil Code of the Republic of Latvia. Online access:<http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN018388.pdf>

knowledge of the methods of law interpretation, the rules of their application, and the ways of solving the competition between them. Although the linguistic method for interpreting law is universally recognized as one of the fundamental methods of interpreting law, the possibilities for its application are not unlimited. Each rule of law can be analyzed not only in linguistic but also in other aspects - systematic, the aim of a legal norm (the law) and the intention of the legislator, logical, historical, etc. The teleological method of interpretation of law is preferable in the absence of unequivocal evidence of the objectives of the law, for example, when they are explicitly worded in the preamble to the law or in separate articles of the law or can be clearly understood from the title and content of the law.

Applying the method for interpreting linguistic law, as in general strict compliance with the law of law, is justified; the importance of this method of interpretation can not be ruled out; applying the linguistic method of interpretation of law (together with others) ensures observance of formal legal requirements and a uniform understanding of the content of the relevant legal regulation.

On the other hand, the linguistic method for interpreting law is not unique or universal, its significance must not be exaggerated. In this context, it needs to be noted that, as the Lithuania's Constitutional Court has repeatedly stated in its acts (inter alia in the decrees of 25 May 2004 and in the resolutions of 13 December 2004), the Constitution can not be interpreted literally merely by applying the linguistic (verbal) method, that in interpreting the Constitution various methods of legal interpretation must be applied: systematic, general principles of law, logical, teleological, legislator's intentions, precedents, historical, comparative, etc. It was also established that the same applies to the interpretation of all lower-law legal acts (Constitutional Court ruling of 16 January 2006). In addition to this, the Lithuania's Constitutional Court has held that the norms and principles of the Constitution cannot be interpreted on the basis of acts adopted by the legislator and other legislative subjects, as it would deny the supremacy of the Constitution in the legal system (Constitutional Court rulings of 12 July 2001, 1 July 2004 , Decrees of 13 December 2004, 10 February 2000).

- Because the interpretation of the law is an integral part of the legal argumentation, the main methods of the law interpretation must be used in the usual praxis investigating the complaints by the Ombudsperson.
- The linguistic method for interpreting law is not unique or universal and each rule of law can be analyzed in other aspects - systematic, the aim of a legal norm (the law) and the intention of the legislator, logical, historical, etc.

### 3.2 Application of law and methods of reasoning (argumentation)

Based on the examination of the problem, first of all the main catagories of interpretative arguments (methods) should be applied and after that the reasoning (argumentation) provided and correct law rule applied.

The literature provides three possible concepts of legal argumentation[35]. First, legal reasoning can be understood as a means of clarifying the content of the applicable law in the context of a specific dispute. Secondly, legal reasoning can be understood as a means of clarifying the content of a law in the context of a particular legal dispute and justifying why the subject in this context resolves the dispute in one way and not otherwise. Thirdly, legal reasoning is understood as a means of justifying a decision. The legal doctrine provides a definition of legal reasoning as "proof of legal arguments, legal conclusions [...] the means to choose a solution and justify this choice". Legal reasoning is seen as a means of transforming the positive law into a clarified right in a case based on the complain. It is argued that legal argumentation provides knowledge of the law applicable and its meaning.

The interpretation of a law is dependent on legal reasoning in the same way that reasoning is also subject to law interpretation. However, this in no way precludes the identification of these two legal institutes. It must be clearly identified as distinct legal elements at least for the following reasons. First, the interpretation of the law and legal reasoning are elements of different legal categories. They can be described as elements of content and form, since the interpretation of the law provides arguments that argue, as a convincing process, that they are used to justify the claims. Secondly, the differences between the objects of legal interpretation and the objects of legal reasoning.

