

EXPLANATORY NOTE

THE DRAFT LAW OF UKRAINE "ON THE UKRAINIAN PARLIAMENT COMMISSIONER FOR HUMAN RIGHTS"

Introduction

This explanatory note needs to be read in conjunction with the draft Law of Ukraine "On the Ukrainian Parliament Commissioner for Human Rights" (hereafter Draft). It is not, and is not meant to be, a comprehensive description of the Draft. So, where a section or part of a section does not seem to require any explanation or comments, none is given.

1. Argumentation of the Need to Adopt the Draft Law

The draft Law of Ukraine "On the Ukrainian Parliament Commissioner for Human Rights" is aimed at a system "refreshment" of the legal framework for the regulation of the Ukrainian Parliament Commissioner's for Human Rights (hereafter the Commissioner) activities.

Initiation of these amendments has been caused by the need of the modern Ukrainian society to develop and strengthen democratic State, governed by the rule of law and based on the progressive human rights standards. In general, the Commissioner acts in two directions: one is solving the problems of concrete people, considering their individual complaints on human rights violations, and the second is solving systematic problems recurring in human rights area, important for the whole society. Currently massive amount of complaints and lack of legal instruments for the proactive work distracts the Commissioner from focusing and working on these systemic issues with strategical approach.

Therefore, the changing social and legal situation with the difficult recurring human rights problems requires to reinforce the Commissioner with effective tools and legal mechanisms for identifying major systematic issues in human rights area and moving to more proactive focus in relation to systematic changes (via strengthening relationships with Parliament, abolishing non-standard functions, clarifying the procedure for applying to administrative courts in order to challenge normative acts, etc.).

The need for adoption of the Draft is also based on the requirements for the Commissioner to perform his mandate protecting the human rights with independence, flexibility and efficiency. Therefore, it is necessary to enhance the overall effectiveness of complaint handling procedure and to review the legal rules regulating the status of the Commissioner, his/her rights and functions. The legal changes are also needed in order to solve the problem of insufficient involvement of civil society in the appointment procedure of the Commissioner.

Also, currently there is an overlap between Ukrainian legal aid system and Commissioner's jurisdiction. The legal changes are needed in order to reduce the unnecessary workload of the Commissioner office where the state legal aid scheme is in place and thus avoiding the duplication of functions and enhancing effectiveness of the Commissioner's activities.

The amendments are needed in order to ensure the balance of powers delegated to the Commissioner and the important functions, entrusted to him/her. This Draft responds to the

general aim of strengthening the institutional capacity of the Apparatus of the Commissioner to protect human rights and freedoms.

The need for adoption of this Draft is also driven by the goal of bringing the national regulatory and legal framework of Ukraine regulating the Commissioner's activities in accordance with the international and European standards and best practices in the human rights area. In this regard, the proposed amendments are taking into account positions and recommendations of the European Commission for Democracy through Law known as the Venice Commission and of various international experts and specialists in the sphere of the protection and promotion of human rights.

The defined problems and shortages in legal regulation cannot be dealt with via existing regulatory act governing the activities of the Commissioner.

2. Goal and Objectives of the Draft Law

The current Law aims to regulate activities of the Commissioner when exercising the parliamentary control over the observance of constitutional human and citizens' rights and freedoms.

The Draft is aimed at introduction of amendments to the current Law through comprehensive and substantial approach. Due to this systematic nature of the proposed regulatory changes, the amendments to the current Law are proposed to be set out in the form of a new edition of the Law.

The main goal of the Draft is to introduce amendments, which will strengthen and facilitate the Commissioner activities aimed at promotion and protection of the human rights and freedoms in an independent, flexible and efficient way.

The Draft particularly aims at achieving this goal through such objectives:

- To strengthen the capacities of the Commissioner's office to solve systematic problems recurring in human rights area, important for the whole society;
- To enhance the role of the Commissioner in facilitating and promoting the good administrative behavior of the bodies of state power, local self-government, associations of citizens, enterprises, institutions, organizations regardless of forms of ownership and their officials and officers of and persons authorized to perform state functions, to recommend changes in administrative practices and rules following the investigation of maladministration;
- To enhance the overall effectiveness of complaint handling procedure by specifying, simplifying and harmonising legal rules for investigation of individual complaints; in that regard the Draft supplements the current law with the norms establishing thorough, detailed and clear procedure of handling of individual complaints on actions of state authorities, local self-government bodies and their officials and officers, which fall within the competence of the Commissioner, unless other special procedure of handling such complaints are provided for by the other laws.
- To enhance the efficiency of the investigations of the human rights violations by specifying how the entity or official, to whom the Commissioner's submission is addressed, should react and by foreseeing the new instrument - the compliance notice (postanova) of the Commissioner - a motivated demand, aimed at the elimination of

revealed acts of violation of human and citizens' rights and freedoms in the sphere of the rights to access to public information and personal data protection;

