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 2.1.4. Developing new or improving the existing methodologies and procedures to carry out a monitoring of the observance of human rights, ensuring activities of the Ombudsperson in preventing such violations

Document	Guidelines on Preparation of Expert Anti-discrimination Opinion (*Amicus Curiae*) for Courts
Short description of the document	The Guidelines on preparation of non-discrimination expert anti-discrimination opinion (amicus curiae) for court (hereinafter – the Guidelines) aim to remedy the lack of a methodological approach to the Commissioner's role as an independent intervener in the judicial proceedings, and to increase the impact of such interventions. For this purpose, Section 1 of the Guidelines provides an overview of the intervention principles, including the purpose of and the procedure for the intervention, and the recommendations for the internal knowledge management to raise the quality of the interventions. Section 2 of the Guidelines explains the key considerations behind the legal analysis of discrimination instances, whereas Section 3 provides practical pointers for drafting the amicus curia interventions, including the rules on clear legal writing and legal reasoning and suggests a detailed outline of the interventions.
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Date	December 2017, Kyiv

GUIDELINES ON PREPARATION OF EXPERT ANTI-DISCRIMINATION OPINION (AMICUS CURIAE) FOR COURTS

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LIST OF ABBREVIATIONS

Commissioner	Ukrainian Parliament Commissioner for Human Rights
CoE	Council of Europe
ECHR	European Convention for Human Rights
ECJ	European Court of Justice[1]
ECtHR	European Court of Human Rights
EUCJ	European Union Court of Justice
EERWM	Law of Ukraine on Ensuring Equal Rights of Women and Men
ECHR	European Convention on Human Rights
PPCDU	Law of Ukraine on Principles of Preventing and Combating Discrimination in Ukraine

INTRODUCTION

A friend of the court (*amicus curiae*) brief is an intervention by a third party that is not a party to the legal action. This third party seeks to use the court as a platform to emphasise a point of law that might not otherwise be considered. Usually the third party provides a written brief for the information of the court.[2] Compared to a lawsuit, the purpose of *amicus curia* intervention is not to argue a particular outcome of the case, but rather to present a neutral legal opinion elaborating in more detail on the applicability of national and international legal standards to the legal issues at hand.

In most European countries, interested third parties – equality bodies, non-governmental organisations or trade unions – can intervene in court proceedings to provide their opinions. Victims may also contact these organisations in order to seek assistance in the form of intervention on their behalf.[3]

So far, no comprehensive studies assessing the nature and impact of the third party interventions by the equality bodies were conducted. Experience of non-governmental organizations (NGOs) as third party interveners before international tribunals has been documented in more detail. Empirical studies show that NGOs often intervene "in cases concerning highly controversial and disputed issues".[4] The scholars have also concluded that in the proceedings before the ECtHR, interventions are made in cases "where there is no clear precedent and where the Court may be divided, [and] they fulfil a role of assisting the Court in new areas of law where the impact is particularly broad."[5] Perhaps the most straightforward effect such interventions can have is the court adopting the arguments of the brief, resulting in a significant change in the law. How common this is, depends on the particular tribunal and the frequency of NGO interventions, but there are number of well-documented cases where interventions have determined, or at least influenced, the main arguments of the Court.[6]

The research study conducted in the U.S., which analysed appellate courts perspective on amicus curie brief, concluded that amicus briefs play a strong role at the appellate level. Courts find amicus briefs sufficiently useful as "[t]hey provide information that the parties themselves may not present or discuss implications and effects on others not party to the suit." Amicus briefs may reduce the amount of research justices have to do. Some courts have even encouraged the filing of amicus briefs when special expertise as needed or they wanted to address larger issues than those presented by the parties.[7]

In Ukraine, Article 10 (1) of the PPCDU enables the Commissioner upon request of a court to issue legal opinions in discrimination cases. Such interventions are not widely practiced by the Commissioner or actively sought after by the courts, e.g. in 2016, the Commissioner received only one request for intervention from the court.[8] As suggested in the Mission Report, this speaks to the low awareness on the part of the judicial bodies. In addition, the Commissioner has no developed methodology for drafting amicus curia interventions and lacks guidance to this end.

The Guidelines on preparation of non-discrimination expert anti-discrimination opinion (amicus curiae) for court (hereinafter – the Guidelines) aim to remedy the lack of a methodological approach to the Commissioner's role as an independent

intervener in the judicial proceedings, and to increase the impact of such interventions. For this purpose, Section 1 of the Guidelines provides an overview of the intervention principles, including the purpose of and the procedure for the intervention, and the recommendations for the internal knowledge management to raise the quality of the interventions. Section 2 of the Guidelines explains the key considerations behind the legal analysis of discrimination instances, whereas Section 3 provides practical pointers for drafting the amicus curia interventions, including the rules on clear legal writing and legal reasoning and suggests a detailed outline of the interventions.

