



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)”
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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

Document	General Instrument: Framework for Adoption and Facilitation of Implementation of Systemic Recommendations
Short description of document	The General Instrument offers guidelines to adopt Special Reports in a planned and systemic way, using uniform format. It aims at outlining the process and main components needed to adopt Specials reports in an efficient manner. It aims at structuring means which help to facilitate the implementation of systemic recommendations as well.
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General Instrument: Framework for Adoption and Facilitation of Implementation of Systemic Recommendations

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1. Introduction

The Venice Commission emphasizes that prioritizing human rights issues may be justified in a young democracy. However, it should be made clear that the Ombudsperson is obliged to react not only to individual human rights violations, but also to general patterns of action which he or she considers endangering human rights¹. Many of the laws establishing the rights and duties of the Ombudspersons and defining guidelines for their activities include reporting to the elected assembly. This view is supported by the International Ombudsman Institute which specifies that the Ombudsperson should *inter alia* be able to bring special reports when bodies under supervision do not accept recommendations².

The Law of Ukraine “On the Ukrainian Parliament Commissioner for Human Rights”³ (hereinafter – the Law on the Commissioner) grants power to formulate remarks and assessments falling outside of the scope of individual case (so called “systemic recommendations”) (Articles 3, 13, 15, 18, 17, 19-1). By this means, the Parliament Commissioner for Human Rights (hereinafter – the Commissioner) flags violations of rights and freedoms when individual cases under examination indicate that legal provisions under investigation are applied in a manner resulting continuously or repeatedly in violations of rights and freedoms.

The Commissioner also reverts to these kind of interventions when analysis of complaints submitted to the Commissioner indicates that the source of violations of human rights and freedoms is the content of a legal regulation itself. In this respect, a special tool for action is a constitutional submission, foreseen in the Law on the Commissioner (Articles 13 para three and 15 para two), but the Commissioner possesses other tools as well, i.e. drawing up systemic recommendations in the Annual and Special reports.

The Law on the Commissioner (Article 18 para one) states that during the first quarter of every year the Ombudsperson presents to the Verkhovna Rada of Ukraine an Annual report on, *inter alia*, the shortcomings discovered in legislation on human and citizens’ rights and freedoms.

According to Article 18 para three of the same law, if necessary the Commissioner presents to the Verkhovna Rada of Ukraine Special reports on separate issues regarding the observance of human and citizens’ rights and freedoms in Ukraine. According to Article 19-1

¹ CDL(2011)079 – Compilation on the Ombudsman Institution (Strasbourg, 1 December 2011) §7.1, see: <http://www.venice.coe.int/webforms/documents/?pdf=CDL%282011%29079-e>.

² International Ombudsman Institute – IOI Best Practice Papers (Issue 1) „Developing and Reforming Ombudsman Institutions. An IOI Guide for Those Undertaking These Tasks“ – June 2017, p. 9, see: <http://www.theioi.org/publications/best-practice-papers>

³ See:

http://www1.ombudsman.gov.ua/en/index.php?option=com_content&view=category&layout=blog&id=38&Itemid=25

para eight of the Law on the Commissioner, every year the Commissioner prepares a Special report within the framework of the National Preventive Mechanism.

These reports are soft power instruments (although some scientists qualify them as some type of sanctions⁴), still extremely significant in ensuring the elimination of detected violations of human rights and freedoms and enhancing the authority of the Commissioner.

2. Criteria for Adoption of Systemic Recommendations

2.1 Compulsory Criterion

According to the Article 19-1 para eight of the Law on the Commissioner, every year the Commissioner prepares a Special report on the state of affairs in relation to prevention of torture and other cruel, inhuman or degrading treatment or punishment, i.e. within the framework of the National Preventive Mechanism, which should be published in the media and sent to the President of Ukraine, the Verkhovna Rada of Ukraine and the Cabinet of Ministers of Ukraine. The National Preventive Mechanism is created under the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁵.

2.2 Additional Criteria

Currently no other criteria are formally established to determine when Special reports and systemic recommendations respectively should be adopted. Systemic recommendations also shall be adopted in cases of (if unsuitable practice affects a group of people):

- 1) inappropriate secondary regulations – meaning that:
 - a) the content of the legislative act must be consistent with its purpose;
 - b) the content of the legislative act must be logical, brief and clear;
 - c) the text of the legislative act should not contain unnecessary, irregular or uncoordinated words, phrases, notes, and ambiguities;
 - d) the hierarchy of legal acts must be observed, i. e. sub-statutory legislation should establish the relevant provisions of the implementation procedure of the law rather than duplicating or interfering legislative regulation;
 - e) sub-statutory legislation should not regulate social relations which should be regulated exceptionally by laws, e. g. the human rights and freedoms.
- 2) legal gaps – meaning that respective social relations, procedure, etc. are not regulated at all or regulated only partially;

⁴ See, for example, G. Kucsko-Stadlmayer (ed.), *European Ombudsman – Institutions*, Springer – Verlag, Wien, 2008.

