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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 EXISTING REGULATORY AND LEGAL FRAMEWORK GOVERNING
THE ACTIVITIES OF THE OMBUDSPERSON**

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INTRODUCTION

The purpose of this Report is to review and assess of the existing regulatory and legal framework governing the activities of the Ukrainian Parliament Commissioner for Human Rights.

In carrying out the above-mentioned aim, the existing legal national framework of Ukraine was reviewed. The analysis performed covered key legal acts related to the Commissioner's activities, including the Constitution of the Ukraine, the Law of the Ukrainian Parliament Commissioner for Human Rights, the Law on Citizens' Appeals, the Code of Administrative Offenses of Ukraine, the Law of on Personal Data Protection, the Law of Ukraine on Access to Public Information, the Law of Ukraine on Principles of Preventing and Combating Discrimination in Ukraine, and other legal acts.

The analysis of the national legal regulation was performed in the light of recommendations published by different international organisations, in particular Recommendations of the European Commission for Democracy through Law (Venice Commission) CDL(2011)079 'Compilation on the ombudsperson institution', Strasbourg, 1 December 2011; Evaluation of Activity of Parliament Commissioner for Human Rights in Ukraine through the International Ombudsmen Institute (2012); Recommendations of the Joint Project between the European Union and the Council of Europe 'Strengthening the Implementation of European Human Rights Standards in Ukraine'; Project of the Transparency International on Ukraine National Integrity System Assessment in 2015; the UNDP Midterm Review: Office of the Ombudsperson Strategy and Action Plan (2013-2017), and other.

I. THE PURPOSE OF THE COMMISSIONER'S ACTIVITIES

I.1. Development and Implementation of Human Rights Policy

1. In Ukraine the Commissioner's model has been built to focus on the human rights protection and promotion. The Commissioner is an independent officer with responsibility to provide easily accessible additional legal remedy to private individuals and society as a whole against public authorities in alleged cases of human rights violations. Indeed, the Office of the Commissioner is charged with a mandate that aims to ensure the protection of human rights at all possible levels and in its broadest sense. As provided for under Article 3 of the Law on the Ukrainian Parliament Commissioner for Human Rights (hereinafter the Law of the Commissioner, the Law), the purpose of the parliamentary control is protection of human rights, observance of protection for human rights and freedoms, prevention of violations, facilitation of restoration of human rights, participation in the law-making process. In addition to this, the Commissioner should play an important role in promotion of legal awareness¹.
2. Following an analysis of the aforementioned legal provisions and comprehensive deliberations at meetings with the Commissioner and representatives of the Office, a dual role of the Commissioner shall be discussed.

Currently, the primary function with the Commissioner remains within the sphere of implementation of human rights, mainly it concerns the objective examination of individual complaints. Essentially, the core function of the Commissioner is to respond to the established violations of human rights and ensure that public service activities are carried out properly, fairly and in accordance with legal acts. In this respect, the legislative framework adopted in 1997 and further supplemented by the 2012 and 2014 amendments allowed for wider powers of investigation in the sphere of particular human rights, e.g. the protection of data and access to public information. As it emerges from the Annual reviews, the investigation of individual complaints has been comprising the largest part of Commissioner's workload for few years now².

In the exercise of his primary function as defender of the people, the Commissioner in Ukraine also holds certain executive and legal representation, and in some cases – public prosecuting powers. The Commissioner may not only recommend for the state

¹ In this regard, one can note the Commissioner's work done in promotion of antidiscrimination principle. Information obtained during Meeting 3 (31 January 2017).

² In this regard, one can see the statistics of the Office published online: <http://www.ombudsman.gov.ua/ua/page/applicant/statistics/> >.

authority to take up certain remedies in regard of the aggrieved individual but he is also entitled to initiate the imposition of administrative fines. In addition to this, the Commissioner plays a role in representing vulnerable members of society before courts. In undertaking these activities, the Commissioner proved to put entrusted powers to often use. At this level, the Commissioner attempts to empower the individuals concerned to react against breaches of legal acts and injustice in general such as discrimination³.

A second but certainly not less significant purpose of the Commissioner concerns the contribution to the development of human rights policy. In this regard, the Commissioner is expected by law to be proactive and to act as a catalyst for the improvement of legal regulation. This is particularly important in view of the fact that systemic failures in legal acts and policies aggravates wide sectors of the population. To this end, the Commissioner has been entitled to participate in the law-making process and essentially act as a watchdog over the legislative initiatives and proposals. In case particular piece of legislation is already in force, the Commissioner is entitled to question it before the Constitutional Court. It was learnt during the meetings that the latter function has been sufficiently actively pursued and developed by the current Commissioner and her Office⁴.

3. Today, there is no legal framework within which the Commissioner would seek to uncover maladministration in the activities of state authorities and make recommendations with a view to putting an end to it. Currently, the general objectives of the Commissioner do not expressly include the improvement and promotion of the right to good governance.

³ Information obtained during Meeting 1 (30 January 2017).

⁴ Information obtained during Meeting 1 (30 January 2017); Information obtained during Meeting 5 (31 January 2017).

II. THE STATUS OF THE COMMISSIONER

II.1. Position of the Commissioner's Office in the Institutional Landscape of Ukraine

4. As an independent and constitutionally defined body, today the Commissioner's institution in Ukraine holds an important place within the institutional framework of national authorities. The activities of the Commissioner are a constituent part of the national system for protection of human rights. The Commissioner is an integral part of the system of constitutional rights and freedoms that includes the judiciary, the President of Ukraine, the Verkhovna Rada of Ukraine, and supranational judicial authorities. It can be maintained that the establishment of the Commissioner institution on the constitutional level and a wide mandate given to them contributes significantly to the development of democratic accountability of state authorities.
5. The Commissioner is not a part of or under a direct control of any public authorities. Even though he has strong ties with the Parliament (as the name suggests), he operates autonomously from the legislator as well as executive government, and the courts.
6. The legal norms defining the status, inter alia rules for appointment, cessation, and accountability of the Commissioner, his competence and relationship with other state institutions are established in several sections of the Constitution of Ukraine, in Section II *Human and Citizens' Rights, Freedoms and Duties*, Section IV *Verkhovna Rada of Ukraine*, and Section XII *Constitutional Court*.
7. The constitutional norms, which are set out in Section II *Human and Citizens' Rights, Freedoms and Duties*, establish a strong mandate for the Commissioner in the sphere of the protection of human rights. In this regard, two points should be made.

Firstly, pursuant to Article 55(2) of the Law of the Commissioner, everyone has the right to appeal for the protection of his or her rights to the Ukrainian Parliament Commissioner for Human Rights (Ombudsmen). In this case the name of the ombudsman clearly reflects his mandate. The Commissioner has an express human rights protection role. The legal context of that provision shall also not be overlooked. The fact that the constitutional provisions are laid down in the section of the Constitution which is aimed at establishing certain catalogue of human rights might be seen as an extension of constitutional rights.

Second, in the Constitution, the Commissioner is provided with a similar institutional background to that occupied by the courts. In this regard, the position of legal norms

regarding the status of the Commissioner in the text of the Constitution should be noted. These norms are introduced immediately after legal provisions establishing that everyone shall be guaranteed the right to challenge in court the decisions, actions, or inactivity of State power, local self-government bodies, officials and officers (Article 55(1) of the Constitution). Thus, under the Constitution it is for the courts and the Commissioner to protect human rights and freedoms.

8. Section IV of the Constitution extends the mandate of the Commissioner further. The Commissioner is not only vested with the responsibility to protect human rights and freedoms but is also under a duty to observe the situation regarding the implementation of the human rights in general. More precisely, pursuant to Article 101, the Ukrainian Parliament Commissioner for Human Rights shall conduct the parliamentary control over *observance* and protection of human and citizens' constitutional rights and freedoms.

This Section of the Constitution also clearly defines the relationship between the Commissioner and legislative branch of the government. As provided for under Article 85(17), it is for the Verkhovna Rada of Ukraine to appoint and remove from the office the Ukrainian Parliament Commissioner for Human Rights; and to hear the Commissioner's annual reports on the state of affairs in the sphere of observance and protection of human rights and freedoms in Ukraine.

9. Lastly, Section XII of the Constitution further strengthens the position of the Commissioner in the institutional landscape. Article 150(1) of the Constitution expressly entitles the Commissioner to apply to the Constitutional Court regarding the questions of constitutionality of certain legal acts. It is important to underline that constitutionality issues shall also be considered upon request from the President of Ukraine, no less than forty-five people's deputies of Ukraine, the Supreme Court of Ukraine, or the Verkhovna Rada of the Autonomous Republic of Crimea. Thus, in this regard, the Commissioner holds a very strong position that can be compared to the one occupied by key state institutions.
10. The constitutional provisions are paralleled by the legal norms laid down in the Law of the Commissioner. The norms set out in the Law provides for a more detailed description on the Commissioner's status and his exact role and purpose. It further stresses that the Commissioner is independent from the government or any other body or person. Statutory independence is formalised under Article 20 of the Law of the Commissioner. As far as the relationship with other state institutions is concerned, one shall particularly note Article 4(2) of the Law of the Commissioner which provides that the Commissioner supplements legal remedies for violation of constitutional human rights and freedoms. It neither repeals them nor results in reviewing the competence of state bodies which ensure protection and restoration of violated rights and freedoms.

11. In summary, explicit recognition for the Commissioner in the Constitution ensures that the activities of the Commissioner come with increased protection. After all, the more complicated it is to amend the legal basis for the activities of the Commissioner, the more likely that the Commissioner will continue to operate on a permanent basis. It also serves to ensure that the findings of the Commissioner regarding the activities of public authorities are taken as seriously as judicial protection.
12. Under this heading, special mention shall also be made on the questions regarding Commissioner's activities in the sphere of access to public information and personal data protection. Dualism of the Commissioner's functions (firstly, the Commissioner is a national institution for human rights protection; additionally, he has a power of controller in the spheres of personal data protection and access to public information) makes it somewhat difficult to describe the position of the Commissioner within the institutional background of Ukrainian public authorities with a sufficient legal certainty. In the interest of clarity and consistency, these questions are covered in Section III.4.1 and Section III.4.2.
13. With regard to international context, it should be noted that the Commissioner's Office has been granted the highest accreditation level – the "A" status. This status indicates that the Commissioner's status and activities fully complies with the Paris Principles approved by the United Nations General Assembly in 1993.

II.2. Guarantees

II.2.1. General Remarks

14. It may be suggested that the legal framework offers every requisite guarantee of independence to the Commissioner. First of all, it should be stressed that the status of the Commissioner is established in the Constitution of Ukraine. Thus, independence of the Commissioner is enhanced through constitutional recognition. Further, the Commissioner is granted formal independence underpinned by the legislative connection. The Commissioner is separate from the law-making bodies and the executive branch. It is important and necessary condition of impartiality and effectiveness.
15. The legal notions regarding the guarantees of the Commissioner are contained in few articles of the Law (mainly set out in Article 4, Article 20 and Chapter III).
16. Certain institutional separation of the Commissioner's office from the legislator is reflected by the legal norms laid down in Article 4 of the Law. It is provided that the powers of the Commissioner shall not be suspended, restricted in case of termination of the Verkhovna Rada of Ukraine or its dissolution (dissolution), the introduction of

martial law or the state of emergency in Ukraine or in its certain areas. Analogous legal provisions are set out in Law on the Legal State of Emergency, the Law on the Legal Regime of the State of War.

