Annex 4.

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

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

Document	Mediation, conciliation and peace agreement as the instruments to restore violated rights
Short description of the document	This Document contains recommendations in regard to employment of new powers on the Commissioner for restoration of violated rights, namely mediation or conciliation (and peace agreement). It provides clear distinction between those mechanisms, key principles and recommendations how to introduce them into national legal order. It offers several possibilities based on best European practices. Furthermore it offers guidelines for employees of the Department how to act as a mediator or conciliator.
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Date	July 2018, Kyiv

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INTRODUCTION

Access to justice is a fundamental right that generally guarantees every person access to an independent and impartial process and the opportunity to receive a fair and just trial when that individual's rights are at stake. It is recognized by Article 6 of the European Convention on Human Rights and by Article 47 of the Charter of Fundamental Rights of the European Union, after the European Union's Court of Justice has recognized the right to valid remedies as a general principle of EU law.

However, access to justice does not always involve judicial recourse. Instead it can be seen as availability of accessible, affordable, timely and effective means of redress or remedies.

The 2008 EU Directive on Certain Aspects of Mediation in Civil and Commercial Matters is intended to facilitate access to dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a sound relationship between mediation and judicial proceedings. Recital 5 of the 2008 Directive states that:

"*The objective of securing better access to justice, as part of the policy of the European Union to establish an area of freedom, security and justice, should encompass access to judicial as well as extrajudicial dispute resolution methods."*

Furthermore, the European Commission suggests that ADRs offer a solution to the problem of access to justice faced by citizens in many countries due to three factors: the volume of disputes brought before courts is increasing, the proceedings are becoming more lengthy and the costs incurred by such proceedings are increasing.

The research into mediation and other methods of ADR used by ombudsmen institutions around Europe confirm that mediation and other methods of ADR are popular mechanisms to restore violated rights, not just in discrimination cases, but in all cases that might come before the ombudsman institution. Typically, the initiative to commence conciliation or mediation procedure,

after receiving an application, lies on the ombudsman and, as a rule, such initiative requires consent of both parties to the dispute and it is confidential by nature. The analysis of selected States further revealed that it is common for the ombudsman to, not just facilitate mediation or other ADR procedures, but to be actively involved by writing proposals. As to the nature of the agreement reached, the analysis of selected States show differences in approach; in some States the agreement reached is binding for the parties and contains a writ of execution and in other States the agreements is of non-binding nature and can be further contested.[1]

Further in this report, a clear distinction between mediation, conciliation and peace agreement is provided and as well as recommendations to what form of ADR is best suitable for the Ombudsman in Ukraine.

Furthermore, key principles underlying ADR are explained and directions on how to implement them in the national legal order are explained.

Finally, recommendations regarding the implementation of suggested ADR into the Ukrainian legal order are provided, especially taking into consideration the aims of this project, namely strengthening the institutional capacity of the apparatus of the Ukrainian Parliament Commissioner for human rights to protect human rights and freedoms.

ALTERNATIVE DISPUTE RESOLUTION – MEDIATION, CONCILIATION, PEACE AGREEMENT

About the mediation process

Mediation is an alternative dispute resolution (ADR) process where an independent third party, the mediator, assists the parties in dispute to identify the disputed issues, develop options, consider alternatives and try to reach an agreement.

Mediation is the procedure for settling disputes without litigation. Mediation is usually less costly, more expeditious and is increasingly being utilized in disputes that would otherwise result in litigation. One of the primary reasons parties may prefer mediation is that, unlike adversarial litigation, mediation is collaborative and allow the parties to understand each other's positions. Also it allows the parties to come up with more creative solutions that a court may not be legally allowed to impose.

However, **the mediator does not give their advice or opinion about the issues or have any role in deciding the outcome of the mediation.** A mediation session is usually a structured, formal process with face-to-face meetings with all the parties in dispute and one or more mediators. At mediation, you will generally be asked to talk directly to the others involved in the dispute and may also have separate sessions with the mediator. There will usually be breaks for each party to reflect on the discussion and get advice or support if they need it.

It is generally accepted that mediation is a purely interest-based dispute resolution process because during the mediation process the discussion expands beyond the parties‘ legal rights to look at the underlying interests of the parties, parties‘ emotions are also addressed and a creative solutions to the resolution of the dispute is sought. The focus of these processes is on clarifying the parties‘ real motivations or underlying interests in the dispute with the aim of reaching a mutually acceptable compromise which meets the real interests of both parties.

The mediator **will**:

- explain the mediation process and set the guidelines for how it will work
- ensure each person has a chance to talk, be heard and respond to the issues
- keep everyone focused on communicating and resolving the dispute
- ask questions to help people identify and communicate about what their goals and desires are and why they feel that way
- help clarify the issues and suggest ways of discussing the dispute
- help the people in dispute develop options and consider whether possible solutions are realistic

[1] See Activity 2.3.3. Mission Report

- try to assist the parties reach an agreement where appropriate and make sure everyone understands any agreement reached

The mediator **will not:**

- take sides, make decisions or suggest solutions - this is for the parties themselves to do
- tell the parties what they should agree to do – the parties decide what to do, including whether to stay at mediation
- decide who is right or wrong - the focus is on finding a solution acceptable to both parties
- give legal, financial or other expert advice
- provide counselling

About the conciliation process

Conciliation is an ADR process where an independent third party, the conciliator, helps people in a dispute to identify the disputed issues, develop options, consider alternatives and try to reach an agreement. As mediation, conciliation session is a structured, formal process with face-to-face meetings with all the parties in dispute and one or more conciliators.

