ANNEX

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„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)“

ANALYTICAL REPORT ON THE ASSESSMENT OF THE EXISTING INSTRUMENTS FOR THE RESTORATION OF VIOLATED RIGHTS INCLUDING THE FIELDS OF PERSONAL DATA PROTECTION, ACCESS TO PUBLIC INFORMATION AND PREVENTION OF ALL FORMS OF DISCRIMINATION IN PARTICULAR

Experts:

Ms. Waltraut Kotschy (Key expert); Ludwig Boltzmann Institute of Human Rights, Austria
Ms. Monika Mayrhofer; Ludwig Boltzmann Institute of Human Rights, Austria
Ms. Iva Ivanišević; Municipal Court in Rijeka, Croatia
Ms. Audronė Gedmintaitė; Supreme Administrative Court of Lithuania
Ms. Elena Masnevaitė; Law Institute of Lithuania
Ms. Aušra Špakauskienė; State Data Protection Inspectorate
Mr. Gintaras Kryževičius; Supreme Administrative Court of Lithuania
Mr. Vigintas Višinskis; Court of Appeal of Lithuania

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INTRODUCTION

According to the outlines of the project the analytical report on activity 2.3.1 shall be focused on assessing how instruments for the restoration of violated rights are applied by the Commissioner, in particular in the fields of personal data protection, prevention of all forms of discrimination and on the accession of public information.

To this end, it will be necessary to start out with an analysis of the legislation of Ukraine defining the legal status, duties and powers of the Commissioner in remedying violated human rights (Part. I of this report); assessment of compliance with comparable EU and Council of Europe legislation will be included. The outcome of this analysis is enhanced and supported by analytical studies on special topics which have been deemed worthy of more detailed deliberations (Part IV of this report). Comparison of the generally available instruments for the restoration of violated rights with the special instruments for restoring violated rights particularly provided by the Laws on personal data protection, on access to public information and on non-discrimination will help to understand the full meaning of these instruments (Part III A of this report).

Referring to problems and shortcomings identified in the course of interviews with representatives of the Commissioner‘s office and of external institutions, model solutions promoted in other jurisdictions in Europe will be described and discussed as to their merits. This will be done with a view to the customary internal processes within the Apparatus of the Commissioner regarding complaints handling, carrying out inspections and cooperation with data controllers and data processors.

Gaps identified in the course of the analysis of the existing legislation and its application shall be described and proposals shall be put forward having close regard to European standards. Special emphasis shall also be put to means of good understanding as a „soft tool“ for conflict solving (Part II C).

Particular attention will be given to the relationship between remedies available to the Commissioner and judicial remedies in the field of prevention of all forms of violations of human rights. Different forms of liability of the violator will be discussed and the problem of having recommendations or requests of the Commissioner enforced will be the object of special analysis under Part IV of this Annex.

I. THE LEGAL FRAMEWORK FOR THE PARLIAMENTARY CONTROL EXERCISED BY THE COMMISSIONER

The Constitution of Ukraine provides that parliamentary oversight of the protection of human and citizen constitutional rights and freedoms shall be conducted by the Authorized Representative to the Verkhovna Rada of Ukraine on Human Rights[1] (hereinafter referred to as "the Commissioner").

The purposes and instruments vested in the Commissioner to exercise parliamentary control are regulated in the Law on the Parliamentary Commissioner for Human Rights (herein after also called 'LPCHR'). According to its Art. 3 the purposes of the Commissioner's parliamentary control functions are[2]:

1) protection of human and citizens' rights and freedoms envisaged by the Constitution of Ukraine, the laws of Ukraine and international treaties of Ukraine;
2) observance of and respect for human and citizens' rights and freedoms by subjects indicated in Article 2 of this Law[3];
3) prevention of violation of human and citizens' rights and freedoms or the facilitation of their restoration;
4) facilitation of the process of bringing legislation of Ukraine on human and citizens' rights and freedoms in accordance with the Constitution of Ukraine and international standards in this area;
5) improvement and further development of international cooperation in the area of the protection of human and citizens' rights and freedoms;
6) prevention of any forms of discrimination in relation to fulfilment of person's rights and freedoms;
7) promotion of legal awareness of the population and protection of confidential information about a person.

Naturally, the Commissioner's mandate is designed to pursue the before mentioned goals and *inter alia* embraces the right/duty to[4]:

1) appeal to the Constitutional Court of Ukraine with regard to: conformity of the laws of Ukraine and other legal acts issued by the Verkhovna Rada of Ukraine, acts issued by the President of Ukraine, acts issued by the Cabinet of Ministers of Ukraine, and legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea concerning human and citizens' rights and freedoms with the

[1] See Article 101 of the Constitution of Ukraine (1996) // Available at http://www.twinning-ombudsman.org/wp-content/uploads/2017/03/EN_Constitution-of-Ukraine.pdf [last seen on 11 November 2017].
[2] Article 3 of the Law of Ukraine "On the Ukrainian Parliament Commissioner for Human Rights" (hereinafter referred to as "the Law on the Commissioner").
[3] "The scope of application of the Law shall extend to relations emerging from the fulfillment of human and citizens' rights and freedoms between a citizen of Ukraine, irrespective of his or her dwelling place, a foreigner or a stateless person, who are on the territory of Ukraine and bodies of state power and local self-government, their officials.
The operation of this Law also applies to relations that arise between juridical persons of public and private law, as well as individuals who are on the territory of Ukraine in cases provided for by a specific law."
[4] Articles 13 and 18 of the Law on the Commissioner.

Constitution of Ukraine; the official interpretation of the Constitution of Ukraine and the laws of Ukraine;

2) make in due course proposals for improvement of legislation of Ukraine in the sphere of protection of human and citizen's rights and freedoms;

3) attend court sessions of all instances, including court sessions held behind closed doors, if legal person in whose interest the judicial proceedings have been ruled to be held behind closed doors, has given consent;

4) to protect the rights and freedoms of an individual and a citizen in person or via representative in accordance with the law:

   - to apply to the Court to protect the rights and freedoms of persons who due to their physical condition, underage, advanced age, disability or disabilities are unable to protect their rights and freedoms; to participate in court cases/trials, proceedings in which were opened upon his claims (applications, petitions (submissions);
   - participate in cases/trials, proceedings in which were opened upon claims (applications, petitions (submissions) of other persons at any stage of the trial;
   - initiate, independently of his participation in the trial, revision of court decisions;

5) submit to respective bodies, documents containing the response of the Commissioner to instances of violation of human and citizens' rights and freedoms, for taking respective measures (submissions[5] are most relevant to context in question);

6) present to the Verkhovna Rada of Ukraine annual reports on the situation with the observance and protection of human and citizens' rights and freedoms in Ukraine by bodies of state power, bodies of local self-government, associations of citizens, enterprises, institutions, organizations, irrespective of their forms of ownership, their officials and officers, whose acts (acts of inaction) resulted in a violation of human and citizens' rights and freedoms, and on the shortcomings discovered in legislation on human and citizens' rights and freedoms;

7) present to the Verkhovna Rada of Ukraine a special report (reports) on separate issues regarding the observance of human and citizens' rights and freedoms in Ukraine.

[5] See Article 15 paras 1 and 3 of the Law on the Commissioner.

II. THE PRACTICAL IMPLEMENTATION OF THE LEGAL FRAMEWORK AND ITS ABILITY TO EFFECTIVELY RESTORE VIOLATED HUMAN RIGHTS

A. Investigation, recommendation and reporting as the core tasks of an Ombudsperson

According to the 1974 definition by the International Bar Association, there are three characteristic types of empowerment for the ombudsperson: investigation, recommendation, and reporting[6]. In case of the Parliamentary Commissioner for Human Rights all these classical instruments are in place, available and used appropriately.

A.1. Investigative powers

The LPCHR grants strong and far reaching investigative powers to the Commissioner. The field of investigations performed by the Commissioner covers all administrative actions, including inaction or delays. This investigative competence includes the area of functioning of the judiciary beyond the strict limits of the administration of justice (see Art. 13 (2), (4), (5) – (7), (9) – (13)). The Law foresees a legal duty of the state authorities to cooperate with investigative activities of the Commissioner (Art. 22).

Investigations may be started on the Commissioner's own discretion or because of a complaint received (Art. 16 LPCHR). Anybody may approach the Commissioner with a complaint within one year after the alleged violation has become known to him. According to the LPCHR (Article 17 (3)), while considering an appeal, the Commissioner shall:

1. initiate proceedings on violation of human and citizens' rights and freedoms;
2. explain what measures the person who has filed an appeal with the Commissioner should undertake;
3. submit an appeal, as appropriate, to the body which is competent to consider the case, and control the consideration of this appeal;
4. decline consideration of an appeal.

From the beginning of his or her investigation, as well as during its course, the ombudsperson can come to the conclusion that there is no reason for further action. For instance, complaints could be unsubstantiated or the problems under consideration could be resolved by informal means (e.g., legal advice, explanation of a specific administrative conduct, advice about alternatives of action) or by the establishment of good understanding with the criticised administrative unit (e. g., mediation, friendly solution). These powers are significant for the function of every ombudsman and form an important part of his daily practice; the expert team was informed by the representatives of the Secretariat of the Commissioner that means of an informal nature like legal advice, explanation of a specific administrative conduct, advice about alternatives of action and others are used on a daily basis.

A.2. Getting involved in court procedures

According to Art. 4 (2) of the LPCHR the Commissioner performs his or her duties independently of other state bodies and officials. On the other hand the Commissioner‘s

[6] Reif, R. C. The Ombudsman, Good Governance, and the International Human Rights. Leiden, 2004, p. 3.

competences are not meant to interfere with or repeal competences of other state bodies also entrusted with the protection of human rights. Therefore there are to be no parallel proceedings to appeals which are under review in court (Art. 17 (4) LPCHR) and the Commissioner shall terminate legal proceedings that have been initiated at his own office if the person concerned has filed an appeal, statement or complaint to the courts.

Nevertheless, the possibility for the Commissioner to show presence in court proceedings is mentioned several times within the legal provisions on the tasks and powers of the Commissioner.[7] How far the Commissioner may intervene in judicial proceedings, which concern litigation about violations of human rights, is not quite clear from the wording of Art. 13 LPCHR. The report for activity 1.1 states in para. 81 that

> ", the Commissioner is also entitled to intervene, in accordance with Article 13(10)(2) of the Law of the Commissioner, into any judicial proceedings that are initiated by other persons at any stage of the proceedings. As the law currently stands, the Commissioner's mandate is not limited to the supervision of judicial proceedings of undue delay or evident abuse of authority. Essentially, the Commissioner has jurisdiction over any human rights violations in judicial proceedings. At the same time, it should be noted that the acts on judicial proceedings may establish certain procedural limitations as to the right to apply to court. For example, as set out in Article 324 of the Civil Procedural Code, only the parties and other persons involved in the case, as well as those who did not participate in the case, if the court decided the question of their rights, freedoms or obligations have the right to appeal in cassation proceedings."

In order to gain more clarity it will be necessary to refer to the different reasons why the Commissioner might decide to get involved into a court proceeding:

a) Whenever the Commissioner becomes involved with the judiciary for the purpose of supervising judicial acts and activities in order to prevent and *detect violations of human rights by a court*, this must be understood as exercising parliamentary control; the question is, however, to what extent parliamentary control over the judiciary is appropriate considering the doctrine of separation of powers.
b) If the Commissioner becomes involved in court proceedings in the interest of one of the parties to the proceeding, this is a case of *providing legal aid*. In how far it is reasonable to have such aid provided by a parliamentary organ *on an individual level*, is open to discussion; in the course of the recent reform of free legal aid in Ukraine it seems to be no longer necessary to add such a task to the duties of the Commissioner. The explicit general obligation to represent vulnerable people in court proceedings seems appropriate under the new system of free legal aid wherever the assumption is valid, that more than just individual interests are at stake. Where „legal aid" is granted by the Commissioner in situations representing a *general problem* of human rights dimension which needed to be advocated before the courts, such a kind of „legal aid" seems to be well fitting into the concept of the Commissioner being a main promotor

[7] See Art. 13 and 18 of the LPCHR

of human rights. As this point seems to deserve further elaboration, a special topic on „defence of public interest“ is contained in part IV of this Annex under item 1.

c) In some cases involvement in judicial proceedings may also be caused by acting as amicus curiae, where the expert opinion of the Commissioner on human rights matters is sought by a court. This valuable contribution to the correctness of court decisions should certainly be upheld by the Commissioner.

d) Involvement of the Commissioner with the (administrative) courts for the sake of punishment/fining of violations of human rights will be discussed in section B

A.3. Issuing recommendations/requests

a) On the legal nature of „recommendations“/“requests“

Whenever the Commissioner finds as a result of his investigations that for the sake of „prevention of violation of human and citizens' rights and freedoms or the facilitation of their restoration“ [8] action is necessary, s/he can „submit documents to the respective bodies containing the response to instances of violation of human rights“.[9] The Commissioner can also make „proposals to bodies of state power concerning the improvement of their activities.[10] In the translations available to the experts, Article 15 (3) of the LPCHR calls such acts of the Commissioner “submissions”; this term is, however, perhaps slightly misleading as it would suggest that it is up to the discretion of the recipient to pay attention to the document which was “submitted”. It seems more adequate to speak about “recommendations” or “requests” made by the Commissioner to the state body or other entity of the public or private sector, as its legal purpose is the following: The responsible officers of the entity shall take measures within one month, suitable to eliminate the revealed acts of violation of human and citizens’ rights and freedoms;[11] the same is explicitly said in Art. 22 (1 -3) for “proposals” of the Commissioner as mentioned in Art 13 (12) LPCHR.

Art. 22 LPCHR foresees a general obligation to cooperate with the Commissioner. Thus, whatever the document containing the Commissioner’s views are called, there is a legal duty derived from Art. 22 to follow the written notification of the opinion of the Commissioner and to act accordingly.

The LPCHR does not contain explicit regulation for the case that the legal obligation to take actions according to a recommendation or proposal of the Commissioner is not fulfilled. Interviews with representatives of the office of the Commissioner suggested that the Commissioner might exercise her powers in such cases 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. However, it seems open to discussion whether non-compliance with recommendations based on Articles 15, 17 or 22 of the LPCHR is indeed an “offence” under the Code of Administrative Offences. A clear regulation within the LPCHR about the legal consequences of non-compliance with Art. 22 would be a preferable solution.

The options open to the Commissioner to promote or even enforce compliance shall be further discussed in part B of this Chapter.

b) On the possible content of „recommendations“/“requests“

[8] Art. 3 (3) LPCHR
[9] Art. 13 (11) LPCHR
[10] Art. 13 (12) LPCHR
[11] Art. 15 (3) LPCHR

The Law on the Commissioner does not provide any of list (neither indicative, nor exhaustive) of the kind of recommendations the Commissioner is entitled to make in case of detected violation of human rights and freedoms. As the rule of law requires a certain level of legal certainty it might seem advisable to have more concrete provisions. In some EU countries the legal framework on the ombudsperson's institution in this field is therefore different. For example, the Seimas Ombudsman of the Republic of Lithuania has *inter alia* the right[12] to:

1) recommend to the Seimas, state or municipal institutions and agencies to amend the laws or other statutory acts which restrict human rights and freedoms;
2) recommend to the collegial body or official to repeal, suspend or amend the decisions which are contrary to the laws and other legal acts, or propose to adopt decisions the adoption whereof has be precluded by abuse of office or bureaucracy;
3) recommend to the collegial body, head of the agency or a superior institution or agency to impose disciplinary penalties on the official at fault;
4) recommend to the prosecutor to apply to the court according to the procedure prescribed by law for the protection of public interest;
5) bring to the officials' attention the facts of negligence in office, non-compliance with laws or other legal acts, violation of professional ethics, abuse of office, bureaucracy or violations of human rights and freedoms and recommend to apply measures to eliminate the violations of laws and other legal acts, their causes and circumstances;
6) propose that material and non-material damage sustained by a person due to the violations committed by the official be compensated in the manner prescribed by law;
7) recommend to the Chief Official Ethics Commission to evaluate whether or not the official has violated the Law on Adjustment of Public and Private Interests in the Public Service.

As was discovered during the fact-finding mission, in Ukraine recommendations of the Commissioner most often propose amendments to legal acts or demand to repeal or amend decisions, which were found to violate human rights or freedoms. Sometimes the Commissioner gives recommendations to apply various measures eliminating the violations of human rights and freedoms (e. g., to install the places of imprisonment in accordance with hygiene norms), but mostly they are framed in special reports presented to the Verkhovna Rada of Ukraine.

Whether to determine a list of possible recommendations or not, is the prerogative of each country. However, as has already been mentioned, the principle of legal certainty requires some clarity when it comes to protection of human rights and freedoms (in some cases potential negative consequences too). Therefore, it is suggested to formulate at least an indicative list of recommendations which the Commissioner would be entitled to give in case of detection of violation of human rights and freedoms. For this purpose a fourth paragraph could be added to Article 15 of the LPCHR.

As concerns the list, it is recommended to consider formalizing already existing practices and introducing some novelties used in other, including EU, countries, such as recommendations of suspension of execution of an administrative act, or of imposition of disciplinary sanctions and of payment of compensation.

[12] Article 19 para 1 of the Law of Republic of Lithuania "On the Seimas Ombudsman" // Valstybės žinios, 1998-12-16, Nr. 110-3024.

In Macedonia, the Ombudsman can apply for suspension of the execution of an administrative act, if he considers the act to be violating human rights and freedoms. The suspension will remain in force until the relevant administrative agency of the second instance or the competent court has decided on the matter. The Ombudsman has to be notified about such a decision. In Bosnia and Herzegovina, the Ombudsman can demand the suspension of the execution of administrative acts for a maximum time of ten days. In Albania, the official measure against which a complaint has been lodged is suspended until a response to the Ombudsman's recommendation is handed in. However, the model suitable for the Ukrainian context (fear of corruption, abuse of the right to appeal to the Commissioner, etc.) would be plain recommendation to stop execution of an administrative act as a softer version (non-obligatory) of interim measures applied by the courts.

A.4. Reporting: Annual and special reports and publications

Almost all ombudsmen have to submit annual reports on their activities to parliament. This applies even to those ombudsmen, who are not appointed by parliament, like the ombudsmen of France and the United Kingdom. This way the ombudsman not only renders account of his activities, which shall put his accountability to parliament into effect, but at the same time enables parliament to employ its own various competences within the democratic control of administration (e.g. right to interpellation, appointment of investigation committees, impeachment of a minister), draws the attention of parliament to a possible necessity of legislation amendments as well as imposes a form of soft sanction in case of non-compliance with recommendations and lacking assistance in investigating and clearing up affairs (especially by raised public attention).