1. GENERAL PRINCIPLES OF *AMICUS CURIAE* INTERVENTION

1.1. The purpose of the intervention

The amicus brief originally developed under English common law as a way for parties without a direct interest in the proceedings to serve as impartial sources of information and legal expertise.[9] This occurred as early as the 1600s, with members of Parliament appearing as *amici* to advise courts on the intended meaning of a law.[10]

Over time, the amicus brief evolved to become a tool of persuasion, often for organizations that did not have a sufficient legal interest to act as parties to a case, but still had some stake in the outcome and impact.[11] The non-governmental organizations have made significant use of this tool to advocate for the particular group or issue they represent, and this practice has been widely adopted by the equality bodies, national human rights institutions, professional organizations, corporations, unions, and banks.[12]

The overall purpose of amicus curiae intervention is to bring expert analysis and evidence to the court from an independent perspective.[13] The UK Equality and Human Rights Commission has explained this purpose by breaking it down into more specific objectives:

- Seeking to develop the law in a particular way – perhaps contributing an alternative view
- Providing evidence that wouldn't otherwise be used, such as the Commission's own research or inquiry findings[14]
- Comparing the law in different countries[15]
- Highlighting the relevance of international law – including human rights treaties and the decisions of international courts.[16]

The UK Equality and Human Rights Commission, which has a long history and extensive experience in providing legal interventions before the national and international courts, sets up strategic objectives for the intervention in each case, for example:

- *"To establish whether the Council's housing list policy discriminates unlawfully on grounds of race and, if so, to secure a change to the policy so that it is no longer unlawful."*
- *"To ensure police officers who have faced discriminatory dismissal are able to seek an effective remedy before the courts."*

- *"To ensure that council's do not discriminate against disabled adults who lack capacity when providing housing; specifically, to ensure disabled adults who lack capacity are not prevented from making applications for emergency housing."*[17]

As it is evident from the examples above, the purpose of the independent intervention is not to support one or another party to the legal dispute, but rather to contribute to achieving a broader public interest by means of an independent expert analysis and evidence.

The reading of Article 10(1) of the PPCDU in conjunction with Article 45(1) of the Ukrainian Code of Civil Procedure of the Republic of Ukraine, suggests that the Commissioner's intervention in the cases of alleged discrimination also aims at providing independent legal opinion in order to assist the court and/or to satisfy a public interest at stake.

Following a good practice example of the UK Equality and Human Rights Commission, it is recommended to create a dedicated section on the Commissioner's website explaining its mandate with respect to amicus curiae interventions, clearly identifying the purpose of such interventions and providing information on the specific cases where the Commissioner has intervened. Providing strategic objectives for each intervention, as suggested above, is particularly useful exercise contributing to transparency of Commissioner's engagements and assisting in educating the general public about the protections offered by the equality law.

1.2. The procedure for the intervention

The procedure for submitting and amicus curiae intervention is not clearly defined under the Ukrainian law. The reading of Article 10(1) of the PPCDU in conjunction with Article 45(1) of the Ukrainian Code of Civil Procedure of the Republic of Ukraine, as well the information provided by the interviewed experts, suggests that the Commissioner's interventions are limited to the instances where the courts request them. [18]

Such request is mandatory for the Commissioner.[19] The interviewed experts pointed out that the parties to the case had initiated the majority of court requests received by the Commissioner, and that no criteria for judges to decide on when to submit such request existed.[20] There is no prescribed timeline for submitting the Commissioner's opinion, but the usual practice is to submit it within two weeks to one-month period.

Unlike the case with the intervention before the European Court of Human Rights, [21] the Commissioner cannot submit a request for leave to intervene in any pending discrimination case upon her own initiative.

1.3. Ensuring quality of the intervention

The research study conducted in the U.S., which analysed appellate courts perspective on amicus curie brief, found that although in general amicus briefs were found useful, about a quarter of them contained inaccurate or questionable information. Respondent judges encouraged the interveners to refine the writing the in general,[22] and, more

specifically, to improve the quality of legal, factual and social-science-related research.[23]

Drafting of the quality amicus brief usually begins with reading the case-file and undertaking the desk research. The research should look into the relevant legal sources such as laws, case-law, including cases handled by the Commissioner's office, and legal scholarly literature, and different empirical studies produced by the state institutions, academic, think tanks, academic institutions, non-governmental organizations and interest groups. It may also entail submitting information requests to state authorities or other relevant institutions. Although the sources may vary depending on the nature of the case, the legal issue at hand, and the overall purpose of the submission, they are required to be up-to-date, reliable and easily accessible.

To ensure accessibility of legal materials, it is recommended for the Commissioner to put in place a robust legal knowledge management system[24] and to cooperate with the external experts on expanding the pool of the legal resources.

In particular, to facilitate access to legal resources, the Commissioner may consider setting up a fully searchable legal database, which would include, *inter alia*:

- The latest versions of national laws and international treaties relevant for the Commissioner's work[25]
- Summaries of the cases handled by the Commissioner and briefs of the selected judgments in anti-discrimination cases decided by the ECtHR, CJEU and the UN Treaty Bodies. Landmark judgments from the national courts may also be included in the database[26]
- Scholarly articles and empirical studies on the anti-discrimination issues
- Examples of *amicus curia* interventions submitted by other European equality bodies or prominent human rights organizations.