17. As regards the independence from the executive, one should refer to Article 4 and Article 20 of the Law of the Commissioner. As provided for under Article 4(2) of the Law, the Commissioner performs his duties independently from any state authorities or their officials. This guarantee is further supported by more elaborate legal regulation laid down in Article 20. Pursuant to Article 20(1), any interference in the work of the Commissioner by the public authorities, local governments, public associations, enterprises, institutions and organizations irrespective of ownership and their officials is prohibited. In addition to this, the Commissioner is not obliged to provide any explanations on details of cases under consideration (Article 20(2) of the Law of the Commissioner).
18. In order for the Commissioner to be able to implement his functions effectively, it is absolutely necessary for him to be assisted by the competent administration. In this regard, Article 10 of the Law establishes that the activities of the Commissioner shall be secured by the Secretariat. The structure of the Secretariat, distribution of duties and other organization matters fall into the discretion of the Commissioner. In addition to this, the Commissioner is entitled to appoint Representatives (for further details please refer to Article 11 of the Law and Section II.4.1 of the Report). As it was suggested at the meetings with representatives of the Commissioner's Office, the Commissioner has indeed certain freedom to define his own policy regarding management of human resources⁵.
19. The above-mentioned guarantee of administrative nature is closely connected with financial independence. The activity of the Commissioner is funded from the state budget of Ukraine and is annually envisaged in a separate line. The Commissioner develops, submits for approval by the Verkhovna Rada of Ukraine and performs its estimate of costs (Article 12 of the Law of the Commissioner). As it was learnt during the meetings⁶, a point of criticism is that once approved, the budget usually is not revised despite existing legal regulation on the issue.
20. Finally, the guaranties of individual kind shall be discussed, as they are provided for under Article 20 of the Law of the Commissioner. First, the protective immunity of the Commissioner has been established and maintained regarding criminal and administrative liability. Under Article 20(3) of the Law, in performing his duties, the Commissioner cannot be without the consent of the Parliament held criminally liable, subject to administrative punishment imposed by the court, detained, arrested, subjected to search and personal examination. The criminal proceedings against the Commissioner may be instituted only by the Prosecutor General of Ukraine. Second,

⁵ Information obtained during the meeting 2 (30 January 2017).

⁶ Information obtained during the meeting 2 (30 January 2017).

the Law establishes certain social and health protection guarantees setting out that the state provides the insurance in the event of death, trauma, disability or illness developed during performance of official duties. Third, additional guarantees regarding the expiration of the term of the Commissioner are also worthy of special mention. According to Article 20(4), upon the expiration of the term the Commissioner retains the right to return to the previous post or be appointed to an equivalent post. Nevertheless, certain concerns were expressed as to implementation of this guarantee in practice⁷.

21. In this context, it is of importance to point out that the Law of the Commissioner is silent on the rank of the Commissioner vis-à-vis other state officials. The status of the Commissioner is not linked to other high-level officials in terms of remuneration, allowances or pension. In addition to this, the Law of the Commissioner does not provide for an immunity established for the Office that would extend to the inviolability of the institution's possessions, documents and premises.
22. Guarantees of independence of the Commissioner also manifest themselves in various legal provisions of the Law, especially regarding the appointment, re-election, and cessation of the office procedures. Each of them shall be discussed below in turn and in more detail.

II.2.2. Appointment

23. The Commissioner is appointed for term of five years by the Parliament. Article 85(17) of the Constitution establishes that the Commissioner is appointed and removed from the office by the Verkhovna Rada of Ukraine. The same legal notions are provided by the Law of the Commissioner.
24. The Parliament has also been given an active role in the selection procedure for the position of the Commissioner. As described by Article 6(1) of the Law of the Commissioner, candidates may be nominated by the Chairman of the Verkhovna Rada of Ukraine or one-fourth of People's Deputies of Ukraine. There is no limit as to the number of candidates and more than two candidates may take part in the election procedure.
25. The Law of the Commissioner grants rather wide opportunities to stand as a candidate in the procedure for the Commissioner's appointment. The Commissioner shall be chosen from among persons who are citizens of Ukraine and who have been residing in Ukraine for the last five years and who have attained the age of 40 on the day of election. In addition to this, candidates shall have good command of state language, high moral qualities, and experience in human rights protection (Article 5(2) of the Law of the Commissioner). It should also be pointed out that in 2012 certain restrictions relating to good repute of candidates were introduced to the Law of the Commissioner. Current legal regulation requires the candidates to provide an

⁷ Information obtained during Meeting 2 (30 January 2017).

assets and income declaration. The candidates must also be checked in light of the framework for preventing and counteracting corruption. In 2012 the Law of the Commissioner also established a direct prohibition to stand as a candidate for individuals who have criminal record which is not expired or who have been given administrative punishment for corruption over the past year.

26. The Commissioner is elected by the absolute and not the qualified majority of Parliament members' votes (Article 6(4) of the Law of the Commissioner). Following the line of arguments also presented by competent international organisations⁸, it is desirable to review the Law in a way which ensures that the Commissioner has full support of the Parliament.
27. At the meetings with the personnel of the office there was also raised a thought that the appointment procedure shall not match the start of the new Parliament. It was pointed out that this may raise concerns regarding the continuity of Commissioner's work and his independence⁹.

II.2.3. Re-election

28. The Commissioner is eligible for reappointment. The Law of the Commissioner does not establish any prohibition for the outgoing Commissioner to be nominated again. Even though there is no legal notion, setting out that the Commissioner shall be eligible for reappointment, it was learnt during the meetings that in practice this legal regulation does not pose any legal uncertainty¹⁰. In this regard, one can also point out that the first Commissioner of Ukraine – Nina Karpachova – remained in the office for three consecutive mandates (in 1998, 2003, and 2007).

II.2.4. Cessation of the Commissioner's duties

29. Article 85(17) of the Constitution of Ukraine and, accordingly, Article 9(6) of the Law on the Commissioner establish that it is for the Verkhovna Rada of Ukraine to adopt a decision regarding the cessation of the Commissioner's duties. Further conditions for the cessation of the Commissioner's duties are laid down in the Law of the Commissioner. The Commissioner shall cease to exercise his duties either at the end of his term of office or on his resignation or dismissal.

The first grounds, set out in Article 9(1) of the Law, concern the termination of authority. These cases include: (1) the resignation, (2) conviction with definitive judgment, (3) legal declaration of missing or presumed dead, (4) the start of the authority of newly-elected Commissioner, and (5) the death.

⁸ For example, Council of Europe. Recommendation 1615 (2003), Venice Commission's 'Compilation of the Ombudsman institution' of December 2011, Transparency International Report on NATIONAL INTEGRITY SYSTEM ASSESSMENT UKRAINE 2015.

⁹ Information obtained during Meeting 2 (30 January 2017).

¹⁰ Information obtained during Meeting 2 (30 January 2017).

The second group of grounds for the cessation of the Commissioner's duties concerns the dismissal from the post (see Article 9(2) of the Law). Accordingly, the Commissioner may be dismissed from the post in the following cases: (1) violation of the oath, (2) failure to meet the restrictions applied to the Commissioner's status, (3) the loss of nationality, (4) inability to continue in his present duties for certain medical reasons.

30. Out of all these grounds, it is worthy to address a violation of the oath separately. Pursuant to Article 7 of the Law, the Commissioner swears to honestly and scrupulously protect human rights and freedoms, conscientiously perform duties, honour Constitution and law, and be governed by justice and personal conscience. He also commits to acting in independent and unbiased manner, serving human rights. During the meetings, it was suggested that this ground is too vague and potentially very wide¹¹. This is even more so since the legal framework does not provide for impeachment procedure or establishment of competent investigation commissions at the Parliament.
31. The application of Article 9(2)(2) setting out that the Commissioner shall be dismissed in case he starts activities incompatible with the duties of Commissioner is also subject to separate mention. As provided for under Article 8(1) of the Law, the Commissioner shall not have representative mandate, hold any other positions at state authorities or perform any other paid or unpaid work, except teaching, scholarly or any other creative activities. The Commissioner also shall not be a member of any political party. It should be pointed out that the application of Article 9(2)(2) is only triggered where the Commissioner fails to meet the requirements within ten days once the incompatibility is discovered (see Article 8(6) of the Law).
32. In this context, it is interesting to note that the failure to continue to be eligible for the post the Commissioner may result in different legal consequences. For example, in case of the Commissioner no longer holds the citizenship of Ukraine a decision on his dismissal shall be adopted. Meanwhile, a conviction with definitive judgment shall result in termination of the authority. Having regard to this, it can be maintained that there is room for improving the coherency of the existing legal regulation.
33. There are no legal notions that would aim to regulate directly the situation where, save in the event of the dismissal, the Commissioner's mandate comes to the end, however, the new Commissioner has yet to be appointed. Nevertheless, the systemic reading of the legal norms may lend some support for the temporary solution of the situation. In this regard, one can note that the Law of the Commissioner does not *expressis verbis* establish that the authority of the Commissioner terminates when the term of the office expires. This may be interpreted as entitling the outgoing Commissioner to perform the duties until the newly-elected Commissioner takes the

¹¹ Information obtained during Meeting 2 (30 January 2017).

oath, this is especially so where Article 6(2)(3) is read in conjunction with Article 9(4).

34. Even though this interpretation of the law works for cases where the office of the Commissioner expires, the same cannot be said with certainty regarding the resignation of the Commissioner. As provided for under Article 9(1)(1), the resignation is a ground to terminate the authority. Accordingly, once the authority of the Commissioner has been terminated, Article 6 of the Law of the Commissioner requires that the candidates shall be nominated within twenty days. The voting at the Parliament takes place in another twenty days at the latest. However, where there is no agreement in the Parliament, which shall be expressed by the majority of votes, the candidates shall be nominated again. Thus, it cannot be excluded that application of current legal regulation could result in legal uncertainty.

II.3. Accountability: Activity Statement

35. The duty to make an annual statement to the legislature on the activities of the office is, first of all, established by Article 85(17) of the Constitution. It is for the Verkhovna Rada of Ukraine to hear the Commissioner's annual reports on the current situation of observance and protection of human rights and freedoms in Ukraine and adopt a resolution based on annual and special reports prepared by the Commissioner.
36. The time limit for the submission of annual report and its content are addressed in detail in the Law of the Commissioner. According to Article 18(1), the annual report shall be submitted during the first quarter of every year. Under general rule, the Commissioner shall report on the situation regarding the observance and protection of human rights. The report shall encompass several aspects as determined by legal provisions set out in Article 18(1) and (2) of the Law, inter alia information on human rights violations by state authorities, the shortcomings in the legislation, information what measures were taken by the Commissioner in regard with determined breaches, results of inspections, conclusions, and recommendations.
37. As it is apparent from the Commissioner's annual reports, indeed, they encompass a wide range of topics. Annual report covers all the activity areas and addresses every single sphere of the Commissioner's mandate individually. Annual reports also provide certain compilation of statistics. Nevertheless, some take the view that single annual review per year is not enough in order to provide the society with adequate and up to date insights on general human rights situation in Ukraine, especially having regard to the peculiarities of the country¹². There are also concerns regarding

¹² Information obtained during Meeting 5 (31 January 2017).

the lack of information about internal functioning of the Commissioner's Secretariat¹³.

38. In addition to the annual reports, the Commissioner may issue special reports. Whereas submitting annual report once per year is mandatory, special reports are published once it is necessary and focus on separate issues regarding the observance of human rights in Ukraine. To date, the Commissioner has published special reports on the implementation of the national preventive mechanism, monitoring places of captivity in Ukraine, application of the Criminal Procedure Code and other issues¹⁴.
39. Finally, annual and special reports in their entirety shall be accessible to the public. As provided for under Article 18(5) of the Law of the Commissioner, reports shall be published in official publications of the Verkhovna Rada of Ukraine. The reports prepared by the Commissioner are also accessible online at the official website of the Commissioner. For example, to date, annual reports starting from year 2013 are uploaded online and can be retrieved by any individual concerned with the activities of the Commissioner.