- To increase the transparency and enhance public confidence in the Institution by introducing amendments clarifying the legal status of the Commissioner, foreseeing higher requirements for the candidate for the post of the Commissioner and making relevant changes regarding his/her appointment, immunity, social guarantees, dismissal and involvement of the civil society in the appointment procedures;
- To strengthen the Commissioner's institution by establishing of more clear and transparent relationships between the Commissioner and Parliament and between the Commissioner and Judiciary, clarifying his/her functions, rights and duties in legislative and judicial procedures;
- To optimize and strengthen the territorial organization of the Commissioner's apparatus in Ukraine and the development on the local area;
- To strengthen the institutional capacity of the Apparatus of the Commissioner to protect human rights and freedoms and ensure its financial independence.

3. General characteristics and main provisions of the draft Law (legal aspects)

The Draft takes into account the specific context of national circumstances of Ukraine and the guiding principles in the human rights area promoted by the European and international legal order.

This Draft follows the same structure as the current law and consists of six Chapters, 22 Articles and Final provisions. But in comparison to the current Law of Ukraine "On the Ukrainian Parliament Commissioner for Human Rights" it is based on the fundamentally new systematic approach, introduces new Article 3¹ "On the principle for good administrative behavior" and substantially changes majority of articles (fourteen articles from the total of twenty two).

In particularly, the amendments introduce legal changes in following areas:

1) Amendments aimed at facilitating the good administrative behaviour of public sector

As provided for under Articles 1 and 3 and a number of other legal provisions set out in the current Law of the Commissioner, the principal function of the Ukrainian Commissioner is observing and protecting the constitutional human and citizens' rights and freedoms, responding to the violations of human rights in various spheres of public law, and participating in the development of human rights policy.

In addition to investigating individual complaints the Ombudsperson's offices European-wide are increasingly focused on working proactively with the public sector to improve public administration by promoting its good administrative behaviour. Good administration could be understood as transparent, fair, all-inclusive and representative process of decision-making and how these decisions are implemented by the administration. The ombudspersons of all generations in Europe and beyond are moving towards the explicit task to enhance the quality of the administration on the basis of what good administration requires. They need to explain what the citizen can reasonably expect from a good administration, and also what the administration should do to demonstrate the good administrative behaviour, serve people and match the citizen's expectations.

Currently, there are no legal provisions expressly including the Commissioner's role in improvement and promotion of the good administrative behaviour.

The proposed amendments specifically introduce the additional role of the Commissioner in facilitating and promoting the good administrative behaviour of the bodies of state power, local self-government and other persons authorized to perform state functions.

In this regard, the amendment to the Article 3 of the Law, which describes the purposes of the parliamentary control exercised by the Commissioner, includes an additional purpose to promote and facilitate the principle of good administrative behavior. The content of this principle is included in the new Article 3¹ "On good administrative behaviour", stating minimum standard of this principle as it is understood on the international and European levels. The amendments also foreseen the adoption of the Code of Good Administrative Behaviour, which provides guidance on practical steps towards greater effectiveness, transparency and accountability of the state authorities. Such Code would help Ukrainian citizens to know what administrative standards they are entitled to expect from the Ukrainian public institutions. It also would serve as a useful guide for civil servants in their relations with the public as a standard how to better serve people.

2) Amendments aimed at substantial improvement of the administrative procedure for handling individual complaints

Current legal framework is quiet 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.

It is true to say that in Ukraine, the legal regulation on the matter of the investigation of individual complaints during the administrative procedures at the state institutions is highly diverse. The main rules concerning the investigation of the complaints are defined in different laws: in the Law of the Commissioner, in the Code of Administrative Offences, in the Law on Citizens' Appeals, in the Law on Data Protection, and other specialized laws. It follows that under current Law the Commissioner does not have objective possibilities to use unified (standard) procedure, customizes to his/her activities in human rights area, while investigating individual complaints.

Also, the current Law of is completely silent on the matter how the choice among different laws on administrative procedures (investigations) shall be made. In this regard, the new detailed chapter is set out in the Draft itself and the provisions of the special laws concerning the administrative procedures and measures should be applied only as an exception, when the special laws explicitly direct to such priority. Where the Draft foresees concrete for investigation of human rights violations customized procedure, the common rules of the Code of the Administrative Offences and the Law on the Citizens' Appeals should not be applied.