For more information on the relevant sources, see **Annex I.**

To expand the pool of its legal resources, the Commissioner's office may want to explore the following options:

- To organize regular meetings with different stakeholders, including scholars, think tanks, and non-governmental organizations in order to receive information about the completed and on-going research, legal cases and other initiatives in the anti-discrimination law field;
- To incentivize research in the area of anti-discrimination law and policy by establishing grants, awards and/or organizing competitions and inviting junior scholars (e.g. doctoral or post-doctoral researchers) to examine under-researches issues;
- To establish cooperation with law faculties and law clinics, and/or to offer internship placement for law students providing possibilities to work on case monitoring projects, which would then feed into the established legal database;
- Where the case requires particular expertise, which lies with other institutions or organizations, to submit joint interventions (joint opinions). A joint

submission has the advantage of relying on more expertise, sharing the workload, and avoiding redundant submissions in the same case.[27]

2. LEGAL ANALYSIS OF DISCRIMINATION CLAIMS

The basic legal analysis of discrimination claims consists of the five main steps, which are summarized below. However, as each case is different, it may bring unique challenges that due to the space constraints are not discussed in these Guidelines. For instance, the following issues may arise: a legal standing for victims' representatives, a failure to provide reasonable accommodation as a form of discrimination, *prima facie* evidence of discrimination, a reversed burden of proof, and others. The drafter of intervention is hence advised to consultant **Annex I** of the Guidelines for the list of sources that might provide useful directions for interpreting these notions.

2.1. Material scope of the law

To be considered, the instance of alleged discrimination should fall within the material scope of the anti-discrimination law. According to Article 4 of the PPCDU, the law extends beyond the enumerated areas of "public relations", and hence provides a higher protection to the victims of discrimination compared to e.g. EU non discrimination law.[28]

2.2. Personal scope of the law

Similarly to the ECHR, the PPCDU contains an open-ended list of protected grounds which means that even if a certain ground, e.g. sexual orientation, is not listed under Article 1(1)(1) of the PPCDU, discrimination based on it is nevertheless prohibited, and a victim of an alleged violation has a right to seek legal remedy.

The courts have given a broad interpretation to the reach of the 'protected ground'. It can include 'discrimination by association', where the victim of the discrimination is not the person with the protected characteristic. For example, in the *Coleman* case, the CJEU found that a mother of a disabled child received unfavourable treatment at work, based on her son's disability.[29]

Notably, victims may feel that the discrimination they have suffered is due to a combination of protected grounds and cannot be covered by one of them alone. This may be the case, for instanc,e if a Muslim Roma woman feels that her lack of promotion in the workplace is due to the combined grounds of religion, ethnic origin and sex. Since PPCDU provides equal protection to all the grounds, when analyzing the personal scope of the law, a case for multiple (intersectional) discrimination should be considered.[30]

For both forms of discrimination listed below, anti-discrimination law requires a causal link between the less favourable treatment or a less favourable effect and the protected ground. In order to satisfy this requirement one merely has to ask the

following question: would the person have been treated less favourably or would the effect of a particular rule on him would be less favourable had they been of a different sex, of a different race, of a different age, or in any converse position under any one of the other protected grounds? If the answer is yes, then the less favourable treatment or effect is being caused by the ground in question.[31]

2.3. Form of discrimination

2.3.1. Direct discrimination

Under Article 1(1)(6) of the PPCDU, direct discrimination occurs when "the person and/or group of persons for their specific features are treated less favorably than another person and/or a group of persons in a similar situation". Direct discrimination requires to meet the following criteria:

Unfavourable treatment

At the heart of direct discrimination is the unfavourable difference of treatment that an individual is subject to. According to Article 1(1)(1) of the PPCDU, such treatment is when an individual "is deprived of recognition, realization or exercise of rights and freedoms in any form established in this law". Examples of such unfavourable treatment are a refusal of entry to a restaurant or shop, receiving a smaller pension or lower pay, being refused entry at a checkpoint and similar situations.

Comparator

Unfavourable treatment will be relevant to making a determination of discrimination where it is unfavourable by comparison to someone in a similar situation. A complaint about "low" pay is not a claim of discrimination unless it can be shown that the pay is lower than that of someone employed to perform a similar task by the same employer. Therefore a "comparator" is needed: that is, a person in materially similar circumstances, with the main difference between the two persons being the "protected ground".[32] The EU non-discrimination law allow for a comparator from the past or a hypothetical comparator,[33] whereas the PPCDU does not explicitly prohibit to make such a comparison.

The apparent exception for finding a suitable 'comparator', at least in the context of EU law within the scope of employment, is where the discrimination suffered is due to the individual being pregnant. Where the detriment suffered by an individual is due to her being pregnant then this will be classed as direct discrimination based on her sex, there being no need for a comparator.[34]

Note that in a case of a multiple (intersectional) discrimination, approach to comparison slightly differs, i.e. a situation of a Romani woman alleging discrimination on the basis of ethnic origin and sex (combined) should be compared to the one of a non-Romani man (diagonal comparison), not Romani man (vertical comparison) or non-Romani woman (horizontal comparison).[35]

2.3.2. Indirect discrimination

Under Article 1(1)(3) of the PPCDU, indirect discrimination occurs "as a result of the implementation or application of formally neutral regulations, evaluation criteria, rules, requirements or practices a person and/or groups of persons because of their specific features have less favorable conditions or the situation compared to other persons and/or groups of persons". Indirect discrimination requires to meet the following criteria:

A neutral rule, criterion or practice

The first identifiable requirement is an apparently neutral rule, criterion or practice. In other words, there must be some form of requirement that is applied to everybody, even to people in different situations. For example, a job advertisement requiring everyone to have a driving licence can seem neutral on its face, however as an effect, it may disadvantage a candidate with visual impairments. Such requirement may fall under the indirect discrimination, unless a justification for it exists (e.g. the employer shows that the job cannot be done without having to drive a car).[36]

Less favourable conditions or a situation

The second identifiable requirement is that the apparently neutral provision, criterion or practice places a "protected group" at a particular disadvantage. This is where indirect discrimination differs from direct discrimination in that it moves the focus away from differential treatment to look at differential effects. In a number of cases, ECtHR and the CJEU considered statistical evidence as a proof of a disproportionate disadvantage of a "protected group" with the most prominent example being *D.H. v. Czech Republic* case.[37]

Comparator

As direct discrimination, indirect discrimination also requires existence of a comparator (see part 2.3.1. of the Guidelines).