In most legal orders, the ombudsman is explicitly empowered to submit special reports to parliament too. Almost all ombudsmen at least consider the submission of such reports admissible. Such a special report enables the ombudsman to point out exceptionally serious grievances in the administration and thus to arouse particular public attention. Consequently, many institutions emphasise that they only make use of these reports in specific exceptional cases. In Latvia, it is provided that the Ombudsman can even transmit his special reports to international organisations, enabling him to operate beyond the scope of parliament[13].

The submission of special reports may be attached to certain preconditions, e. g. to particularly severe or extensive problems, (e.g. Czech Republic, Denmark, Spain, Croatia), a negligence or a mistake of great significance or a matter of outstanding relevance, particularly in cases of proceedings *ex officio* (Greece). Other states are only entitled to make special reports at predetermined points in time (e.g., quarterly or three times per year). To a certain extent, special reports are designed as sanctions in the same manner as annual reports.

Article 18 para one of the Law on the Commissioner stipulates that during the first quarter of every year, the Commissioner shall present to the Verkhovna Rada of Ukraine an annual report on the situation with the observance and protection of human and citizens' rights and freedoms in Ukraine by bodies of state power, bodies of local self-government, associations of citizens, enterprises, institutions, organizations, irrespective of their forms of ownership, their officials and officers, whose acts (acts of inaction) resulted in a violation of human and citizens' rights and freedoms, and on the shortcomings discovered in legislation on human and citizens' rights and freedoms. According to the Law, the annual report should refer to cases of violation of human and citizens' rights and freedoms, in relation to which the Commissioner has undertaken necessary measures, results of the inspections conducted within

[13] See Section 15 para 2 of the Ombudsman Law of Republic of Latvia.

the period of one year, conclusions and recommendations aimed at improving the situation with regard to securing human and citizens' rights and freedoms (Article 18 para two).

Concerning special reports, they are presented by the Commissioner to the Verkhovna Rada of Ukraine if necessary on separate issues regarding the observance of human and citizens' rights and freedoms in Ukraine and 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 (Article 18 para three and Article 19-1 para eight of the Law on the Commissioner).

By formulating such requirements for the Commissioner, the Ukrainian legislator gives a tool to the Commissioner not only to report on human rights violations to the Parliament of Ukraine but also to provide recommendations and proposals for elimination of human rights and freedoms abuses, so the Parliament has in-depth information on the human rights and freedoms situation to exercise the changes observing of the rule of law in the country.

However, it is worth mentioning that:

1) neither the Law on the Commissioner, nor any other legal act elaborates on how precise and detailed annual and special reports should be, what parts would be necessary or desirable;
2) currently no criteria are formally established to determine when special reports should be adopted (except those within the framework of the National Preventive Mechanism);
3) clear procedure for issuing annual and special reports and approving recommendations contained in them respectively is not established.

The analysis of annual and special reports published on the official website of the Commissioner revealed that the structure and content of these reports vary to a significant extent. For example, some of the special reports are adopted without a section containing recommendations (e.g., the special report "Observance of the Rights of the Minors Who are in the Educational Colonies of the State Penitentiary Service of Ukraine" (2014) contains a section titled "General Conclusions", but does not include any concrete recommendations) and exclusively describe the factual situation. Most of the annual and special reports lack a strong analytical section as well. Therefore, it is recommended to develop a uniform structure for all annuals and special reports and maybe a separate structure for adopting special reports in the framework of the National Preventive Mechanism.

The following structure for annual and special reports could be considered: introduction, legal part, descriptive part, analytical part, conclusions, and recommendations. The descriptive and the analytical part could 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 should be inserted into a special report. In case of annual reports and special reports issued on an annual basis (e.g., special report "Monitoring the Custodial Settings in Ukraine" and the ones adopted in the framework of the National Preventive Mechanism), it is recommended to add a spate section on monitoring. The key point of this section would be to reveal, which of the recommendations from the previous annual and special reports were implemented and when.

Recommendations addressed in annual and special reports usually concern inappropriate legal regulations, legal gaps or inadequate application of legal regulations, if unsuitable practice affects a group of people. These three criteria for when to adopt recommendations in both special and annual reports should be formalized (although it should be noted that according to

the Law on the Commissioner (Article 18 para one) the Commissioner communicates shortcomings discovered in legislation in his or her annual report to the Verkhovna Rada of Ukraine). This could be done by supplementing the respective provisions of paras one and three of Article 18 of the Law on the Commissioner accordingly.

The Law on the Commissioner does not set out the procedure of adopting annual and special reports. Currently, there is no special internal regulation on adopting annual and special reports as well. The expert team is under the impression that the current practice does not follow clear guidelines, varies from case to case and from expert to expert within the Apparatus of the Commissioner. Keeping this in mind, it is recommended to consider establishing a clear procedure for issuing annual and special reports, which should define stages, terms, principles of distribution of responsibilities, forms of discussing the separate parts/recommendations draft annual and special reports, etc.

Since reporting aims to illustrate the work of the ombudsman, the presentation of recommendations and proposals for parliamentary bills takes centre stage.

Most ombudsmen are explicitly empowered to submit parliamentary bills. Partly, this applies to ombudsman-institutions, which particularly serve the purpose of human rights protection and are therefore charged with the implementation of constitutional and international obligations in this field on the level of national legislation. In practice, these institutions incorporate legislation proposals into their annual activity reports. The institutions themselves regularly consider such proposals to be highly effective despite their lack of binding character. Some ombudsmen indicated that by means of recommendations for legislation amendments high political pressure could be exerted.

The Law on the Commissioner (Article 13(3-1)) grants the right for the Commissioner to make in due course proposals for improvement of legislation of Ukraine in the sphere of protection of human and citizens' rights and freedoms. The Commissioner is not granted the right of direct legislative initiative. However, he or she may approach the relevant agencies with proposals for legislative initiative, for amending legal provisions or for issuing other legal acts concerning human rights and freedoms contained in annual and special reports, acts of submission, and other documents.

It is widely acknowledged by international bodies and various countries in Europe that the mandate of the Ombudsperson includes the right to timely initiate the adoption or revision of laws, with the purpose of ensuring human rights and freedoms. **Report 1.3** on *Drafting Recommendations Aimed at Bringing the National Regulatory and Legal Framework in Accordance with the Best EU Practices in the Human Rights Area Basic Project*[14] indicates that the existing legal framework in Ukraine does not provide for a sturdier legal ground and methodology as to how the Commissioner participates in the law-making process and contains a recommendation to partially formalize the possibilities of the Commissioner to participate in the process of preparing draft laws and in the development of the *ex-ante* impact assessments, which could contribute to strengthening the capacity of the Commissioner in the relationship with the legislative bodies.

The power to submit suggestions and proposals to the legislator is of great significance for the Ombudspersons' effectiveness. It enables the Ombudsperson to reveal systemic deficiencies observed at the level of complaints, which exceed the importance of an individual case to a great extent ("systemic approach"). Therefore, it is repeatedly recommended to establish the Commissioner's right to timely initiate the adoption or revision of laws, with the purpose of ensuring effective protection of human rights and freedoms.

[14] See: http://www.twinning-ombudsman.org/wp-content/uploads/2017/09/EN_Mission-report-1-3.pdf.

B. Enforcing recommendations and other findings of the Commissioner

From the fact-finding mission in the framework of activity 2.2.1 "Analysis and Assessment of the Efficiency of Activities of the Ombudsperson on Elimination of Detected Human Rights Violations, Control Procedures over Fulfilment of Ombudsperson's Recommendations, Response to the Ombudsperson's Acts of Submission to the State and Local Self-government Bodies, their Officials, on Elimination of Detected Human Rights Violations" (hereinafter referred to as "the activity 2.2.1 mission"), it was revealed that the nature of the Ukrainian Commissioner is perceived differently in the society of Ukraine than in the EU partly because of the prevailing culture and present political environment in the country. Several representatives of an institution agreed that the non-implementation of recommendations usually results in administrative procedures against those agencies not willing to implement the recommendations. The techniques of soft power such as negotiation, conciliation and mediation are rarely used to achieve the higher implementation of recommendations provided by the Commissioner.[15]

In case of lacking or insufficient reaction to a recommendation (or ‚request', ‚finding' or whatever terminology is used) different sanctions are prescribed in general – either alternatively or cumulatively. Notifications to a superior agency, reports to parliament and publication of the recommendation are the sanctions most commonly provided.

B.1. Enforcement by involving a "higher instance"

In nearly all legal systems, it is provided that recommendations of an ombudsperson are directly submitted to the controlled administrative unit. Only in Germany and Austria this is not the case, as recommendations have to be submitted to the highest organ responsible. This practice provides a stronger impact to the recommendation. Certainly, as has been mentioned above, a recommendation may be preceded by informal attempts at conciliation brought directly before the agency responsible. In those states, where recommendations are to be directly submitted to the controlled unit, a report has to be submitted initially to the superior agency (e. g., Czech Republic, Estonia, Hungary, Romania, Portugal, Poland, Slovakia, Slovenia) or the highest responsible agency (e. g., Spain, Malta). Sometimes even these agencies have duties of response and time limits (Slovakia – 20 days, Hungary – 30 days). In some states, in addition, the government can always be informed about insufficient reaction to a recommendation (e. g., Czech Republic, Estonia, Romania, Slovenia).

In Ukraine the Commissioner when trying to facilitate the implementation of systemic recommendations and to accelerate the elimination of violations of human rights and freedoms in a broader context is using top-down pressure unofficially. Top-down pressure tends to politicize a matter if this is not formalized. In Ukraine a superior agency or official is informed in writing if the addressee of systemic recommendations fails to implement them, although such procedure is not foreseen in the Law on the Commissioner or other legal acts. Therefore, to avoid the potentially negative political nuances the procedure of notification should be formalized.

It would seem most appropriate to design special „sanctions" in all cases where recommendations of the Commissioner are ignored by the controlled agency: In such cases the superior agency or official should be notified of the controlled agency's failure to comply and should be obliged within a reasonable timeframe to inform the Commissioner about the

[15] See Twinning Report 2.2.1 on *Analysis and Assessment of the Efficiency of Activities of the Ombudsperson on Elimination of Detected Human Rights Violations, Control Procedures over Fulfilment of Ombudsperson's Recommendations, Response to the Ombudsperson's Acts of Submission to the State and Local Self-government Bodies, their Officials, on Elimination of Detected Human Rights Violations* (hereinafter referred to as "the Report 2.2.1" – http://www.twinning-ombudsman.org).

final results. Such kind of a „sanction“ would be more in line with a classical concept of an ombudsperson's institution and would serve in reducing the questionable practice to apply administrative liability for failure to implement the recommendations of the Commissioner.

B.2. Facilitating enforcing by making non-compliance public

It is possible to go even further by strengthening the public effect and simultaneously foresee in the Law on the Commissioner that all notifications of the Commissioner shall be published on the official website of the Commissioner's institution and the agencies and / or officials concerned.

For the most part, the publication of recommendations is also possible outside of official reports. Thereby, the ombudsmen most commonly referred to their website, where they can make the entire activity report or particular recommendations accessible (e. g., Denmark, Spain, Greece, Hungary, Croatia, Latvia, Portugal, Slovakia).

In Ukraine, according to the Article 18 para 5 of the Law on the Commissioner, annual and special reports, along with the resolution adopted by the Verkhovna Rada of Ukraine, shall be published in official publications of the Verkhovna Rada of Ukraine. As the expert team was notified during the fact-finding mission, last three years the Verkhovna Rada of Ukraine refused to put annual reports of the Commissioner on the agenda of its plenary sessions and adopt resolutions based on them accordingly. Respectively, these annual reports of the Commissioner were not published in official publications of the Verkhovna Rada of Ukraine.

Analysis of the official website of the Commissioner institution indicates that annual and special reports alongside with some submissions of the Commissioner are publicly available, however only in an integral form. Extracting recommendations from these documents and putting them into a form of a monitoring nature (i.e., recommendation in brief, addressee, timeframe for implementation, implementation status) on the official website of the Commissioner institution would serve as an additional public pressure tool and help to facilitate the restoration of violated human rights and freedoms. Not to mention much easier management of such kind of information performed by the Secretariat of the Commissioner.

Obligation to publish the recommendations of the Commissioner received on the official website of the agency or official would be one step further. Such a tool would not only correspond with the above mentioned, but also contribute to the implementation of the principle of good governance in a sense that the persons concerned would be made aware of the problems the agency or official is facing in appropriate field.

In many states the ombudsmen have, according to their responses, the possibility to make an affair public in the media. In some states this is explicitly provided for in such cases where the competent administrative unit fails to observe the submitted recommendation or does not satisfactorily justify its non-observance in the ombudsman's view (e.g., Czech Republic, Estonia, France, Croatia, Slovenia). Sometimes even names of officials may be announced (e. g., Czech Republic, Spain, Estonia). In France, the agency is explicitly empowered to express its own view regarding the matter. Slovenia provides for not only the possibility of publication in the mass media, but also the absorption of costs by the concerned agency, if it fails to react to a recommendation despite repeated requests. In Croatia, the media are legally obliged to make such publications on the Ombudsman's demand. In practice, out of all types of sanctions, the possibility of publishing a case in the media should have the strongest preventive effect.

In Ukraine only special reports adopted within the National Preventive Mechanism are published in the media (Article 19-1 para eight). No other communicative options of the Commissioner are regulated by the law. In case of gross or systemic violations of human

rights and freedoms, exceptional indifference towards recommendations of the Commissioner or ignorance of the superior agency or official towards notification of the Commissioner it would be expedient to formalize such a measure as publicity in the media. It would have double – remedial and preventive – effect. On one hand, visibility would force the culpable side to save its public image and implement the recommendations addressed and it would encourage others to seek for defence of their rights and freedoms at the level of the Commissioner. On the other hand, it would discourage the culpable side and other agencies/officials from violations of human rights and freedoms.

B.3. On the availability of compulsory enforcement by means of execution

Under the present legal system decisions ("recommendations", "requests", "submissions" or whatever they may be called) of the Commissioner cannot serve as a legal basis for compulsory enforcement (execution).

In 2016 a reform of the procedure of enforcement of court decisions and decisions of other authorities was adopted in Ukraine, which introduced many new features, such as e.g. private enforcement officers, a unified Register of Debtors, an electronic System for the Enforcement Procedures, access to official state data bases for the enforcement officers etc.

In this context it seems interesting to explore whether under the new system compulsory enforcement could also be made available for decisions of the Commissioner. As this is a more complex issue, it will be treated separately in Part IV of this Annex under item 3.

B.4. On the possibility to decide on compensation

So far, deliberations have been focused on corrective remedies. The question also arises whether and to what extent compensatory remedies are available to the Commissioner in order to remedy the established wrong-doing. More specifically, it shall be explored whether the current legal system in Ukraine allows for recommendations of the Commissioner on the subject of compensation as an independent form of remedies.

It is true that according to the existing legal rules the question of compensation is usually decided by the courts. Nevertheless, it does not seem impossible to assume that the Commissioner should also be competent to request that compensation for the loss caused especially by public authorities should be paid. In general, this is not a function which is completely foreign to the tasks of an Ombudsperson. As such deliberations are nevertheless new in this project, this topic will be analysed in more detail within part IV of this Annex, reserved for analytical studies on special topics.

B.5. Enforcement by applying to the courts with an administrative protocol for the purpose of fining

Concerning punishment of violations of human rights the Commissioner has fully to rely on the courts: The competence of fining is the prerogative of the administrative courts according to the Code on Administrative Offences. The Commissioner can therefore only bring a case to the attention of the court and cannot him/herself impose a fine or other punishment.

Formally this is done by way of drawing up a so called "administrative protocol" and submitting it to the locally competent administrative court. This possibility is provided by Article 18840 of the Code on Administrative Offences and is in its wording not limited to specific human rights or specific offences.

C. Making use of means of good understanding

From the fact-finding mission in the framework of activity 2.2.1 "Analysis and Assessment of the Efficiency of Activities of the Ombudsperson on Elimination of Detected Human Rights Violations, Control Procedures over Fulfilment of Ombudsperson's Recommendations, Response to the Ombudsperson's Acts of Submission to the State and Local Self-government Bodies, their Officials, on Elimination of Detected Human Rights Violations" (hereinafter referred to as "the activity 2.2.1 mission"), it was revealed that the nature of the Ukrainian Commissioner is perceived differently in the society of Ukraine than in the EU partly because of the prevailing culture and present political environment in the country. Several representatives of an institution agreed that the non-implementation of recommendations usually results in administrative procedures against those agencies not willing to implement the recommendations. The techniques of soft power such as negotiation, conciliation and mediation are rarely used to achieve the higher implementation of recommendations provided by the Commissioner.[16]

When asked during the activity 2.2.1. mission, representatives of the Apparatus of the Commissioner stated that they do use some methods that they call mediation, being fully aware that the term is not used fully technically correct in this respect. They use the term for activities that they describe roughly as "Despite sticking to a merely written procedure – which is the usual format we use – we sometimes summon complainants to visit us in person and explain their complaint and what outcome they wish for. Then we summon the alleged violator (e.g., the representative of an administrative body) and tell them what would be a wise reaction to the complaint and how they could amend the situation and comply with our request (recommendation)."[17]

During this fact-finding mission the expert team was enlightened[18] that procedures of mediation, as it is understood at the Apparatus of the Commissioner institution, are of considerable significance when it comes to cases which could be solved without formally approved outcome. On the other hand, the interlocutors pointed out the fact that there is no legal framework on mediation (only draft law on mediation) and its elements are employed in a very flexible way.

It is more than obvious that usage of separate technics of alternative dispute resolution by no means can be qualified as mediation as it is at least minimally formalized procedure. Rather closer to what is already done by the Apparatus of the Commissioner are forms of negotiation and conciliation attempts.

Negotiations include some elements of the principle of good administration (e.g., the right to be heard before a negative decision is made), but are usually used when systemic recommendations are given in acts of reaction of the Commissioner (e.g., "подання") and administrative liability for failure to implement systemic recommendations is pending.