⁵ See: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx>.

- 3) inadequate application of legal regulation – meaning that:
 - a) fair legal regulation is applied, but it is interpreted incorrectly;
 - b) improper legal regulation is applied.

3. Monitoring of the Cases

The decision on issuing systemic recommendations in Annual or Special reports (except the ones given in Special reports adopted in the framework of the National Preventive Mechanism) is usually taken *ad hoc*. Generally the need to adopt systemic recommendations arises from repetitive homogenous violations of human rights and freedoms or an extraordinary case of violations. The decision on adopting systemic recommendations in an Annual or Special report is currently not the result of special monitoring, but rather an individual decision of a specialist of the Apparatus of the Commissioner based on everyday work experience.

In every respective department of the Apparatus of the Commissioner the monitoring of individual cases on a permanent basis in order to single out cases which require issuing systemic recommendations shall be carried out.

In every respective department of the Apparatus of the Commissioner the person in charge is to be appointed for this particular function to exercise.

3.1 Assessment of the Selected Cases

In order to ensure prompt and relevant reaction to systemic violations of human rights and freedoms and achieve timely and efficient elimination of these violations the assessment of the selected material shall be carried out on a quarterly basis.

The following parameters shall be applied when deciding on whether there is a necessity to initiate the adoption of systemic recommendations:

- 1) expediency – meaning that the elimination of violations of human rights and freedoms cannot be achieved by other – more moderate – means;
- 2) proportionality – meaning that potential systemic recommendations will keep the administrative and other burden to a minimum and not restrict the agencies more than required to achieve the elimination of violations of human rights and freedoms;
- 3) effectiveness – meaning that when adopting systemic recommendations, all the possible alternatives of reaction to violations of human rights and freedoms must be assessed and the most adequate one chosen, systemic recommendations must provide for

measures allowing for the most effective and economical elimination of violations of human rights and freedoms;

- 4) clarity – meaning that there is adequate grounds for the adoption of logical, consistent, concise, comprehensive, accurate, clear and unambiguous systemic recommendations;
- 5) systematicity – meaning that potential systemic recommendations shall be consistent with each other, may not contradict international law, legal acts, case-law and systemic recommendations already adopted.
- 1) Having established a preliminary need for appropriate reaction, the person in charge shall communicate his or her findings to the head of the respective department of the Apparatus of the Commissioner for discussion on further action.

4. Procedure for Adoption of Special Reports

Preparation of each document has several stages which include initiative, approval or dismissal of the initiative, planning, setting the deadline, doing the work and completion. Adoption of a Special report should go through some phases as well. The procedure of issuing a Special report shall include such steps:

- 1) the department of the Apparatus of the Commissioner responsible for the respective sphere of human rights and freedoms informs the Commissioner on the necessity to adopt a Special report on a specific issue;
- 2) the Commissioner validates the initiative and sets the terms for preparing the draft of the Special report;
- 3) the head of the respective department of the Apparatus distributes tasks among the specialists of the department and sets the terms for preparing the preliminary draft of the Special report, the head of the respective department is also responsible for coordinating the preparation of the preliminary draft of the Special report;
- 4) the preliminary draft of the Special report is discussed during a general meeting of the department, including the final phrasing of systemic recommendations (*inter alia* applying criteria of expediency, proportionality, effectiveness, clarity, and systematicity);
- 5) if needed, the preliminary draft is refined and the final draft of the Special report is presented to the Commissioner;
- 6) the Commissioner – after familiarizing him-/herself with the final draft of the Special report - summons a general meeting of the department in charge and other relevant

specialists of the Apparatus and leads an in-depth discussion on the overall content of the draft of the Special report presented (*inter alia* applying criteria of expediency, proportionality, effectiveness, clarity, and systematicity);

- 7) each systemic recommendation should be discussed separately; in case of a disagreement as to whether a specific systemic recommendation should be adopted, voting may be organized (in the event of a tie vote, the Commissioner shall have the casting vote);
- 8) if needed, the draft is refined and a Special report is adopted by the Commissioner.

4.1 Additional Requirements When Adopting a Special Report in the Framework of National Preventive Mechanism

The Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment does not set out any special requirements for reporting on the situation monitored in the defined field.