However, unlike mediator, a conciliator **may have professional expertise in the subject matter** in dispute and will generally provide advice about the issues and options for resolution. **A conciliator will not make a judgment or decision about the dispute.**

In conciliation, greater focus is given to legal rights of the parties as opposed to their underlying interests although underlying interests of the parties should not be completely put aside during conciliation process.

The role of conciliators is similar to that of mediators except that the conciliator **may also**:

- have specialist knowledge and give you some legal information
- suggest or give the parties expert advice on the possible options for sorting out the issues in your dispute
- actively encourage the parties to reach an agreement.

The conciliator **will not:**

- take sides or make decisions
- tell you what decision to make, although they may make suggestions
- decide who is right or wrong
- provide counselling.

About peace agreement (friendly settlement)

A peace agreement (friendly settlement) is a contract based on a bargain between the parties governed not by procedural but substantive law.

A peace agreement can be the result of any dispute, with or without the help of a third party (mediator, conciliator etc.).

Usually it does not contain a writ of execution and thus the execution of the agreement can be achieved through a regular law suit based on a contractual obligation.

Appropriateness of ADR

Although ADR processes have an important role to play in providing greater access to justice, not every dispute is suitable for ADR.

For example, cases based on allegations of fraudulent conduct or illegal behavior are not conducive to mediation/conciliation because the polarized positions that characterize these disputes inhibit discussion and they place the mediator/conciliator in an impossible ethical position.

Furthermore, ADR may not be appropriate in some cases where power imbalances may exist which put the parties in unequal positions, allowing one party to place undue pressure on the other. The result may be that one party may impose their solution on the other side.

In some cases there may be uncertainties in the law which need to be clarified, either because there is a lot at stake in a particular case, or because its outcome could affect a number of other cases. In those situations ADR is not seen as an appropriate mean for dispute resolution. There are cases in which public interest dictates that a public hearing should take place and a public decision be made. Furthermore, any case in which a party is motivated to engage in an ADR process, but only for improper tactical reasons, is not one appropriate for resolution through ADR.

While it is difficult to set out general categories of cases which are appropriate for resolution through mediation or conciliation, it can be suggested that features of appropriate cases include:

where the parties wish to restore or maintain their relationship with the other party; claims where the monetary and non-monetary costs of litigation are disproportionately high in comparison to the issues in dispute; claims where one or both parties are seeking remedies which are not available through the traditional court system (such remedies may include: an apology, an explanation; flexibility in relation to financial repayments; changes in administrative procedures); and where the parties wish to resolve the dispute in a confidential and private manner.

As it has been already stated in previous Reports, some EU countries limit the Ombudspersons engagement only to discrimination cases (for eg. Estonia and Croatia), however most of the countries do not have such a limitation (eg. Slovenia, Latvia, Portugal).[2]

Furthermore, during the interviews conducted with members of Commissioners office, it has been emphasized that the power of the Ombudsperson to conduct mediation or conciliation should not be limited just to cases of discrimination, but rather it should be opened to all disputes and questions that come before the Ombudsman.[3]

Therefore, based on best European practices and opinion given by the staff of the Commissioners' office, it is recommended that the Ombudsperson in Ukraine should have a discretional power in deciding which case or complaint brought before him is suitable for ADR. It is recommended that the assessment should be made on the basis of a range of factors including how best to serve the specific interests of the parties and how best to ensure that justice is accessible, efficient, and effective for the parties involved.

What form of ADR is best suitable for the Commissioner for Human Rights in Ukraine

The fundamental difference between mediation and conciliation is the degree of involvement by the neutral and independent third party in the respective processes. While both processes incorporate the principle of self-determination and are non-determinative processes, conciliation allows the third party (the conciliator) to give advice on substantive matters through the issuing of formal recommendations and settlement proposals. In contrast, mediation requires that the third party (the mediator) address process issues only and facilitate the parties in reaching a mutually acceptable negotiated agreement. Another important distinction between mediation and conciliation is whether it is a rights based approach or interests based approach.

It is evident that there exists a fundamental procedural difference between the role of the conciliator and that of a mediator. The conciliator is an active intervener, and may have an advisory role on the content and the outcome of a dispute. A conciliator may make suggestions, give expert advice and use intervention techniques that not only actively influence the likely terms of an agreement, but also encourage all parties to settle. A mediator, on the other hand, generally assists the parties to communicate with each other so that they can identify, clarify and explore the issues in dispute before they consider their options to reach a mutually acceptable negotiated agreement.

Based on those clear differences between mediation and conciliation (and peace agreement) and the nature and role of the Commissioner, it is recommended to introduce a new role to the Commissioner as a conciliator, rather than a mediator. The Commissioner is a professional, with substantive legal knowledge and providing legal recommendations is already one of its main powers.