Using conciliation as a way of conflict management the ombudsperson has the authority to seek a friendly solution. As it was noted in the Report 2.2.1, following the classical ombudsman model, the ombudsperson shall have no power to make decisions that are binding on the entity concerned. Instead, the power of persuasion must be used, backed by the

[16] See Report 2.2.1 on *Analysis and Assessment of the Efficiency of Activities of the Ombudsperson on Elimination of Detected Human Rights Violations, Control Procedures over Fulfilment of Ombudsperson's Recommendations, Response to the Ombudsperson's Acts of Submission to the State and Local Self-government Bodies, their Officials, on Elimination of Detected Human Rights Violations* (hereinafter referred to as "the Report 2.2.1" – http://www.twinning-ombudsman.org).

[17] See Report 2.2.1 – http://www.twinning-ombudsman.org

[18] The information was obtained during the Meeting No 1 and Meeting No 2.

thoroughness of the investigative findings and the personal authority of the ombudsperson. In this case the result of conciliation is not completely open, as the conciliator is not completely neutral, but on the side of a legally legitimate result that is more or less in line with a standard recommendation the Commissioner would give on the subject.[19]

Given that confusion in terminology and that none of these above-mentioned tools are directly or indirectly indicated by the Law on the Commissioner, the efficiency of the application of such techniques is limited. This leads to a situation where the authority of the Commissioner must be based mainly on retributive grounds, which is in contradiction with the classical concept of the position of an ombudsman institution. For example, the Ombudsman Law of Republic of Latvia[20] names facilitation of conciliation between the parties to the dispute as one of the tasks of the Ombudsman. Therefore, it would be more appropriate to enhance powers under the Law on the Commissioner (specifically Article 17 para three), adding an option to opt for mediation, negotiation and reconciliation, if suitable, before deciding to initiate proceedings on violation of human and citizens' rights and freedoms. As an example, the strategic initiative procedure employed by the European Ombudsman could be indicated. Given the evident importance of the availability of such an additional instrument for solving conflict situations, a special analytical study on the applicability of mediation and its preconditions is added to Part IV of this report.

[19] http://www.twinning-ombudsman.org

[20] See Section 12 subpara 6 // Available at http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Citi/Ombudsman_Law.pdf [last seen on 13 November 2017].

III. SPECIAL PROBLEMS OF THE COMMISSIONER'S CONTROL IN THE FIELDS OF DATA PROTECTION, ACCESS TO PUBLIC INFORMATION AND NON-DISCRIMINATION

According to Art. 13 (14) of the Law on the Parliamentary Commissioner for Human Rights the Commissioner (LPCHR) may be entrusted with further competences, additional to those assigned by the LPCHR. The most relevant additional areas of activity conveyed to the Commissioner by special laws are data protection, access to public information and non-discrimination.

These special laws usually also contain some provisions on the instruments available to the Commissioner when exercising his/her functions under this special law. In how far these provisions convey competences which exceed those provided under the LPCHR or are even different in nature, shall be explored in the following chapters.

A. Instruments for restoring rights

A.1. Under the Law on Personal Data Protection

The Law of Ukraine on Protection of Personal Data (hereinafter – LPDP) aims to protect the right to privacy in relation to the processing of personal data. The control over the observance of this Law is entrusted to the courts and to the Parliamentary Commissioner for Human Rights.

According to Art. 23 of the LPDP the Commissioner has the competence:

1) to receive proposals, complaints and other appeals of individuals and legal entities concerning the protection of personal data and make decisions following their consideration.

Granting a general right to approach the Commissioner with complaints or appeals concerning a human right is totally in line with the general remit of functions of an ombudsman-like institution as the Commissioner. What is less clear is the legal nature of the "decision" which the Commissioner should take in settling the concern brought before him. As it is nowhere elaborated what would be the legal consequences of such a "decision" it seems justified to assume that "decision" just means "final answer" with the purpose of settling the request made. As the requests may be of a very different legal nature – the Law speaks of "proposals", "complaints" and "other appeals" – the necessary final answer can also be of a very different kind in legal terms, especially also in regard to the possibility to enforce compliance by all parties involved.

2) In order to come to a decision as mentioned above, but also outside of request made by individuals or legal entities, the Commissioner has the power of investigation in all forms which seem necessary and appropriate (Art. 23 (2) and (3)).

To conduct scheduled or unscheduled inspections (para 2) for checking on compliance with legislation on human rights is one kind of application of this power. To monitor new practices, trends and technologies which have an impact on data protection is a more general application of this power to investigate (para 12).

3) Art. 23 (5) of the LPDP contains a more specific description of the legal instrument which contains the Commissioner's "decision" when he intends to" prevent or eliminate a violation of the legislation on the protection of personal data": in this case he may

issue "binding requests (regulations)", which set out in detail how the person or institution charged with the violation of the right to data protection shall proceed in order to prevent or eliminate the violation. [21]

The additional power to draw up protocols on bringing violations of the LPDP to administrative liability (Art. 23 (10)) is most relevant in this context.

4) Further competences of the Commissioner mentioned in Art. 23 LPDP are of an educative kind, such as para 6, concerning "recommendations on the practical application of the LPDP", or para 11, containing the general task to inform the public about data protection, or relate to the general function of the Parliamentary Commissioner concerning proposals for amending legislation which concerns human rights (para 8).

Assessing draft codes of conduct concerning the implementation of data protection in specific areas of public administration or private businesses is another means of providing recommendations on the practical application of the LPDP in certain fields of data processing (Art. 23 (9).

Procedural provisions:

The Law itself does not contain procedural provisions concerning the application of the main instruments for restoring violated rights: The bringing in of complaints or similar appeals is not curtailed by formal requirements and the further handling of such appeals is left to the discretion of the Commissioner.

Within this discretion the Commissioner regulates procedures by means of an "Orders of the Commissioner": How to issue binding requests (regulations) is set out in detail in the procedure for the exercise by the Ukrainian Parliament Commissioner for human rights of control over observance of the legislation on protection of personal data, approved by the Order of the Ukrainian Parliament Commissioner for Human Rights (08.01.2014 No1/02-14) (hereinafter - the Order)[22]. The Order points out:

- that based on an inspection, during which violations of the legislation on protection of personal data were revealed, a compliance notice about the elimination of violations, detected during the inspection, is drawn up in accordance with the Annex 2 to this Procedure (hereinafter - the Compliance notice). The controller or processor subjected to the inspection shall take measures to eliminate the violations listed in the compliance notice within a period of not less than 30 calendar days (- specified in the compliance notice-) and shall inform in writing the Commissioner about the measures taken along with copies of documents confirming elimination of the found violations;
- control over timely and full fulfilment of the requirements specified in the compliance notice, is carried out by studying the supplied documents and, if necessary, by holding unscheduled inspection;
- in the event of failure to fulfil the compliance notice within the set term, the Commissioner draws up a protocol on administrative offense as foreseen by the Article 188 (40) of the Code of administrative offenses of Ukraine (herein after the Code) in the

[21] According to the article 23 (5) of the LPDP the Commissioner can issue binding requests (regulations) as regards the prevention or elimination of violations of the legislation on protection of personal data, including the changes, removal or destruction of personal data, ensuring access to them, providing or prohibiting their provision to third person, suspension or termination of the processing of personal data.

[22] *http://www.twinning-ombudsman.org/wp-content/uploads/2017/03/EN_On-approval-of-documents-in-the-area-of-personal-data-protection.pdf*

form and according to the procedure, foreseen by the legislation and the Procedure of registration of materials on administrative offenses;

- if during inspection an administrative offense under the Article 188 (39) or article 188 (40) of the Code, committed by the subject of inspection, is discovered, the Commissioner can also draw up a protocol on administrative offense, provided for by the item 1 of article 255 of the Code in the form and according to the procedure, foreseen by the legislation and the order of registration of the materials on administrative offense;
- if during the inspection signs of criminal offense are discovered, the Commissioner directs the necessary materials to the law enforcement agencies.

A.2. Under the Law on Access to public Information

The Law on access to public Information (further: LApI) in its new version of 2014 entrusts the Commissioner with the "*parliamentary* control of the enforcement of the human right to access to information" (Art. 16), and provides (in Art. 17) powers "in addition" to those mentioned in the LPCHR: They refer partly to the task of promoting awareness about the purposes of the law, partly to instruments which should support enforcement of the responsibilities of the institutions named "information providers" under the Law. It is noteworthy that the concept of "information provider", who is the addressee of the obligation to give access to information, is not limited to public institutions but extends to commercial entities with specific influence on society because of their dominant economic position.

The – comparatively new – Law contains in its Chapter V explicit and comprehensive provisions on important procedural aspects of the Commissioner's handling of appeals against "an information provider's decisions, actions or lack thereof".

Art. 24 LApI foresees explicitly the possibility to appeal to the Commissioner against a denial of access or against inactivity on the side of an information provider. As further possibilities for addressing appeals, the Law names "a higher authority" and also "the courts", which leads to the conclusion that the Commissioner may also be appealed to if the "higher authority" does not act satisfactorily, but can no longer be appealed to if a court has been approached.[23]

Art. 25 LApI described the formal requirements for a valid appeal/complaint and lists the necessary information to be provided in the appeal. The Commissioner is bound to deal with the complaint, even within very strict time limits, unless one of the reasons of Art. 26 for denial of examination exists. The outcome of the Commissioner's investigations has to be shared with the complainant and with the information provider under examination. The final result of the investigations is a "decision" of the Commissioner; if the complaint has been founded to be justified, the information provider will be requested to give the information he withheld so far and to introduce disciplinary actions against his officials which violated the Law.

The information provider under obligation of a Commissioner's request has to act accordingly within 5 days and has to notify the Commissioner about compliance.

"Failure of an information provider to respond to the request may be appealed to the court" (Art. 28 (2)). Whether this can be done only by the complainant or also by the Commissioner is not stated. It is also not regulated what the information provider may do if he disagrees with the decision of the Commissioner. Naturally, he could just wait whether his opponent is bringing the case to court, where he could defend his position. However, it would be

[23] The relationship between procedures before the Commissioner and before a court are discussed in more detail in Chapter II A 2.

preferable to have an explicit right of both parties to appeal against "decisions" of the Commissioner, considering the fact that according to Art. 28 (1) the information provider has a legal duty to take measures in compliance with the Commissioner's decision.

The LApI additionally contains a list in its Art. 29 of those offences which will result in responsibility for violation of the right to access to public information. The consequence of such responsibility may be administrative liability under the Code of Ukraine On administrative Offence and/or liability under Ukrainian civil law comprising compensation for material or immaterial damage suffered by the complainant.

A.3. In the field of non-discrimination

Specific instruments of the Commissioner to counteract violations in the field of anti-discrimination are laid down in two legal acts: the *Law of Ukraine "On Principles of Prevention and Combating Discrimination in Ukraine"* (hereinafter also called Anti-Discrimination Act) and the *Law of Ukraine "On Equal Rights and Opportunities for Women and Men"* (hereinafter also called Gender Equality Act). Besides these two specific laws it is important to mention that the prevention of any forms of discrimination in relation to the fulfilment of person's rights and freedoms is defined as one of the purposes of the parliamentary control exercised by the Commissioner in Article 3 of the Law of Ukraine "On the Ukrainian Parliament Commissioner for Human Rights" and the exercise of control over the ensuring of equal rights and opportunities for women and men is laid down as one of the tasks of the Commissioner in Article 13 of the same law.

The following remarks will provide a short overview of the existing instruments as laid down in the two specific legal acts mentioned above recapitulating what has been explained in more detail in preceding reports (Activity 1.1 and Activity 1.3).[24]

a) Law on the prevention and combating discrimination in Ukraine

The *Law of Ukraine "On Principles of Prevention and Combating Discrimination in Ukraine"* defines in Article 9(1) the Ukrainian Parliament Commissioner for human rights as one of the subjects,[25] vested with powers to prevent and combat discrimination. The specific powers of the Commissioner concerning the prevention and combating of discrimination are laid down in Article 10. Accordingly, the Commissioner is entrusted with the following powers:

- to carry out the control over the observance of the principle of non-discrimination in various areas of public relations, in particular in the private sphere;
- to appeal to court with statements about discrimination in order to protect public interests and personally or through a representative is involved in the judicial process in cases and according to the procedure established by law;
- to conduct monitoring and summarize the results of the observance of the principle of non-discrimination in various spheres of relations;
- to consider the applications of persons and/or groups of persons on discrimination;

[24] Especially the report of Activity 1.3 also discusses the discrepancies and inconsistencies of the two acts. Thus, the present report will omit this issue from its analysis.

[25] Other subjects defined by the *Law on the prevention and combating discrimination in Ukraine* are the Verkhovna Rada of Ukraine; the Cabinet of Ministers of Ukraine; other state authorities, authorities of the Autonomous Republic of Crimea, local self-government bodies; and non-governmental organizations, physical and legal entities.

- to keep record and summarize the cases of discrimination in various spheres of relations;
- to make proposals on improvement of legislation on preventing and combating discrimination, application and termination of positive actions;
- to give opinions in cases about discrimination on the court's request; in the annual report to highlight the issue of preventing and combating discrimination and the observance of the principle of non-discrimination;
- to cooperate with international organizations, the relevant authorities of foreign countries on compliance with international standards of non-discrimination; and
- to carry out other powers defined by the Constitution and the laws of Ukraine.

In addition, Article 14 of the *Anti-Discrimination Act* gives every person who thinks that there was a discrimination against him/her the right to submit a complaint to various state institutions including the Commissioner according to the procedure provided by law.

b) Law on ensuring equal rights and opportunities for women and men

Article 9 of the *Law on ensuring equal rights and opportunities for women and men* defines the specific mandate for the Commissioner including the power to exercise control over observance of equal rights and opportunities for women and men; the competence to consider complaints on cases of discrimination based on sex; and the obligation to highlight the issue of observance of equal rights and opportunities for women and men in the annual report. In addition, Article 22 stipulates that "the person who thinks that there was a discrimination against him\her on the basis of sex or he\she became the object of sexual harassment, has the right to submit a complaint to (…) the Ukrainian Parliament Commissioner for Human Rights (…) according to the procedure provided by law."

B. Special problems encountered

B.1. About the ideal „mix" of competences

As has been pointed out also in previous reports drawn up in the course of this project, the Ukrainian Parliamentary Commissioner for Human Rights has to fulfil a whole cluster of functions which are – in other countries –not all of them necessarily attached to the role of an ombudsman-like institution. On the contrary, supervising the implementation of the right to data protection is in those Member States of the CoE which ratified Convention 108 and the Additional Protocol, the task of a very special sort of authority, which is independent like the Ombudsman or a court but acts as administrative authority; its decisions have similar legal effects as those of other administrative authorities.

What has been said for the legal field of data protection is widely true also for the field of Access to public Information. In many countries such a right is controlled by a special authority and in some countries, e.g. Great Britain, Germany or Slovenia, supervision over both legal fields, data protection and access to public information, has even been entrusted to the same authority, given that the two legal fields are related to each other in substance and also call for similar procedural remedies.

In the field of non-discrimination the situation may be different: In this area it will be necessary more often to intervene on behalf of vulnerable individuals or even vulnerable

groups of individuals within society; to assist the interests of such groups is a core task of ombudsman-like institutions.

B.2. Special problems encountered in the area of restoring the right to data protection

a) According to feedback obtain from interviews of members of the staff of the Commissioner, it seems that understanding of the nature and requirements of data protection and access to public data is still not wide spread in the Ukrainian society and also not in the public administration of Ukraine. Evidently even state institutions do quite often not react to a recommendation of the Commissioner explaining that, for example, some legal act is not in line with the LPDP. The main reason for such non-reaction is most likely a lack of understanding for what data protection would require. Even if institutions want to comply, they often are not certain how to achieve compliance.[26] There is evidently a considerable need for education on data protection and its implementation. This is why the model of **„positive action“,** developed actually in the context of promoting non-discrimination, is explained in greater detail in Part IV of this report: it could serve as a way of planning educative activities also for better implementation of other human rights, such as data protection or access to public information.

b) In the discussion with representatives of a state authority, which is processing personal data on a large scale, the problem was brought up how to provide, on a continuous level, expert knowledge on data protection *within* the institution. The remarks of the representatives of the state authority showed great uncertainty about the appropriate organisational solution how a special human rights expert (for data protection) should be placed within an authority of the public sector: Should it be the head of the institution? If not, who could exercise the necessary influence on the institution?

In this context the concept of „the **data protection officer**“ immediately comes to mind as an example how expert advice could be organized within institutions. There is a provision in the LPDP which could be read as providing a legal basis for installing a „data protection officer“: According to Art. 23 (7) the Commissioner may „cooperate with units or responsible persons that according to this Law organize the work related to the protection of personal data during their processing” and he may even “disclose the information about these units and responsible persons”, presumably to data subjects who have questions about the processing of their data by a certain controller, who has such a responsible person.

Reckoning that it is of general interest to promote the idea of having such a function within an institution as nucleus for spreading practical knowledge about the implementation of a human right, this topic shall be specifically dealt with in part IV of this Annex. The concept of a data protection officer can be seen as a model for how internal expertise combined with impact on the whole institution can be provided, also for implementing other human rights than data protection.

B.3. The right to access data about persons

A particular problem of „the correct understanding“ of human rights must be addressed in the context of the relationship between „access to information“ according to the Law on data

[26] During the Meeting No 4, it was stated that to implement European standards of data protection was definitely a goal of the sector, explained e.g. the difficulties which were encountered when trying to set up a scheme for timely erasure of data which were no longer needed.

protection and according to the Law on Access to public Information. Seen from the perspective of the usual division in European law making between the interests protected by laws on data protection on the one side and laws on access to public information on the other side, the legal situation in Ukraine is confusing:

The Law of Ukraine on Personal data protection grants in its Art. 8 a right to everybody to receive information from any controller, whether and which data are processed about him/her by the controller. This coincides with the European standard. Additionally, however, the Law on Personal Data Protection grants in Art. 16 *a right to access data about a third party* by addressing a request to any controller who processes data about the third party. This is completely outside any European standard: There is no such general right to have access to data about another individual - on the contrary: the fundamental right to data protection prevents that the existence of such a right could be claimed.

On the other hand, the right to have access to personal data is not only granted by the LPDP but, additionally, also by the Law on Access to public information:

> „Article 19. Development of Information Requests
>
> 1. Every person shall have the right to address an information provider with
>
> an information request, *regardless of whether the document in question is related to that person*, without specifying the reason for request."