The Draft enhances the efficiency of the administrative procedure establishing clear provisions concerning the formal steps on submission of complaints and requirements of complaints. Among other things it is foreseen that anonymous complaints shall not be investigated unless the Commissioner decides otherwise; the list of concrete grounds for the refusal to investigate a complaint is provided together with the deadline for the review of these grounds (during 20 working days). The decision about refusal to open proceedings shall

be motivated. The accepted complaints shall be investigated with the opened proceedings and a response shall be given to the applicant within a reasonable period of time necessary for quick resolution of the complaint.

Amendments of Article 15 sets out a special obligation for the institution following the issues of a final submission by the Commissioner: the duty of the entity or official, to whom the submission of the Commissioner is addressed, to investigate the submission of the Commissioner and inform in written form not later than 30 days after the receiving of submission about the results of the investigation of the submission. Additionally, Draft introduces the new type of legal instrument of the Commissioner to the Law - the compliance notice (postanova) of the Commissioner, which is a motivated demand, intended for a particular body of state power, body of local self-government, association of citizens, enterprise, institution, organization, irrespective of their forms of ownership, their officials and officers for exercise of measures set by the Commissioner or his/her representative aimed at the elimination of revealed acts of violation of human and citizens' rights and freedoms in the sphere of the rights to access to public information and personal data protection. The body or official who receive the compliance notice are obliged to perform these activities in within the set period, and inform the Commissioner in writing about it not later than 5 days after expiry of the set period for the performance. Against this compliance notice the appeal can be lodged to the Appeal administrative court Kiev.

3) Amendments aimed at substantial improvement of the legal status of the Commissioner

The status of the Commissioner is constitutionally defined, and the legal framework offers key guarantees of independence to the Commissioner. But there is the need of relevant improvements particularly with regard to the more effective appointment procedure, stronger legal underpinning of independence in terms of dismissal procedure and guarantees after expiry of the term of office, as well as enhancing the public confidence in the institution itself.

Draft aims at ensuring greater transparency in the nomination process and increasing the public confidence by foreseeing higher requirements to the candidates to the Commissioner's post: additionally to previous requirements: full civil and political rights, has higher education, high moral qualities, at least 10 years of experience in human and civil rights protection at the day of election.

Current Law lacks consistency in terms of what is assumed to be candidate's good reputation. Even though it is established that the candidate shall possess high moral qualities, at the same time the law does not prevent a person with previous corruption record to stand as a candidate. Choosing a candidate from among persons that offer every requisite of independence, competence and merit shall be a decisive factor. Therefore, Draft amends Article 5 of the Law of the Commissioner and establishes that only persons of good reputation and proof of no previous corruption may be nominated as candidates to the post of the Commissioner. The limitation in the current Law which factually allowed to candidate persons who have been given an administrative punishment for corruption more than 1 year before was abolished. SO the Draft allows to avoid the situations where the candidate could be punished for corruption few years before and still be considered a legitimate candidate.

The inclusion of the civil society into the appointment procedure is foreseen in amendments to the Art. 6 which states that Proposals for candidates(s) to the post of the Commissioner are made by listed authorities only after consultation with representatives of human rights organizations.

In order to bring the national law closer to the international standards, legal rules regarding the number of votes required in the Parliament for a decision on appointment are revised. The legal provisions laying down that the Commissioner is appointed by a simple majority of votes in the Parliament are not in line with the prevailing international standards, therefore the Draft foresees that during the first round the appointment must be pronounced by the 2/3 of all Members of Parliament and during the second round – the simple majority of votes in the Parliament will be sufficient. Such repeat voting on the appointment of the Commissioner shall be conducted no later than thirty days after the previous voting. The candidate shall be deemed appointed until he or she receives the majority of votes from People's Deputies of Ukraine making up the constitutional composition of the Verkhovna Rada of Ukraine, with the resolution adopted thereof. The Draft also foresees that if no candidate for the post of the Commissioner receives the necessary number of votes or voting for the nominations has not taken place within the time stipulated by this article, the nomination of candidates for appointment to the post of the Commissioner shall be held again within thirty days from the date of the voting which did not take place. Other laws may not establish a different procedure for nomination of the candidates and for the voting procedure for the post of the Commissioner than this law.

In order to strengthen the total independence of the Commissioner, the Draft introduces amendments making the procedure of dismissal of the Commissioner more difficult, establishing the qualified majority 2/3 of votes to dismiss the Commissioner as provided for under international standards. The Commissioner whose dismissal is envisaged, must be heard on his or her request in public prior to the vote on the dismissal.