II.4. Institutional Framework

II.4.1. Apparatus

40. Activities of the Commissioner is supported by the Secretariat (Article 10 of the Law of the Commissioner). Further, the structure of the Secretariat, distribution of duties, and other aspects concerning organization of the Office are regulated by the Regulations approved by the Commissioner. These provisions ensure that the Commissioner has certain discretion and flexibly to decide on work organizational questions of the Secretariat.
41. In addition to this, the Commissioner has a right to appoint Representatives. Organization of activity and scope of authority of the Representatives are also regulated by the Regulations approved by the Commissioner (Article 11 of the Law of the Commissioner).
42. Indeed, current legal regulation allows for a wide discretion of the Commissioner in establishing working patterns in internal organization. There is only a single mandatory requirement established in the Law of the Commissioner as organizational arrangements are concerned. Pursuant to Article 19-1(7), a separate structural unit for the prevention of torture and other cruel, inhuman or degrading treatment or punishment shall be established in the Secretariat of the Commissioner.

¹³ Data collected by Transparency International in NATIONAL INTEGRITY SYSTEM ASSESSMENT UKRAINE 2015 http://ti-ukraine.org/wp-content/uploads/2016/12/nis_assessment_eng.pdf

¹⁴ Online Access: <http://www.ombudsman.gov.ua/ua/page/secretariat/docs/presentations/>

43. In their work the Commissioner's Office may also be assisted by a board of advisors, experts, representatives of civil society (Article 10(3) of the Law). It was learnt during the meetings that the board contributed in establishing strategical aims of the Commissioner's office and monitoring their implementation.
44. In this context, it should be mentioned that there is a very close cooperation (also described as a synergy¹⁵) between the Commissioner's Office and representatives of the NGO's. It was confirmed on several meetings that the Office of the Commissioner is open and proactive in terms of launching projects on human rights protection in collaboration with the NGO's¹⁶. However, the status of the latter is not established in the legal regulation¹⁷. In this regard, one can note possible concerns regarding the duty not to divulge any private information or any document submitted to the Commissioner, in particular sensitive data.
45. Turning to the powers given to the personnel of the Apparatus one should note that the Law of the Commissioner does not lay down legal provisions with precision regarding the officials and servants of the Commissioner's office who assists him. As it was learnt during the meetings, the legal regulation requires certain tuning since legal provisions of the Law formally establishes the powers to the Commissioner alone and technically disregards that in implementing these powers the Commissioner is assisted by particular personnel¹⁸.
46. There are also strong indications that the status of the Representatives and personnel at the Commissioner's Office should be strengthened in terms of delegated administrative powers and financial security¹⁹.
47. Finally, yet importantly, measures to raise skills and qualifications of the personnel should be supported with adequate resources. During the meetings particular mention was made on the necessity to offer possibilities for the personnel to improve their qualification in the sphere of constitutional referrals²⁰ and other legal topics.

II.4.2. Regional set-up

48. Regional offices are not formally established under national law. Currently, their status, guarantees and competence are subject to the regulation by internal rules, which are adopted by the Commissioner²¹. The number of regional offices is significantly lower than the number of regions.

¹⁵ Information obtained during Meeting 1 (30 January 2017).

¹⁶ Information obtained during Meeting 5 (31 January 2017); Information obtained during Meeting 6 (31 January 2017).

¹⁷ Information obtained during Meeting 1 (30 January 2017).

¹⁸ Information obtained during Meeting 2 (30 January 2017)

¹⁹ Information obtained during Meeting 5 (31 January 2017); Information obtained during Meeting 2 (30 January 2017).

²⁰ Information obtained during Meeting 5 (31 January 2017).

²¹ Information obtained during Meeting 2 (30 January 2017).

49. Taking into account the size and administrative structure of the territory of Ukraine, it can be maintained that regional offices should be strengthened. Indeed, some activities concerning investigation of complaints, interviews, examination of situation and facts on the spot could be efficiently carried out by the regional units of the Office under Regulations approved by the Commissioner. Therefore, the issues on the legal status of the regional units and their powers could be clarified. In this regard, there is room for consideration whether the Commissioner's activities could benefit from complementing the Law with legal provisions concerning the legal right of the Commissioner to establish structural units in the regions and its scope. Nevertheless, one should be mindful of maintaining the Commissioner's flexibility in order to ensure that regional units would operate where it is most efficient.
50. In this context, a special mention should be made to the network of Regional public relations coordinators gathering local community activists which has been established with support of donor and international organizations. This network helps to respond quickly to the violation of human and citizen's rights and freedoms in the regional level. Besides, it helps to solve the problem of unequal number of monitors in different regions as well as to expand the scope of activities despite to the limited financing from the State budget.

III. THE MANDATE OF THE COMMISSIONER

III.1. General Observations

51. The Office of the Commissioner has been established as an independent constitutional body charged with the duties to observe and protect human rights. To this end, over the years the Commissioner's Office has grown in competence and has been assigned particular legal powers, *inter alia* within legislative, executive and judicial spheres.
52. From a historical point of view, it should be mentioned that the Law of the Commissioner was adopted on 23 December 1997 and entered into force on 15 January 1998. Over the years, there have been few amendments to the Law which essentially extended the Commissioner's mandate. In 2008, it was established that the Commissioner has the right to exercise control over the ensuring equal rights and opportunities for women and men. In 2012, the Law was supplemented with the legal notions setting out that the Commissioner has the right submit proposals for improvement of the legislation and the activities of institutions working in the sphere of the protection of human rights. In the same year, the Law was also supplemented by Article 19-1 which laid down the legal notions regarding the performance of functions of national preventive mechanism by the Commissioner. In this regard, the Commissioner is entrusted with functions of national preventive mechanism pursuant to the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. In addition to this, Article 13 of the Law of the Commissioner was amended on several other occasions in 2014. The mandate was expanded by establishing that the Commissioner is entrusted with the function to observe the implementation of the right to access to public information. The Commissioner was also given the power to initiate, independent of his participation in the court proceedings, the review of court judgments. It was also established that the Commissioner has the right to exercise other authorities set out in the law.
53. In the legislative area, the Commissioner's input is given on future and existing legislation since the fact whether legislation regarding human rights is sound and effective is a theme commanding Commissioner's constant attention. Indeed, the Commissioner has been given different legal instruments to be used prior to legislation being drafted and those to be used in response to existing legislation. Without doubt, the evolved and strengthened role of the Commissioner shall be related to the development of a more structured relationship with the legislative bodies.

54. The core function of the Commissioner continues to be protection of individuals from unfair actions of the State. The law has no exceptions and extends the jurisdiction of the Commissioner to the legal relationships between private individuals and state authorities, bodies of local self-government, any other institutions irrespective of their form of ownership, and their employees. To this end, the Commissioner has the right to consider individual complaints and issue authoritative opinions and recommendations. Where appropriate, the Commissioner may assist in facilitating access to available legal and judicial remedies. Over the years, as reflected by annual reports, the Commissioner has investigated many issues including social welfare pension claims, serious misbehaviour in prisons, protection of mentally ill persons etc. Nevertheless, moving from specific and individual concerns towards solutions on systemic problems within public administration shall be of no less importance²².
55. Lastly, the Commissioner's mandate on the protection of human rights also includes additional or secondary duties such as personal data protection and access to information. Further, protection of the right to private life or the right to access to information is supported by coercive measures and sanctions. Under these circumstances, these functions of the Commissioner require further consultations since the legal framework and practical experience in implementing it²³ seem to suggest the first impression that this role may overshadow the other functions of investigating maladministration and preventing human rights violations²⁴. Creation of separate state institution so-called the Information Commissioner having double powers in fields of personal data protection and access to information could be an alternative solution to the problem²⁵.

III.2. The Exercise of Legislative Duties

56. The participation of ombudspersons in legislative process proves to be a valuable preventive measure and may provide collective benefit for the entire society or large part thereof. In Ukraine, the role of the Commissioner in law-making procedure manifests itself through wording of Article 3(4) of the Law. It provides that the facilitation of the process of bringing legislation of Ukraine on human rights and freedoms with the Constitution of Ukraine and international standards is one of the purposes of the parliamentary control exercised by the Commissioner. In practice,

²² Information obtained during Meeting 5 (31 January 2017).

²³ Information obtained during Meeting 3 (31 January 2017).

²⁴ The same point was raised on several occasions during the scheduled meetings (Meeting 5 on 31 January 2017, Meeting 1 on 30 January 2017).

²⁵ The Commissioner has launched a public consultation on the creation of the institute of the Information Commissioner. See <http://www.ombudsman.gov.ua/en/all-news/pr/chomu-vazhlivo-stvoriti-institut-informatsijnogo-komisara/>

this task is interpreted broadly and the Commissioner is entitled to act in each main stage of legislative process.

III.2.1. Initiating the Law-making Process

57. According to Article 9(1) of the Constitution of Ukraine, the right of legislative initiative in the Verkhovna Rada of Ukraine belongs to the President of Ukraine, the People's Deputies of Ukraine, and the Cabinet of Ministers of Ukraine. Even though the Commissioner is not formally entitled to institute a legislative procedure, Article 13(3-1) of the Law of the Commissioner provides that the Commissioner is entitled to make in due course proposals for improvement of legislation of Ukraine in the sphere of human rights protection. Currently, there is no legal framework in terms of how exactly these legislative proposals shall be made²⁶. To this end, the Commissioner collaborates with ministries and certain committees of the Parliament, even by submitting the draft laws prepared on their own motion. The examples derived from practice seem to suggest the first impression that the Commissioner is proactive in his capacity as draft law promoter²⁷ and finds it as one of the most efficient ways to prompt the state authorities to address systemic problems at the most suitable level²⁸. In promoting legislative initiatives, the Commissioner has generally found collaboration with committee of human rights and on several occasions successfully conducted initiatives that led to adoption of laws²⁹.
58. The Commissioner has also an indirect or informal impact on the law-making process. In this regard, one should note the authoritative nature of opinions and recommendations issued by the Commissioner since they are also capable of triggering certain legislative initiatives. The documents adopted by the Commissioner provide for the interpretation of a legal provision frequently in the light of the European standards formulated by the European Court of Human Rights and other international institutions of human rights protection. It is consistent that this may alert law-making bodies and give rise to certain legislative procedures. This is even more so when the Commissioner urges the state authorities to establish a well-defined policy rule.

III.2.2. Monitoring the Law-making Process

59. It is not uncommon that the ombudsmen are asked to participate in the law-making process or assess the legislative proposals. As foreseen in Article 13(2) and Article

²⁶ Information obtained during Meeting 2 (30 January 2017).

²⁷ Information obtained during Meeting 2 (30 January 2017); Information obtained during Meeting 3 (31 January 2017).

²⁸ Examples include the constitutional submissions regarding restrictive sessions of the Cabinet of Ministers; legal provisions of the Criminal Code on the right vested to the Criminal Bureau to detain people without trial; legal provisions of the Criminal Code on the appeal right against continuation of detention; legal acts concerning the status of creative workers and related institutions. Information obtained during Meeting 1 (30 January 2017).

²⁹ Information obtained during Meeting 1 (30 January 2017).