Leaving aside details concerning the conditions for granting access, it is questionable on a principal level, whether it is useful to have such a multiplication of „a right to access personal data". Particularly so, as the procedural provisions for claiming and enforcing such a right are different under the Law on data protection and under the Law of Access to public information. If there are valid reasons for having this right in several forms, it would be helpful if these reasons were clearly perceivable, for instance by stating the – possibly existing – differences concerning the remit of applicability of these access rights.

B.4. On the state of the development of procedural rules for the enforcement of rights

a) Concerning the right to data protection

As has been shown above, the Law on personal data protection does not contain extensive regulation of the procedural side of deciding on cases and enforcing decisions. The Commissioner has introduced some details by means of an Order about the procedure of bringing in complaints and about dealing with them.

In the discussions with representatives of the Department which is responsible for matters of data protection within the office of the Commissioner, it was revealed that compliance with requests or recommendations of the Commissioner is very often not to be achieved in a smooth and speedy manner. Art. 28 of the LPDP states that "Violation of legislation on personal data protection shall involve liability established by law. " So far, effecting liability needs drawing up a protocol by the office of the Commissioner in order to evoke administrative liability under the Code of administrative offence for non-compliance. This has proven for the Commissioner and his staff to be a very onerous way of trying to enforce the Commissioner's decisions: it means opening up an additional new procedure before a court after actually already having decided about the case; the fact that the Commissioner is not a

party to the case in court adds to the difficulty to duly represent the Commissioner's opinions in the court procedure.[27]

Specifically problematic is also the time frame which is available for evoking administrative liability: If the workload on the actual cases before the Commissioner is too heavy, it can happen that the protocol for the court cannot be drawn up in time with the result that a violation of the right to data protection remains unpunished. [28]

Even if the office of the Commissioner succeeds in submitting a protocol in time to the courts, the court procedure tends to take rather long time; moreover, Ukrainian controllers and processors tend to appeal to the higher court if the court of first instance decided to impose a fine. Thus, it takes even longer until a violation of the right to data protection results in negative consequences for the violator.

Moreover, punishing (fining) the natural or legal person who violated the right to data protection does not in itself restore the violated right: There are situations where the violated right cannot be restored because of the nature of the violation: Illegal disclosure cannot be undone; in such cases only punishment of the culprit and compensation for damages seem to provide adequate solutions. In many other cases it is, however, necessary that the violator acts in a specific way, e.g. deletes or rectifies certain data. In such cases enforcement of the action is necessary. In how far this is foreseen under the existing legal framework in Ukraine for execution is analysed in Part IV 3. (Enforcement by execution). One of the main problems in this respect is the legal nature of decisions of the Commissioner: A clear statement in the relevant legal provisions would be needed that such decisions are granted the legal status of being "enforceable" in the sense of the new Ukrainian laws on compulsory enforcement proceedings.

In discussions with representatives of the Commissioner's office also the question was brought up who should reward compensation in order to achieve an efficient settling of conflict situations. In most countries this is a remedial instrument reserved for application by the courts. Even the new EU General Data Protection Regulation, which greatly emphasizes the role of data protection supervisory authorities, does not change the exclusive competence of the courts to decide on matters of compensation. Moreover, the representatives of the Commissioner's office explained that a new competence for the Commissioner to decide on compensation, e.g. in a preliminary way, would create considerable practical problems for the

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[27] The judicial process does not always have the intended result as the Commissioner is not party to the proceedings and does not have the right to appeal. This right can be exercised only by a person whose rights have been violate.
Another problem worth mentioning is the fact, that it is not possible for the Commissioner to influence the ending of the administrative court procedure where the incriminated institution has meantime solved the problem in a satisfactory way, but the applicant still wants to challenge the authority.

Administrative protocols also should be handed in person. Consequently, the activities of the Department are mainly limited to Kiev area. The Report of the activity 2.1.1, Page 51, *http://www.twinning-ombudsman.org/wp-content/uploads/2017/03/EN_Report_Activity_2.1.1.pdf*

[28] Article 38 of the Code of Administrative Offences sets up time limits for the imposition of an administrative penalty: Unless otherwise stipulated in the Code, a penalty procedure may be imposed only within a period of three months from the date of the commitment of the offence, and where the offence is continuing, no later than within three months from the date of detection of the offence. On the other hand, according to Article 17 of the LPCHR, complaints can be submitted to the Commissioner within the period of one year after disclosure of the act of violation of human rights and in case of exceptional circumstances, this period can be extended by the Commissioner, but should not exceed two years. This leads to a rather inconsistent situation, where the Commissioner can assert that a violation has taken place but the culprit, in many cases, cannot be punished.
On the whole, legal time frames for obligatory actions of authorities seem to be extremely short: E.g. public bodies have an obligation to respond to the request of a person and to provide information within a 5 days period.

staff as they are not trained and have no practical experience in assessing the amount of pecuniary compensation adequate for different cases of violating the right to data protection. All in all, it seems that matters of compensation should stay an exclusive competence of the courts.

b) Concerning the right to access to public information

The Law on Access to public information is fairly new and contains in its Chapter V provisions on the procedure for claiming access and having it enforced in case of not immediate compliance. Contrary to the situation concerning the enforcement of data protection, in the field of Access to public information the Law itself deals with the procedural side of ensuring compliance with the human right. Details may be taken from Part III A. 2

c) Concerning non-discrimination

The relevant laws foresee similar procedural instruments as the LPCHR for restoring rights. Apart from taking up problems which have been found in investigations performed on the Commissioner‘s own initiative, the Commissioner has to „consider applications of persons or groups of persons on discrimination“.[29]

Special value is set on the Commissioner‘s monitoring of the situation, on making proposals for amendments to the legal framework, on appealing to court in order to protect public interests and to provide his/her opinion in cases about discrimination in the courts.

NGOs, who are active in the field of preventing discrimination, have criticized that clear and comprehensive rules about the procedure for asserting recognition of the right to non-discrimination are missing in the relevant laws. Even if rules may be found by an analysis of the whole body of Ukrainian law, this is too complicated, difficult and time consuming for individuals which are victims of discrimination: ERT[30], for instance, believes that both procedures for access to justice and legal aid schemes should be reviewed and adjusted, as necessary, to ensure that they meet the needs of victims of discrimination.

[29] Art. 10 of the Law on preventing and combating discrimination in Ukraine

[30] The Equal Rights Trust in its legal analysis of the Law on prevention and combating discrimination: „While it is possible that provisions to this effect are contained in other pieces of Ukrainian legislation, ERT is firm in its view that all anti-discrimination legislation should be as accessible and easy to use as possible, and would therefore advocate the inclusion of any provisions on access to justice in the Anti-Discrimination Law itself “ (http://www.refworld.org/docid/55cb41f44.html)

IV. ANALYTICAL STUDIES ON SPECIFIC TOPICS

1. Defence of Public Interest

Both the doctrine and current judicial practice in EU Member States maintain that it is impossible to make a universal concept of public interest. Considering this, the formulation and interpretation of the concept of public interest must be and falls within the competence of courts. For instance, in Lithuania the Supreme Administrative Court has noted on many occasions that the concept of public interest must be interpreted in its specific context (the judgement of the Supreme Administrative Court of Lithuania of 23 January 2004). The Supreme Court of Lithuania has also stated that the concept of public interest is an assessment criteria; therefore, it must be applied taking into account the circumstances of a specific case.

Despite the distinctions in approaches to defining the public interest concept, the public interest has the following commonly known features[31]:

1) public interest is very versatile;
2) at its most general sense, public interest describes certain common interests of people as members of the society;
3) public interest is not absolute, it is usually limited to satisfaction of the most important needs of the society or its members;
4) different public interests can coexist simultaneously, and a balance between them is needed;
5) public interest can be related to both a single individual and a large group of persons or to the society in general.

Sometimes, in specific relations, it is difficult to determine the public interest and to define the limits of its defence; in such case, not only specific circumstances but also interpretation of public interest in the context of the society, legal regulation and judicial practice must be considered.

Under these circumstances, a very important issue is the list of state officials, public bodies, organizations, and natural persons who are entitled to defend the public interest.

Common approach is that prosecutors, administrative entities, state institutions, establishments, organizations, or natural persons can submit a claim to a court to defend the public interest or rights and legitimate interests of the state, municipality or persons concerned in cases and under the conditions provided for by law.

Generally, the public interest is defended in three ways[32]:

1) a right to join the proceedings is granted to a special state official, prosecutor, whose main function is to defend public interest. Countries which use this model for public defence grant their prosecutor a right to file a claim or to join the trial in any case which he/she deems necessary for defence of public interest;
2) a right to defend public interest is granted to public organizations (protecting consumer rights, women rights, child rights, environment, etc.), as well as to special state or municipal institutions or officers (Competition Council, institutions

[31] Mitkus, S., Šostak, O. R. Peculiarities of Defence of Public and Private Interests. Socialiniai tyrimai / Social Research. 2008. Nr. 2 (12), 75–83.
[32] *Ibid*.

for environment protection, etc.);

3) filing a special-collective-claim. Here, a single stakeholder files a claim on behalf of a larger or a smaller public group.

The latter claim is filed according to the rules provided by the civil procedural law. In the sphere of administrative procedure, one may consider the initiation of the test cases (a type of action, which is very closely related to the class action (collective claim).

Starting with the analysis of the current legislation in Ukraine, one should note that the legal rules on the defence of public interest do not clearly confer the powers on the Commissioner to defend the public and not only individual interest.

The analysis the Ukrainian legislation shows the following:

The legal rules on the participation in the civil procedure of bodies and persons authorized by law to protect the rights, freedoms and interests of other persons are laid down in the Code of Civil Procedure of Ukraine. As provided for under Article 45(1) of the Code, in cases established by law, public authorities, local self-government bodies, natural and legal persons may apply to the court for the protection of the rights, freedoms and interests of others, or public or public interests, and participate in these cases. At the same time, the Commissioner of the Verkhovna Rada of Ukraine on Human Rights, bodies of state power, bodies of local self-government must provide documents to the court confirming the existence of valid reasons that make it impossible to independently address these persons to court in order to protect their rights, freedoms and interests.[33]

Similar provisions are set out in the Administrative Procedural Code of Ukraine. Article 60(1) of the Code provides that in cases established by law, public authorities, local self-government bodies, natural and legal persons may apply to the administrative court with administrative lawsuits on the protection of the rights, freedoms and interests of other persons and to participate in these cases. At the same time, bodies of state power and bodies of local self-government should provide evidence to the administrative court confirming the existence of valid reasons that make it impossible for them to appeal independently to the administrative court to protect their rights, freedoms and interests. In order to protect the rights and freedoms of a person and a citizen in cases established by law, the Commissioner of the Verkhovna Rada of Ukraine on Human Rights may, personally or through his representative, apply to the administrative court with an administrative suit (application).[34]

In this context, it is appropriate to offer to evaluate the existing national legislation in a more integrated way by referring to concrete examples and practices concerning the ombudsmen's right to defend the public interest, which are applied in Europe.

For example, in 2014, the National Audit Office of Lithuania has published a report on the defence of public interest in Lithuania. According to the data, which was published in this document, a total of 19 state institutions are entitled to defend public interest[35]. The situation in general has not changed.

It should be pointed out that in Lithuania the Ombudsman does not have a direct access to the courts in order to defend the public interest. Nevertheless, the remedies operated by the Ombudsman while defending the public interest are mainly related to the review of the

[33] Online Access: http://zakon2.rada.gov.ua/laws/show/1618-15/page2, accessed on 8 November 2017.
[34] Online Access: http://zakon2.rada.gov.ua/laws/show/2747-15/page3, accessed on 8 November 2017.
[35] Online Access: https://www.vkontrole.lt/failas.aspx?id=3119, accessed on 9 November 2017.

legality of regulatory legal acts or indirect protection of public interest such as: the right to apply to the administrative court with a request to investigate conformity of an administrative regulatory enactment (or its part) with the law or Government resolution; to propose to the Seimas to apply to the Constitutional Court regarding the conformity of legal acts with the Constitution and laws of the Republic of Lithuania; to apply to the court for the dismissal of officials guilty of abuse of office or bureaucracy; or to recommend to the prosecutor to apply to the court according to the procedure prescribed by law for the protection of public interest.

It is understood that there are other practices in EU States too. In this regard, one should note the example of the Czech Republic. In 2012, the Czech Republic Ombudsperson filed the first action to protect the public interest, using his new powers based on an amendment to the Code of Administrative Justice[36]. The action was directed against several final and conclusive administrative decisions of the Municipal Authority in Duchcov, thereby this administrative body had permitted the construction of a photovoltaic power plant in the cadastral area of Moldava in Krušné Hory and subsequently issued an occupancy permit.

In a standard investigation, the Deputy-ombudsman found a number of shortcomings in the administrative procedure itself. The environmental impact of this industrial construction had not been assessed in advance (possible and probable impact on the landscape character, impact on the favourable condition of Ptačí oblast Východní Krušné Hory, not granting an exception to protective conditions related to specially protected plant and animal species). Further, the Building Act was allegedly fundamentally breached since the construction had been permitted and carried out in the open landscape and in a non-developed area, i.e. in violation of one of the basic objectives of construction regulation, namely the protection of non-developed areas.

Since the Ombudsman's duty always is to convince the court that there is a compelling public interest in an action against a specific decision, his line of reasoning was as follows. During administrative proceedings, it was not just some specific legal rule that was breached. The authorities concerned had not respected a number of provisions of various sector regulations (the Building Act, the Nature and Landscape Protection Act, European regulations). In the opinion of the Ombudsman, unlawfulness of the issued decisions had reached such an intensity that the principles of the rule of law and prevention were negated. The Ombudsman paid particular attention to the continuing negative impact of the construction on environment and the non-developed area and, last but not least, to the inability of the public administration to remedy the situation "internally", i.e. by means of extraordinary remedial measures.

Since the public administration as a whole had been unable to provide for a remedy of these unlawful procedures, not being able to do so even within an administrative review of the contested decisions by the Regional Authority of the Ústí nad Labem Region and the Ministry for Regional Development, the Ombudsman decided to use his new special powers and demand that the administrative court cancelled the acts in question.

It is interesting to point out that the investigation of individual citizen complaints frequently also means the defence of public interest. As examples in Europe prove, there are various forms of actions on how the public interest is defended by the Ombudsmen. As a comparison, the Ombudsman in Denmark is believed to rely more heavily on individual citizen complaints to achieve what we have defined as "public interest". For example, the Danish lawyers give the Ombudsman very considerable credit for having speeded the final determination of tax matters. This he achieved by proposing procedural and organizational changes after a sweeping study of tax administration. The study was undertaken after a single taxpayer had complained about a seemingly unconscionable delay in obtaining a needed ruling. The same

[36] Online Access: https://www.ochrance.cz/en/news/press-releases-2012/ombudsmans-action-to-protect-public-interest/, accessed on 7 November 2017.

may be said of numerous other cases. What may at first have seemed to be narrowly personal grievances were later perceived to have implications that overshadowed the initial episodes. Thus, individual complaints often have broad external effects because they lead the ombudsman to make recommendations for changes that affect many people besides the complainant.[37]

Proposals

As far as main principles relating to the Commissioner's ability to initiate proceedings before a court are concerned, it is proposed that the Commissioner could be entrusted to apply to courts specifically in the cases regarding the defence of public interest (actio popularis). The objective of this proposal, together with a proposal regarding the review of regulatory acts[38], is to establish a complete legal framework for entitling the Commissioner to act independently, where revealed irregularities are considered to be of a systemic character (see the facts explained in the above-mentioned Czech Republic Ombudsperson action).

In determining the extent for the Commissioner's right to apply to courts for defending the public interest, one should ensure that the legal remedy of this kind is not duplicated by the duties of other state authorities. Therefore, the legal regulation shall establish a right and not a duty of the Commissioner to apply to courts in order to defend public interest where particular matter falls into the field of the competence of other state authorities and they are capable to defend the public interest efficiently on their own initiative. In no case the Commissioner shall replace administrative authorities, on which the duty to defend public interest is placed by law. Therefore, having established that certain legal proceedings are in progress and there is no pressing need to intervene as a third person into litigation, the Commissioner shall refuse to undertake remedies for the defence of public interest.

The other possible area of activity regarding the defence of public interest, which could merit further consideration, is the initiation of proceedings against systematic violations of the rights and interests of the individuals and the legal persons in administrative proceedings. This sort of complaints could be called as test cases and are very closely related to the classic name the class action (collective claim). However, it should be specified that the Commissioner shall apply to the courts in this way in order to defend the public interest where the following conditions are met: first, particular matter falls into the field of the competence; second, the violation has systematic feature; third, the podania is not exercised by offender. Furthermore, the Commissioner's request to the court shall contain non-material matter – to order the infringer to stop unlawful actions and restore status quo. Such proposal is based on the idea that by submitting these claims the Commissioner does not call the individuals concerned whose rights have been violated into a group. Such persons do not participate in the proceedings. Nevertheless, the declaration of the violation by the court decision would have a preliminary ruling effect in individual cases.

The implementation of these proposals requires the amendments to the Code of Administrative Judicial Procedure of Ukraine and the Code of Civil Procedure of Ukraine.

Additionally, in considering how to ensure the efficiency of the above-mentioned measures, one should note that the Commissioner could benefit from establishing special jurisdictional rules in Article 20 of the Code of Administrative Judicial Procedure of Ukraine. It could provide that Kyiv district administrative court as the court of first instance has the exceptional jurisdiction on these matters. The Supreme Administrative Court of Ukraine as the court,

[37] Burton Allen Weisbrod, Joel F. Handler, Neil K. Komesar, Public Interest Law– An Economic and Institutional Analysis, 1978, page 509.

[38] http://www.twinning-ombudsman.org/wp-content/uploads/2017/09/EN_Mission-report-1-3.pdf

which reviews court decisions of district administrative courts as a court of cassation[39], should be the last instance court. This would contribute to the uniformity of application and interpretation of the law, including the unification of the case law in the sphere of the claims on the defence of the public interest submitted by the Commissioner.

It is also worth noting that if the Commissioner opts to reinforce an active role in judicial matters, the possibility to appear as amicus curiae shall be formalized accordingly in the procedural law and the Law of the Commissioner. The expertise knowledge of the Commissioner is in particularly relevant in cases regarding the defence of public interest. Therefore, the right to defend the public interest, which is also conferred on the courts, could be implemented more efficiently if the Commissioner is entitled to intervene into the undergoing proceedings regarding the defence of public interest and to provide opinion regarding the matters under consideration. In order to provide an adequate legal framework to implement the aims of the ombudsperson institution, adopting legal provisions regarding the defence of public interest before courts could contribute to enforcing human rights legislation independently of individual complaints filed with the Commissioner.