Special reports in the framework of National Preventive Mechanism shall be adopted after additional requirements for the assessment of the actual situation are fulfilled. The assessment of the actual situation shall be carried out after:

- 1) a thorough on-site examination of the situation of human rights and freedoms, analyzing risk factors, identifying problems and good practices, if needed; such checks usually lasting a few days and carrying out a large group of experts, might be notified in advance; such checks at places of imprisonment may be made every 5 years;
- 2) thematic inspections which shall be usually carried out upon receipt of a notice of possible violations; they focus on a specific area, such as health care the provision of or penalties, or specific individuals, such as persons sentenced to life imprisonment, etc., also shall take into account the amount of ex-checks, their specifics, etc.;
- 3) questionnaire checks which might be made in advance unannounced, shall be carried out by operatively small teams, completing checklists, providing short reports.

5. Structure of Special Reports

When adopting a Special report its structure is not less important. As such a document should be clear, concise enough, well structured and user friendly. Its targets groups must be kept in mind as well.

Uniform structure when adopting Special reports shall be:

- 1) introduction,
- 2) legal part,
- 3) descriptive part,
- 4) analytical part,
- 5) conclusions,
- 6) recommendations.

The descriptive and the analytical parts can be merged if this proves to be purposeful. In case of Special reports adopted in the framework of the National Preventive Mechanism an additional section explaining the implementation of this Mechanism in Ukraine shall be inserted into a Special report.

The introduction shall briefly explain the motives for adopting a Special report. The legal part is understood to present a list of laws, sub-statutory acts, case-law, etc. relevant to the object and area of investigation. The descriptive part shall characterize the factual situation and investigation conducted. The evaluation of detected undesirable trends, shortcomings of legal regulation in the light of international and national standards shall be the object of the analytical part. Corresponding conclusions should follow as a basis for adopting systemic recommendations.

In case of Special reports issued on an annual basis (in the framework of the National Preventive Mechanism) a separate section on monitoring shall be added. The key point of this section is to reveal, which of the systemic recommendations from the previous Special report were implemented and when.

When a Special report is issued because of inappropriate legal regulation or legal gaps, the prepared draft law or sub-statutory law shall be annex to it with the suggested legal reform.

6. Facilitation of Implementation of Systemic Recommendations

Efficiency of systemic recommendations resides in their implementation. A fairly frequent reaction to systemic recommendations published in Annual and Special reports is indifference. Such a situation is intolerable and undermines the essence of the human rights and freedoms as well as the authority of the Commissioner's, so the following formal and informal measures shall be applied.

6.1. Formal Measures

6.1.1. Constitutional Submissions

In cases of legal shortcomings which constitutionality examination falls under the competence of Constitutional Court a constitutional submission to the Constitutional Court shall be lodged. Such measure would effectively contribute to the elimination of systemic violations of human rights and freedoms.

If an addressee fails to implement systemic recommendations on shortcomings of such legal regulations, the respective department of the Apparatus of the Commissioner – after the expiry of a reasonable time limit⁶, which should be not longer than 6 months – proceeds to action to challenge the respective legal regulations before the Constitutional Court.

A project of such submission shall be prepared according standards provided in the Law of Ukraine on the Constitutional Court of Ukraine in two weeks period. In extremely complex cases the term shall be prolonged to one month accordingly.

6.1.2. Defence of Public Interest (Class Action)

In the context of systemic recommendations on inadequate application of laws, the Commissioner does not have the right to independently initiate proceedings before a court in cases of public interest (class action)). Currently, the right to apply to courts to defend public interest is vested in the prosecutor (mainly) and other institutions (Article 60 of the Code of Administrative Judicial Procedure and Article 45 of the Civil Procedure Code).

Taking into account the current legal framework, the respective department of the Apparatus of the Commissioner within the time frame of two weeks (in extremely complex cases the term shall be prolonged to one month accordingly) prepares all the necessary material for referral to respective institution, e. g. prosecutor's office or other, to defend public interest (class action).

The material shall be prepared in a manner of factually and legally reasoned address with annexes if needed and *mutatis mutandis* contain all the parts of an administrative act, *inter alia*, concluding one determining the systemic violation of the human rights and freedoms and background for public action of an appropriate institution.

Taking into account the expert knowledge of an Ombudsperson and the personnel of the Apparatus of the Commissioner in the field of human rights and freedoms his or her leadership in initiating class action would greatly contribute to faster and more efficient dispute resolution or even amicable settlement.