13(5) of the Law, the Commissioner has access to documents from all bodies of state power and the right to attend sessions of Verkhovna Rada and the Cabinet of Ministers. Nevertheless, in practice the Commissioner has restricted possibility to participate in the sessions of the Cabinet of Ministers³⁰. As it was pointed out during the meetings, the Commissioner may be invited to the sessions only if the discussions strictly and directly concern human rights matter. In addition to that, under legal acts there is no formal possibility for the Commissioner to participate in the debates³¹.

60. Currently, the Commissioner's Office strives to develop a clear methodology how best to implement the monitoring function. Monitoring the case-law of the European Court of Human Rights, especially in cases started against Ukraine, proves to contribute a lot to this end. In this regard, one can also note monitoring the conclusions of the draft laws on their impact assessment, which currently have not received due attention of the Office.
61. Even though in this area Commissioner's role is of an advisory nature and he does not hold a formal right to challenge draft acts, these activities do contribute to the quality of the law and in particular its compliance with the standards provided by the European Convention on Human Rights, as interpreted in the case-law of the European Court of Human Rights, and other international standards.

III.2.3. Monitoring the Implementation of Legal Acts

62. In the course of his activities, the Commissioner shall monitor that existing legislation or administrative regulations are consistent with, in particular, the Constitution and international standards developed in the sphere of human rights protection. The Law of the Commissioner provides for two types of response if he becomes aware of deficiencies in regulations laid down by the Parliament or other state authorities. The Commissioner may make use of the general measure and notify the public authority concerned, e.g. particular Committee of the Parliament or relevant Minister, about the legal regulation that allegedly is not in accordance with the standards of superior power. In addition to this, Article 150(1)(1) of the Constitution and Article 13(3) and Article 15 of the Law of the Commissioner provide the Commissioner with a direct access to the Constitutional Court concerning the matters of constitutionality of particular legal acts.
63. In this context, one should note that information about shortcomings in the legal regulation regarding the protection of human rights, which are discovered by the

³⁰ As it was pointed out during the meetings, the participation of the Commissioner at the sessions of the Cabinet of Ministers was restricted from February 2014. The Commissioner is no longer summoned to these sessions on the regular basis. Information obtained during Meeting 1 (30 January 2017); Meeting 13 (14 February 2017).

³¹ Information obtained during Meeting 1 (30 January 2017).

Commissioner, is to be included into annual report (Article 18(1) of the Law of the Commissioner).

64. As a supplementary measure in monitoring the compliance of current legal regulation with the international human rights standards, one can also mention cooperation with international human rights organisations. According to Article 19 of the Law of the Commissioner, the Commissioner is entitled to participate in the preparation of reports on human rights submitted by Ukraine to international organizations in accordance with current international agreements ratified by the Verkhovna Rada of Ukraine. This right certainly extends Commissioner's possibilities to monitor the compliance by Ukraine with international legal obligations in the field of human rights and influence the process of bringing Ukraine national legislation with the norms and principles of international law.
65. Further monitoring function carried out by the Commissioner in the spheres of the right to information and personal data protection will be addressed separately in more detail.
66. The Commissioner exercises control over the observance of legislation on personal data protection. He has the right to conduct inspections of bodies processing personal data, also has access to any information and documents which are necessary to control the ensuring of personal data protection, including the access to personal data, relevant databases or files, restricted information. Despite the provisions of the Law on Protection of Personal Data on the Commissioner's right to access to information, obstacles to receive information necessary for control exist because of correlation between laws. For instance, imbalance between the Law on Protection of Personal Data and the Law on Banks and Banking could be noticed. The Article 62 of the Law on Banks and Banking lists bodies which information concerning legal entities or individuals and containing banking secrecy shall be disclosed by banks to. Nevertheless, the Commissioner is not inscribed to this list. The problem could be tackled by the adoption of the amendment to the Law on Banks and Banking prepared by the Commissioner's Office and discussed with experts of the Council of Europe.
67. Monitoring of implementation of the Law on Protection of Personal Data exercised by the Commissioner can reveal gaps, overlap and ambiguities of the legal framework. Lack of a clearly established role of the Commissioner in law-making process reduces the effectiveness of the monitoring and creates obstacles to the development of legal regulation in line with data protection principles.
68. According to Article 23 of the Law on Protection of Personal Data, the Commissioner has the right to provide recommendations on practical application of the legislation on personal data protection, to explain the rights and obligations of the relevant persons upon request of subjects of personal data, controllers and processors of personal data, units or persons responsible for the organisation of the protection of

personal data, other persons. It is not clear whether the Commissioner has the right to provide recommendations on his/her own initiative³². Provisions of the Law on Protection of Personal Data are quite abstract, that makes their understanding and implementation questionable and problematical.

III.3. Implementation of Human Rights Protection

69. Within the current legal framework, in choosing the legal tools for protection of human rights the Commissioner has been given flexibility and informality. Indeed, the discretion to open proceedings in a particular case is a wide one. As an independent constitutional body, which guarantees objectivity and confidentiality, the Office of the Commissioner is entitled to examine individual complaints, to recommend redress, to facilitate access to judicial redress, and to suggest overall improvements on general human rights situation. In cases where entrusted by the law, it also performs additional functions, e.g. initiates the imposition of administrative liability.

III.3.1. The Right to Challenge Normative Acts

70. The Commissioner's mandate regarding the relationship with the Constitutional Court is a wide one. It manifests itself through wording of several legal provisions prescribed by the Constitution itself, the Law on Constitutional Court, and the Law of the Commissioner. As already mentioned earlier, most importantly, the Commissioner is granted a direct access to the Constitutional Court:

Firstly, as provided for under Article 150(1)(1) of the Constitution and Articles 13(3) and 15 of the Law of the Commissioner, the Commissioner has the right to apply to the Constitutional Court 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 Constitution of Ukraine. The Law of the Commissioner establishes that to this end the Commissioner refers a constitutional submission.

Second, the Commissioner is entitled to apply to the Constitutional Court of Ukraine with regard to the official interpretation of the Constitution of Ukraine and the laws of Ukraine (see Article 150(1)(2) and 150(2) of the Constitution).

³² Marie Georges, the expert of the Council of Europe, has made comment on the Draft Law on Protection of Personal Data that Commissioner's recommendations on application of the legislation on personal data protection should be a general mission of awareness on personal data protection obligations and rights.

71. Currently, this is the most commonly used tool for human rights protection in a more generic and systemic way. Indeed, the Commissioner is very active in employing this power: from 2000 to 2017 (data until 1 February)³³ the Commissioner applied to the Constitutional Court with 40 applications and requests (30 applications regarding the constitutionality of the legal regulation and 10 requests for official interpretation of the Constitution); in particular this activeness increased since 2014 (23 applications and requests provided). The subject matter of applications varies from rights of people with disabilities to the rights related to good administration (e.g., publicity of managing of governmental affairs).

Around a half of all applications and requests were regarded inadmissible by the Constitutional Court (including 11 out of 23 submitted since 2014). However, the Constitutional Court adopted final decisions in 13 cases initiated by the Commissioner (10 – on constitutionality of the legal regulation, 1 – official interpretation of the Constitution, 2 – on both constitutionality and interpretation of the Constitution), among them the decisions of 2016 regarding the forcible hospitalisation of mentally disabled persons and the freedom of public religious assemblies, which can be regarded as the landmark cases concerning the application of European human rights standards in the respective spheres.

Three applications by the Commissioner are still pending the resolution on the admissibility stage in the Constitutional Court.

Due to a rather high percentage of the applications by the Commissioner to the Constitutional Court, which are considered as inadmissible by the latter, it is worth considering the introduction of measures that could ensure the quality of applications.

72. It should be pointed out that the legal regulation does not lay down any general criteria for cases when the constitutional submission shall be made and the Commissioner in this regard enjoys a wide margin of appreciation. There are also no legal provisions linking the legal remedy at issue with the procedures of monitoring of human rights protection or investigations based on individual complaints.
73. In addition to this, neither the Constitution, nor the Law on the Constitutional Court (including the draft Law implementing the recent amendments to the Constitution related to the Constitutional Court) provides any precise time limit for the settlement of the constitutional justice cases by the Constitutional Court. Nor any order of priority for hearing the cases is established. That sometimes can impede the effective settlement of problematic human rights issues identified by the Commissioner³⁴. In light of recent practical experience acquired with the placing of constitutional submissions, it was also noted that current legal framework lacks certainty with regard to time limits for consideration of constitutional submissions and, where

³³ Information provided by the Constitutional Court of Ukraine.

³⁴ Information obtained during Meeting 1 (30 January 2017).

unconstitutionality is found, revision of the existing legal regulation³⁵. It was strongly suggested that legal uncertainty in this sphere may render the referrals to the Constitutional Court inefficient.

74. Under this heading, it should also be mentioned that the Commissioner may also be asked, where necessary, to provide expert opinions concerning issues in the field of human rights by the Constitutional Court itself even in the cases which were not initiated by the Commissioner.
75. It is equally important to point out that the Law of the Commissioner is silent on the control of normative administrative acts, i.e. normative acts, which do not fall into the competence of the Constitutional Court. During the meetings, the representatives of the Commissioner's Office confirmed that the Commissioner has the right to challenge these acts before administrative courts in accordance with the usual procedures laid down in the Code on Administrative Proceedings. It seems to be also true that the latter tool is rarely, if at all, implemented in practice³⁶.

III.3.2. The Right to Apply to Courts

76. Under law, the Commissioner is entrusted certain jurisdiction within the sphere of administration of justice. In this respect, the mandate of the Commissioner, as defined by the legal acts, is related not only to the monitoring of general situation regarding human rights protection but also to proactive intervention in cases of violations of human rights.
77. Currently, the Commissioner provides a significant contribution in situations where judicial proceedings against public authorities are too complicated for vulnerable people³⁷. In addition to this, as it was stated during the meetings with the Commissioner and the representatives of the Office, dealing with numerous complaints may reveal a systemic failure of the state authorities to act in accordance with the law or a pattern of misconduct by the state authorities³⁸. In response, the Commissioner may undertake other legal measures such as a submission to the Constitutional Court to put an end to the irregularity which was identified by the Commissioner while dealing with individual complaints.
78. It should be also noted that, under general rule, the Commissioner may not intervene in cases pending before courts. Concurrence between the investigation by the Commissioner and legal protection before the judiciary is clearly regulated by Article 4(2) and Article 17(4) of the Law. Essentially, these provisions prescribe that the Commissioner is only entitled to conduct an investigation only prior to or after judicial proceedings.

³⁵ Information obtained during Meeting 1 (30 January 2017); Meeting 9 (31 January 2017).

³⁶ Information obtained during Meeting 9 (31 January 2017).

³⁷ Information obtained during Meeting 2 (30 January 2017); Meeting 3 (31 January 2017).

³⁸ Information obtained during Meeting 1 (30 January 2017).