KEY PRINCIPLES OF MEDIATION/CONCILIATION

Mediation/conciliation is based on a mutual consent of the parties; it is based on voluntary participation, activity and self-determination of the parties of mediation/conciliation, independence and neutrality of the mediator/conciliator and confidentiality of the process itself.

It is recommended that the key principles the key principles underlying conciliation should be set out in statutory form.

[2] See Activity 2.3.3. Mission report

[3] See Minutes of the Meeting with Mr. Viktor Barvitskyi, Representative of the Commissioner for Human Rights on personal data protection and access to public information

In that sense, as it was already stated in previous Reports, the main principles of mediation have already been incorporated in the Draft Law on Mediation.[4] Main principles of mediation apply to conciliation as well.

Further in this report a more detailed analysis of the main principles together with recommendations for their application will be provided.

Voluntary nature of mediation/conciliation

Voluntary nature of mediation/conciliation has two perspectives; first, voluntary agreement for the commencement of conciliation process and second, the right of the parties to withdraw from the process at any time without explanation.

As to the first aspect of voluntary nature of mediation/conciliation, it should be noted that, according to EU Law, mediation/conciliation as an alternative dispute resolution, can be prescribed as an obligatory mean of dispute resolution before turning to court. Voluntary nature of mediation under various EU legislations lies not in the freedom of the parties to choose whether or not to use that process but in the fact that "the parties themselves are in charge of the process and may organize it as they wish and terminate it at any time".[5] Therefore, a distinction should be made between mandatory attendance at the first, information session of the mediation/conciliation process and voluntary participation ("staying") in the mediation/conciliation process.

The initiative to commence conciliation (or mediation) can be on the parties and/or on the Commissioner. Indeed, in most of the EU countries the initiative to commence conciliation is on the Ombudsperson upon receiving an application.[6]

Furthermore, the voluntary nature of mediation/conciliation applies to the mediator/conciliator as well. In that sense, the Commissioner acting as a mediator/conciliator can withdraw himself of the mediation/conciliation process. That might be the case when the Commissioner feels that it futile to proceed with mediation or conciliation since a satisfactory outcome of the process could not be reached in a reasonable period of time.

Therefore, it is recommended that participation in mediation and conciliation is voluntary, and any party involved in a mediation or conciliation may withdraw from the process at any time and without explanation. This principle should also be applied to the Commissioner when acting as a mediator or conciliator and should be based on its professional discretion. The right to initiate conciliation or mediation could be placed on the parties and the Commissioner itself.

Confidentiality

One of the crucial aspects for a successful mediation or conciliation is the confidentiality of the process itself. The parties should feel safe in expressing their arguments and they should know that discussions will not be disclosed to anyone so that they can speak openly.

In that sense, all statements, discussions, materials, arguments should be protected by confidentiality since without this protection, parties would not be prepared to make the kind of admissions or concessions that are required to reach a settlement.

However, it should be noted that the principle of confidentiality is a complex one and it is not easy define how strong the protection should be.

The mediator/conciliator can be banned, for example, from giving evidence in relation to: party invitations or willingness to participate in a mediation/conciliation; party's statements, admissions and settlement proposals made during a mediation/conciliation; mediator/conciliator proposals for settlement and any party's expression of willingness to accept it; or any document prepared solely for the purpose of a mediation/conciliation.

The Commissioner, when acting as a mediator/conciliator, should be afforded protection in the processes and parties should not be in a position to compel him to eventually testify in subsequent proceedings without its consent and the consent of the other party.

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[4] See Activity 2.3.1. Mission Report

[5] See for example *Menini and another v Banco Popolare Società Cooperativa* (Case C-75/16)(14 June 2017) and joined cases *of Rosalba Alassini and Others* (C-317/08 and C-320/08).

[6] See Activity 2.3.3. Mission Report

However, there might be situations where this privilege could not be invoked and there are a number of circumstances when a mediation or conciliation communication should not be protected, such as:

- where disclosure of the content of the agreement resulting from mediation or conciliation is necessary in order to implement or enforce that agreement;
- where disclosure is necessary to prevent physical or psychological injury or ill health to a person;
- where disclosure is required by law;
- where the mediation or conciliation communication is used to attempt to commit a crime, or to commit a crime, or to conceal a crime;
- where disclosure is necessary to prove or disprove a claim or complaint of professional misconduct or negligence filed against a mediator or conciliator.

It is recommended that some of the protections in relation to confidentiality should be enshrined in the statute.

In that sense, in the Comparative Version of the Draft Law of Ukraine "ON THE UKRAINIAN PARLIAMENT COMMISSIONER FOR HUMAN RIGHTS" (Activity 1.5.) the Law of the Commissioner was supplemented with a new Subparagraph 15, stating that "*the information gathered through mediation cannot be later on used in civil or administrative cases in courts without express permission of the interested parties, except in cases of public interest or where the publicity of the agreement reached through mediation is a necessary clause for its validity.*"

Furthermore, it is recommended that in the Code of Good Administrative Behavior a paragraph prescribing the confidentiality of mediation/conciliation be inserted.