The last proposal on the matter concerns the sustainable development of soft law. European equality bodies in other states have now developed concrete methodology for drafting amicus curiae to courts. When drafting such methodology for the Commissioner, one should take into account the difference between drafting a legal claim and providing an amicus curiae opinion, as the latter should be more neutral legal opinion that analyses the points of law rather than factual circumstances of the case. The methodology should include basic elements of violation analysis (for instance, like in Latvia, the key elements addressed by amicus curiae in their opinion are similar to those used in preparation of expert reviews[40]) and tips of good legal writing.

2. Compensational Remedies

The Law of the Commissioner is silent on the fact whether the Commissioner is entitled to recommend the compensation for the damage sustained by any natural or legal person or whether the Commissioner is entitled to file action for damages. Article 15 of the Law of the Commissioner simply provides that the submission of the Commissioner is a document, which is submitted by the Commissioner to bodies of state power, bodies of local self-government, associations of citizens, enterprises, institutions, organizations, irrespective of their forms of ownership, their officials and officers *for the purpose of taking*, within the period of one month, *relevant measures aimed at the elimination of revealed acts of violation* of human and citizens' rights and freedoms. Thus, the Law of the Commissioner does not provide for any indicative list of relevant measures or explain the types of measures that can be addressed to the public authority concerned. Under these circumstances, it is difficult to ascertain whether and under what conditions the Commissioner could recommend the public authority to compensate the damage sustained by the aggrieved individual. At the meetings with the representatives of the Office, it was also not indicated that the Commissioner issues any recommendations with a purpose to obtain financial compensation. For these reasons, it can be assumed that at this stage the use of compensational remedies by the Commissioner is very limited, if not impossible due to the lack of a clear legal background in the Law of the Commissioner.

Nevertheless, in order to enhance the remedial competence of the Commissioner it is suggested to explore the possibilities for providing compensatory remedies further. Indeed, in

[39] Online Access: http://zakon2.rada.gov.ua/laws/show/2747-15/page2, accessed on 7 November 2017.
[40] Information upon request provided by Ms. Anete Ilves, Legal Councellor of the Social, Economic and Cultural Rights Division, Republic of Latvia Ombudsman Office, 23 May 2017.

some cases remedial action is essential in order to rectify the breach. It is a principle of international law that the reparation of a wrong may consist in an indemnity. The damage may include pecuniary damage in the form of a reduction in a person's assets or loss of profit, non-pecuniary damage and future loss. Where non-pecuniary damage is found, equitable compensation or sometimes symbolic damages may be awarded.

Both forms of damages are an internal part of the legal system in Ukraine. Moreover, the Civil Code of Ukraine[41] sets out few general provisions on indemnification concerning the activities (or omission) of public authorities. In this respect, Article 276 concerning the restoration of the violated personal non-property rights shall be noted. According to Article 276(1), a state power body, a body of the Autonomous Republic of Crimea, a local self-government, a physical or a legal entity, whose decisions, actions or inactions violate the personal non-property right, shall be obliged to take necessary actions for immediate restoration of such right. Article 276(2) further establishes that if the actions necessary for immediate restoration of the violated personal non-property right are not taken, the court may adopt a decision on restoration of the violated right and on compensation for moral damage due to such violation.

Pursuant to Article 1173, damage inflicted to a physical or legal person as a result of illegal decisions, actions or inactivity of the public authorities while exercising their competence shall be indemnified by the state irrespective of the guilt. Similarly, Article 1174 further sets out the right to compensation for the loss caused by the officials of public authority. Meanwhile, Article 1175 deals with the compensation for loss caused in the sphere of law-making.

In addition to this, Article 25 of the Law on Citizens' Appeals provides for the reimbursement of losses to a citizen in connection with violation of requirements of this Law during complaint processing. According to Article 25(1) of the Law on Citizens' Appeals, in case the complaint is satisfied, the body or the official that took the unlawful decision concerning application of the citizen shall compensate the material losses, incurred during submission and processing of the complaint, the justified costs, incurred in connection with travelling for complaint processing at the request of the corresponding body, and earnings lost. Disputes concerning reimbursements of costs shall be settled in the court. Meanwhile, Article 25(2) sets out that moral suffering, incurred because of unlawful actions or decisions of a body or an official during complaint processing, can be compensated to a citizen at his/her request according to the procedure, established by the current legislation. The amount of compensation of moral (non-material) losses shall be determined by court.

As illustrated by the provisions of the Civil Code and the Law on Citizens' Appeals, established legal framework provides a clear legal basis for the non-contractual liability of the state. These legal rules can offer a starting-point for further developments on how the Commissioner could facilitate the implementation of the right to compensation for the aggrieved individuals. It is true that according to the existing legal rules the question of compensation is mostly decided by the courts. Nevertheless, it does not seem impossible to confer the right to suggest to pay the compensation for the loss caused by public authorities on the Commissioner. In general, this is not a foreign function to the Ombudsmen.

State practice confirms this position. For instance, in the Czech Republic, as provided for under Article 19(e) of the Ombudsman Act, the defender may suggest provision of indemnification or filing a claim for indemnification. In Slovenia, Article 39(2) of the Ombudsman Act provides that the Ombudsman shall recommend the way how to remedy the established wrong-doing. In this, he may recommend that the body should repeat a certain

[41] Online Access: http://zakon2.rada.gov.ua/laws/main/435-15; http://teplydim.com.ua/static/storage/filesfiles/Civil%20Code_Eng.pdf, accessed on 16 November 2017.

procedure in accordance with the law, recommend the compensation for the damage, or recommend some other way how to remedy the wrong-doing that has affected the individual. In this, he shall not interfere in civil legal rights of the individual to the compensation for the damage. In Lithuania, the Ombudsman may also propose that material and non-material damage sustained by a person due to the violations committed by the official be compensated in the manner prescribed by law (Article 19(18) of the Law of Seimas Ombudsman). In Norway, if the Ombudsman finds that there are matters, which may entail liability to pay compensation, he may, depending on the circumstances, also suggest paying the compensation.

While discussing compensatory remedies, a compensation on an *ex gratia* basis shall also be addressed. The public authority may decide to grant compensation without formally admitting any legal liability. Nevertheless, the possibility of *ex gratia* payments is a matter of legal culture of the given country. Therefore, it is a little premature to suggest it as a novelty to the remedial regime of the Commissioner and more detailed studies on the matter shall be further conducted.

Judicial Remedies

The judicial remedies held by the Commissioner may be subdivided into two groups: (i) judicial remedies concerning the legality of regulatory legal acts and (ii) judicial remedies applied where a breach of individual rights and legal interests is established.

There is no doubt about the efficiency of the Commissioner's right to initiate normative control of legal acts. As was confirmed by the previous studies[42], challenging normative acts proves to be very efficient in the Commissioner's activities. Normative control is considered as a key task to the Commissioner. It allows the Commissioner solving legal issues in a systematic and broader way.

In setting the future direction for the implementation of remedies, it is also proposed that the Commissioner should have a direct access not only to the Constitutional Court, as provided for under Article 150(1)(1) of the Constitution and Articles 13(3) and 15 of the Law of the Commissioner, but also to administrative courts, which are entrusted with normative control of general legal acts. It in this regard, it should be noted that currently Article 60(1) of the Code of Administrative Judicial Procedure of Ukraine does not expressly provide for the direct access to the courts in order to challenge regulatory legal acts. It simply establishes that the Commissioner shall apply to administrative courts in accordance with the procedure established by law. In addition to this, the current legal framework relates the Commissioner's right to apply to administrative courts in order to challenge normative (regulatory) legal acts to the fact that application is made by the subject of the legal relationships, in which this act will be applied. Nevertheless, there are no compelling reasons, which would support a conclusion that the Commissioner's right to apply to administrative courts in order to challenge regulatory acts shall be made depended on an individual complaint and adversely affected legal interests of particular private parties. To remedy the situation, Article 13 of the Law of the Commissioner shall be supplemented by a legal norm conferring the right to apply to administrative courts on the Commissioner with regard to the legality of general rules. Indeed, the proposed amendment to the legal framework would make the system of judicial remedies conferred on the Commissioner complete.

This proposal is motivated by a fact that the Commissioner has already a direct access to the Constitution Court. It would be consistent to apply the same approach in the sphere of legality

[42] See Reports of Activity 1.3. and 1.4. Online Access: http://www.twinning-ombudsman.org/what-we-do/component-1/

of other regulatory acts. Moreover, it should be emphasized that under current legal regulation an administrative case concerning the legality of regulatory acts shall be resolved within one month or, in exceptional cases, within two months. Under these conditions, it would be regrettable if a remedy of this kind remains under-utilised despite being very efficient in terms of time and its effects.

Turning to the question of judicial remedies which are available in the event of violations of individual legal interests and subjective rights, it should be noted that essentially the Commissioner has jurisdiction over any human rights violations in judicial proceedings and takes up various roles in this regard, e.g. acts as a legal representative or public prosecutor. The Commissioner is entitled to appeal against individual administrative acts and judgements by courts. Thus, the Commissioner's mandate is not limited to monitoring of judicial administration but also allows for certain intervention in judicial proceedings, including the right to initiate review of final judicial decisions. Article 13(10)(2) of the Law of the Commissioner provides that the Commissioner is entitled to participate in any proceedings at any stage of the trial irrespective of the fact whether particular proceedings were started upon the Commissioner's initiative. In addition to this, as provided for under Article 13(10)(3) of the Law, the Commissioner is authorised to initiate a review of judgments of courts at all times. Moreover, the current legal framework formally does not limit the Commissioner's mandate to the issues regarding human rights protection.

Under these circumstances, it is proposed to remove the right to access the court in order to defend individual legal interests and subjective rights of the aggrieved individual from the legal arsenal of judicial remedies conferred on the Commissioner. First, it is a well-established practice that the ombudsmen are forbidden from intervening into judicial proceedings and, above all, questioning the soundness of court decisions. Second, the issue of an overlapping between the Commissioner's activities and Ukrainian legal aid system shall be addressed accordingly. In Ukraine, the state legal aid scheme is in place and therefore there is no rationale for the Commissioner to act as a legal representative of the disadvantaged members of the society.

To sum up the analysis of judicial remedies available to the Commissioner, it should be concluded that once the investigation has produced conclusive evidence that there is a violation of individual legal interests or subjective rights, the Commissioner must seek to reach a friendly solution in order to rectify the violation at issue and satisfy the complainant. To this end, the Commissioner shall rely on a set of remedies of non-judicial kind.

Where a friendly settlement cannot be achieved, the Commissioner will have to choose between two currently available remedies, i.e. making a recommendation or including certain information into annual or special report. In the former case, the public authority concerned shall respond within the time-limit together with an explanation on the measures taken to implement the recommendation. If the Commissioner finds the measures satisfactory, the matter shall be closed and no further action is taken. However, where no measures are undertaken or they are not sufficient, the Commissioner may draw up a special report to the Parliament repeating the recommendations the Commissioner has already put forward to the public authority concerned. Meanwhile, including the information about the failure to implement the recommendation into annual report contributes to the aim at improving the functioning of the administrative apparatus as a whole.

A different situation occurs where a systemic irregularity has been detected. Systemic irregularities cannot be solved through a regular investigation and require to address the issues at a macro level by undertaking wide-ranging investigations aimed at altering the established administrative practices and procedures. As mentioned above, recent years have witnessed valuable efforts on the part of the Commissioner to implement their remedial competence by

referring to the Constitutional Court. At the same token, the remedial competence of the Commissioner may be further enhanced by conferring on the Commissioner a direct access to the administrative courts in order to challenge other regulatory legal acts.

One may argue that the primary duty of the Commissioner is to deal with the individual complaint that are addressed to him. Meanwhile, a proactive role and own initiative inquiries, though important, should not be used too frequently. Nevertheless, having regard to the extremely wide mandate conferred on the Commissioner in Ukraine as well as the size of the population, in our view, the implementation of proactive mechanism, which consists of own initiative investigations, is a core tool for the Commissioner to perform their activities as efficient as possible. Indeed, own initiative investigations may be triggered by the investigation of certain individual complaints. However, unlike investigations of individual complaints, own initiative inquiries have no admissibility requirements or time limits which if not satisfied normally preclude the investigation of individual complaints. Having regard to this, there are no formal barriers to address structural violations of human rights or systemic administrative malfunctioning.

While discussing the judicial remedies held by the Commissioner, one should also note that the Law of the Commissioner does not explicitly provide for so called "specific powers" of the Ombudsmen such as the right to initiate criminal, administrative[43] or disciplinary proceedings. Within the scope of their function, ombudsmen can detect violations of rights. These infringements can comprise insufficient compliance with the duty of assistance, non-compliance with recommendations, and particularly violations of rights within the performance of administration that the ombudsman observes resulting the course of his investigation. In such cases, ombudsmen can generally either initiate criminal and disciplinary proceedings themselves or at least recommend the initiation of such[44]. In this respect, the ombudsmen of Poland and Sweden are assigned with the strongest powers, as they can initiate both criminal and disciplinary proceedings without any restriction.

Even though the initial model of the ombudsperson's institution opted as suitable to Ukraine was based on strong control powers of the executive branch, in order to comply with the nature of ombudsmen and their genuine tasks it is not proposed here to include the above-mentioned powers into the Commissioner's remedial regime, in particularly into the list of judicial measures.

The approach that the *judicial* remedies held by the Commissioner should not include the right to initiate criminal, administrative or disciplinary proceedings before the courts is motivated by a set of reasons. First, there is a risk that at some stage the Commissioner and his Apparatus will find themselves flooded with the requests to initiate disciplinary or other legal proceedings and this will generate the need for ad hoc decisions and for individual instructions. Moreover, it does not appear that up until this date the remedies of this kind proved to be of a pressing need to the efficient activities of the Commissioner even though the right to initiate the legal proceedings theoretically may be derived from very broad provisions of Article 13 of the Law of the Commissioner. Indeed, the Law of the Commissioner does not

[43] It needs to be clarified that the analysis here and in the following text of this section concerns general areas of the Commissioner's activities (classical functions) and does not address the specific tasks conferred on the Commissioner where he acts in principle as an executive body (i.e. data protection, access to public information or antidiscrimination). It should be noted that current legal framework (concretely, legal provisions of the Administrative Code of Offences) establishes that the Commissioner's Office is entitled to draw up administrative protocols in which administrative offences are described. This concerns personal data protection and access to information breaches. The Commissioner can proceed administrative protocols to the court and then the court decides on the breaches in question. Nevertheless, as mentioned above, these questions are not a subject matter of this section.

[44] G. Kucsko-Stadlmayer (ed.), European Ombudsman – Institutions, Springer – Verlag, Wien, 2008, pp. 55–56.

specify the types of measures that may be addressed to the infringer and, at least in theory, it may be interpreted broadly.

Second, it does not seem to be enough value in duplicating the duties of other state authorities, which are directly responsible for initiating criminal, administrative or disciplinary proceedings. On the contrary, it is reasonable to consider that in no case the Commissioner shall replace administrative authorities, on which the duty to defend public interest is placed by law.

Finally, the observance of the rule of law as a whole is not a direct task of the Commissioner. The bottom line, however, is that the objectives of the Commissioner's activities will be difficult to achieve if the Commissioner loses his impartial function to act as a mediator between the state and the citizens, based on the power of personal authority and strong reasoning, and is granted punitive measures, e.g. the right to prosecute certain officials of public authorities. In order to counter and remedy human rights violations and instances of maladministration it is necessary for the Commissioner to preserve its neutrality, and accordingly, the institution should not involve itself in litigation although it certainly should have the power to advise those who seek its assistance as to the legal remedies which may be available to them. Assigning additional punitive powers to the Commissioner would lead to the adverse amendment of his purpose and key powers.

As an alternative and should this prove to be necessary by the institution, one may consider that the Commissioner could exercise the specific powers to initiate criminal, administrative of disciplinary proceedings *within the boundaries* of his regular forms of activities, such as investigation of individual complaints, reporting and recommendations. Indeed, this would reflect on certain practice in Europe. In some cases, if, in the performance of their duties, the Ombudsmen detect an act that could constitute a crime or an offence, the Ombudsmen normally notify the competent public authorities such as the public prosecutor. Similarly, in the case of a disciplinary offence the Ombudsmen may send the relevant information to the official's superior. The Ombudsmen may also recommend the initiation of criminal, administrative or disciplinary proceedings where they determine that a violation of rights with elements of a criminal act, an offence or a contravention of working discipline has occurred. Nevertheless, initiation of criminal, administrative and disciplinary proceedings *before courts* by the Commissioner on his own motion would constitute an undesirable implementation of his mandate.

Proposals

Having regard to the broad nature of the provisions concerning the remedies set out in the Law of the Commissioner, it can be assumed that the Commissioner has a wide list of means of remedial action at his disposal in order to address instances of human rights violations. On the one hand, it is difficult to deny that this wide margin of appreciation provides advantages to the activities of the Commissioner, such as flexibility and adjustment to individual circumstances. On the other hand, it is possible to consider whether the lack of indicative list of relevant measures causes legal uncertainties hindering the smooth functioning of the institution and leading to inconsistent practices. In terms of benefits, if the law was supplemented with an indicative list of measures it would be clear to the applicants and infringers, which measures they may expect to receive, and how they are to conduct themselves to rectify the breach.

The question also arises as to the extent how the judicial remedies held by the Commissioner are implemented. Challenging the legality of normative acts before the Constitutional Court can provide a core remedy for addressing the issues in a systematic and broader way and preventing administrative errors in the future. Similar development of entitling the

Commissioner to challenge directly the legality of normative administrative acts before administrative courts is to be welcomed and encouraged.

At the same time, it is proposed to exclude from the Commissioner's remedial regime the judicial remedies which are currently applied where a breach of individual rights and legal interests is established. Once the investigation has produced conclusive evidence that there is a violation of human rights, the Commissioner must seek to reach a friendly solution in order to rectify the violation at issue and satisfy the complainant. To this end, the Commissioner shall rely on a set of remedies of non-judicial kind. This lack of formal legal authority should not be seen as a threat to the efficiency of the remedial regime conferred on the Commissioner. The truth is that the Commissioner has sufficient forms of remedial redress at his disposal at both micro level of specific investigations seeking the correction of individual mistakes and applying classical measures such as recommendations and reporting, and macro level of wide ranging own initiative investigations leading to the cases of normative control.