The law is the main and perhaps the only source of legal interpretation, while the scope of legal argumentation is much broader. They may include both law and empirical statements, and general practical arguments, etc. Meanwhile, legal reasoning is obligatory in all cases. Even when the rule is clear, the decision maker must state why it is clear to him, because clarity is not such a simple thing. Nevertheless, both legal practice and doctrine often find a different ways if argumentation (reasoning). *Pseudo-argumentation method*. This method means that there are no motives in the decision, or there are no pseudo-motors, i.e. obscure words that are not understood, meaningless phrases that can not be considered as sufficiently weighty arguments in the conclusions drawn. In principle, such a decision is not motivated. Simple *syllogism method*. This method means that the conclusions of the decision are formulated as a logical rule of law applied and the conclusion is drawn from the factual circumstances. *Facts Identification Method*. In applying this method, the decision details the circumstances of the case and the facts. However, there are no conclusive conclusions, no options for resolving the dispute are discussed, and sometimes even the applicable legal norm is not specified. This method is also inadequate because of the lack of reasonableness and motivation of the decision and in the absence of it, criticism of the decision cannot be made. *Dialogue method*. In discussing the solution to the dialogue method, the Ombudsman discusses all "for" and "against" arguments in the reasoned decision. This is done both in terms of the factual aspect and the applicable legal norms, legal principles and other sources of law. A conclusion is then made and indicates why it gives priority to one or the other arguments.

Thus, the argument is not only consistent solution and discusses in detail the factual and legal aspects of the case, but also to search a variety of arguments, the values of balance. The reasons for the decision in such cases take several or even several dozen pages. Of course, the scope of the reasons for a decision depends directly on the complexity of the case. If the case is not complicated, there is no possibility of alternative solutions, there are no major problems of law interpretation or

[35] Liutakas Marius. The Relationship between Legal Arguments and Legal Interpretation in the Context of a Judicial Context. Online access:<http://vddb.library.lt/fedora/get/LT-eLABa-0001:E.02~2007~D_20081203_204526-11033/DS.005.1.01.ETD>

fact-finding, and the legal issue addressed does not have a systemic significance, it simply is not necessary to write expanded motives. Conversely, when a question has a systemic significance when it comes to solving complex issues of law and fact, to rely on the right to principles and values, it is necessary to write expanded motives. A *complex syllogism or a scientific method*. This method of reasoning the decisions is similar to the method of dialogue - the decision also deals with all factual and legal circumstances of the case, all arguments for "for" and "against" are indicated. However, unlike the method of dialogue, the Ombudsman discusses and modifies all arguments in such a way that the decision he makes is the only logical consequence of those arguments. In addition, the Ombudsman, after discussing all the arguments and submitting their assessment, formulates a clear position, i.e. the decision made becomes a systematic recommendation and not only a solution to a single issue. Such reasoning is not only comprehensive and coherent, but also general, since the legal situation is clarified, a new rule is formulated, which can be relied upon by other institutions, for example: courts, when dealing with similar cases.

- The scope of the reasons for a decision depends directly on the complexity of the complain.
- If the complain is not complicated, there is no possibility of alternative solutions, there are no major problems of law interpretation or fact-finding, and the legal issue addressed does not have a systemic significance, it simply is not necessary to write expanded motives.
- Conversely, when a question has a systemic significance when it comes to solving complex issues of law and fact, to rely on the right to principles and values, it is necessary to write expanded motives.
- In discussing the solution to the dialogue method, the Ombudsman discusses all "for" and "against" arguments in the reasoned decision. This is done both in terms of the factual aspect and the applicable legal norms, legal principles and other sources of law. A conclusion must be made and indicate why it gives priority to one or the other arguments.

### 3.3 Contradictions of legal norms

Collisions of legal norms can be between:

a) different legislative acts (constitution and law, law and accompanying act, etc.);

b) uniform legal acts (laws and regulations accompanying the law);

(c) general and special rules;

d) the principles of law and law;

(e) the principles of law.

The conflict between the legal acts of different legal acts is resolved in accordance with the hierarchical rule declaring that the legal act of higher legal power has priority over the lex superior imperative legi inferiori.