For example, it could read as follows:

"The mediator/conciliator must keep confidential all information arising out of or in connection with the mediation/conciliation, including the fact that the mediation/conciliation is to take place or has taken place, unless compelled by law or grounds of public policy to disclose it. Any information disclosed in confidence to mediators/conciliators by one of the parties must not be disclosed to the other parties without permission, unless compelled by law."

Self-determination

The self-determination principle of mediation and conciliation process entails the parties to retain virtually all of the power over the resolution and outcome of their dispute.

The 2008 EC Directive on Mediation[7] explicitly provides for the principle of self-determination where it states that "*the mediation provided for in this Directive should be a voluntary process in the sense that the parties are themselves in charge of the process and may organize it as they wish and terminate it at any time*."

Similarly, the UNICITRAL Model Law on International Conciliation[8] addresses the principle of self determination and the sets out that: "*1. The parties are free to agree, by reference to a set of rules or otherwise, on the manner in which the conciliation is to be conducted. 2. Failing agreement on the manner in which the conciliation is to be conducted, the conciliator may conduct the conciliation proceedings in the circumstances of the case, any wishes that the parties may express and the need for a speedy settlement of the dispute."*

Party capacity to participate in a mediation or conciliation is an aspect of self-determination that extends to a continuum of potential obstacles to full participation by a broad range of persons. Mental illness, domestic violence, abuse, duress, fraud, and stress associated with conflict may impact a party's ability to use the process effectively and to make informed decisions which may have serious legal and personal consequences for them.

During the mediation or conciliation procedure there should be a presumption of parties' capacity to participate in the process. Of course, this does not apply to minors. If, at any point in the mediation

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[7] See Preambul par. 13 of the DIRECTIVE 2008/52/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 May 2008 on certain aspects of mediation in civil and commercial matters, at https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF last access on 6 July 2018.

[8] Art. 6 of the UNCITRAL Model Law on International Commercial Conciliation at http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf last access on 6 July 2018.

or conciliation process, a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating actively in the process, the mediator or conciliator should explore with the party the circumstances and potential accommodations, modifications, or adjustments that would enable the party's participation.
When acting as a mediator or conciliator, the Commissioner might be required to continually assess for capacity at every stage where a party must make a decision during the process (for e.g. does the party have the capacity to understand and sign the agreement to mediate or conciliate; does the party have the capacity to understand the process; does the party have the capacity to engage in negotiations with the other side).
Furthermore, the principle of informed consent is intrinsically linked with the issue of party capacity and the principle of self-determination.
The 2004 European Code of Conduct for Mediators[9] provides that "*the mediator must ensure that the parties to the mediation understand the characteristics of the mediation process and the role of the mediator and the parties in it. The mediator must in particular ensure that prior to commencement of the mediation the parties have understood and expressly agreed the terms and conditions of the mediation agreement including any applicable provisions relating to obligations of confidentiality on the mediator and on the parties*."
Therefore it is recommended that parties involved in a mediation or conciliation should be fully informed by the Commissioner: (i) about the process before they agree to participate in it; (ii) that their continued participation in the process is voluntary; and (iii) that they understand and consent to any agreed outcomes reached in the process.
Efficiency
The efficiency of mediation or conciliation is seen through costs and duration of proceedings.
It is recommended that the mediation or conciliation conducted by the Commissioner is free of charge or at minimum costs. If represented by a lawyer the financial cost of a mediation or conciliation should be borne by the parties, and should be on the basis of a written agreement to that effect entered into at the beginning of the mediation or conciliation.
Furthermore, the duration of a mediation or conciliation will vary depending on the nature of issues in dispute, the complexity of the dispute and number of issues that need to be settled upon. However, **both processes should be completed in the shortest time practicable, relative to the nature of the dispute.**
Depending on the subject matter, where a State or State organ is a party to the dispute it is convenient to use mediation or conciliation in resolving the case to decrease the burden of legal costs borne by the State.
Flexibility
The principle of flexibility has two aspects: procedural flexibility afforded by ADR processes and flexibility of outcomes that can be achieved through mediation and conciliation. The procedural flexibility of mediation or conciliation can be found in parties freedom to have recourse to ADRs, to decide which organization or person will be in charge of the proceedings, to decide on the procedure itself and finally, to decide on the outcome of the procedure.
Furthermore, the flexible outcomes reached through these processes represent the manifestation of individualized justice for parties.
Therefore, **mediation and conciliation should aim at preserving the flexibility of the process**.
Neutrality and impartiality
The principle of neutrality and impartiality should be included in any general statutory formulation that concerns mediation and conciliation. The principles of neutrality and impartiality are fundamental to the success of mediators and conciliators because they ensure that the principle of equality of arms will be respected during the process.
Neutrality, in the broadest sense of the term, includes issues such as a lack of interest in the outcome of the dispute, a lack of bias towards one of the parties, a lack of prior knowledge of the dispute and/or the parties, and the idea that the mediator or conciliator will be fair and even-handed.