2.3.3. Incitement to discrimination

According to Article 1(1)(4) of the PPCDU, "incitement to discrimination are orders, instructions or appeals to discrimination in relation to persons and/or group of persons for their specific features".

This covers, for instance, night club proprietors who instruct doormen to deny customers access on grounds of race or home owners who instruct estate agents not to let or sell their property to ethnic minorities. It would also cover instances where employers instruct temping agencies not to refer employees over a certain age to them.[38]

Establishing incitement to discrimination requires, in the first place, to answer a question: if given instructions (appeals) were followed (executed), would that

behaviour amount to a discrimination and, if yes, what form of discrimination (direct or indirect)?

2.4. Justification for discrimination

Article 1(1)(1) PPCDU provides that a discriminatory situation may be justified "when such restriction has legitimate, objectively reasonable aim, which is achievable in appropriate and necessary way". In case of direct discrimination, "restriction" means unfavorable treatment (Article 1(1)(6) of the PPCDU), and in case of indirect discrimination - implementation of a seemingly neutral rules, requirement of practice (Article 1(1)(3) of the PPCDU).

Similar justification for discrimination, also referred to as "general defence", is available with regard to both direct and indirect discrimination under the ECHR, whereas the EU law allows it only with regard to indirect discrimination.[39]

According to the wording used in both the ECtHR and the EU directives, this is not, strictly speaking, a defence to discrimination as such but rather a justification of differential treatment, which will prevent a finding of discrimination being made. However, in substance, if not in form, the courts treat issues of justifications as defences to discrimination.[40]

In order to determine whether the differential treatment is justified, it must be determined that:

- there is no other means of achieving that aim that imposes less of an interference with the right to equal treatment. In other words, the disadvantage suffered must be the minimum possible level of harm needed to achieve the aim sought (appropriate, necessary means), and
- the aim to be achieved is important enough to justify this level of interference (legitimate, objectively reasonable aim)[41]

Notably, incitement to discrimination cannot be justified.

2.5. Harassment

According to Article 1(1)(7) of the PPCDU, harassment is "an unwanted to a person and/or group of persons behavior, the purpose or consequence of which is the humiliation of their human dignity because of specific features or creation for such person or group of persons of tense, hostile, abusive or humiliating atmosphere." Unlike EU law, PPCDU does not expressly recognize harassment as a form of discrimination.[42]

According to this definition, there is no need for a comparator to prove harassment. This essentially reflects the fact that harassment of itself is wrong because of the form it takes (verbal, non-verbal or physical abuse) and the potential effect it may have (violating human dignity).

In the Coleman case decided by the CJEU (discussed above), the court found that harassment included: labelling the mother 'lazy' when she asked for time off to care for her son, inappropriate and insulting comments made about both her and her child, and threats of dismissal when she occasionally arrived late for work due to her child's condition.[43]

3. DRAFING AMICUS CURIAE INTERVENTION

3.1. Clear legal writing rules

Writing in clear language can be difficult at the Commissioner's office, since much of the subject matter is complex and the language of anti-discrimination legislation is not in itself straightforward. Nevertheless, the Commissioner must try to set an example by using language that is as clear, simple and accessible as possible, accounting for the fact that discrimination cases also involve vulnerable individuals and hence all the legal documents must be comprehensible for them.[44]

For example, Justice Peter Jackson, an English Court of Appeal (until July 2017 – High Court) award-winning judge, has delivered several judgments in "plain language" using simple phrases and emoji so that the children involved in the proceeding would be able to read and comprehend it themselves.[45] Below is an excerpt from one of his judgments:

"Those lies were important, because they meant that no one could trust the mother either. So the children had to stay in foster care instead of being able to go home. The mother now says she is embarrassed to have been so stupid. Maybe she is. Mr A says that they shouldn't have had to keep apart and that they were only doing what was natural. It shows that he doesn't care how the children are feeling."[46]

Amicus curia interventions, as any other legal documents, should be drafted in a clear language in order to ensure that they effectively communicate the message to both the court and the parties involved in the dispute. Apart from following the rules and conventions for grammar and punctuation for the language of the intervention, a person assigned by the Commissioner to draft the document should also account for the clear legal writing rules provided below.

RECOMMENDATIONS FOR CLEAR LEGAL WRITING[47]

- Simplicity and clarity are key. Keep the style clear and simple and avoid unnecessary phrases, e.g. "allows making a conclusion" can be substituted by "to conclude".
- Take time to clearly determine what you are trying to emphasise and structure your sentence accordingly.
- Aim for an average sentence length of 15 to 20 words. Avoid trying to squeeze too much information into each sentence. If the sentence is getting long and overburdened with sub-clauses, divide it into two.
- Keep paragraphs short: one idea and analysis of it per paragraph.
- Vary your sentence structure; not every sentence needs to start with "taking into account" or "pursuant to Article X".