79. In the light of the abovementioned point, it is, in particular, noteworthy that general rules precluding the Commissioner to start investigations, which are parallel to judicial proceedings, do not mean that the Commissioner is not allowed to get involved into judicial proceedings in general. On the contrary, the Law of the Commissioner provides for more than one way to entertain his jurisdiction over the judicial activities.
80. *First*, as foreseen under Article 13(10)(1) of the Law and legal acts on judicial proceedings (Article 45(1) of the Civil Procedure Code and Article 60(1) of the Code on Administrative Proceedings), the Commissioner is entitled to apply to courts in order to protect human rights and freedoms of socially disadvantaged persons. As learnt during the meetings, in implementing this function the Commissioner essentially acts as a legal representative³⁹. In this regard, it should be noted that in Ukraine, the government has implemented free legal aid reform to help more people get necessary legal assistance and support the most vulnerable⁴⁰. However, this reform has not had adequate impact on the activities of the Commissioner regarding the appeals to courts. As shown by the annual reports on the Activities of the Commissioner, issues regarding the administration of justice comprise one of the largest parts of the Commissioner's workload⁴¹. It can be maintained that the Commissioner implements the power to apply to courts as a legal representative irrespective of his own investigation since the existing legal framework does not formally link the Commissioner's power to submit petitions on behalf of disadvantaged individual with administrative procedure carried out by the Commissioner on basis of individual complaints. Under current legal regulation the Commissioner exercises discretion to decide whether to make use of the appeal to courts power.
81. *Second*, 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, 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

³⁹ Information obtained during Meeting 9 (31 January 2017).

⁴⁰ Article 59 of the Constitution of Ukraine. ЗАКОН УКРАЇНИ Про безоплатну правову допомогу (Відомості Верховної Ради України (ВВР), 2011, № 51, ст.577) <http://zakon2.rada.gov.ua/laws/show/3460-17>

⁴¹ Щорічна доповідь, 2016, 170 p. In this regard, one can note that in 2015 the Commissioner referred six submissions to the courts and took more than 900 acts of response. <http://www.ombudsman.gov.ua/ua/page/applicant/statistics/>. See also information obtained during Meeting 2 (30 January 2017).

participate in the case, if the court decided the question of their rights, freedoms or obligations have the right to appeal in cassation proceedings.

82. *Third*, according to Article 13(10)(3) of the Law of the Commissioner, the Commissioner has the right to initiate the reopening (review) of judicial decisions irrespective of his participation in the judicial proceedings. The latter power has been introduced relatively recently, in 2014. The legal framework does not formally limit the implementation of this power to exceptional circumstances. There are no formal criteria for determining the type of judicial disputes that attract the Commissioner's attention. Under general rule, the Commissioner has the right to get involved into any litigation concerning human rights issues.
83. *Fourth*, in monitoring the human rights protection in the sphere of administration of justice the Commissioner is entitled to attend court hearings at all instances, including court hearings that are not public, subject to a consent from private person concerned (see Article 13(9) of the Law of the Commissioner). In this respect, the law does not limit the monitoring function to implementation of the right to fair procedure or administrative aspects of court proceedings but also generally it is possible for the Commissioner to observe any aspect of human rights protection (and, where necessary, as have been mentioned above, possibly intervene into cases that are before courts). In this context it was pointed out during the meetings that since there are no recordings of the court hearings, the Office of the Commissioner monitors judicial proceedings on a regular basis⁴². Nevertheless, there is no methodology for choosing particular court hearings to attend and the choice is essentially made in a rather random and subjective manner.

Further, the monitoring function of the Commissioner is supplemented by the power to supervise the implementation of judicial decisions as foreseen under Article 13(12) of the Law of the Commissioner.

84. The *fifth* point regarding the Commissioner's mandate vis-à-vis courts concerns a horizontal role. The Commissioner has informal possibility to appear as *amicus curiae* in judicial proceedings involving human rights violations. The expertise knowledge of the Commissioner is in particularly relevant when cases concern non-discrimination principle⁴³.
85. *Lastly*, the Commissioner's mandate extends to cover the judiciary itself since the law defines the Commissioner's role in disciplinary matters. As for holding judges accountable, according to the Constitution of Ukraine and the Law on the Judicial System and Status of Judges, only High Council of Justice of Ukraine and the High Qualification Commission of Judges of Ukraine are entitled to assess the actions of judges or their inaction. The High Qualifications Commission of Judges of Ukraine shall function in two chambers, the qualifications chamber and the disciplinary

⁴² Information obtained during Meeting 1 (30 January 2017).

⁴³ Information obtained during Meeting 2 (30 January 2017); Meeting 3 (31 January 2017).

chamber. According to Article 102(2)(4) of the Law on the Judicial System and Status of Judges⁴⁴, the Commissioner appoints one member of the Disciplinary Chamber from among persons who are not judges. In this context, it should be pointed out that the right of the Commissioner to submit information for a disciplinary proceedings regarding the actions of judges of the Supreme Court of Ukraine and higher specialized courts has been recently excluded on the basis of the Law № 192-VIII of 12.02.2015⁴⁵.

III.3.3. Investigative Function and Handling Complaints

86. Within the current legal framework and the conditions laid down therein, the task of the Commissioner is to start an objective investigation into the way in which the state authority has conducted within the sphere of human rights protection. The field of investigation covers all administrative actions, including inaction or delays.
87. The Commissioner is sufficiently freely accessible to natural or legal persons. Pursuant to Article 2(2) and Article 17(1) of the Law of the Commissioner, any citizen, foreigner, stateless persons or their representatives, legal person may refer a complaint to the Commissioner in respect of an instance of human rights violations in the activities of state authorities. The Law of the Commissioner sets out single limitation applied for lodging individual complaints. Pursuant to Article 17(2), complaints shall be submitted within the period of one year after disclosure of human rights violations. In case of exceptional circumstances, this time limit may be extended by the Commissioner but should not exceed two years⁴⁶. There are no other conditions under which a complaint may be referred to the Commissioner set out in the Law of the Commissioner. However, one should note that certain requirements to individual complaints are laid down in the Law on Citizens' Appeals.
88. Additionally, the investigation may be started as not only a result of individual complaint but also on Commissioner's own motion (as foreseen under Article 16(3) of the Law of the Commissioner). The same article establishes that the relevant information regarding possible human rights violations may also be submitted by People's Deputies of Ukraine. The investigations ex officio are usually directed at the systemic problems in the sphere of the protection of human rights. The Commissioner addresses the international human rights norms, also refers to the case-law of the European Court of Human Rights in the resolution of individual complaints or constitutional submissions.
89. The Commissioner has been given strong powers of investigation. There are no indications that the legal regulation lacks any guarantees for a full access to all the elements required for the performance of his duties. The powers of investigation

⁴⁴ <http://zakon2.rada.gov.ua/laws/show/2453-17>

⁴⁵ <http://zakon2.rada.gov.ua/laws/show/22/98-%D0%B2%D1%80>

⁴⁶ In this regard, certain concerns were expressed as to the efficiency of the norm since the Office regularly receives information that is over two years old. Information obtained during Meeting 2 (30 January 2017).

include access to classified information or documents; legal duty of the state authorities to supply the Commissioner at his request with any information; the right to invite officials and civil servants, private persons to obtain oral and written explanations on circumstances under review, and other powers provided under Article 13 and Article 22 of the Law of the Commissioner. Thus, in considering individual complaints or performing investigation on his own motion, the Commissioner's activities are inquisitorial in nature, i.e. he can review documents, access all kind of information, ask for explanations from the state bodies concerned. He can therefore adopt a decision on information that may not be available to the person who lodges complaint.

90. The Law of the Commissioner does not provide any special rules or procedures to be followed where the Commissioner receives individual complaint or performs investigation on his own initiative. As it is established in Article 17(1) of the Law and was confirmed during the meetings⁴⁷, in performance of his investigative duties the Commissioner follows the procedures laid down in the Law on Citizens' Appeals. The Law on Citizens' Appeals sets out the requirements to individual complaints, grounds for refusing to consider complaints, procedural rights of private individuals, time limits for consideration of individual complaints, duties of the competent authority in considering the complaints and other fundamental aspects of administrative procedure. It is worthy to mention, as it was learnt during the meetings, the rules set out in the Law on Citizens' Appeals are not entirely compatible with the proper and efficient implementation of Commissioner's functions⁴⁸. For example, the Law on Citizens' Appeals establishes that individual concerned shall be given the opportunity to appear in person during administrative procedures. However, due to its ambiguity, in practice this norm is regarded only as declarative⁴⁹. Another example concerns the scope of the application of the Law on Citizens' Appeals, i.e. the Law is aimed at regulating legal relationships between natural persons and public authorities. Meanwhile, legal persons do not fall within the scope of application⁵⁰. This is opposite to the Law of the Commissioner which does not establish any distinction of this kind. Even though more than one draft law aimed at improving the Law on Citizens' Appeals was introduced, none of them was efficiently considered⁵¹.

In addition to the aforementioned examples, it should be also noted that the application of the Law on Citizens' Appeals is not that coherent. For instance, the Commissioner applies legal provisions of the Law on Citizens' Appeals to declare anonymous complaints, as well as complaints repeatedly lodged by the same persons and raising the same issues, inadmissible. At the same time, there is still a degree of uncertainty whether legal provisions of the Law on Citizens' Appeals should be

⁴⁷ Information obtained during Meeting 1 (30 January 2017).

⁴⁸ Information obtained during Meeting 2 (30 January 2017).

⁴⁹ Information obtained during Meeting 1 (30 January 2017).

⁵⁰ Information obtained during Meeting 1 (30 January 2017).

⁵¹ Information obtained during Meeting 1 (30 January 2017).

disregarded when they become concurrent in regard to the legal regime established in the Law of the Commissioner.

91. A point of criticism is also that the Law of the Commissioner does not provide for any principles of law related to the administrative procedure carried out by the Commissioner. The legal regulation is not entirely clear regarding the checklist what composes review criteria employed by the Commissioner, e.g. is it similar or wider to the ones used by courts. It is not quite clear at this point what the resolution of individual complaints by the Commissioner is targeted at, i.e. whether the Commissioner assesses the conduct of state authority in regard of their illegality, procedural unfairness, manifest errors or these components altogether. In addition to this, it is not certain whether the Commissioner applies duty of care or good governance criteria since the legal regulation does not expressly provide for any legal principles aimed at establishing legal imperative of good administration.
92. Upon conclusion of the investigation, the Commissioner presumably draws up a decision, in which he opens a case on human rights violations. However, the criteria for choosing in which matters to start the case is not clearly represented⁵². One should also note that not all investigations end up in opening the case. Frequently, the Commissioner may adopt a document in which he explains what legal measures the individual concerned should take up, transfers the complaint to competent state authority or refuses to consider the complaint⁵³. However, the Law of the Commissioner fails to set out particular grounds for each of the above decisions.
93. Having in mind strong investigative powers vested to the Commissioner, the outcome of the investigation may reveal a wide spectrum of unlawful conduct. However, there are no legal provisions regarding additional measures, or in some cases – duties, that could be made of use by the Commissioner, e.g. informing state institution concerned, if appropriate, about the actions of the civil servants that may call into question the disciplinary responsibility, informing Verkhovna Rada which shall make appropriate representations or informing competent bodies about the facts calling into question the application of criminal law.

III.3.4. Issuing Authoritative Opinions and Recommendations

94. The legal framework is quite ambiguous in terms of what exactly happens after the Commissioner has decided to open the case on human rights violations and how it correlates, e.g. with the Commissioner's right to apply to courts. Presumably, the decision to open case on human rights violation, adopted under Article 17(3)(1) of the Law of the Commissioner, in most of the cases may lead to issuing acts of response, i.e. a constitutional submission or a regular submission. As provided under Article 15(3), a submission is a document submitted to the state authority concerned and adopted for purpose of taking within a period of one-month relevant measures

⁵² Information obtained during Meeting 5 (31 January 2017).

⁵³ Statistics of the Activities of the Commissioner: <http://www.ombudsman.gov.ua/ua/page/applicant/statistics/>

aimed at the elimination of revealed acts of human rights violations. A submission is not formally binding and is understood as proposal to particular state authority as the wording of Article 22(1)(3) of the Law suggests. In other words, a submission is an authoritative opinion rendered by the Commissioner as to whether the state authority concerned acted in a fair, adequate manner and in accordance with the law.