[9] See Art.3.1. od the European Code of Conduct for Mediators at http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf last access on 6 July 2018

It is commonly thought that if a mediator or conciliator is unable to maintain a neutral stance, codes of ethics and standards of practice should require that he or she withdraw from the case.
In relation to the principle of impartiality, Article 3 (b) of the 2008 EC Directive on Mediation defines a 'mediator' as "*any third person who is asked to conduct a mediation in an effective, impartial and competent way*."
Therefore it is recommended that the principles of neutrality and impartiality be included in any general statutory formulation that concerns mediation and conciliation since those principles are fundamental to protecting the integrity and transparency of mediation or conciliation.
Furthermore, it is recommended to introduce a statutory duty on mediators and conciliators to disclose any conflict of interests. This would ensure that the principles of neutrality and impartiality are properly adhered to.

LEGAL FRAMEWORK

The power of the Commissioner to act as a mediator/conciliator
The role of the Commissioner as a mediator/conciliator is currently informal and is undertaken on the good will of the Commissioner's Office and on *ad hoc* basis.[10]
Although the representatives of the Commissioner's Office find mediation/conciliation as their natural role in dispute resolution[11], the Commissioner was never requested to take up a more formal role as a mediator/conciliator.[12] However the representatives of the Commissioner's Office find that strengthening the position of the Commissioner through mediation/conciliation would be desirable since their informal activities as mediator/conciliator had proved to be efficient by now.
Article 13. of the Law on the Ukrainian Parliament Commissioner for Human Rights (with relevant amendments and supplements as of 14 August 2014, hereinafter: LPCHR) grants a number of powers to the Commissioner, but does not mention the power to act as a mediator/conciliator.
In that sense, in the Comparative Version of the Draft Law of Ukraine "ON THE UKRAINIAN PARLIAMENT COMMISSIONER FOR HUMAN RIGHTS" (Activity 1.5.) the Law of the Commissioner was supplemented with a new Subparagraph 15, *stating that the Commissioner has the right 'to act as a mediator where it is seen possible when trying to improve relations amongst the citizen, the administration and public services and (or) trying to reach a friendly solution. The information gathered through mediation cannot be later on used in civil or administrative cases in courts without express permission of the interested parties, except in cases of public interest or where the publicity of the agreement reached through mediation is a necessary clause for its validity*."[13]
Based on previous findings in this report and clear distinctions between mediation and conciliation in respect to third parties powers and rights versus interests based approach of dispute resolution, it is recommended to amend the new Subparagraph 15 of Draft Law of Ukraine "ON THE UKRAINIAN PARLIAMENT COMMISSIONER FOR HUMAN RIGHTS" in a way to replace the word "mediator" and "mediation" with "conciliator" and "conciliation".

[10] See Analytical Report on the Existing Regulatory and Legal Framework Governing the Activities of the Ombudsperson (Activity 1.1.), Comparative Analysis of National and European Legislation Concerning the Activities of the Ombudsperson (Activity 1.2) and Recommendations Aimed at Bringing the National Regulatory and Legal Framework in Accordance with the Best EU Practices in the Human Rights Area (Activity 1.3).
[11] See Minutes of the Meeting with Ms. Olena Smirnova, Deputy of Head Apparatus of the Commissioner for Human Rights and Ms. Aksana Filipishyna, Representative of the Commissioner for observance of the right of the child, non-discrimination and gender equality.
[12] See Minutes of the Meeting with Ms. Iryna Kushnir, Representative of the Commissioner for drafting of constitutional appeals and observance of the right to access to public information and Ms. Iryina Bisyk, specialist of the Department of personal data protection.
[13] See Comparative Version of the Draft Law of Ukraine "ON THE UKRAINIAN PARLIAMENT COMMISSIONER FOR HUMAN RIGHTS" (Activity 1.5.)

Statutory definition of mediation/conciliation

Even if the Commissioner would be granted the power to act as a mediator/conciliator, there is at present no Law on Mediation/Conciliation in force in Ukraine and therefore, no legal framework exists for conducting a mediation/conciliation process.

Council of Europe Recommendations aim at introducing mediation in Member States and call for means to encourage its use.[14] Accordingly, steps have actually been taken in Ukraine to introduce a Law on Mediation: the Draft Law on Mediation number 2480 had been withdrawn from Parliamentary procedure and the Draft Law on Mediation number 3665 has passed the second reading in Parliament.

When introducing a general law on mediation/conciliation, a clear definition of the process should be provided and a distinction between mediation and conciliation should be visible from the definition.

Further in this report an emphasis shall be given to conciliation procedure as a more suitable mean of ADR for the position of the Commissioner.

The 2002 UNCITRAL Model Law on International Commercial Conciliation defines conciliation as: "

"… a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons (the conciliator) to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute." [15]

This broad definition of conciliation indicates that there is no distinction among procedural styles or approaches to mediation or conciliation. However, from Art. 6 par. 4 of the Model Law a distinction is clearly visible since it provides that "*the conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute.*"[16]

Therefore it essential that any statutory definition of conciliation clearly and consistently defines the role of the third party as one in which they actively assist the parties in finding a resolution to the dispute. **It is recommended that when provision for conciliation is made in legislative form, it should be defined as an advisory and confidential structured process in which an independent third party, called a conciliator, actively assists the parties in their attempt to reach, on a voluntary basis, a mutually acceptable agreement to resolve their dispute. Furthermore it is recommended that a conciliator may, at any stage in the conciliation process, make a proposal to the parties to resolve the dispute, but he or she may is not empowered to impose such a proposal on the parties.**

PROCEDURAL ASPECTS OF MEDIATION/CONCILIATION

The process of mediation/conciliation

In the Activity 2.3.3. - Mission Report on the 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) an analysis of some European countries on the mediation/conciliation process has been provided. Based on those findings further recommendations as to the procedure of mediation/conciliation lead by the Commissioner are provided.