- Use the active voice wherever possible, e.g. "the employer dismissed the employee", not "the employee was dismissed by the employer"
- Use concrete, not abstract, language, e.g. "there was no discrimination based on age" instead of "there are no grounds for conclusions that there was discrimination based on sex".
- Use gender inclusive language, e.g. consider using they/their instead of he/she if possible for the purpose of the intervention.
- Avoid jargon and pompous language that might not be understood by the parties, such as notwithstanding, aforesaid/aforementioned and *inter alia*.
- Use brackets sparingly and never include information essential to the meaning of the text to brackets. If something is important enough to be included, it should not be hidden away in brackets or footnotes.

3.2. Approaches to legal reasoning

When drafting the intervention, the author should decide on the most appropriate and effective legal reasoning methods for the purpose of the intervention, and rigorously apply them when drafting the document. This is particularly relevant when for the "legal arguments" part of the intervention (see part 3.3.3. of the Guidelines). Legal literature recognizes five main types of legal reasoning:[48]

1. **Rule-based reasoning.** With rule-based reasoning, a rule (e.g. a law on anti-discrimination, or an administrative regulation) is applied to a set of facts. This approach is mechanical and is therefore effective only in a limited number of situations. In many cases, until the case law is well established, straightforward application of the rule may be difficult due to the various meanings that words in the rule hold and real-life circumstances which are not accounted for in the law.
2. **Reasoning by analogy**. Reasoning by analogy in the law occurs when that the facts of the precedent-setting case are the same as the facts of the case in question so that the rule of the precedent case (e.g. the finding of indirect discrimination) applies to the present case.
3. **Distinguishing cases (reverse reasoning by analogy).** With distinguishing cases, it is determined that the facts of the precedent-setting case are not like the facts of the case in question so that the rule from the case law does not apply to the case in question.
4. **Policy-based reasoning.** With policy based-reasoning, it is determined that applying a particular rule to a case would create a precedent that is good for society. This type of reasoning requires extensive research into constitutional principles and philosophical concepts beyond the law.
5. **Inductive reasoning (synthesis).** This method of reasoning looks at the holdings from the relevant cases and by synthesizing those cases, comes up with a general rule. More specifically, this reasoning looks at the similarities among the facts of the precedent cases and the differences among the facts of those cases and how these similarities and differences affect the outcome. The reasoning behind the holdings of the relevant cases and how the reasoning affects the outcome is also assessed.

3.3. Outline of the intervention[49]

3.3.1. Introduction

The intervention should start with an introduction, which covers the following:

- A brief description of the Commissioner's mandate. There is no need to provide detailed information with respect to the institution's specialist knowledge or expertise, but it is worth re-iterating the powers vested in the Commissioner by law. For instance, the paragraph could read as follows:

  The Ukrainian Parliament Commissioner for human rights is an independent statutory body, which, within the framework of the parliamentary control over the observance of constitutional human and civil rights and freedoms and the protection of the rights of everyone on the territory of Ukraine, prevents any forms of discrimination and take measures to combat discrimination. According to her mandate, the Ukrainian Parliament Commissioner for Human Rights gives opinions in cases about discrimination on the court's request.[50]

- A succinct explanation of the public interest/key legal issue raised by the case, and their impact upon the public generally or certain vulnerable groups it. For example:

  This case raises important legal questions particularly relevant for the victims of sexual harassment in the workplace.

- When the intervention exceeds 3 pages, an outline of the intervention discussing the sequence of the sections and contents of each section (also see part 3.3.3. of the Guidelines).

- The order sought to accommodate the intervention, i.e. the outcome you wish to see from the intervention, and invite the court to proceed accordingly (see part 3.3.4. of the Guidelines). This will enable the court and the parties to understand where the intervention fits into the proceedings.

3.3.2. Factual context

If relevant, including some brief background, which provides factual context for the intervention, is a useful way to introduce the substance of the submission. This section might also serve a broader educational purpose of setting the legal dispute within the relevant social context.

When drafting this section of the submission it is useful to think about these questions:

- Why is this particular case important for a certain vulnerable group of a population?
- How the Commissioner has previously addressed the issues raised by the case?

- Are there any pertinent studies or statistics, which might help to explain the legal/political/social background of the case?

Cases in which interveners become involved are often of great legal significance, and may address a variety of complex or novel issues pertaining to different areas of law, such as labour law, contract law, family law. It is important to bear in mind that the Commissioner is not expected to deal with all of the issues in a case, nor the Commissioner's mandate and powers provided by the law allow for it. Rather, a total clarity on the issues to which the intervention relates is crucial, and will be appreciated by the court.

3.3.3. Legal arguments

Following the analysis of the factual context, the intervention should proceed to the legal analysis of the points to be raised for the court's attention. This is the key part of the Commissioner's contribution to the case and thus it should be ensured that it is easy for the court and the parties to follow.