In order to enhance the remedial competence of the Commissioner, it may be suggested that the Commissioner be vested with the authority to propose the public authority to compensate certain loss incurred by the aggrieved legal or natural person. Meanwhile, conferring on the Commissioner the right to initiate criminal, administrative or disciplinary proceedings before the courts, which is normally a remedy associated with a punitive function, at this stage seems to be inappropriate and not in line with the purpose of the institution.

3. Enforcement by execution

Situation at Present

The current legal system in Ukraine does not provide the possibility of compulsory enforcement for decisions (recommendations, requests etc.) of the Ombudsman. This is a serious draw back in those areas of competence of the Commissioner where mainly individual cases of violations of rights are decided but cannot be finally established. The Mission report 1.3 on Enhancing Efficiency of Complaint Handling Procedure therefore contained the following suggestion: [45]„Having regard to the executive powers given to the Commissioner in special areas of law, it is recommended to foresee in the Law on Data Protection, the Law on Access to Public Information and the Law on Equal Opportunities the second type of final acts of the Commissioner following the investigation of individual complaints, i.e. legally binding administrative acts imposing legal sanctions".

The following analysis examines possible legislative changes, which would result in creating the legal preconditions for submitting decisions of the Ombudsman to court bailiffs in order to have them enforced in accordance with established procedures. Such a legal possibility would greatly increase the efficiency of the work of the Ombudsman, create preconditions for more effective elimination of identified violations, and avoid duplication of proceedings in court. In case of disagreement with the Ombudsman's decisions, the parties to the proceedings could still defend their rights in court.

As a result of the recent reform of the procedure of enforcement of court decisions in Ukraine several laws were adopted resp. amended: the Civil Procedure Code of Ukraine of 18 March 2004 (Text No. 1618-IV, the last edition from 13-07-2017), the Law of Ukraine "On enforcement proceedings" of June 2 2016, and the Law of Ukraine "On agencies and persons in charge of enforcement of court rulings and decisions of other agencies" of June 2, 2016.

According to Art. 3 of the Law of Ukraine "On enforcement proceedings" the following documents can be the basis of execution:

[45] PROPOSAL NUMBER 3 –

1) enforcement notes and orders, issued by the courts on the basis of court decisions, decisions of third courts, decisions of international commercial arbitration, decisions of foreign courts and other grounds provided for in laws or international treaties of Ukraine;

2) court rulings in civil, economic and administrative cases, cases concerning administrative violations of law, criminal proceedings and other cases provided by law.

3) notary executive records;

4) resolutions of the Labour Dispute Commission, issued on the basis of decisions of such commissions;

5) Decrees of state executives regarding recovery of enforcement fee, decisions of state or private executors regarding recovery of enforcement costs, the imposition of a fine, decisions by private enforcement agencies on recovery of basic salary;

6) *resolutions of bodies (officials) who are authorized to deal with administrative law violations cases, in cases established by law*;

7) decisions of other state bodies and resolutions of the National Bank of Ukraine, which are recognized as executive documents;

8) the decisions of the European Court of Human Rights, taking into account the peculiarities provided for in the Ukrainian law "On the enforcement of judgments of the European Court of Human Rights and the application of judicial practice", as well as decisions of other international jurisdictional bodies as provided for by international agreements of Ukraine;

9) decisions (resolutions) of state financial monitoring entities (authorized by their officials), if their execution is provided by law for the bodies and persons who execute the enforcement of decisions.

When assessing Art. 3 of the Law of Ukraine “On executive proceedings”, it seems that it is not necessary to change this provision in order to make the decisions of the Ombudsman enforceable - it would fully suffice to establish within the Law on the Parliamentary Commissioner for Human Rights which legal acts (recommendations, requests, decisions ….) of the Commissioner shall be recognized as executable documents and enforceable under the Law of Ukraine "On executive proceedings".

The requirements for an executable document are set out in Art. 4 of the Law of Ukraine “On executive proceedings”. A decision issued by the Ombudsman would have to comply with these requirements if they shall become executable.

“An executable document shall specify:

1) the title of the document and the date of issue, the name of the issuing body and the name of the issuing officer;

2) the date and number of the decision, on the basis of which the execution document was issued;

3) the full name (legal persons) or name, first name and last name (natural persons) of the debtor or debtors, their place of residence (legal persons) or residence or place of residence (natural persons), and the date of birth of debtors who are natural persons;

4) the legal entity identification number in the The United State Register of Legal Entities, Individual Entrepreneurs and Public Organizations of Ukraine of the creditor and the debtor (if any for legal entities);

The taxpayer identification number or passport number (for natural persons who because of their religious beliefs have refused to receive a taxpayer identification number in accordance with the established procedure and have informed the relevant controlling body about this and have a special mark in their passport) of the debtor (for natural persons-taxpayers);

5) The operative part of the decision demanding for enforcement measures;

6) date of entry into force of the decision (except for decisions that are executed immediately);

7) the time frame for the enforcement of a decision.

Other data can be indicated in the executing document (if known to the court or other body (official) who issued the enforcement document), which identify the creditor and the debtor and may help to enforce the decision at stake, such as the debtor's place of work, the location of debtor's assets, details concerning the debtor's accounts, phone numbers and other communication addresses.

If a decision of an international jurisdictional body is submitted for enforcement, enforceability depends on the existing international agreement of Ukraine: the document must comply with all the requirements stipulated in the relevant international agreement with Ukraine.

According to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, infringements named in 83 Article of the Regulation foresees administrative fines up to 10 000 000 EUR, or in the case of an undertaking, up to 2 % of the total worldwide annual turnover of the preceding financial year. The imposition of legal sanctions may force a massive amount of money back to the state. It is therefore appropriate to consider the decision of the Ombudsman to decide the question on taking measures to ensure the claim. The basis for ensuring the protection of the court can be a classic example of enforcement set in the Code of the civil procedure Ukraine.

Article 151. The grounds for securing a claim

1. The court upon the request of the persons involved in the case may take measures to secure a claim.

2. The statement of claim shall include:

1) the causes in connection of which the claim shall be secured;

2) the type of claim secure which shall be applied with justification of its necessity;

3) other information required to secure a claim.

3. The claim secure is permitted at any stage of the proceedings, if non-appliance of the measures may hinder or make impossible the execution of court decision.

4. Upon the statement of the person concerned the court may secure a claim before filing a statement of claim in order to prevent piracy of intellectual property. The documents and other evidence confirming that this person is subject to the relevant intellectual property rights and that his\ her rights may be violated in the case of failure to apply measures to secure the claim shall be enclosed to the statement of

claim securing. The statement shall also include its copies with respect to the number of the people the measures to secure a claim are asked to take about.

5. In case of filing a statement of claim securing before submitting the statement of claim the applicant shall submit the appropriate petition within ten days after the enactment of decree on claim securing.

Article 152. Types of claim securing

1. The claim shall be secured:

1) seizure of property or money belonging to the defendant and is in his or other persons` possession;

2) prohibition to perform some specific action;

3) establishing the obligation to carry out certain actions;

4) prohibition to others to make payments or transfer the property to the defendant or the performance of other related to him obligations;

5) stop of the distress sale, if a claim on ownership of the property or on excluding it from the description is filed.

6) stop the recovery on the basis of executive document claimed by the debtor in court;

7) the transferring of the thing that is in dispute to the deposit of others.

2. If necessary, the court may apply other types of claim. The court may use several types of claim.

3. The types of claim secure should be corresponding to the alleged plaintiff demands.

4. Not allowed the secure of claim by seizure of wages, pensions and scholarships, assistance on state social insurance paid in connection with a temporary disability (including taking care of the sick child), pregnancy and childbirth, for child care until the achievement of the age of three years, of assistance, paid by mutual funds, charitable organizations, as well as severance pay, unemployment benefits. This requirement does not apply to the claims for the recovery of maintenance for harm caused by injury, other health damage or death of a physical person, for damages caused by crime.

5. Perishable items cannot be seized.

6. The claim securing by ceasing a temporary administration or liquidation of a bank, a ban or the establishment of the obligations to perform some specific actions for the benefit of the temporary administrator, the liquidator of the bank or National Bank of Ukraine during the implementation of the temporary administration or liquidation of the bank is not permitted.

It should to be noted that, not only court has the right to apply temporal measures; according to the existing legal regulation, the other state institutions, Customs, state tax collection authorities can apply these measures too.

In assessing the before mentioned legal regulation, it should be noted that giving the right to the Ombudsman's to take enforceable decisions must be matched accordingly by the requirements for the content of executive documents with the requirements for the structure of

decisions taken by the Ombudsman, since the enforceable part of the decision must be entered in the enforcement document.

At the same time, it should be noted that not all decisions can be enforced. It depends on the nature of the decision. The concept of implementation is not provided by law. In judicial practice, decisions that may be taken using enforcement measures are called enforceable. Consequently, in the regulation which imposes enforced decisions implementation must be set that an enforceable document can be may only be issued only for an enforceable decision.

The current legal regulation does not provide the Ombudsman right to implement a mediation. However, according to the provided PROPOSAL NUMBER 4 – Promoting Sound Public Administration via Mediation.

Due to the increasing European trend to facilitate and encourage mediation in all areas, it could be beneficial to review the existing legal regulation in order to acknowledge expressly that such activities are compatible with the mandate of the Commissioner. Therefore, it is recommended to amend the Law of the Commissioner by expressly introducing the right of the Commissioner to act as a mediator.

In the case of successful meditation, the parties agree on a solution to the dispute. Different types of disputes can be resolved in this way. It is likely that the parties to the dispute will do well in the agreement that resolved the dispute. However, there are exceptional cases in which the parties will refuse to reach an agreement. An even worse situation would arise if one party / parties would fulfil the agreement and the other party / parties will refuse to implement it. There may be cases where the party trying to delay the settlement of the dispute confirms the agreement without intention to implement it later. It is therefore appropriate to consider the possibility of mediation and the agreement of the parties to the dispute between the parties approved by the Ombudsman to be binding on the parties, and if one of the parties refuses to carry out the agreement at the request of the party concerned, it could be enforced in accordance with the procedure for the enforcement of judgments. In this case, the definition of the mediation process should set out the requirements for the content of the meditations reached and the Ombudsman's duty to approve it. The procedure and conditions for the issue of an enforceable title should also be established.

Following the given suggestions to give the Ombudsman the right to issue enforceable executive documents, the objective of increasing the efficiency of the Ombudsman's activities may not be achieved if the decisions taken are not fulfilled. The current legal regulation does not provide for the right of the Ombudsman to participate in the enforcement process. Therefore, it would be advisable to replace the existing regulation with the right of the Ombudsman to participate in the enforcement process.

Suggestions for changes

In order to increase the efficiency of the work of the Ombudsman, it is proposed that the Ombudsman should be empowered to take decisions that may be enforced in Law of Ukraine “On executive proceedings” order. The Ombudsman should also be empowered to apply protective measures. For this reason the Law on the Commissioner for Human Rights should be changed.

In order to ensure the efficiency of the mediation process conducted by the Ombudsman, it is suggested that the Ombudsman's mediation process and the agreement approved by the Ombudsman be binding on the parties and could be enforced under the procedure established by the Law of Ukraine "On executive actions".

Law of Ukraine "On executive proceedings" sets out the requirements for the content of the enforcement document. That ombudsman's decisions would comply with these requirements it is necessary to regulate the content of the Ombudsman's decisions and align the requirements of the procedural part with the requirements of the Law on Ukraine on the content of the executive document.

The Ombudsman must have the right to participate effectively in the enforcement process: to submit his executed instrument for enforcement, to participate as an executor in the enforcement proceedings as a representative of the recovering person, and to monitor the enforcement proceedings.

4. Mediation

The role of the Commissioner as a mediator is currently informal and is undertaken on the good will of the Commissioner's Office and on *ad hoc* basis.[46]

Although the representatives of the Commissioner's Office find mediation as their natural role in dispute resolution[47], the Commissioner was never requested to take up a more formal role as a mediator.[48] However the representatives of the Commissioner's Office find that strengthening the position of the Commissioner through mediation would be desirable since their informal activities as mediator have proved to be efficient by now.

However, no legal framework exists that grants the Commissioner the right to act as a formal mediator.

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.

In that sense, in the 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) it was recommended to amend the Law of the Commissioner by expressly introducing the right of the Commissioner to act as a mediator. "*For example, Art. 13 of the Law of the Commissioner could be 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*."[49]

However, even if the Commissioner would be granted the power to act as a mediator, there is a present no Law on Mediation in force in Ukraine and therefore, no legal framework exists for conducting a mediation procedure.

Furthermore, unlike in some other EU and CoE Member States, neither the Laws on preventing discrimination in Ukraine, nor the Law on access to public information or the Law

[46] 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).

[47] Meeting No 1, Meeting No 2.

[48] Meeting No 5, Meeting No 6.

[49] See par. 70 of the 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).

on personal data protection prescribe mediation as a mean of friendly, out-of-court dispute resolution.

Therefore, in order to introduce a new power to the Commissioner to act as a mediator, it would be necessary not only to amend the LPCHR by expressly granting this power to the Commissioner but also to develop a Law on Mediation. Moreover, it would be advisable to mention in the laws governing non-discrimination, access to public information and personal data protection mediation as a means of friendly dispute resolution.

Council of Europe Recommendations aim at introducing mediation in Member States and call for means to encourage its use.[50] 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.

It seems relevant for this Report to analyse the Draft Law on Mediation number 3665 (hereinafter: Draft Law), which is still undergoing parliamentary procedure, as it would determine how the Commissioner could act as a mediator if he were granted such a role.

The main principles of mediation have been incorporated in the Draft Law. Namely, mediation is carried out on the basis of mutual consent of the parties; it is based on voluntary participation, activity and self-determination of the parties of mediation, independence and neutrality of the mediator and confidentiality of the process itself.

Voluntary participation in the mediation is envisaged in Art. 5 of the Draft Law. Any pressure on the parties to conduct or terminate mediation is prohibited. However, it should be noted that, according to EU Law, mediation as an alternative dispute resolution could be prescribed as an obligatory means 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 are themselves in charge of the process and may organize it as they wish and terminate it at any time".[51] Therefore, it would be recommendable to examine this possibility further, especially in the light of strengthening the position of the Commissioner as a protector of human rights and with the aim of reducing the workload of courts.

Furthermore, according to the Draft Law, the parties shall have the right to organize the mediation process as they see fit, to terminate it at any time and to appeal to a court or arbitral tribunal for the protection of violated rights.

It should be noted that the right to appeal for protection of violated rights is somehow unclear and it could be misunderstood by its wording. Namely, it is unclear if it refers to violated rights during the mediation process itself or to violated rights that had been the subject matter of the mediation process or to the right to appeal the mediation agreement as a result of the mediation. If the aim of the mediation is strengthening the position of the Commissioner and, at the same time, reducing the case load of the courts, it is recommended for the right to appeal to be formulated in a less ambiguous way which leaves no doubts as to the meaning of the right itself and respects the very nature of the mediation process including its results.

[50] 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.

[51] 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).

The principle of voluntary participation in mediation extends to the mediator and other mediation participants. According to the Draft Law, mere participation of a person in a mediation activity may not be considered as recognition of any results of this process by this person, neither concerning the making of claims nor as a waiver of such claims.

Furthermore, the mediation parties themselves choose a mediator (or in the case of the Commissioner the parties choose the Commissioner to be the mediator) and independently determine the range of issues to be discussed, the options for resolving the dispute, the content of the agreement resulting from mediation, the timing and methods for its implementation etc. A final decision is made only by the mediation parties and not by the mediator.

A mediator acts independently of the mediation parties or any other party such as state bodies, other legal entities or individuals. Intervention of state bodies, any legal entities and individuals in the activities of the mediator during the preparation and conduct of mediation is prohibited. A mediator cannot act as a lawyer, representative and/or legal representative of the mediation party.

The mediator is a neutral (impartial) person who helps the parties to the dispute to negotiate and reach an understanding. During the mediation process the mediator seeks to ensure an impartial approach towards the parties and takes into account all the circumstances of the case. He has the right to give an advice to the parties exclusively on the procedure of the mediation but has no right to resolve the dispute. Unless otherwise provided by the mediation agreement, the mediator is not entitled to provide instructions and recommendations regarding dispute settlement options or to assess the behaviour and positions of the mediation parties.

Confidentiality is of utmost importance for mediation. Unless otherwise agreed, mediation is confidential. Confidentiality refers to the proposal to mediation and the willingness of the parties to participate in the mediation procedure; thoughts, suggestions or confessions expressed during the mediation procedure; the readiness of one of the parties to accept the other party's proposal for dispute settlement and other information on the process of preparation and conduct of mediation. Mediation participants, including the mediator, as well as those involved in the organization of the mediation process shall not have the right to disclose mediation information without the written consent of the mediation parties. Neither mediation party has the right to disclose mediation information without the written consent of the other party. In the event that the mediator received information from one of the parties relating to a dispute or mediation procedure, he may disclose such information to the other party. However, if the party informs the mediator of such information, unless disclosed to the other party, this information will not be disclosed to the other party to the mediation.

The mediator chooses the means and methods of conducting mediation independently and coordinates the procedure of mediation with the parties of mediation, observing the requirements of the current law, mediation rules, and rules of business and professional ethics of mediators.

Mediation begins on the day when the parties agreed to meet with the mediator for the mediation procedure. If one of the parties has sent a written proposal for a meeting with the mediator for the mediation procedure and has not received the consent of the other party for the mediation within thirty days from the date of submission of the proposal or for another term specified in the proposal, such a proposal shall be rejected.

Furthermore, mediation is terminated by:

1) the conclusion by the parties of a mediation agreement on the results of mediation in any form - from the day of the conclusion of such an agreement;

2) a statement made by the parties or one of the parties addressed to the mediator about the termination of the mediation - from the date of receipt by the mediator of such an application;

3) the mediator's statement, after consultation with the parties, that further efforts to reach an agreement within the mediation procedure are no longer justified or the impossibility of attracting third parties, if the dispute concerns the rights and legitimate interests of these persons, from the day the parties receive such an application.