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[14] See Council of Europe, Committee of Ministers Recommendation No. R (81) 7 on the Committee of Ministers to Member States on measures facilitating Access to Justice; Council of Europe, Committee of Ministers Recommendation Rec (2001) 0 on the Committee of Ministers to Member States on alternatives to litigation between administrative authorities and private parties; Council of Europe, Committee of Ministers Recommendation No. R (99) 19 on the Committee of Ministers to Member States concerning mediation in penal matters; Council of Europe, Committee of Ministers Recommendation Rec (2002) 10 on the Committee of Ministers to Member States on mediation in civil matters.

[15] See Art. 1 of the UNCITRAL Model Law on International Commercial Conciliation at http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf last access on 6 July 2018.

[16] See Art. 6 par. 4 of the UNCITRAL Model Law on International Commercial Conciliation at http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf last access on 6 July 2018.

As already stated in this Report, it is recommended that the Commissioner has the power to initiate conciliation procedure based on an application and based on its own discretional power. Consent of both parties is needed for conciliation procedure. The consent can be withdrawn during the procedure.

It is further suggested that the Commissioner, in the first phase, sends a copy of the application to the accused party and asks for consent on participating in conciliation procedure. In the same time, the request for conciliation should be sent to the applicant as well. If one or both of the parties do not give his or their consent, the Commissioner shall terminate the procedure. If the parties agree to mediation/conciliation, the Commissioner shall present his proposals for solution to the parties in a written form. The Commissioner shall end the procedure when the parties agree to the proposals.

If the dispute continues and the proposals are not agreed to, a session shall be held by the parties or their representatives. It is advisable to have the first session with both parties, but in a later phase the Commissioner can decide to have individual sessions. If the parties agree to the proposals of the Commissioner during the sessions, the Commissioner shall confirm the agreement and it shall be binding. In the agreement reached, the Commissioner can propose a deadline for the fulfilment of the agreement, but the parties could be free to suggest their deadline. If the agreement has not been fulfilled in the deadline set in the agreement, it may be submitted to a bailiff. If a conciliation procedure is ended upon the request of the parties or if the Commissioner confirms that no agreement has been reached, the applicant has a right to turn to court or an organ of pre-trial procedure for protection of his or her rights.

It is recommended for the procedure governing mediation/conciliation conducted by the Commissioner to be set out in statutory form.

Enforceability

The 2008 EC Directive on Mediation obliges Member States to set up a mechanism by which agreements resulting from mediation can be rendered enforceable if both parties so request. Article 6 of the 2008 Directive states that: *"Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability."*

As outlined in Article 6(2) of the 2008 Directive: „*The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made.*"

In conclusion, it is recommended that the settlement agreement negotiated at a mediation/conciliation conducted by the Commissioner to be enforceable by a court or bailiff and contains a writ of execution.

Limitation periods and res iudicata

Article 8. of the 2008 EC Directive on Mediation addresses the effect of mediation on limitation periods. It states that: "Member States shall ensure that parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process."

It has been argued that effective provision for mediation/conciliation requires certainty that the recourse to mediation/conciliation suspends the limitation periods for initiating procedures in the courts. If that were not the case, the parties' action could be extinguished by the time it becomes clear that the mediation/conciliation will not resolve the dispute.

Therefore**, it is recommended to have a statutory provision prescribing the stay of statutory limitation periods during the mediation/conciliation process. The limitation period should start to run again after the Commissioner confirms, in a written form, that no agreement has been reached.**

Finally, **as a natural result of the binding nature of the agreement reached through mediation/conciliation procedure before the Commissioner, the agreement between the parties on substantive issues should have the power of res iudicata.**