95. Notably, even though the submission is not binding, it should be certainly authoritative. The Commissioner's ability to secure results therefore depends upon the quality of the arguments he makes, the moral authority inherent in his Office, the implementation of so-called mediator's function. In addition to this, the Commissioner might be quite resourceful in approaching the press and spend considerable time and energy to make his opinions public.
96. It should also be born in mind that the Commissioner may ensure that his opinions are authoritative by issuing recommendations aimed at improving the situation within particular sphere of human rights protection in annual or special reports (in this regard, see Article 18 of the Law of the Commissioner). Recommendations of this kind are often related to amendments to the law or recommendations for changes in administrative practice and policy. Thus where the Commissioner makes a recommendation, he shall aim at having a structural impact.
97. There is no legal regulation by statute regarding the possibility of appeal with the administrative court against administrative decisions to derogate from the Commissioner's submission. Nevertheless, as provided under Article 22(2) of the Law of the Commissioner, any refusal of state authorities to cooperate shall incur liability in accordance with effective legislation.

III.3.5. Initiation of Administrative Liability

98. 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.
99. In addition to this, the Administrative Code of Offences also provides grounds to issue administrative protocols where public authorities do not comply with the submissions of the Commissioner.
100. Such activities cannot normally be viewed as part of the ombudsman duties. As it was rightly pointed out on more than one occasion during the meetings⁵⁴, drawing-up administrative protocols is incompatible with the purpose of the Commissioner prescribed by the Constitution and the Law of the Commissioner. In practical terms,

⁵⁴ See, for example, Information obtained during Meeting 13 (14 February 2017).

the workload related to the initiation of administrative liability has also aggravated disproportionately, and in some cases paralysed, the work of the Office. Considering that the legal regulation on administrative offences seems to be far from perfect, for example in terms of imperative content of administrative protocols⁵⁵, time limits for imposing liability⁵⁶, there is substantial room for improvement in existing legal framework.

III.3.6. Mediation

101. The activities of the Commissioner can be broadly classified as a form of mediation for disputes between state authorities and private parties. Notably, the activities of the Commissioner in the sphere shall not be understood as taking up a formal role of a mediator. Unlike mediation requiring both parties to participate, human rights issues may be addressed by one party. It might be frequently efficient for the Commissioner to work with one side to resolve the matter, especially in the early stages. This is also in particular efficient when the dispute concerns minor or simple complaints which can be solved in a cooperative and friendly manner. Thus, after the investigation where the Commissioner finds that the state authority failed to comply with the requirements laid down in the legal acts the Commissioner may enter into informal mediation with the state authority concerned.
102. However, there is no legal framework for the Commissioner to be authorized to engage into mediation during the investigation or after the investigation has been carried out. As it was pointed out during the meetings with the representatives of the Commissioner's Office⁵⁷, the role of the Commissioner as a mediator is informal and is undertaken on a good will of the Office and on ad hoc basis. There were no indications that the Commissioner was requested to take up the role of the mediator by the private parties or the state authorities on their own initiative.

⁵⁵ The main difficulty which raises using this judicial enforcement is that a person who does not follow the Commissioner's recommendation has to reveal his/her personal data necessary for drawing up a protocol. If he/she refuses to provide requested data, the Commissioner cannot draw up the protocol.

⁵⁶ Article 38 of the Code of Administrative Offences sets up time limits for the imposition of administrative penalty. If the administrative offence cases stipulated in the Code or other laws are triable by court (judge), a penalty may be imposed no later than within a period of three months from the date of commitment of the offence, and where the offence is continuing, no later than within three months from the date of detection of the offence, apart from cases on administrative offences stipulated by the Code. According to Article 17 of the Law on the Ukrainian Parliament Commissioner for Human Rights, appeals shall 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. Inconsistency of provisions of these two laws determines that the Commissioner is forced to consider appeals on violation of human rights despite expiry of time limits for the imposition of administrative penalty for this violation.

⁵⁷ Minutes of the Meeting with Ukrainian Parliament Commissioner for Human Rights Ms. Valeriya Lutkovska on 30 January 2017.

III.4. Mandate of the Commissioner in the Specific Areas of Law

III.4.1. Legal Regulation on Data Protection and its Compliance with the European Legal Standards

103. Beside the Commissioner, no other state body having authorities related to personal data protection exists in Ukraine. According to Article 22 of the Law on Protection of Personal Data, only the Commissioner and courts exercise control over the observance of legislation on personal data protection. Until 2014, the state policy on sphere of personal data protection was realised by the State Service on Personal Data Protection. It was a central body of executive power, activity of which was directed and coordinated by the Cabinet of Ministers through the Minister of Justice. The State Service on Personal Data Protection did not fulfil the requirement of independence so the mandate of the personal data protection authority was delegated to the Commissioner.
104. With regard to personal data protection, the Commissioner has a broad control over state and local self-government bodies. The Commissioner has the right to conduct inspections of bodies processing personal data; to obtain any information and documents which are necessary for personal data protection control; to issue binding requests as regards the prevention or elimination of violations of the legislation on personal data protection, 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; to provide recommendations on practical application of the legislation on personal data protection; to draw up protocols on bringing to administrative responsibility and direct them to the court. The Commissioner has the right to draw up a protocol in the case of failure to inform the Commissioner about personal data processing that must be reported according to law, failure to comply with legal requirements of the Commissioner on prevention and elimination of violations of personal data protection legislation, incompliance with the procedure for personal data protection set by the legislation which led to the illegal access to them or to the violation of rights of personal data subject.
105. In the field of personal data protection, the Commissioner's authorities are exercised not only on state and local self-government bodies but also on state enterprises, institutions, organizations (irrespective of the form of their ownership) and private entrepreneurs who process personal data. Thus, in this sphere the activity of the Commissioner covers wider range of subjects than in the case of exercising parliamentary control envisaged by the Law of the Commissioner. Furthermore, the nature of Commissioner's authorities related to personal data protection is different; these authorities overstep tasks of parliamentary control and imply powers of state body. The activity of the Commissioner in the sphere of personal data protection is

not named “parliamentary control” by the Law on Protection of Personal Data. For what concerns personal data protection, the Commissioner acts as an executive body. It determines that the personal data protection sphere is left aside from the control exercised by the Commissioner as a national institution for human rights.

106. Turning to the question of current legal regulation in Ukraine and EU standards, it should be mentioned that equivalence between personal data protection standards provided by the Law on Protection of Personal Data and regulatory framework set up by the Directive 98/46/EC on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of such Data could be seen. The Law applies to personal data processed by automated means and personal data stored in or intended to be part of non-automated filing systems. Key criteria for making personal data processing lawful are set up by the Law. Data processing is only lawful if one of six prescribed grounds for data processing exists (consent of the personal data subject to process his/her personal data, permission for processing of personal data provided to the data controller in accordance with the law solely for the purpose of his/her authority, need for exercising of a duty by the data controller under the law etc.).
107. The general requirements of the Law with regard to personal data processing correspond to the principles of data quality set up in the Directive (personal data must be processed openly and transparently for specific, clearly formulated and legal purposes, determined by the consent of personal data subject or provided for by laws; they must also be accurate, authentic and, where necessary, kept up to date; they must not be processed for longer than necessary for the purposes for which they were collected). The Law forbids the processing of special categories of personal data. Comparing with the Directive, the Law establishes more special categories of personal data, stricter regime of personal data protection is applied also for biometric and genetic information.
108. According to the Law, personal data subject can exercise the following rights: the right to know about processing of his/her personal data, the right to obtain information about processing of his/her personal data, the right to access to his/her personal data, the right to object against processing of his/her personal data, the right of request to change or destroy his/her personal data, the right to be protected from automated decision that has legal consequences for him/her, the right to lodge complaints on his/her personal data processing to the Commissioner or courts. The data controller is obliged by the Law to notify the Commissioner of the processing of personal data, which is of particular risk to the rights and freedoms of personal data subjects, to notify personal data subject of processing of his/her personal data, to protect personal data against accidental loss or destruction, illegal processing.
109. The system of tools ensuring legality and validity of transborder transfer of personal data is more developed in regulatory framework set up by the Directive than by the Law. According to the Law, transfer of personal data to foreign subjects shall be

performed if the relevant state ensures an appropriate personal data protection. States Parties to the European Economic Area, as well as countries that have signed the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data are recognized as those ensuring the appropriate level of protection of personal data. The Cabinet of Ministers of Ukraine determines the list of other countries that offer adequate protection of personal data. The transfer of personal data is also permitted if one of five prescribed by Law grounds exists (personal data subject gives his/her unambiguous consent to such a transfer, there is a need to conclude or perform a contract between the data controller and the personal data subject for benefit of the personal data subject, there is a need to protect public interest, to set, enforce and maintain a legal claim etc.). The opinion of the Commissioner is not required before listing countries offering adequate protection of personal data or establishing by the law cases when transfer of personal data to states ensuring the appropriate personal data protection is permitted. The more significant role of the Commissioner in the process of the transborder transfer of personal data should be created and the situation seems to be improving by the Draft Law on Protection of Personal Data prepared by the Commissioner's Office.

110. The obligation introduced by the Directive to establish an independent public authority responsible for monitoring the application of the regulatory framework on personal data protection has been fulfilled by giving a new mandate to the Commissioner in the sphere of personal data protection.
111. A challenge could come seeking to harmonise Ukrainian legislation with the General Data Protection Regulation coming into force on the 25th of May, 2018. The Regulation was developed to ensure effectiveness of personal data protection in the light of social and economic changes, new technologies, data digitalisation and globalisation. One of the substantial novelties introduced by the Regulation is the establishing of the principle of accountability. It means that data controllers would be required to be able demonstrate that they have taken all appropriate measures to ensure compliance. Various tools would help data controllers to fulfil this requirement (data protection impact assessment, prior consultations with data protection authority in high-risk cases, mandatory data protection officers for special groups of data controllers and data processors, implementation of principles of data protection by design and data protection by default). The Regulation also introduces the personal data subject's right to be forgotten, the right to data portability, the security breach notification, administrative fines up to 20 million Euros or up to 4 percent of the total worldwide annual turnover of the preceding financial year.
112. The most visible discrepancy comparing the Law on Protection of Personal Data with the Directive and the Regulation is related to notification of personal data processing. According to Article 9 of the Law, the controller of personal data shall notify the Commissioner of the processing of personal data, which is of particular risk to the rights and freedoms of personal data subjects within thirty working days

after beginning of such a processing. The fact that notification shall take place after beginning of the processing is not compatible with the Directive and the Regulation, also with the aim of prevention of violations. The processing should be possible only after the Commissioner has taken a decision allowing the processing of personal data. A step has been taken to improve the legal regulation and the Draft Law on Protection of Personal Data has been prepared and discussed with experts of the Council of Europe.

113. The main danger to personal data speaking about legal framework comes from other laws and legal acts than the Law on Protection of Personal Data. Despite the Law was adopted in 2010, the national legal framework has not been harmonised with personal data protection standards until now. For instance, the Law on Access to Public Information does not limit the right to information on the ground of necessity to ensure personal data protection. Specific legal provisions or other legal mechanism bringing the maintenance of registers in line with the requirements of personal data protection do not exist. Revision of the existing legal stock in the light of personal data protection is needed and the Commissioner should be enabled to conduct it with the right to initiate required amendments to legal acts.