⁶ The Law on the Commissioner does not set any time limit for the implementation of systemic recommendations. Article 22 para one subpara 3 states that bodies of state power, bodies of local self-government, associations of citizens, enterprises, institutions, organizations, irrespective of their forms of ownership, officials and officers addressed to by the Commissioner shall cooperate with him or her and assist him or her, as appropriate, in considering proposals of the Commissioner to improve their activities in the area of protection of human and citizen's rights and freedoms and during **one month** from the date of receipt of such proposals providing the Commissioner with a reasoned written response. This provision and term set by it are relevant only in individual cases.

6.1.3. Administrative Liability

The Law on the Commissioner does not contain explicit regulation for the case that the legal obligation to take actions according to a recommendation, including systemic recommendation, of the Commissioner is not fulfilled. As the legal framework lacks clarity in individual and exceptional cases the Commissioner shall exercise his or her powers by invoking Article 188 (40) of the Code of Administrative Offences. The latter provision gives the office holder the power to draw up an administrative violation protocol for not fulfilling the requests of the Commissioner.

The respective department of the Apparatus of the Commissioner shall prepare a project of an administrative violation protocol within 2 weeks counting from the deadline for responding to the Commissioner or failed negotiations (conciliation).

6.2. Informal Measures

Informal methods of facilitating the implementation of systemic recommendations and accelerating the elimination of violations of human rights and freedoms are not less important and sometimes work even more efficiently. Before applying more severe means (e.g., applying administrative liability, starting proceedings before the Constitutional Court) informal methods should be employed as interim measures, which at times result in prompt and better implementation of systemic recommendations. In this respect an Ombudsperson's actions are more reminiscent of a quasi-mediator than of a punisher. Therefore, it is recommended to consider using informal methods which facilitate the implementation of systemic recommendations on a permanent basis before starting formal proceedings.

6.2.1. Top-Down Pressure

An official notification to a supervising agency or official shall be sent if the addressee of systemic recommendations fails to implement or ignores them after the expiry of a reasonable time limit: in cases of legislative shortcomings – not later than after 3 months, in other cases – after 2 months.

An official notification shall include explanatory section concerning next formal steps of the Commissioner, e. g. lodging a constitutional submission to the Constitutional Court or initiating class action, if systemic recommendations are still being ignored. As well as a notice that this particular document will be published on the official website of the Commissioner.

6.2.2. Negotiations (Conciliation)

Negotiations (conciliation) are usually used when systemic recommendations are given in acts of reaction (e.g., “подання”) and administrative liability for failure to implement systemic recommendations is pending.

Negotiations (conciliation) shall take a form of guidance of the addressees of systemic recommendations and include elements of the principle of good administration (e.g., the right to be heard before a negative decision is made):

- 1) the appointed expert negotiator (conciliator) (personnel member of the Apparatus of the Commissioner) shall make suggestions for settlement terms and give advice on the subject-matter;
- 2) the result of negotiations (conciliation) is not completely open, as the negotiator (conciliator) is not completely neutral, but on the side of a legally legitimate result that is in line with a systemic recommendation given by the Commissioner on the subject;
- 3) the negotiator (conciliation) shall bring involved parties to a shared table and give them the chance to discuss the matter together, bring their own version of the story to the attention of the others and listen to one another, while the negotiator (conciliator) shall make sure that the atmosphere remains respectful and focused and keep the process within the limits of the legally possible and desirable.

The following principles when negotiating shall be applied:

- 1) the voluntariness of involved parties – meaning that negotiations (conciliation) are possible only when all involved parties agreed to take part in this procedure;
- 2) confidentiality – meaning that all participants of negotiations (conciliation) are obliged to keep confidential all information which becomes known during the procedure;
- 3) reciprocal respect, tolerance and forbearance – meaning that all participants of negotiations (conciliation) should refrain from insulting acts and words;
- 4) cooperation – meaning that all participants of negotiations (conciliation) cooperate with each other;
- 5) qualified practice of the expert negotiator (conciliator) – meaning that the expert negotiator (conciliator) should be properly prepared, competent, act efficiently and in compliance with standards applicable for negotiators (conciliators).

7. Concluding Remarks

Guidelines presented in this instrument, often enough sufficiently specific, should facilitate and make more efficient procedure of Special reports adoption, their content more solid, targeted and user friendly. Clear criteria for adoption, permanent monitoring of the cases, parameters for their assessment, defined stages when preparing a draft Special report, structural parts, etc. are the key elements which were lacking in the preparation of Special reports practice. It is hoped that this general instrument proves helpful for not only adoption of Special reports, but also for facilitation of implementation of systemic recommendations as this area is still problematic enough.