SUMMARY OF RECOMMENDATIONS

1. Based on best European practices and opinion given by the staff of the Commissioners' office, it is recommended that the Ombudsperson in Ukraine should have a discretional power in deciding which case or complaint brought before him is suitable for ADR. The assessment should be made on the basis of a range of factors including how best to serve the specific interests of the parties and how best to ensure that justice is accessible, efficient, and effective for the parties involved.
2. Based on clear differences between mediation and conciliation (and peace agreement) and the nature and role of the Commissioner, it is recommended to introduce a new role to the Commissioner as a conciliator, rather than a mediator. The Commissioner is a professional, with substantive legal knowledge and providing legal recommendations is already one of its main powers.
3. It is recommended that the key principles underlying mediation/conciliation should be set out in statutory form.
4. It is recommended that participation in mediation/conciliation is voluntary, and any party involved in a mediation/conciliation may withdraw from the process at any time and without explanation. This principle should also be applied to the Commissioner when acting as a mediator/conciliator and should be based on its professional discretion. The right to initiate conciliation/mediation could be placed on the parties and the Commissioner itself.
5. It is recommended that some of the protections in relation to confidentiality should be enshrined in the statute.
6. It is recommended that in the Code of Good Administrative Behavior a paragraph prescribing the confidentiality of mediation/conciliation be inserted.
7. It is recommended that parties involved in a mediation/conciliation should be fully informed by the Commissioner: (i) about the process before they agree to participate in it; (ii) that their continued participation in the process is voluntary; and (iii) that they understand and consent to any agreed outcomes reached in the process.
8. It is recommended that the mediation/conciliation conducted by the Commissioner is free of charge or at a minimum cost.
9. It is recommended that mediation/conciliation be completed in the shortest time practicable, relative to the nature of the dispute.
10. Depending on the subject matter, where a State or State organ is a party to the dispute it is recommended to use mediation/conciliation in resolving the case to decrease the burden of legal costs borne by the State.
11. It is recommended that mediation/conciliation aim at preserving the flexibility of the process.
12. It is recommended that the principles of neutrality and impartiality be included in any general statutory formulation that concerns mediation/conciliation since those principles are fundamental to protecting the integrity and transparency of mediation/conciliation.
13. It is recommended to introduce a statutory duty on mediators/conciliators to disclose any conflict of interests. This would ensure that the principles of neutrality and impartiality are properly adhered to.
14. Based on previous findings in this report and clear distinctions between mediation and conciliation in respect to third parties powers and rights versus interests based approach of dispute resolution, it is recommended to amend the new Subparagraph 15 of Draft Law of Ukraine "ON THE UKRAINIAN PARLIAMENT COMMISSIONER FOR HUMAN RIGHTS" in a way to replace the word "mediator" and "mediation" with "conciliator" and "conciliation".
15. It is recommended that when a provision for conciliation is made in legislative form, it should be defined as an advisory and confidential structured process in which an independent third party, called a conciliator, actively assists the parties in their attempt to reach, on a voluntary basis, a mutually acceptable agreement to resolve their dispute.

16. It is recommended that a conciliator may, at any stage in the conciliation process, make a proposal to the parties to resolve the dispute, but he or she is not empowered to impose such a proposal on the parties.
17. It is recommended for the procedure governing mediation/conciliation conducted by the Commissioner to be set out in statutory form.
18. It is recommended that the settlement agreement negotiated at a mediation/conciliation conducted by the Commissioner to be enforceable by a court or bailiff and contains a writ of execution.
19. It is recommended to have a statutory provision prescribing the stay of statutory limitation periods during the mediation/conciliation process. The limitation period should start to run again after the Commissioner confirms, in a written form, that no agreement has been reached.
20. It is recommended that, as a natural result of the binding nature of the agreement reached through mediation/conciliation procedure before the Commissioner, the agreement between the parties on substantive issues should have the power of res iudicata.

APPENDIX I

GOOD ADMINISTRATIVE BEHAVIOR IN REGARD TO MEDIATION/CONCILIATION

(example of clauses)

1. Competence

The Commissioner or a member of his office must be competent and knowledgeable in the process of mediation or conciliation. Relevant factors include proper training and continuous updating of their education and practice in mediation or conciliation skills.

2. Fees

Mediation/conciliation conducted by the Commissioner's Office is free of charge.

3. Independence

If there are any circumstances that may, or may be seen to, affect Commissioner's independence or indepence of a member of Commissioners office conducting mediation or conciliation or there are circumstances that give rise to a conflict of interests, those circumstances must be disclosed to the parties before acting or continuing to act. Such circumstances include, but are not limited to:

– any personal or business relationship with one or more of the parties;

– any financial or other interest, direct or indirect, in the outcome of the mediation or conciliation.

4. Impartiality

Mediators/conciliators must at all times act, and endeavor to be seen to act, with impartiality towards the parties and be committed to serve all parties equally with respect to the process of mediation/conciliation.

5. Procedure

The mediator/conciliator must ensure that the parties to the mediation/conciliation understand the characteristics of the mediation/conciliation process and the role of the mediator/conciliator and the parties in it. The mediator/conciliator must in particular ensure that prior to commencement of the mediation/conciliation the parties have understood and expressly agreed the terms and conditions of the mediation/conciliation agreement including any applicable provisions relating to obligations of confidentiality on the mediator/conciliator and on the parties. The mediator/conciliator must conduct the proceedings in an appropriate manner, taking into account the circumstances of the case, including possible imbalances of power and any wishes the parties may express, the rule of law and the need for a prompt settlement of the dispute. The mediator may hear the parties separately, if he deems it useful.

6. Fairness of the process

The mediator must ensure that all parties have adequate opportunities to be involved in the process. The mediator must inform the parties, and may terminate the mediation, if:

– a settlement is being reached that for the mediator appears unenforceable or illegal, having regard to the circumstances of the case and the competence of the mediator for making such an assessment, or

– the mediator considers that continuing the mediation is unlikely to result in a settlement.

7. The end of the process

The mediator must take all appropriate measures to ensure that any agreement is reached by all parties through knowing and informed consent, and that all parties understand the terms of the agreement. The parties may withdraw from the mediation at any time without giving any justification.