Also, the additional dismissal ground is foreseen: the administrative punishment for corruption.

The Draft foresees that after expiration of the term, the Commissioner shall exercise the powers before a newly elected Commissioner is sworn in. It is commendable that during appointment procedure, which consists of multiple stages, the Commissioner continues to carry out duties until a subsequent appointment of new head of the Institution. This practice is preferred comparing to the solution, applied in other countries, to confer the activities of the institution on the deputy. Nevertheless, it should be pointed out that this practice stems from the systemic interpretation of the legal provisions, which set out that the authority of the Commissioner terminates when the newly-elected Commissioner takes the oath. While this legal regulation, in principle, generate no difficulties in its application, in order to ensure greater legal clarity and simplification, the Draft now established directly that, save in the event of the dismissal, the Commissioner shall remain in office until his successor takes up his duties.

The guarantees for the Commissioner do not end here and the Draft further amendments in terms of immunity, social guarantees and proper financing of the Institution.

The Draft introduces the amendment to the Art. 12 which foresees that the budget for the Commissioner could be reduced in relation to the previous financial year only by a

percentage not greater than the percentage the budget of the Verkhovna Rada, President and Government is reduced. In order to ensure the greater independence of the Commissioner he/she is given the right to be heard in public session of the Verkhovna Rada prior to the vote on the budgetary outlays for the activity of the Commissioner.

Also, the Draft foresees that the amendments to the Law of the Commissioner introduce the right of the Commissioner to establish the regional units. The right to define the scope and operating principles of the regional set-up should be maintained for the Commissioner.

4) Amendments aimed at substantial improvement of the functions of the Commissioners, focusing on the strategic issues and balanced relationships with the legislative and judicial powers

The draft introduces amendments which direct the office to a strategic approach of solving problems. Regarding the Commissioners powers and functions in the relationship with the judiciary few instruments are foreseen in that regard: first, according to the changes in the Art. 13 the Commissioner is deprived of the right and duty of legal representation. The office is not a law firm or a center for provision of free legal aid, especially taking into account that Ukraine has a functioning Legal aid system. This function which allowed the Commissioner to initiate the legal disputes on citizens behalf and not to channel them to the Legal aid institution, distracted the resources needed for the strategic issues. 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 legal representative of the disadvantaged members of the society. Seeking to reduce the workload of the Commissioner's institution and enhancing effectiveness of its functioning, the Draft removes the overlapping between Ukrainian legal aid system and Commissioner's jurisdiction and foresees that the Commissioner has the rights to apply to the court to protect human and civil rights and freedoms, personally or through his/her representative only in the manner prescribed by the law. Respecting the balance of institutional powers the norm, that he/she could initiate, independently of his participation in the trial, revision of court decision was abolished together with the norm h/she participate in cases, proceedings in which were opened upon claims (applications, petitions (submissions) of other persons at any stage of the trial.

Additionally, Article 13 was supplemented by a very important norm allowing the Commissioner to apply and attend to the administrative court with a request to investigate the legality of an administrative regulatory enactment (or its part) concerning the protection of human and civil rights and freedoms. Normative control can be considered as a key task of the Commissioner. It allows stepping back a little from the ongoing individual complaints and thus solving legal issues in a systematic and broader way. Therefore the Commissioner should strengthen the dialogue not only with the Constitutional Court but also with administrative courts, which are entrusted with normative control of general legal acts.

Currently, the Commissioner is entitled to apply to administrative courts to challenge normative (regulatory) legal acts only if there is an interest of the person concerned in bringing proceedings. This is a model of so-called concrete judicial review of regulatory acts. However, the current legal regulation does not allow for an abstract judicial review of regulatory acts and does not confer a right to initiate this type of review on the Commissioner. Under these circumstances, the Draft introduces the direct right of the Commissioner to take action in order to challenge regulatory legal acts before administrative

courts. However, the Commissioner's right to challenge regulatory legal acts before administrative courts shall be limited to the issues falling directly into the competence of the institution, where the dispute concerns the protection of human and civil rights and freedoms.

Commissioner's functions are also expanded expressly introducing his/her rights to carry out mediation according to the Law of mediation of Ukraine.

In order to achieve systematic changes, the Commissioner should have the right to propose to the Parliament to adopt or to revise the legislation with the purpose of ensuring human rights and freedoms and promoting and protecting the right to good public administration at any time when in the course of their duties they deem it necessary.