As to the results of mediation, an agreement reached by the parties on the results of mediation may be set out in writing in a form of a contract. The agreement on the results of mediation should not contain provisions that contradict the laws of Ukraine, the interests of the state and society and its moral principles. In other words, such provisions should be declared null. If the mediation was conducted within the framework of criminal proceedings, judicial or arbitral proceedings or enforcement proceedings, its results relating directly to the subject matter of the claim or criminal proceedings shall be executed by a settlement agreement, conciliation agreement or other document in accordance with the requirements of the applicable law. If the parties have reached an agreement on matters that cannot be the subject of a peace agreement (conciliation agreement), the parties may conclude a separate contract on these issues. The agreement reached on the results of mediation is obligatory for the parties to fulfil in the terms and in the manner specified by them. In case of non-fulfilment of the mediation agreement, the other party has the right to apply to the court in accordance with the procedure established by law to protect the violated rights and legitimate interests. For the mediation to have a full effect it would be advisable to prescribe the possibility to have a binding mediation agreement containing a writ of execution. However, a binding mediation decision must be brought in line with the right to access to courts (Art. 6. Convention for the protection of human rights and fundamental freedoms – European Convention on Human Rights) in cases of compulsory mediation.[52] The possibility to address to a court may not be hindered in such circumstances. Mediation would only open up the possibility of conflict resolution outside the courts, but could not finally prevent the parties to seek conflict resolution by a court.

A mediator cannot be compelled to give evidence in a court or arbitration hearing about circumstances that have become known to him in connection with the duties of a mediator, except when required to ensure the protection of the interests of children or to prevent the harm to physical or psychological health of a person, or when disclosure of the content of the agreement by the result of mediation is necessary for the enforcement of this contract.

Mediators (including the Commissioner) should receive good training on mediation skills. In that sense, Art. 17 of the Draft Law provides a legal bases for such a training to be conducted (training is going to be conducted by individuals and legal entities whose programs have been accredited by associations of mediators; mediators can receive basic training and advanced training on mediation and will receive a certificate).

Mediation should be less expensive than going to court. According to Art. 19 of the Draft Law costs related to mediation consist of mediator remuneration(s) and costs associated with logistical and organizational support for mediation. Expenses are covered by mediation parties in equal shares, unless the mediation parties in the mediation agreement agree on another principle of distribution. The procedure for the formation and the amount of remuneration and compensation of expenses related to the material and technical and organizational provision of mediation, as well as the procedure for calculations, are set out in

[52] See Menini and another v Banco Popolare Società Cooperativa (Case C-75/16)(14 June 2017).

the mediation agreement. However, since the Commissioner is receiving his remuneration from the state (as well as all the personnel of the Commissioner's Office), it is advisable that mediation carried out by the Commissioner is free of charge and that none or only a small fee is due for this kind of mediation.

Finally, the Draft Law on Mediation does not contain provisions about the effect which the beginning of a mediation process will have on statutory time limitations (that is especially important for claims for damages or other compensation) as well as to time limits for bringing in a claim. Also, the Draft Law does not contain provisions on the relation between mediation process and other dispute resolution processes (court or arbitral proceedings) relating to the same subject matter and the same parties (dismissal of a claim while a mediation process is ongoing, *res iudicata* etc.). All of this is especially important to preserve the rights of the parties to access to court.

To conclude, the Draft Law on Mediation sets a solid base for the mediation process. However, it seems recommendable to make further amendments to the Draft Law to create an effective means of friendly dispute resolution and, at the same time, to guarantee respect for the right of the parties to access to court.

Outside the legislative framework, experience shows that strong campaigning would be needed in order to bring to life new legal remedies. This is especially true for mediation as the beneficiaries need to recognize this instrument as being a convenient, cost efficient and fast way of dispute resolution which depends, however, mostly on their good will to settle the dispute in a friendly manner. Therefore, it is recommendable to further explore the ways this campaign could be conducted. In particular, it should be made well known to public that the Commissioner can act as a mediator with all the benefits the mediation process brings to the parties.

5. The instrument of Positive Action

As mentioned above, both the Anti-Discrimination Act as well as the Gender Equality Act mention "positive action" as one instrument that can be applied by the Commissioner. Positive Action is an important, however, very often disputed and, even more, not well-understood instrument among the public at large. The concept is based on the differentiation between formal and substantive equality. Formal equality is understood as treating people the same, for example through legal equality, meaning that law should not make any difference between people on basis of certain social characteristics such as gender, ethnicity, age, disability and others as well as that all people are treated equally before the law. Substantial equality is a more encompassing concept that takes into consideration that people are different and, thus, may suffer disadvantages when being treated the same. With the example of gender, the European Institute for Gender Equality (EIGE) defines substantive gender equality as follows:

> "The concept of substantive gender equality combines formal gender equality with equality of outcome, meaning that equality in law, equal opportunities and equal treatment of women and men are complemented by equality in impact, outcome or result. Substantive gender equality requires that equality is interpreted according to the broad context or realities of women's disadvantages and the impact of these circumstances in terms of eliminating disadvantage in outcome or result. It is a

> channel by which women can exercise and fully enjoy all human rights and freedoms on an equal footing with men."[53]

In order to achieve substantive equality a purely complaints-led model – which in case of discrimination requires an individual person to lodge a complaint at a court or another competent body, such as equality bodies or ombuds institutions, in order to establish a violation of her or his rights not to be discriminated against – is important but not sufficient.[54] Positive action[55] is a more encompassing instrument that requires proactive measures by state and other institutions to eliminate disadvantages faced by members of specific groups. There are many limitations of focusing purely on a complaints-led approach, above all, that discriminatory attitudes and structures are often deeply embedded in society and thus, may only "be capable of bringing about a limited amount of social change."[56] There are many measures that fall under the heading positive action. The following definition might serve as a starting point:

> "(…) positive action consists of proportionate measures undertaken with the purpose of achieving full and effective equality in practice for members of groups that are socially or economically disadvantaged, or otherwise face the consequences of past or present discrimination or disadvantage."[57]

Positive action pursues a proactive approach, instead of reacting to individual claims, the responsibility lies with state and other institutions and organisations. Positive action aims at systematic change and addresses institutional and structural forms of inequality, "[r]ather than determining a breach of the law, the focus is on identifying systemic discrimination and creating institutional mechanisms for its elimination".[58]

Positive Action in international and Ukrainian law

Positive Action in the field of anti-discrimination and equality is required by many international human rights instruments Ukraine is state party too. For example, in its General Comment No. 18 on Non-discrimination the UN Human Rights Committee says that:

> "The Committee also wishes to point out that the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate

[53] EIGE, substantive gender equality, http://eige.europa.eu/rdc/thesaurus/terms/1401 (2 November 2017).
[54] Fredman, Sandra (2009) Making Equality Effective: The role of proactive measures. European Network of Legal Experts in the Field of Gender Equality. European Commission. Directorate-General for Employment, Social Affairs and Equal Opportunities, p. 1.
[55] There are many terms that are used more or less synonymously for this instrument. The term positive action used mainly in European law and politics, in the US affirmative action is the term that is used more frequently. Other terms are positive measures or temporary special measures.
[56] O'Cinneide, Colm (2014), Positive Action, available at http://www.era-comm.eu/oldoku/SNLLaw/04_Positive_action/2014_April_Cinneide_Paper_EN.pdf (2 November 2017).
[57] European Commission (2009) International perspectives on positive action measures. A comparative analysis in the European Union, Canada, the United States and South Africa, available at http://bim.lbg.ac.at/files/sites/bim/International%20Perspectives%20on%20Positive%20Action%20Measures.pdf (2 November 2017), p. 24.
[58] Fredman (2009), p. 3.

> conditions which cause or help to perpetuate discrimination prohibited by the Covenant."[59]

Other international human rights treaties that provide for special measures are, for example, CERD, CRPD or CEDAW.[60] The CEDAW Committee has given the most detailed instructions on how states should use und understand "temporary special measures"/positive action. The Committee

> "(…) views the application of these measures not as an exception to the norm of non-discrimination, but rather as an emphasis that temporary special measures are part of a necessary strategy by State parties directed towards the achievement of de facto or substantive equality of women with men in the enjoyment of their human rights and fundamental freedoms."[61]

The Ukrainian constitution not only contains several stipulations concerning principle of equality and non-discrimination it also contains a detailed paragraph specifying measures "which could be termed 'positive action'".[62] The third paragraph of Article 24 says:

> "Equality of the rights of women and men shall be ensured by providing women with opportunities equal to those of men in public, political and cultural activities, in obtaining education and in professional training, in work and remuneration for it; by taking special measures for the protection of women's health and occupational safety; by establishing pension benefits; by creating conditions that make it possible for women to combine work and motherhood; by adopting legal protection, material and moral support of motherhood and childhood, including the provision of paid leave and other privileges to pregnant women and mothers."

The report of the Equal Rights Trust has pointed out that all five measures listed in this paragraph are problematic:

a) The formulation of "providing women with opportunities equal to those of men" is not laid down to be a requirement. However, international human rights law *requires* states to take positive measures.
b) Some measures contain discriminatory conceptions, e.g. the proposal of special measures for protecting women's health and occupational safety suggests that women per se "have any particular occupational safety requirements that men do not have".

[59] United Nations Human Rights Committee, *General Comment No. 18: Non-Discrimination,* UN Doc. HRI/GEN/1/Rev.1, 1989, para. 10.
[60] For a more detailed discussion of Ukraine's obligations concerning positive action resulting from international human rights law see Equal Rights Trust (2015) In the Crosscurrents. Addressing Discrimination and Inequality in Ukraine. London, pp. 238-242.
[61] CEDAW Committee (2004) General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against women, on temporary special measures, UN Doc. HRI/GEN/1/Rev.7, para 18.
[62] Equal Rights Trust (2015) p. 238; for a detailed discussion of provisions protecting the rights to equality and non-discrimination see pp. 213-256.

c) They contain stereotype notions, e.g. that it is first and foremost women that are responsible for the upbringing of children and that men do not have difficulties in combining parenthood and work.[63]

The problematic and potentially discriminatory wording of Article 24 of the Ukrainian Constitution has serious consequences when policy and legal measures proposing positive action are reviewed if they are in line with the provisions of the Constitution. This is required by the *Law on ensuring equal rights and opportunities for women and men*. It has been pointed out, that "provisions of legislation which would otherwise be considered as discriminatory on the basis of sex have been considered unproblematic, in part because they are arguably measure which fall within the third paragraph of Article 24".[64] An additional shortcoming of Article 24 of the Constitution is its limitation to gender. Other characteristics, as would be required by international human rights law, are not covered by this provision.

As mentioned above, the competence to make proposals on application and termination of positive action is explicitly included in the powers of the Commissioner (Article 10) as laid down in the *Law of Ukraine "On Principles of Prevention and Combating Discrimination in Ukraine"*. Article 9(2) of said law further stipulates that the subjects mentioned in Article 9(1) (that means also the Commissioner) can apply positive action to achieve the objective of this law. Said law also contains a definition of positive action in Article 1(1.5):

> "…positive actions are special temporary measures that have legitimate, objectively reasonable aim to eliminate legal or actual inequality in opportunities for the person and/or group of persons to exercise rights and freedoms granted to them by the Constitution and the laws of Ukraine on equal basis"

Article 6(3) lays down that actions are not considered as discrimination in the following cases:

- "the special protection by state of specific categories of persons, who need such protection;
- the implementation of measures aimed at the preservation of the identity of certain groups of persons, where such measures are necessary;
- provision of benefits and compensation to certain categories of persons in the cases provided by law;
- establishing state social guarantees for certain categories of citizens;
- special requirements, set by the legislation, concerning the exercise of the specific rights of persons."

Again, it has to be emphasised that such actions are not *required* by law, as would be international human rights standard, authorised institutions *can* apply these forms of positive action in order to achieve the objective of the Law.

Also the *Law on ensuring equal rights and opportunities for women and men* lays down a definition of positive action in Article 1:

[63] For a detailed discussion see Equal Rights Trust (2015) pp. 241-242.
[64] Equal Rights Trust (2015) p. 242.

"positive action are special temporary measures aimed at eliminating imbalance between the opportunities for women and men to exercise equal rights granted to them by the Constitution and the laws of Ukraine."

Article 6 of the Gender Equality Act stipulates that the following actions are not considered as discrimination based on sex:

- the special protection of women during pregnancy, childbirth and breastfeeding of the child;
- compulsory military service for men, set forth by law;
- the difference in the pension age for women and men set forth by law
- special requirements to the labour protection of women and men related to the protection of their reproductive health;
- positive action.

Also this list contains discriminatory provisions, such as the restriction of compulsory military service for men and the difference in the pension age for women and men. Again, the explicit mentioning of positive action as "an exception to the principle of non-discrimination rather than a requirement and, as discussed above, such an approach is not in line with international best practice."[65]

The role of positive action in Ukraine and in the work of the Commissioner

As indicated above, the introduction of positive action measures is a demanding task that requires considerable amount of resources. Several international stakeholders have repeatedly pointed out the importance of introducing different measures such as awareness raising campaigns,[66] support services,[67] access to education,[68] training of state officials and judiciary[69] in Ukraine. The CEDAW Committee has positively noted the establishment of minimum quota of 30 per cent for women candidates on the electoral lists of political parties in the districts at the national level in legislative elections as well as the efforts to take temporary special measures in the private sector. However, the CEDAW Committee is also concerned "about the lack of implementation in practice of temporary special measures in the State party".[70] The Committee called on Ukraine to

[65] Equal Rights Trust (2015) p. 275.
[66] See, for example, CRPD (2015) UN Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Ukraine, CRPD/C/UKR/CO/1, 2 October 2015, para. 15-16; CERD (2016) UN Committee on the Elimination of Racial Discrimination, Concluding observations on the twenty-second and twenty-third periodic reports of Ukraine, CERD/C/UKR/CO/22-23, para. 14(d), CEDAW (2017) Committee on the Elimination of Discrimination against Women, Concluding observations on the eighth periodic report of Ukraine, CEDAW/C/UKR/CO/8, para. 19(d).
[67] CRPD (2015) para. 36-37.
[68] CRPD (2015) para. 44-45; CERD (2016) para. 22(f); CEDAW (2017), para. 34-35.
[69] CRPD (2015) para. 28-29; CEDAW (2017) para. 11(c),
[70] CEDAW (2017) para. 24.

(a) "Provide capacity-building to all relevant State officials and policymakers, and to political parties in particular, on the concept of temporary special measures and adopt and implement such measures, including time bound goals and quotas, directed at achieving the substantive equality of women and men in all areas in which women are underrepresented or disadvantaged, including in public and political life, education, health and employment;

(b) Address the root causes of the weak implementation of existing temporary special measures and adopt legislation to encourage the use of temporary special measures covering both the public and private sectors."[71]

Also other international stakeholders and bodies such as the *European Commission against Racism and Intolerance* [72] have emphasised the importance of positive action for the advancement of equality. The Equal Rights Trust has summarized a comprehensive list of recommendations including the adoption of different measures of positive action.[73]

In the framework of the *Strategy for Preventing and Combating Discrimination in Ukraine 2014*-2017, the Commissioner has developed a system of objectives, activities, conditions and tools to use in its work in order to prevent and combat all forms of discriminations. One of the four reasons for drafting the Strategy was to adopt a "proactive approach" in order to successfully combat[74] discrimination and ensure respect for the principle of equality. Among the objectives of the Strategy are the "[e]ffective response to incidents of individual and systemic discrimination and due redress" and the "[e]ffective promotion of equality and non-discrimination by elucidating and raising awareness of the issue". A specific action concerning the first objective laid down in the Strategy is the submission of recommendations to public and private bodies in regard to the application of positive duties to promote equality in accordance with international and European standards. The actions to achieve the objective of awareness-raising include

- the wide dissemination of information about the Commissioner, its statory remit, powers and grievance submission procedures;
- publish general explications to equality and non-discrimination law;
- develop and run an awareness-raising campaign concerning the right to equality and non-discrimination;
- conduct training workshops on equality and non-discrimination law for a broad range of target groups;
- conduct staff trainings in the commissioner's office to mainstream the issues of equality and non-discrimination; and

[71] CEDAW (2017) para. 25.
[72] ECRI (2017) ECRI Report on Ukraine (fifth monitoring cycle), CRI(2017)38, published on 19 September 2017.
[73] Equal Rights Trust (2015) pp. 375-380.
[74] Strategy for Preventing and Combating Discrimination in Ukraine 2014-2017, available at https://www.google.at/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwj8wIyX2KLXAhWJJsAKHXKJBtcQFggrMAA&url=http%3A%2F%2Fwww.ombudsman.gov.ua%2Ffiles%2Fdocuments%2Fforeing%2FEng%2FCommissionersEqualityStrategicPlan_ENG_FINAL.pdf&usg=AOvVaw1R4fMS7Zti1LZr4xswSX9R (3 November 2017).

- periodically convene direct dialogues with relevant law and policy makers on recommendations to promote equality and non-discrimination.[75]

6. The function of a 'Data Protection Officer'

With special regard to public sector institutions

When data protection was introduced in the 80ies of the last century in several countries in Europe, it could not be expected that this entirely new legal field was sufficiently clear to all processors of personal data, so that the rules would be applied comprehensively and correctly. In this situation, especially – but not exclusively - in Germany, a new idea was developed how to cope with this problem:

When data protection authorities communicated with institutions which processed personal data, very often they did not find a person within the institution who felt to be responsible for the way how data protection was applied in the institution, because it was rather seen as a problem of each single division in the institution as far as it used personal data. However, as successful data protection in an institution needs a holistic organisational concept, the idea of attaching responsibility for data protection to the usual distribution of responsibilities within an institution did not turn out to create satisfactory results. As a remedy the idea was developed to have one single person in the institution in charge of data protection matters. This idea was especially welcome to the data protection supervising authorities as a more stringent dialogue in data protection matters could be developed if the other side, the partner in this dialogue, was clearly defined.

For a person to be "responsible" *within an institution* usually means that this person is either the head of the institution or is "responsible" under the orders of the head of the institution. Having the reasons in mind why the concept of a "data protection officer" was developed, this kind of responsibility would not be appropriate, because

- the tasks of a head of an institution, being an enterprise or a public authority, usually do not include high class expertise in a special legal field such as data protection; moreover
- as the person "responsible" for data protection matters in the whole institution should promote and guarantee compliant data processing, s/he should be able to voice an expert opinion without being ordered to the contrary - this results in the necessity of a special position for the data protection officer within the institution.

In those European countries which have introduced the figure of a "data protection officer" in their legal system, varieties have been developed as to the exact position of this role. Germany, for instance, tended towards considerable independence of this function within the relevant institution combined with protection against removal because of activities for promoting data protection which might be onerous on the institution and therefore less welcome. In other European countries the role of a data protection officer has been opposed, mainly in the private sector, exactly because of this special protection against removal laid down in labour law.