8. Confidentiality

The mediator must keep confidential all information arising out of or in connection with the mediation, including the fact that the mediation is to take place or has taken place, unless compelled by law or grounds of public policy to disclose it. Any information disclosed in confidence to mediators by one of the parties must not be disclosed to the other parties without permission, unless compelled by law.

APPENDIX II

GUIDELINES ON HOW TO CONDUCT MEDIATION/CONCILIATION

THE ROOM

1. The room should offer a safe and cosy atmosphere
2. No intrusion by third persons should be guaranteed
3. Mediation/conciliation session is an effective working round, not a psychotherapy
4. A grounded belief is that rounded table is most suitable for mediation/conciliation, but squared tables could work as well
5. The parties should not be place far away from each other (comfortable distance)– remember, mediation/conciliation is about reaching an agreement between the parties, trying to find their „common language“ in order to understand each others positions
6. Eye contact with the parties is important during the session

FORM OF COMMUNICATION

1. During mediation/conciliation session questions are means of communication
2. Questions should be used strategically, to structure and control conversation in accordance with the questioning technique
3. By questions, the parties should be motivated to talk, to tell and to generate ideas, while staying in the borders of the main subject of the dispute
4. Ask open questions – they invite and motivate the parties to tell more, to disclose and share their thoughts, feelings and intentions (opposite to closed questions), for example:
    - “Could you please tell me more about …?”
    - “What need to happen so you could gain back the trust to the other party?“
    - “Have you thought about possible solutions here?”
5. To clarify some facts ask closed questions, they examines, confirms, precise and closes the story told, for example:
    - “When you signed a contract?”
    - “What colour was that car?”
    - “Did you submit a claim to the court or no?”
6. It is important to learn as much information as possible, in the beginning of the process
7. In other phases – closed questions, to precise facts, to discipline the party in mediation who is too vague in the answers, evades answering or in too philosophical mood
8. Be careful with using „Why“ questions, they might sound aggressive - tone of voice, attitude, mood, body language, intonation are very important when asking questions
9. In the aspect of asking questions the work of mediator is similar to the work of journalist
10. A good question can help the respondent to think about themes, about which the person haven’t even thought before in the heat of the dispute
11. For the mediator this task is very heavy especially if the subject of the dispute is complicated and connected with a list of complicated facts, which the mediator must learn in a limited period of time
12. Stay with the subject, if the party speaks about subject A, don’t ask about B

13. Notice the subject - Notice and hear the moment, when the party repeats some word, phrase or subject 2, 3 or even 4 times, he/she is sending of strong signal that he/she wants to talk about this more and wants to be helped to be disclosed

"I noticed that today you mentioned twice [the subject X]. Would you like to tell me more about this and what [the subject X] means to you?"

The purpose of such question is:

1. to help to the party to realise the posed question; and
2. to discover the meaning of it; and
3. to help to the opponent to hear wishes, feelings and aims of the first party.

14. Be an active listener - The purpose of the active listening is to correctly perceive inner condition, needs, feelings and wishes of the partner in conversation, which mostly are expressed in a rather hidden and indirect way. These messages must be paraphrased to share with the partner of conversation his world of feelings. Active listening = letting the partner in conversation talk, showing gestures, facial expression and body language or mutual understanding, at the same time remembering and respecting the feelings of the opposing party in mediation
15. Reflection during the session is positive in a reasonable quantity and frequency. Take into account type of the dispute and personalities of the parties. If the tempo of mediation is slower the mediator can manage to reflect almost after every second sentence. For example:

Statement: "I want to have peace and silence when I am home."
Reflection: "So you say that peaceful atmosphere is important for you."

Statement: "I don't want to continue this agreement because I am constantly cheated."
Reflection: "Do I understand you right that you have lost trust into your business partner?"

The party positively approves that the mediator has understood correctly what was told by the party.

The party negatively responds by saying that that is not what was just told. In this case the mediator should try to clarify the contents of information by asking that party to explain a little more for better understanding of the story.

Perplexity showed by the both parties. This is typical to fast speed, precise, business-like mediation processes, when it is almost impossible for the mediator to find the right time for reflection of said information and posed emotions.

Not only to contents, but also to emotions

- "I see that you are very sad now."
- "You have a lot of anger about this matter."
- Naming emotions can help the parties to understand better the situation

JOINT AND SEPARATE SESSIONS

1. If the mediation/Conciliation process begins with a joint meeting, then the parties strengthen their confidence into neutrality of mediator and equal attitude towards both parties
2. The introductory session is especially important because the first impression about the mediator and his abilities to conduct the process of mediation is established.
3. When the mediation process is opened by separate sessions, there is much higher probability that both parties will disclose without delay to the mediator their wishes, aims and interests
4. The risk of separate sessions is connected with the fact that the opponent can feel and demonstrate distrust into the mediator and start questioning his neutrality, not knowing what issues the mediator has discussed with the opponent in the absence of the other party
5. Joint and separate sessions supplement to each other, not exclude. Application of just and only separate session could be useful when both or any of the parties would have proposed a clear precondition that it's participation in mediation is only realistic when both parties will never sit in the same room.

6. Individual sessions should be organized by the mediator in equal amount and length with both parties
7. When conducting separate sessions the mediator must make sure that he is able to maintain his impartiality and neutrality