Regarding the strengthening the relationships with the Parliament the Draft introduces changes into Art. 13 which foresees that the Commissioner has the right to make in due course proposals for improvement in the sphere of protection of human and citizen's rights and freedoms and to take part and present the position in all related meetings with a right of deliberative vote. When fulfilling this right, the Commissioner has the right to participate in parliamentary sessions and meetings, to attend the meetings at the Government and other state institutions where matters of human rights are discussed with the right to speak.

To make the shortcomings discovered in legislation on human and citizens' rights and freedoms more visible it is foreseen that during the debate on the annual report at the session of the Parliament, the Commissioner may personally present a summary of the report and ensuing conclusions.

4. Other Information Necessary for the Consideration of the Draft Law

The proposed amendments do not envisage abolishment or limitation of human and citizens' rights and freedoms, but expand their affirmation by law and strengthen the guarantees for the protection of these rights and freedoms.

The amendments are aimed at further development of the Rule of law in Ukraine. Besides, they will not lead to the violation of international commitments of Ukraine.

Economic and Fiscal Argumentation

T.b.c. by the Beneficiary.

The draft Law implementation will not directly affect the expenditure and revenues parts of the State Budget of Ukraine and local budgets

or

Enactment of this draft law will require additional budget funds: esp. for example, for regional offices.

The Position of the interested parties

T.b.c. by the Beneficiary after consultations with the interested parties.

Regional aspects

The Draft is not intended to essentially affect the regional policies and outcomes. It introduces some amendments which will positively influence the regional presence of the

Commissioner's office. Amendments to the Art. 10 foresee that the Commissioner may establish the regional offices of the Secretariat in the administrative-territorial units. The regional offices have a status of the unit of the Secretariat and the heads of the regional offices have a status of the head of the unit of the Secretariat. The procedure for establishing such bodies and organization of their activity shall be regulated by the Regulations approved by the Commissioner. *Expansion of the office to the regions, taking into account the scale of the country and regional specifics, is very important. This right to establish the regional offices stated in Law will be the ground for the office to appeal to the allocation of relevant financial support for its activities.*

Prevention of the discrimination

This Draft is based on the equality and non-discrimination standard and will have no negative effect in that regard.

Prevention of the corruption

Dealing with the questions of the prevention of the corruption the Draft strengthens requirement for the candidates to the Commissioner office. Current law foresees that a person who has a criminal record that is not expired or expunged for committing a crime unless a person is rehabilitated or a person who has been given an administrative punishment for corruption during the last year shall not be appointed as a Commissioner. The Draft foresees that a person may not be held to be of good repute and may not be appointed a Commissioner he has been given an administrative punishment for corruption nevertheless the fact when the punishment of the corruption succeeded.

Also Art. 9 was supplemented with the additional dismissal ground that the authority of the Commissioner shall be terminated in the case of administrative punishment for corruption.

Involvement of the civil society

T.b.c. by the Beneficiary after consultations with the civil society.

Assessment of the regulatory impact

Introduced changes to the regulatory field of the Commissioner's activities will have the indirect positive impact on the economic relationships. Various subjects will profit from new clear procedures of individual claims investigation. The foresee changes assigned responsibilities to act accordingly and respond to the Commissioner's act of responses indiscriminately to all bodies of state power, local self-government, enterprises, organizations, irrespective of ownership. The Draft ensures balanced approach in that regard. The whole society will profit from the better and more efficient promotion and protection of human rights.

Positive effects on the market environment and relationship between state and private sector are awaited from the newly introduced function of facilitating and promoting the good

administrative behaviour of all administrative institutions and of the adoption of the Code of the good administrative behaviour stating the high standard how the public administration should serve people.

Influence on the labour market

The Draft is not intended to affect labour market policies and outcomes.

Prognosis of Anticipated Consequences of Application of the draft Law upon its Adoption

Adoption of the Draft will provide legal grounds for ensuring proper development and performance of Commissioner's activities promoting and protecting the human rights.

It will improve the effectiveness and efficiency of the Commissioner's activities by concentrating his focus on systemic human right issues and reducing the workload which duplicates the activities of the state legal aid system.

The improved co-ordination will be the result of application of the norms related to strengthening the relationships with the Parliament and the right to speak during the for the human rights important meetings at the Parliament and Government, and when presenting the annual reports.

Amendments aimed at introducing new administrative complaint handling procedure will enhance the overall effectiveness of complaint handling procedure, also the personnel will have more time for solving systematic problems and concentrate on cases important for the whole society, more even distribution of work will be achieved.

Amendments facilitating the good administrative behaviour will enhance the society's trust to the public administration and promote the clear standard how to better serve people.

The more clear and detailed appointment and dismissal procedures will contribute to the overall increase of the transparency and enhance public confidence in the State.