On the whole it seems reasonable to admit that having a person within an institution who is in charge of data protection matters in the way, that s/he is an expert and can therefore answer

[75] Strategy for Preventing and Combating Discrimination in Ukraine 2014-2017, without page numbers.

questions arising in the institution on data protection matters, seems to be an advantage if the institution wants to be compliant with data protection law. Moreover, such a person could also be active in the institution by educating the staff of the institution in data protection matters and also propose organisational measures which promote data protection within the institution.

Concerning the position of the "data protection officer" in relation to the management of the institution several models are conceivable. A position of far-reaching independence combined with the duty to interact with the national data protection authority – as, for instance, favoured in Germany – is one model. This goes usually hand in hand with the DPO's responsibility for data protection compliance also in case of procedures before the supervisory authority or in court. A certain disadvantage of this model might be seen in the fact that it tends to alienate the Data protection officer from the management. Another model might be easier to integrate into existing institutions: the DPO acts in a capacity of supporting the top management by advising and reporting and it is always the top management which gives the orders necessary for implementing data protection. With this latter model it is crucial that the DPO can approach the top management whenever s/he thinks it necessary and that s/he is not hindered to express his/her expert opinion before the top management. The competence to decide about the effects of the advice given by the DPO stays with the top management. So, a DPO of this type would not diminish the responsibility of the top management for compliance with national data protection law, but it would make decisions of the top management concerning data protection matters considerably more safe as to their appropriateness and thus safe the institution from monetary loss because of fines and from immaterial loss because of negative perception by the public.

Which model is chosen depends on the national legal situation.

As concerns the public sector, special legal provisions would be required if a model would be chosen which enables the DPO to *decide independently* about data protection matters in the institution he belongs to. S/he would, consequentially, also be legally responsible for compliance. If, on the other hand, a model is chosen, where responsibility stays with the head of institution, and the DPO has mainly the task to give expert advice and report to the top management on shortcomings in the application of data protection in the institution, additional legislation would presumably not be needed. There must, however, exist guarantees, either in form of legislation or in contractual form, that legally correct advice may never have disadvantageous consequences for the DPO.

From the point of view of the Commissioner, having such DPOs in public institutions would, by all means, be advantageous, as it would facilitate communication and, most likely, also implementation of orders of the Commissioner in the institution. To this end it would not be necessary to have a DPO in every single authority on all levels of state administration – it is only important that the remit of competences is just as far reaching as that of the management institution to whom the DPO reports; this means, that a DPO could be competent for data protection matters in a ministry and all administrative institutions which are sub-ordinates of the ministry. If this is considered to be unpractical, every institution could have its own DPO. Such questions are usually left to considerations of practicality and what fits best into the organisational traditions of the institutions concerned.

Having a DPO would, anyway, be a first step towards integrating data protection into the daily work of an institutions on a continuous basis. A DPO could particularly contribute to training the staff in the application of data protection law and thus help to raise the overall understanding of human rights matters in the Ukrainian administration and society at large.

Debtors' Register

During the meeting with the representatives of the Department it was also revealed that they are preparing the recommendation to the controllers of the register of the debtors. According to the Law of Ukraine on the Process of Execution[76] the information about the debtors (such as name, surname, date of birth, issued document of the bailiff) is published in the official website of the Ministry of Justice of Ukraine[77]. The mentioned information about the person as a debtor can be found on the website of the register by entering only the number of identification of the person. As it appears the controller of the register publishes not only mentioned personal data, but also the address of the debtor. In the law on the Process of Execution it is not stipulated which information must be public. There is only a general provision which says that information about the debtors is public. According to the representatives of the Department, they are going to issue the recommendation to stop publicize the home address of the debtors because this information reveals the living place of the debtor.

First of all, it is important to mention that there is no special law in the Ukraine which regulates the establishment, administration, modernization and the liquidation of the register. Also, there is no provisions which concerns the data processing in the registers, data recipients.

Secondly, the ground of the establishment of the register is implemented in concrete law. The provisions of this law are only about the purpose of the register, the objects of the register, the data processed in the register[78]. There are no provisions which concerns the term of the data publication in the website, which concrete data can be published, the purpose of data publication, the data recipients, data storage period, measures regarding lawful and fair processing of such data.

According to what was mentioned above, it would be highly recommended to develop legal regulation concerning the data processing in the registers and state information systems in order to prevent violations in the field of personal data protection.

V. CONCLUSIONS

1. The general competences attached to the function of the Ukrainian Parliament Commissioner for Human Rights under the Law on the Commissioner are in line with international standards concerning Ombudspersons acting in the field of human rights promotion and protection. However, the Ukrainian Commissioner is additionally entrusted with the supervision of fields of law which are usually outside the sphere of activities of Ombudspersons. This is especially true for the supervision of the implementation of data protection and for ensuring access to public information in Ukraine. The development of the legal framework for these areas of law has undergone significant changes in Europe during the last 20 years. Dealing with these topics is no longer the prerogative of ombudsman-like institutions; in many countries, especially infringements of data protection have been subjected to "normal" procedures for counter acting and punishing violations of administrative law. This results in applying the usual instruments of penal administrative law, which are coercive and subject to review under the general system foreseen for the revision of administrative decisions in a country.

[76] The Law of Ukraine on the Process of Execution *http://zakon2.rada.gov.ua/laws/show/1404-19*
[77] The Law of Ukraine on the Process of Execution Article 9 (1) *http://zakon2.rada.gov.ua/laws/show/1404-19*
[78] The Law of Ukraine on the Process of Execution Article 9 (1) (5) (6) *http://zakon2.rada.gov.ua/laws/show/1404-19*

a) In the context of the legal system applied in Ukraine, the studies already performed during this project advocated for a revision of the present tasks of the Commissioner and for the introduction of the main principles of the legal developments mentioned above. This would mainly result in separating at least supervision of data protection from the "ombudsman-functions" and establishing an additional authority which fulfils the requirements for such authorities under the existing Council of Europe legal framework.
b) There are several good reasons also for transferring the task of ensuring the right to access to public information to such a new authority: first of all, these two rights may come into conflict and need therefore conciliation which can be best achieved if the same authority decides; moreover, there are several examples available which show that this model of organization works well in practical application.
c) Incorporating the topic of promotion of non-discrimination would be an additional option; however, it has been less intensely advocated in the studies performed under this project, as the very nature of discrimination is linked to specific disadvantages and vulnerabilities on the side of the persons concerned, which are usually well taken care of by an institution of the ombudsman type.

2. In analysing the instruments which are provided for the Commissioner by the LPCHR for restoring violated rights, it became apparent that considerable uncertainty prevails as to the legal effects of such instruments. Uncertainty starts with the terminology used in the Law: There is no single specific name attributed to the "letter" which the Commissioner addresses to the entity which has been found to violate a human right; the legal nature of the "letter" is to oblige the addressee to act accordingly. It is further unclear what all options of the Commissioner to force the violator to comply with the "letter" are and it is also uncertain what the addressee of the letter could do to defend his legal position.

These uncertainties actually extend also to the instruments for restoring rights under the Law on data protection and even to restoring rights under the Law on Access to public information although there is a whole Chapter of provisions on procedural questions. Regardless of whether a new authority should be put in charge of data protection and access to information, there must be clear answers given in the Law to the following questions:

a) What is the legal nature of the act of the competent authority stating that a certain right has been violated and ordering the violator to counteract the violation in the manner prescribed?
b) What happens if the violator does not act accordingly?
c) How can the "violator" defend his legal position and what consequences would initiating revision have on the obligations foreseen in the decision of the authority in charge of data protection?

If a new authority of the type of a data protection supervisory authority under the Additional Protocol to Convention 108 were created, decisions of this institution would have to be legally binding. Consequentially, such decisions must be open to revision by the courts in order to satisfy the rule of due process under Art. 6 ECHR.

3. The Commissioner's role vis-à-vis the judiciary needs particular examination. In their discussion with the representatives of the Commissioner's office the experts were informed about a growing tendency to involve the Commissioner into court proceedings in the role of support for one of the parties. A special study in Part IV 1 deals with the question how a

reasonable and justified area of intervention of the Commissioner in judicial proceedings could be defined ("Defence of public interests").

a) As far as main principles relating to the Commissioner's ability to initiate proceedings before a court are concerned, it is proposed that the Commissioner could be entrusted to apply to courts specifically in the cases regarding the defence of public interest (*actio popularis*). The objective of this proposal, together with a proposal regarding the review of regulatory acts[79], is to establish a complete legal framework for entitling the Commissioner to act independently, where revealed irregularities are considered to be of a systemic character (see the facts explained in the above-mentioned Czech Republic Ombudsperson action).
b) In determining the extent for the Commissioner's right to apply to courts for defending the public interest, one should ensure that the legal remedy of this kind is not duplicated by the duties of other state authorities. Therefore, the legal regulation shall establish a right and not a duty of the Commissioner to apply to courts in order to defend public interest where particular matter falls into the field of the competence of other state authorities and they are capable to defend the public interest efficiently on their own initiative. In no case the Commissioner shall replace administrative authorities, on which the duty to defend public interest is placed by law. Therefore, having established that certain legal proceedings are in progress and there is no pressing need to intervene as a third person into litigation, the Commissioner shall refuse to undertake remedies for the defence of public interest.
c) The other possible area of activity regarding the defence of public interest, which could merit further consideration, is the initiation of proceedings against systematic violations of the rights and interests of the individuals and the legal persons in administrative proceedings. This sort of complaints could be called as test cases and are very closely related to the classic name the class action (collective claim). However, it should be specified that the Commissioner shall apply to the courts in this way in order to defend the public interest where the following conditions are met: first, particular matter falls into the field of the competence; second, the violation has systematic feature; third, the *podania* is not exercised by offender. Furthermore, the Commissioner's request to the court shall contain non-material matter – to order the infringer to stop unlawful actions and restore status quo. Such proposal is based on the idea that by submitting these claims the Commissioner does not call the individuals concerned whose rights have been violated into a group. Such persons do not participate in the proceedings. Nevertheless, the declaration of the violation by the court decision would have a preliminary ruling effect in individual cases.
d) The implementation of these proposals requires the amendments to the Code of Administrative Judicial Procedure of Ukraine and the Code of Civil Procedure of Ukraine.
e) Additionally, in considering how to ensure the efficiency of the above-mentioned measures, one should note that the Commissioner could benefit from establishing special jurisdictional rules in Article 20 of the Code of Administrative Judicial Procedure of Ukraine. It could provide that Kyiv district administrative court as the court of first instance has the exceptional jurisdiction on these matters. The Supreme Administrative Court of Ukraine as the court, which reviews court decisions of district administrative courts as a court of cassation[80], should be the last instance court. This would contribute to the uniformity of application and interpretation of the law,

[79] http://www.twinning-ombudsman.org/wp-content/uploads/2017/09/EN_Mission-report-1-3.pdf
[80] Online Access: http://zakon2.rada.gov.ua/laws/show/2747-15/page2, accessed on 7 November 2017.

including the unification of the case law in the sphere of the claims on the defence of the public interest submitted by the Commissioner.

f) It is also worth noting that if the Commissioner opts to reinforce an active role in judicial matters, the possibility to appear as *amicus curiae* shall be formalized accordingly in the procedural law and the Law of the Commissioner. The expertise knowledge of the Commissioner is in particularly relevant in cases regarding the defence of public interest. Therefore, the right to defend the public interest, which is also conferred on the courts, could be implemented more efficiently if the Commissioner is entitled to intervene into the undergoing proceedings regarding the defence of public interest and to provide opinion regarding the matters under consideration. In order to provide an adequate legal framework to implement the aims of the ombudsperson institution, adopting legal provisions regarding the defence of public interest before courts could contribute to enforcing human rights legislation independently of individual complaints filed with the Commissioner.

g) The last proposal on the matter concerns the sustainable development of soft law. European equality bodies in other states have now developed concrete methodology for drafting *amicus curiae* to courts. When drafting such methodology for the Commissioner, one should take into account the difference between drafting a legal claim and providing an *amicus curiae* opinion, as the latter should be more neutral legal opinion that analyses the points of law rather than factual circumstances of the case. The methodology should include basic elements of violation analysis (for instance, like in Latvia, the key elements addressed by *amicus curiae* in their opinion are similar to those used in preparation of expert reviews[81]) and tips of good legal writing.

Additionally, material and procedural questions of compensational remedies in the context of restoration of violated rights are discussed in a special study to be found in Part IV 2 of this Analytical report. The final proposals are the following:

a) Having regard to the broad nature of the provisions concerning the remedies set out in the Law of the Commissioner, it can be assumed that the Commissioner has a wide list of means of remedial action at his disposal in order to address instances of human rights violations. On the one hand, it is difficult to deny that this wide margin of appreciation provides advantages to the activities of the Commissioner, such as flexibility and adjustment to individual circumstances. On the other hand, it is possible to consider whether the lack of indicative list of relevant measures causes legal uncertainties hindering the smooth functioning of the institution and leading to inconsistent practices. In terms of benefits, if the law was supplemented with an indicative list of measures it would be clear to the applicants and infringers, which measures they may expect to receive, and how they are to conduct themselves to rectify the breach.

b) The question also arises as to the extent how the judicial remedies held by the Commissioner are implemented. Challenging the legality of normative acts before the Constitutional Court can provide a core remedy for addressing the issues in a systematic and broader way and preventing administrative errors in the future. Similar development of entitling the Commissioner to challenge directly the legality of

[81] Information upon request provided by Ms. Anete Ilves, Legal Councellor of the Social, Economic and Cultural Rights Division, Republic of Latvia Ombudsman Office, 23 May 2017.

normative administrative acts before administrative courts is to be welcomed and encouraged.

c) At the same time, it is proposed to exclude from the Commissioner's remedial regime the judicial remedies which are currently applied where a breach of individual rights and legal interests is established. Once the investigation has produced conclusive evidence that there is a violation of human rights, the Commissioner must seek to reach a friendly solution in order to rectify the violation at issue and satisfy the complainant. To this end, the Commissioner shall rely on a set of remedies of non-judicial kind. This lack of formal legal authority should not be seen as a threat to the efficiency of the remedial regime conferred on the Commissioner. The truth is that the Commissioner has sufficient forms of remedial redress at his disposal at both micro level of specific investigations seeking the correction of individual mistakes and applying classical measures such as recommendations and reporting, and macro level of wide ranging own initiative investigations leading to the cases of normative control.

d) In order to enhance the remedial competence of the Commissioner, it may be suggested that the Commissioner be vested with the authority to propose the public authority to compensate certain loss incurred by the aggrieved legal or natural person. Meanwhile, conferring on the Commissioner the right to initiate criminal, administrative or disciplinary proceedings before the courts, which is normally a remedy associated with a punitive function, at this stage seems to be inappropriate and not in line with the purpose of the institution.

4. At present, it seems that an often used remedy in case of non-compliance with one of the Commissioner's decisions is drawing up a "protocol" which is then submitted to an administrative court for punishing the violator under the Code of administrative offences.
If it should be decided to establish a new supervisory authority for data protection (and possibly also for access to information), according to nowadays standards this authority should itself have the power to punish violations of the right to data protection (and of the right to access to information, if applicable). The present way of reacting to violations of human rights is time consuming, onerous and not very effective.

5. The question of compulsory enforcement of decisions of the Commissioner (or of a newly created supervisory authority) should be solved: As is pointed out in more detail in the analysis in Part IV 3 of the Annex, it is possible to include other authorities than courts into the list of the institutions which can produce legal titles which are "executable". A suitable provision would have to be added to either of the relevant laws. The requirements for the content of legal documents which shall be the basis for execution are laid down in the Law of Ukraine on enforcement proceedings. The following suggestions are made in the special study on Enforcement:

a) In order to increase the efficiency of the work of the Ombudsman, it is proposed that the Ombudsman should be empowered to take decisions that may be enforced in Law of Ukraine "On executive proceedings" order. The Ombudsman should also be empowered to apply protective measures. For this reason the Law on the Commissioner for Human Rights should be changed.
b) In order to ensure the efficiency of the mediation process conducted by the Ombudsman, it is suggested that the Ombudsman's mediation process and the agreement approved by the Ombudsman be binding on the parties and could be

enforced under the procedure established by the Law of Ukraine "On executive actions".

c) Law of Ukraine “On executive proceedings” sets out the requirements for the content of the enforcement document. That ombudsman’s decisions would comply with these requirements it is necessary to regulate the content of the Ombudsman's decisions and align the requirements of the procedural part with the requirements of the Law on Ukraine on the content of the executive document.
d) The Ombudsman must have the right to participate effectively in the enforcement process: to submit his executed instrument for enforcement, to participate as an executor in the enforcement proceedings as a representative of the recovering person, and to monitor the enforcement proceedings.

6. As coercive instruments for restoring violated rights are limited and often slow to be effective the Commissioner should try to promote the application of “means of good understanding”. The fact that there is no law yet on mediation in Ukraine is certainly a drawback, but efforts should be made to have such a law passed. Considering that many cases could possibly be finally solved outside of the courts, it seems worth to study more deeply the preconditions and techniques of successful mediation, as has been done in Part IV 4 of the Analytical Report. The role of the Commissioner in Ukraine as a mediator is currently informal and is undertaken on the good will of the Commissioner’s Office and on *ad hoc* basis. In order to introduce a new power to the Commissioner to act as a mediator, it would be necessary not only to amend the LPCHR by expressly granting this power to the Commissioner but also to pass a Law on Mediation; a draft is already available in the Parliament of Ukraine.

7. Prevention of violation of rights must also be considered in the given context as an important instrument to safeguard human rights. To this end a model, which is called “positive action” and was created in the context of promoting non-discrimination is described in Part IV 5 of the Analytical Report. It was developed with a view to the possibility of general application of the principles of this tool. Such wider application seems to be particularly advisable as the Commissioner also possesses some experience in using this tool in the context of non-discrimination.

8. How much awareness raising on specific human rights is actually necessary, especially also on data protection (considering the amount of electronic data processing going on in Ukraine), was demonstrated in discussions with representatives of the public sector. There is evidently a great interest in finding organizational models for incorporating into the institutions special expertise on certain human rights like data protection on a continuous basis. This is why a special contribution dealing with the function of a “data protection officer” in the sense of the new EU General Data Protection Regulation was added to Part IV of the Analytical Report.