III.4.2. The Right to Access Public Information

114. Under current legal regulation, it is rather difficult to describe how the Commissioner's powers in the field of access to public information relate to the competence of other state institutions. According to the Law on Access to Public Information, three sorts of control over the access to public information exist: parliamentary control, public control, and state control. Parliamentary control over the observance of the right to access to information is exercised by the Commissioner, temporary investigative commission of the Verkhovna Rada and National deputies of Ukraine. Public control is carried out by deputies of local councils, civil organizations, community councils, citizens individually through appropriate public hearings, public examinations etc. State control over the observance of provisions on access to public information shall be exercised as provided for by the law. There are no specific provisions on control procedure, on the possible results of parliamentary, public or state control. Competences and powers of bodies participating in control over the observance of the right to access to public information are not delimited. It is unclear when each of the control forms should be exercised.
115. It should be mentioned that the Commissioner has the right to draw up a protocol on bringing to administrative responsibility when someone's right to access to public information is violated. The question rises why this right is delegated to body exercising parliamentary control over the observance of the right to access to public information. The right to draw up a protocol is an attribute of executive power and should be delegated to body exercising the state control in the field of access to public information.

III.4.3. Gender Equality

116. Equality clearly constitutes one of most important fundamental human rights therefore Ukrainian legal system has adopted integrated approach towards the state control of implementation of the principle of non-discrimination. The initial human rights related competence of the Commissioner was broadened with the adoption of special Law of Ensuring Equal rights and Opportunities of Women and Men in 2005 to embrace also the control over the observance of equal opportunities of women and men. However, the gender became only one of the grounds of prohibited discrimination with adoption of another special law – the Law on Principles of Prevention and Combating Discrimination of 2013, which is aimed to ban discrimination on numerous of grounds (including sex). This legal regulation puts the Commissioner under the obligation to supervise the implementation of the principle of equal treatment in much broader perspective.
117. Both antidiscrimination laws reflect the general constitutional principle of general equality (Article 24 of the Constitution of Ukraine). On the one hand, the Constitution consolidates the non-exhaustive list of prohibited grounds of discrimination⁵⁸, on the other – in detailed way describes the principles of gender equality⁵⁹. Those constitutional guidelines shall not be overlooked when assessing the Commissioner’s mandate and its implementation.
118. The Law of Ensuring Equal rights and Opportunities of Women and Men was amended twice in 2012 and 2014. The first amendment (Law No 4719-VI of 17.05.2012) was related to the mainstreaming of gender equality in collective bargaining whereas the second amendment (Law No 1263-VII of 13.05.2014) made changes both to the Law of Ensuring Equal rights and Opportunities of Women and Men and to the Law on Principles of Prevention and Combating Discrimination. The amendment law No 1263-VII reflects clear asymmetry which started to be observed in legislative approach towards the competence of the Commissioner in the general framework of implementation of (gender) equality. The changes with regard to the powers of the Commissioner in the Law of Ensuring Equal Rights and Opportunities of Women and Men were rather fragmental compared to much more elaborated amendments in the Law on Principles of Prevention and Combating Discrimination. Despite the fact that the former law still contains three rudimental provisions on the competence of the Commissioner in Article 9, namely the duty to exercise control over the observance of equal rights and opportunities for men and women within the

⁵⁸ The Constitution notes race, colour of skin, political, religious and other beliefs, sex, ethnic and social origin, property status, place of residence, linguistic or other characteristics.

⁵⁹ Equality of the rights of women and men is ensured: by providing women with opportunities equal to those of men, in public and political, and cultural activity, in obtaining education and in professional training, in work and its remuneration; by special measures for the protection of work and health of women; by establishing pension privileges, by creating conditions that allow women to combine work and motherhood; by legal protection, material and moral support of motherhood and childhood, granting paid leaves and other privileges to pregnant women and mothers inclusive.

control over the observance of human and civil rights and freedoms; the competence to investigate complaints about sex discrimination and to obligation to cover the issues on observance of the equal opportunities in annual report) the latter piece of legislation (the Law on Principles of Prevention and Combating Discrimination) is much more detailed.

119. It could be stated firmly that the amendments of 2014 to the Law on Principles of Prevention and Combating Discrimination have developed a more enhanced and structured competence of the Commissioner in the area covered by this legislation. The novelties of 2014 included the new right of the Commissioner directly or through a representative ‘to appeal to the court with the claim of discrimination to protect the public interest by participating in proceedings in cases and procedure provided by the law (Article 10 (1) new point three) and the right to give opinions in the courts in cases of discrimination (Article 10 (1) new point eight). The right to appeal to the court with the claim does not seem clear enough as it refers not to the individual victim but to the protection of public interests. There were also no evidences of the practical exercise of this right with regard to gender equality. New competences inserted in the Law in 2014 also include the right to make proposals to improve legislation on prevention and combat of discrimination (Article 10 (1) new point seven).
120. It seems that the new pattern to reinforce the powers of the Commissioner (which will also be used when observing the compliance with gender equality legislation) in the Law on Principles of Prevention and Combating Discrimination rather than in the Law of Ensuring Equal rights and Opportunities of Women is confirmed in the draft legislation. The draft law No 3501 of 20.11.2015 focuses on the further extension of the competence of the Commissioner to include the right to issue binding requirements (instructions) to eliminate violations of equality legislation and the right to draw the protocols for the further imposition of administrative sanctions.
121. The duality of regulative substance (two different texts of legislation; two references to sex as a ground of prohibited discrimination; differences in coverage, definitions etc.) do not necessarily contribute to effectiveness of the implementation of the principle of non-discrimination by the Commissioner. Analysis of the deficiencies of both acts with regard to compatibility with EU equality acquis is not among the objectives of this report, as long as they do not constitute major obstacle for fulfilment of supervisory powers of the Commissioner.
122. The Law on Ensuring Equal Rights and Opportunities of Women and Men defines the supervision powers of the Commissioner in a short and very broad manner. The substance of the right and duty to ‘exercise of control over the observance of the principle of equal rights and opportunities’ is rather ambiguous. It is clear that the Law on Principles of Prevention and Combating Discrimination has outrun the former law with regard to the competence and today provides for more detailed and solid basis for the implementation of the objectives of the Commissioner in the area

of gender equality. This finding could be crucial when deciding on the further evolution of the legislative framework. The internal competition of two laws in the field of human rights does not seem reasonable and desirable at least for the sake of legal certainty and transparency.

123. The relationship between the equality legislation, which provides for the competence of the Commissioner in the area of gender equality, and the Law of the Commissioner does not seem to constitute the difficulties as the former will be considered *lex specialis*. However, the competence provisions in the Law on the Commissioner shall be consistent with the more detailed and specific stipulation of competences in the equality legislation.
124. During the meetings, it was noted that currently, issues surrounding the gender equality does not fall into priority matters of the society⁶⁰. In addition to this, it was pointed out that more proactive in the sphere are the NGO's⁶¹. The informative function in form of the annual report does function well enough. The specificity of the gender discrimination requires putting more emphasis on awareness raising campaigns, instruments of prevention as well as counselling and advising of victims. These activities are provided at the level of the Office of the Commissioner but the statutory consolidation would increase the effectiveness.

III.4.4. National Preventive Mechanism

125. Ukraine ratified the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 2006. Activities of the national prevention of torture are conducted by the Commissioner's office since 2012. To this end, Articles 13 and 19-1 of the Law of the Commissioner were amended.
126. According to the requirements of the Law of the Commissioner, a separate structural unit the Department for Implementation of the National Preventive Mechanism was established within the Secretariat of the Commissioner. Coordination functions are granted to the Representative of the Commissioner for Human Rights (the Authorized Human Rights Representative) and the Head of the Department. In this regard, the competence given to the Representative should be clarified in terms of delegated administrative powers, guarantees, and financial security.
127. Eventually, having regard to the expertise provided by international and national specialists, it was decided to introduce the national preventive mechanism in the format "Ombudsman +", which means that in carrying out monitoring visits employees of the Commissioner's Office act in cooperation with civil society

⁶⁰ Minutes of the Meeting with Ukrainian Parliament Commissioner for Human Rights Ms. Valeriya Lutkovska on 30 January 2017.

⁶¹ Minutes of the Meeting with Mr. Arkadiy Bushchenko, Human Rights Protection Group (NGO) on 31 January 2017.

activists. The model includes these elements: the central office of the Commissioner (Authorized Human Rights Representative and Department of NPM) and the regional representatives of the Commissioner from one “ombuds” side, and the council of experts, the representatives of NGO’s and the observers from other (“+”) side. The activities of the latter are coordinated by the regional public relations coordinators. It should be mentioned that the jurisdiction of a regional public relations coordinator of the Commissioner extends not only to the region, where he or she operates, but also to the neighbouring regions, where there are no such coordinators⁶². In this context, it should be noted that the Law of the Commissioner does not provide any legal provisions regarding regional coordinators of Commissioner’s Office and their assistance in the NPM implementation process. As mentioned above, the number of the regional offices are considerably lower than the number of regions. It was also established during meetings (13, 14 February, 2017) that there are 1–2 coordinators in the regions, who perform both certain NPM functions and other functions of the Commissioner’s Office (e.g. control the observation of human rights to information, make appeals, prepare the proposals of the submissions, participate in courts proceedings, list the protocols of the administrative offences, etc.). These findings raise certain concerns regarding the structural organization of the Office. Thus, the division of responsibilities of the Office should be reconsidered and elaborated in more precise terms.

128. When performing the functions of national preventive mechanism, the Commissioner is obliged by the Law of the Commissioner to cooperate with the Sub-Committee on Prevention of Torture, the international organizations and relevant bodies of foreign states working in this area.
129. In performing the NPM functions, the Law of the Commissioner establishes wide competences to the Commissioner, including the right to visit the places in which persons are forcibly held in, psychiatric institutions, child care centres, social and rehabilitation centres, to interview persons who stay in those places etc. In this regard, no weaknesses in the legal regulation were established.
130. The Optional Protocol requires regular monitoring of places of detention (e.g., it is recommended to inspect places of detention once in three years on average). In the NPM implementation process the Authorized Human Rights Representative comprehensively monitors observation of human rights in places of isolation from society, primarily using "on the spot visits" which are found to be a powerful tool. The Authorized Human Rights Representative also personally meets with prisoners and other persons.

⁶²<http://www.ombudsman.gov.ua/en/page/secretariat/regionalni-predstavnicztva-upovnovazhenogo/regionalni-koordinatori.html>

131. Taking into consideration a particularly high number of places of detention in Ukraine and scarce resources allocated to the Commissioner's Office⁶³, the cooperation between the Commissioner and the community of observers and representatives of the NGO's is inevitably very close. With support of donor and international organizations, a network of Regional public relations coordinators gathering local community activists is established. The existence of this network significantly enhances the credibility of monitoring visits conducted by the Office (NPM unit). Observers from across Ukraine and the Commissioner's representatives gather in different regions of Ukraine and improve their skills while conducting group visits to different places of detention. As it was noted during the meetings (14 February, 2017,) the cluster meetings help fixing the identified violations as soon as possible and contributes to the prevention of torture. Besides, it helps to solve the problem of unequal number of observers in different regions as well as to expand the scope of activities despite the limited financing from the State budget⁶⁴.
132. The Law of the Commissioner stipulates that every year the Commissioner prepares a special report on the state of affairs in relation to prevention of torture and other cruel, inhuman or degrading treatment or punishment. This report shall be published in the media and sent to the President of Ukraine, the Verkhovna Rada of Ukraine and the Cabinet of Ministers of Ukraine in compliance with the legislation of Ukraine on information.
133. The reports of monitoring visits as well as annual and special (thematic) reports are published on the website of the Commissioner. The recommendations of the Commissioner are addressed to the responsible authorities and are aimed at overall improvements, including administrative practice, policy, and laws.