Following the general rule of thumb for legal drafting, the section should answer three key questions (each of them is discussed in more detail below):

1. *What is the relevant law?* In this part, is it useful to refer to the key provisions of the PPCDU relevant for the case. To make the intervention more reader-friendly, it is recommended to include the text of the relevant articles in the annex to the submission, instead of replicating them in full in the main body of the document.
2. *What does the law mean?* The second part aims at providing interpretation of the rule found in the PPCDU to disclose its meaning. An inquiry in the legal sources listed in **Annex I** may assist in understanding the letter of the law through in order to meet the objectives of the intervention.
3. *How does it apply to this case?* This part builds on the earlier analysis, and focuses on the application of the law to the facts of the case. In particular, it requires undertaking a substantive analysis of the case (see part 2 of the Guidelines) and employing one or more approaches to legal reasoning discussed above (see part 3.2. of the Guidelines). This part of the submission is optional and should be decided on case by case basis, taking account the wording of the court's request. In some cases, explanation of the meaning of the law is sufficient to achieve the purpose of the intervention.

If the case deals raises several important issues under the anti-discrimination law and the Commissioner decides to address all of them, it is advisable to discuss each issue separately, under different heading (see the example below).

EXAMPLE OF CONTENS FOR THE "LEGAL ARGUMENTS" PART OF THE INTERVENTION

Section A. Indirect discrimination as a form of differential treatment

1. What is the relevant law?
2. What does that law mean?

3. How does it apply to this case?

Section B. The notion of disability as a protected trait under the anti-discrimination law

1. What is the relevant law?
2. What does that law mean?
3. How does it apply to this case?

Section C. The division of the burden of proof between the parties

1. What is the relevant law?
2. What does that law mean?
3. How does it apply to this case?

3.3.4. Conclusion

The submissions should conclude with a brief statement of the request to the court, e.g. upholding a particular interpretation of the law. As stated in the introduction, the drafting should be mindful of a unique nature of the intervention, and hence should consider adopting a more neutral wording for the concluding part of the document. Explicit calls urging the court to support one or another party to the dispute should not be made.

CONCLUSIONS

Amicus curiae interventions often have the common goal of changing the law or affecting policy, and may achieve this goal in a variety of ways through their direct effects. Beyond the primary goal, interveners often see other, indirect, benefits from the interventions, such as greater credibility for the intervening organization.[51] Hence, quality interventions in the cases dealing with contentions issues under the anti-discrimination law may not only contribute to fulfilling Commissioner's mandate, but also raise the profile of the institution and the awareness of the equality law among the general public.

ANNEX I. RECOMMENDATORY LIST OF SOURCES

National law

- National legal acts
- Case law of the national courts

International treaties and other instruments[52]

- European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950)
- International Covenant on Civil and Political Rights (16 December 1966)
- International Covenant on Economic Social and Cultural Rights (16 December 1966)
- United Nations Convention Against Torture (9 December 1975)
- United Nations Convention on the Elimination of All Forms of Racial Discrimination (4 January 1969)
- United Nations Convention on the Elimination of Discrimination Against Women (18 December 1979)
- United Nations Convention on the Rights of Persons with Disabilities (13 December 2006)
- United Nations Convention on the Rights of the Child (20 November 1989)
- Universal Declaration on Human Rights (10 December 1948)

EU instruments

- Charter of Fundamental Rights of the European Union (7 December 2000)
- Commission Recommendation 92/131/EEC on the protection of the dignity of women and men at work (27 November 1991)
- Council declaration on the implementation of the Commission Recommendation on the protection of the dignity of women and men at work, including the code of practice to combat sexual harassment (19 December 1991)
- Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security (19 December 1978)
- Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (27 November 2000)
- Directive 2006/54/EC of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (5 July 2006)
- Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (9 February 1976)
- Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services (13 December 2004)
- Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (29 June 2000)

- Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (13 December 2007)

Case law of the regional and international courts and treaty bodies

- Case-law of the European Court of Human Rights
- Case-law of the Court of Justice of the European Union
- Case-law of the European Committee of Social Rights
- Case-law of the UN Treaty Bodies

Internet databases and other resources

- Handbook on European non-discrimination law (Council of Europe and the EU Fundamental Rights Agency)
- How to Present a Discrimination Claim: Handbook on seeking remedies under the EU Non-discrimination Directives (European Commission)
- Publication database (European Equality Law Network)
- Library (European Network of Equality Bodies (Equinet))
- CODICE. Constitutional case-law database (The European Commission for Democracy through Law (Venice Commission))
- Resources and Documentation Center (European Institute for Gender Equality (EIGE))
- Publications and Resources (EU Fundamental Rights Agency (FRA))
- Case-law analysis (European Court of Human Rights (ECtHR)

Examples of amicus curiae interventions by other human rights bodies

- The European Commission for Democracy through Law (Venice Commission)
- Council of Europe Commissioner for Human Rights
- UK Equality and Human Rights Commission

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[1] From 2009 it is called the European Union Court of Justice.

[2] European Commission, How to Present a Discrimination Claim: Handbook on seeking remedies under the EU Non-discrimination Directives (2011), http://ec.europa.eu/justice/discrimination/files/present_a_discrimination_claim_handbook_en.pdf, p. 71

[3] European Commission, How to Present a Discrimination Claim: Handbook on seeking remedies under the EU Non-discrimination Directives (2011), http://ec.europa.eu/justice/discrimination/files/present_a_discrimination_claim_handbook_en.pdf, p. 71

[4] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2350825, p. 294

[5] Dinah Shelton, "The Participation of Nongovernmental Organizations in International Judicial Proceedings," 88 American Journal of International Law (1994) 611-642, p. 638.