The collision between acts of equal legal effect is governed by the rule lex posterior derogat legi priori (the preceding law takes precedence over the previous one). In deciding which legal act is later, and which previous one, the legal significance is not the date of adoption of the legal act, but the date of its publication.

However, in the event of a conflict between the general and special legal rules adopted at different times, a rule providing that the subsequent general rule does not eliminate the previous special rate applies unless otherwise stated in the law itself ((lex posterior generalis non derogat legi priori speciali). In the event of a conflict between legal principles and legal norms, priority is given to the principles of law. Faced with the two principles, "there is no principle inapplicable: the" stronger "(this situation) principle is consolidated more intensively than the weaker."

1. Hierarchy rule (lex superior derogat legi inferiori).
2. Chronological rule (lex posterior derogat legi priori).
3. Special rule of priority rule [lex specialis derogat legi generali].
4. The subsequent general rule does not eliminate the previous norm of the place [lex posterior generalis non derogat legi priori speciali].
5. In the event of a conflict of several precedents, priority is given to the latter.
6. Rule of the most authoritative opinion.

- The rules for the the solving of the contradictions between legal nors must be applied:
- hierarchy rule;
- chronological rule;
- special rule of priority rule;
- priority rule for the latest precedent;
- priority rule for the higher precedent.

### 3.4 Legislative Omission

Legal gaps arise for various reasons. The reason for one is the dynamics of life, the backlog of legislation from rapidly changing social relations. Another reason is imperfect law-making (legislation), inadequate modelling and prediction in the drafting of laws (legislation), ignorance of the actual situation, in other words, mistakes by the legislator (other legislators), which may arise from: a) mistakenly believes that no relationship needs to be regulated; (b) erroneously believes that the right can be specified in the application; c) mistakenly assigns the right to address the matter to the law-making authority; d) issue an unnecessary rate; e) decide the question not as it should; f) adopt radically contradictory and equal law rules[36].

Legal gaps are classified according to various criteria. Almost all authors distinguish primary and secondary legal loopholes. A primary legal gap is when, due to imperfect law-making, misunderstanding of the problem or other reasons, certain actual social relations in general are not a matter of legal regulation (also known as a clear legal gap). For example, in Lithuania, the law for a long time did not regulate the relations related to human tissue and organ donation and transplantation. The secondary legal gap is when certain social relations have been regulated by legal norms, but in the course of changing life there are new and unforeseen and not discussed situations in the law (or another legal act) (in this case it would be more accurate to speak not about

[36] Legislative Issues of Omission in Constitutional Jurisprudence. A National Report was prepared for the Fourteenth Congress of the Conference of European Constitutional Courts. Online access:<http://www.confeuconstco.org/reports/rep-xiv/report_Lithuania_lt.pdf>

the law, but about the law (or other law act) gap. For example, according to the legal regulation enshrined in the Civil Code, various copyright items were defended, but until 1994 there were no computer programs and databases as an independent object of copyright protection. Legal gaps are also categorized as accidental and non-accidental. An accidental legal gap occurs when the legislator does not regulate certain factual relationships because they do not know them at all. It is not a coincidence that the legislator, knowing the actual relationship, deliberately does not regulate them for political, economic or other reasons.

According to the reasons for the occurrence, legal gaps can be divided into: 1) gaps due to insufficient legal regulation; These are cases where the law (or other legal act) does not regulate a particular relationship; 2) gaps due to insufficient legal certainty; these are cases in which the law (or other legal act) regulates in a certain concrete case insufficiently clear. Among other things, the specific types of legal gaps are also referred to as axiological gaps, i.e. y cases when the law (or other legal act) regulates a certain issue in a morally unacceptable manner.

All legal gaps in practice cause one or another type of legal problem that needs to be addressed. Solving these problems, i.e. the ways in which gaps in law can be tackled can be diverse and must be applied by the Ombudsman as well.

- It is recommendet to solve the legal gaps with the help of the general principles of law and apply them for effective protection of human right by Ombudsperson