⁶³ The Law stipulates that expenditures on financing the national preventive mechanism shall be provided in the State budget of Ukraine (Article 19-1 (10)). Nevertheless, it was suggested during the meetings (15 February, 2017) that the financing of activities of NPM (especially in regions) is not adequate as it is not envisaged in a separate line and is provided within the allocated funds approved by the Verkhovna Rada.

⁶⁴ <http://www.npm.org.ua/en/news/jak-poperediti-torturi-v-ukraini-dosvid-npm.htm>

CONCLUSIONS

1. Having regard to the constitutional purpose of the Commissioner's activities, the Commissioner provides a significant contribution to the development of democratic accountability of state authorities within the Ukrainian system for protection of human rights. Currently, the principal function of the Commissioner, which essentially is reflected by a number of legal provisions set out in the Law of the Commissioner, is responding to the violations of human rights in various spheres of public law. Equally important activities that are carried out by the Commissioner and his Office are participation in the development of human rights policy. Existing legal framework requires the Commissioner to undertake both functions in a proactive manner. Nonetheless, in order to strengthen these activities, the legal framework can be improved in a way that would recognise the Commissioner's standing in ensuring the right to good administration. In this regard, there is room for consideration whether the Commissioner could benefit if awareness of the right to good administration was enhanced via the constitutional and subsequently other legal regulation.
2. Generally, the existing law is in compliance with European and international standards. The Law of the Commissioner provides for all major elements of the Ombudsman activities that are aimed at ensuring effectiveness, independence, and impartiality of the Office. Having said that, the current legal regulation shall be improved. It is not well-structured and in certain cases lacks legal certainty and systemic approach. It was established that the Law of the Commissioner on certain occasions was amended without taking into account other legal acts or was subsequently not revised in accordance with new legal acts.
3. The legal framework offers every formal requisite guarantee of independence to the Commissioner. His status is constitutionally defined and further strengthened by legal regulation that establishes that the Commissioner is separate and independent from state or other public authorities. Legal provisions regarding immunity for the Commissioner in carrying out his functions are also in place. In addition to this, the Commissioner is given necessary discretion in implementing his policy regarding the distribution of human resources and creating working patterns. Legal regulation in this regard might need only a minor tuning. Having said that, the current legal regulation on the status of the Commissioner deserves attention in terms of the following aspects:
 - a. *Appointment procedure.* Notably, the legal regulation regarding the voting for the candidates who are nominated to the post of the Commissioner should provide stronger guarantees for the independence of the institution. Respectively, legal framework related to the number of votes required in the Parliament for a decision on appointment to be adopted shall be revised.

- b. *Cessation of the duties.* Legal grounds for termination and dismissal of the Commissioner lack precision and legal clarity. Moreover, there are no legal notions that would aim to regulate directly the situation where, save in the event of the dismissal, the Commissioner's mandate comes to the end, however, the new Commissioner has yet to be appointed. In this respect, consideration should be given to establishing legal provisions providing for a temporary appointment or to clarification of existing legal rules.
- c. *Re-election procedure.* The current legal regulation lacks legal certainty since it does not directly establish the right of the ongoing Commissioner to be nominated for a new term. Even though it must be emphasised that there has never been any practical problem in this respect, it is desirable that these discrepancies are removed. In addition to this, further analysis shall be undertaken in order to look more closely at whether opting for a single but longer term of appointment could have beneficial effects for the Commissioner and his Office in carrying out the mandate assigned to it by the Constitution.
- d. *Strengthening professional and administrative capacity of the Office.* Further steps shall be made in order to guarantee efficiency of the work of the Commissioner and his Office. In order to enhance the capacity to perform Commissioner's competences, there should be adequate conditions and means for training and qualification. In addition to this, international cooperation shall be strengthened. Ensuring adequate level of funding to the Commissioner's Office, in particular by providing appropriate remuneration for the Commissioner (linked to the high-ranking officials) and personnel of the Office, shall also be taken as a priority.
- e. *Regional set-up of the Office.* Regional offices are not formally established under national law. Currently, their status is subject to the regulation by internal rules which are adopted by the Commissioner. It is not proposed to interfere with the Commissioner's discretion as to organisation of the regional functioning of the Office. Nevertheless, the activities of the regional offices could be strengthened if their status and operating principles were defined under the Law of the Commissioner. Therefore, further analysis related to creating adequate legal framework setting out that the regional offices operate under the guidance of the Commissioner and provide unified public services, including NPM functions, shall be performed.
- f. *Accountability and presenting activity statements.* Having regard to the contents of annual reports, the methodology in presenting relevant information and materials shall be improved. Despite the fact that annual reviews are quite extensive, they do not provide the statistics with sufficient details and adequate explanations. In addition to this, there is room for improvement by preparing a user-friendly version of activity statement that would be aimed at the members of the society. At the same time, this could enhance the awareness of the Commissioner's functions.

4. As regards the mandate of the Commissioner, currently, the Commissioner is charged with overall competence. Within the existing legal framework, in choosing the legal tools for protection of human rights the Commissioner has been given flexibility and informality. Even though deciding for the most suitable model of the Commissioner's activities falls into the discretion of the Parliament, a number of important issues should be further analysed and, where appropriate, improved:
 - a. *Law-making process.* The existing legal framework is not meant to provide for a sturdier legal ground and methodology as to how the Commissioner participates in the law-making process. The legal regulation should establish a mechanism for the Commissioner to actively provide oversight of law-making process and its goals, support and implement policy of human rights protection in the sphere, and thereby foster the quality of laws. This includes providing meaningful and more formalized opportunities for the Commissioner to contribute to the process of preparing draft law proposals and to the *ex ante* impact assessment. Thus, the evolved and strengthened role of the Commissioner shall be related to the development of a more structured relationship with the legislative bodies. Under current circumstances, this is of particular importance since the Commissioner is capable to promote regulatory coherence in pursuit of greater harmonisation of supranational and national levels of human rights protection.
 - b. *Monitoring the existing legal regulation and its implementation in practice.* One of the effective instruments of the Commissioner to address the systemic human rights problems and to generate new legislative initiatives in this field is the constitutional entitlement to apply to the Constitutional Court on the issues of the constitutionality of the legislation or the official interpretation of the relevant constitutional provisions. The activeness of the Commissioner in using this right is increasing during the recent years of activities and proved to be resultative. Indeed, the right of the Commissioner to apply to the Constitutional Court regarding the constitutionality of the legislation or the official interpretation of the Constitution has proved to be an effective instrument in responding to the systemic human rights problems. However, few measures can be considered in order to increase even more the effectiveness of this instrument: the introduction of measures that could ensure the quality of applications by the Commissioner and the legal provisions (preferably in the Law on the Constitutional Court) for the order of consideration of cases by the Constitutional Court, including the possibility to give priority to those cases where the systemic human rights problems are involved.
 - c. *Protection of human rights before courts.* Overall, currently the Commissioner provides a valuable contribution in facilitating access to available legal and judicial remedies for vulnerable people. Nevertheless, preliminary concerns are raised in connection to the Commissioner's right to apply to courts in terms of its necessity. 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. Having regard to the fact that the state legal aid scheme is in place, there is no rationale for the Commissioner to act as a representative of the disadvantaged members of the society. Moreover, the Commissioner's mandate is not limited to monitoring of judicial administration but also allows for certain intervention in judicial proceedings. The right to initiate review of final judicial decisions may be seen as unsubstantiated interference into the administration of justice if the law does not provide for appropriate and sufficient safeguards. In addition to this, it is not quite clear how the abovementioned function correlates with the legal provisions of the Law of the Commissioner that in essence prohibit the interference in cases before courts. Having regard to this, deeper analysis shall be performed on the matter under consideration, preferably, in a comparative manner. At the same time, opportunities may be sought for strengthening the Commissioner's role as *amicus curiae* if the necessity to build up strong legal relationship of the Commissioner vis-à-vis courts is established.

- d. *Handling individual complaints.* Given the fact that the Commissioner is easily accessible and free-of charge, capacity of the Commissioner to investigate and handle individual complaints shall be strengthened. Essentially, this is inseparably linked to the revision of relation between the Law of the Commissioner and the Law on Citizens' Appeals. Few points of criticism could be made in this regard. Interestingly enough, the Law of the Commissioner does not provide for any separate rules and principles related to the administrative procedure carried out by the Commissioner and refers to the Law of Citizens' Appeals. The improvement of the legal framework regarding the grounds of admissibility of the complaints, review criteria, grounds for adopting particular kind of acts is an urgent need. In addition to this, the legal framework is quite ambiguous in terms of what exactly happens after the Commissioner has decided to open the case on human rights violations and how it correlates with other powers of the Commissioner, e.g. the right to make a constitutional submission or legal request.
- e. *Initiation of Liability.* Further, the Commissioner's competence in initiation of administrative liability and especially drawing-up administrative protocols cannot be viewed as being in line with the constitutional purpose of the Commissioner or international standard of the Ombudsmen. It is evident that the Office of the Commissioner is not well equipped to carry out investigations in order to draw-up administrative protocols and is lacking the necessary expertise in the sphere. Moreover, this creates disproportionate workload and as a consequence obstructs the exercise of principal functions of the Commissioner.
- f. *Mediation.* Given the fact that the informal activities of the Commissioner as a mediator proved to be efficient, possibilities to create a legal framework in this regard must be explored further.

5. The Commissioner's role as a controller in the fields of personal data protection and access to public information creates a dualism of the Commissioner's status and complicated relationships between the Commissioner and other public authorities.
 - a. In the field of personal data protection, the Commissioner has rights and duties whose nature is other than the ombudsman's status. With the view to enact national legislation in the line with EU rules on personal data protection, the Commissioner has been entitled to act as an independent supervisory authority with coherent promotion, protection and control power. From the point of view of personal data protection, the Commissioner could be equated with a state executive body. It is difficult to provide an unambiguous evaluation of consolidation of two bodies – a national institution for human rights and a personal data supervisory authority, under one roof but the first impression is that the Commissioner's role of personal data protection authority may overshadow the ombudsman functions of investigating maladministration and preventing human rights violations. Review of the existing legal regulation on personal data protection has revealed that further amendments to legal acts are needed concerning the following aspects:
 - i. More coherent adoption of the EU personal data protection standards *including* that provided by the General Data Protection Regulation coming into force in 2018 should be arranged. Provisions of the Law on Protection of Personal Data on notification of personal data processing, transborder transfer of personal data, drawing up administrative protocols demand to be rethought.
 - ii. The role of the Commissioner to participate in data protection policy making and enhancing the awareness on personal data protection is quite weak. Establishment of procedures and ways how the Commissioner can be engaged in law-making process shall improve the situation.
 - iii. The approval of the Law on Protection of Personal Data in 2010 was not accompanied by the revision of existing legal regulation in the light of personal data protection principles. Such revision is urgent and leadership of the Commissioner may be crucial for success of this process.
 - b. Current control system in the field of access to public information lacks clarity and institutional balance. Drawing-up of administrative protocols should be removed from the competence of the Commissioner exercising parliamentary control over the observance of the right to access public information and delegated to state control body.
6. In the sphere of equal treatment, more detailed and precise description of procedures and actions of the Commissioner with regard to various appeals, notifications and complaints about infringements of individuals' rights as well as investigations on the initiative of the Commissioner would be an advantage both for individuals as well as for the Office of the Commissioner.