[6] Open Society Justice Initiative, Modes of Strategic Litigation: Third Party Interventions, p. 2

[7] Victor E. Flango, Donald C. Bross & Sarah Corbally. "Amicus Curiae Briefs: The Court's Perspective", 27 Justice System Journal (2006), 180-190, p. 189.

[8] Such competence was granted to the Commissioner about 5 years ago and in total institution has submitted about 5 expert opinions (Project meeting notes with Mrs. Aksana Filipishyna, Representative of the Commissioner – Director of the Department for observance of the rights of the child, non-discrimination and gender equality).

[9] Madeleine Schachter, "The Utility of Pro Bono Representation of U.S.-Based Amicus Curiae in Non-U.S. and Multi-National Courts as a Means of Advancing Public Interest," 28 Fordham International Law Journal (2004) 88-144, pp. 89-90.

[10] *Ibid.*, p. 90.

[11] *Ibid.*

[12] *Ibid.*, p. 91.

[13] Equality and Human Rights Commission, Our human rights legal powers, https://www.equalityhumanrights.com/en/our-human-rights-work/our-role-national-human-rights-institution-nhri/our-human-rights-legal-powers

[14] *In addition to legal authority, third party interventions can provide factual or other information to which the applicants or court might not otherwise have access or wish to introduce. This often includes expert evidence or statistics. Particularly in the context of discrimination, statistics play a very important role in establishing discriminatory practice*s (Open Society Justice Initiative, Modes of Strategic Litigation: Third Party Interventions, p. 3-4). *These can include scientific information (for instance, the reports on the utility of DNA databases supplied in S. and Marper v. the United Kingdom or so called "Brandeis briefs" setting out statistics and other studies which show a particular policy or practice amounts to indirect discrimination (see, for instance, D.H. and others v. the Czech Republic, on placing Roma in special schools))* (Paul Harvey, Third Party Interventions before the ECtHR: A Rough Guide (2015), https://strasbourgobservers.com/2015/02/24/third-party-interventions-before-the-ecthr-a-rough-guide/)

[15] *Due to limits on time and resources, the court and the applicant may not be able to draw on all available legal authority in developing their arguments. Comparative law is one particularly valuable source of legal authority in which NGOs often have a strategic advantage. By presenting comparative law arguments, a third party intervention may make the court aware of an analysis that it otherwise might have missed* (Open Society Justice Initiative, Modes of Strategic Litigation: Third Party Interventions, p. 3)

[16] Equality and Human Rights Commission, Our human rights legal powers, https://www.equalityhumanrights.com/en/our-human-rights-work/our-role-national-human-rights-institution-nhri/our-human-rights-legal-powers. Also see the Commission's objectives are identified here: Equality and Human Rights Commission , Legal interventions, https://www.equalityhumanrights.com/en/legal-casework/legal-cases/legal-interventions

[17] Equality and Human Rights Commission , Legal interventions, https://www.equalityhumanrights.com/en/legal-casework/legal-cases/legal-interventions

[18] "The Ukrainian Parliament Commissioner for human rights [...] gives opinions in cases about discrimination on the court's request" (Article 10(1) of the PPCDU) and "At the same time, the Commissioner of the Verkhovna Rada of Ukraine on Human Rights must substantiate the court's inability to independently protect its interests." (Article 45(1) of the Ukrainian Code of Civil Procedure).

[19] "Failure to comply with the requirements of the Commissioner of the Verkhovna Rada of Ukraine on human rights regarding the provision of the said substantiation results from the application of the provisions stipulated in Article 121 of this Code." (Article 45(1) of the Ukrainian Code of Civil Procedure).

[20] It has to be noted that one of the steps forward towards fostering cooperation with courts and encourage courts to obtain amicus curia from the Commissioner was made on 16 February 2015, when the High Specialized Court of Ukraine for civil and criminal cases, having considered the application made by the Commissioner , issued the recommendation for the heads of regional courts of appeal of Kyiv and Sevastopol city, the Court of appeal of the Autonomous Republic of Crimea on the necessity for courts to receive the conclusion of the Ukrainian Parliament Commissioner for human rights in cases of discrimination. See the Mission Report for more information.

[21] Rule 44(3)(b), http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf

[22] See pat 3.1. of the Guidelines

[23] Victor E. Flango, Donald C. Bross & Sarah Corbally. "Amicus Curiae Briefs: The Court's Perspective", 27 Justice System Journal (2006), 180-190, pp. 186-187

[24] See e.g. http://eige.europa.eu/lt/about-eige/documents-registry/knowledge-management-and-communications-strategy-eige

[25] See Annex I. Recommendatory list of legal sources of anti-discrimination law.

[26] See e.g. http://www.right2info.org/cases

[27] Laura Van den Eynde, "An Empirical Look at the Amicus Curiae Practice of Human Rights NGOs Before the European Court of Human Rights," (2013) 31 Netherlands Quarterly of Human Rights 271, p. 288.

[28] Council of Europe and the EU Fundamental Rights Agency, Handbook on European non-discrimination law (2011), http://www.echr.coe.int/Documents/Handbook_non_discri_law_ENG_01.pdf, p. 64

[29] CJEU, Coleman v. Attridge Law and Steve Law, Case C-303/06 [2008]

[30] European Commission, How to Present a Discrimination Claim: Handbook on seeking remedies under the EU Non-discrimination Directives (2011), http://ec.europa.eu/justice/discrimination/files/present_a_discrimination_claim_handbook_en.pdf, p. 24

[31] Council of Europe and the EU Fundamental Rights Agency, Handbook on European non-discrimination law (2011), http://www.echr.coe.int/Documents/Handbook_non_discri_law_ENG_01.pdf,

[32] Ibid., pp. 23-25

[33] See e.g Article 2(2)(a) of the 2000/78/EC Directive: "[o]ne person is treated less favourably than another is, has been or would be treated in a comparable situation". See also European Commission, How to Present a Discrimination Claim: Handbook on seeking remedies under the EU Non-discrimination Directives (2011), http://ec.europa.eu/justice/discrimination/files/present_a_discrimination_claim_handbook_en.pdf, p. 37

[34] Council of Europe and the EU Fundamental Rights Agency, Handbook on European non-discrimination law (2011), http://www.echr.coe.int/Documents/Handbook_non_discri_law_ENG_01.pdf, p. 25

[35]European Roma Rights Center, Multiple Discrimination (2009) http://www.errc.org/cms/upload/file/roma-rights-2-2009-multiple-discrimination.pdf, p. 7

[36] European Commission, Limits and Potential of the Concept of Indirect Discrimination (2011), http://www.equalitylaw.eu/downloads/2720-limpot08-en, p. 8

[37] ECtHR, D.H. and Others v. the Czech Republic [GC] (No. 57325/00), 13 November 2007

[38] European Commission, How to Present a Discrimination Claim: Handbook on seeking remedies under the EU Non-discrimination Directives (2011), http://ec.europa.eu/justice/discrimination/files/present_a_discrimination_claim_handbook_en.pdf, p. 40

[39] Council of Europe and the EU Fundamental Rights Agency, Handbook on European non-discrimination law (2011), http://www.echr.coe.int/Documents/Handbook_non_discri_law_ENG_01.pdf, p. 43

[40] Council of Europe and the EU Fundamental Rights Agency, Handbook on European non-discrimination law (2011), http://www.echr.coe.int/Documents/Handbook_non_discri_law_ENG_01.pdf, p. 44

[41] CJEU, Bilka-Kaufhaus GmbH v. Weber Von Hartz, Case 170/84 [1986]

[42] See e.g. Article 2(3) of the 2000/78/EC Directive: "Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment."

[43] CJEU, Coleman v. Attridge Law and Steve Law, Case C-303/06 [2008]

[44] European Commission, English Style Guide. A handbook for authors and translators in the European Commission (2017), https://ec.europa.eu/info/sites/info/files/styleguide_english_dgt_en.pdf, p. 1

[45] Amy Sanders, Plain English judgment gets the thumbs up and a :-) (2016), https://www.familylaw.co.uk/news_and_comment/plain-english-judgment-gets-the-thumbs-up-and-a#.Wi2Mf0qnHIV, case Lancashire County Council v M and others, [2016] EWFC 9 (4 November 2016) https://www.familylaw.co.uk/system/froala_assets/documents/1083/Lancashire_County_Council_v_Mr_A_and_Ors__2016__EWFC_9.rtf, Monidipa Foundzer, Law

'Dear Sam': Judge writes to 14-year-old to explain custody ruling (28 July 2017), https://www.lawgazette.co.uk/law/dear-sam-judge-writes-to-14-year-old-to-explain-custody-ruling/5062255.article#.WXtFjlUlKio.twitter, case of English and Wales High Court, A (Letter to a Young Person), Re (Rev 1) [2017] EWFC 48 (26 July 2017), http://www.bailii.org/ew/cases/EWFC/HCJ/2017/48.html

[46] Lancashire County Council v M and others, [2016] EWFC 9 (4 November 2016) https://www.familylaw.co.uk/system/froala_assets/documents/1083/Lancashire_County_Council_v_Mr_A_and_Ors__2016__EWFC_9.rtf, para. 36

[47] Adapted from EU Fundamental Rights Agency, Style Guide for Authors (2012), https://fra.europa.eu/sites/default/files/annex_2_to_annex_a1_-_fra_style_guide_for_authors.pdf, pp. 4-5

[48] Adapted from Fruehwald, Edwin S., A More Rigorous Approach to Teaching the Reasoning Portion of Case Analysis: A Key to Developing More Competent Law Students (July 18, 2014). Available at SSRN: https://ssrn.com/abstract=2468281 or http://dx.doi.org/10.2139/ssrn.2468281

[49] Adapted from JUSTICE, To Assisst the Court: Third Party Interventions in the Public Interest, https://justice.org.uk/wp-content/uploads/2016/06/To-Assist-the-Court-Web.pdf, p. 72-73

[50] Law on the prevention and combating discrimination in Ukraine, Article 10 para. 1

[51] Open Society Justice Initiative, Modes of Strategic Litigation: Third Party Interventions, p. 2

[52] Adapted from the Council of Europe and the EU Fundamental Rights Agency, Handbook on European non-discrimination law (2011), http://www.echr.coe.int/Documents/Handbook_non_discri_law_ENG_01.pdf