ANNEX

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„Implementation of the best European practices with the aim of strengthening the institutional capacity of the Apparatus of the Ukrainian Parliament Commissioner for Human Rights to protect human rights and freedoms (Apparatus)“

RECOMMENDATIONS AIMED AT BRINGING THE NATIONAL REGULATORY AND LEGAL FRAMEWORK IN ACCORDANCE WITH THE BEST EU PRACTICES IN THE HUMAN RIGHTS AREA

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Introduction

1. Drafting recommendations aimed at bringing the national regulatory and legal framework in accordance with the best EU practices in the human rights area responds to the general aim of strengthening the institutional capacity of the Apparatus of the Ukrainian Parliament Commissioner for Human Rights (hereafter the Commissioner) to protect human rights and freedoms. The following recommendations and proposals seek to address the legal issues encountered by the Commissioner's institution and provide advice and guidance in the form of particular suggestions on how to amend the existing legal regulation in order to bring it more closely in line with European standards.

2. This report essentially reflects general legal concerns and recommends to establish or further strengthen, as the case may be, a coherent and comprehensive framework for the legal regulation of the Commissioner's activities. In so doing, the analysis took into account the specific context of national circumstances, in particular the undergoing institutional reforms, and had special regard to the guiding principles in the human rights area promoted by the European legal order.

3. A list of recommendations presented in the report not only highlights the importance of ensuring the efficient functioning of the Commissioner's Apparatus but, above all, insists that the Commissioner plays an essential role in ensuring the accountability and the right to a transparent, just and effective public administration. It is hoped that the national authorities concerned, civil society organisations and other stakeholders take all necessary and appropriate steps, be it legislative, administrative or judicial, to ensure that the role of the Commissioner is carried out with a special regard to the right to good administration as a fundamental human right.

4. The report is structured in a thematic manner in order to facilitate access to the particular questions addressed by the experts. It proceeds in the following manner. Part I begins with particular recommendations regarding the Commissioner's functions in promoting the right to good administration. Part II places proposals to the specific aspects of legal status of the Commissioner, such as the appointment procedure, immunity, social guarantees, accountability, and dismissal. In Part III the focus then shifts to the mandate of the Commissioner in the context of administrative procedures carried out in handling individual complaints. The analysis proceeds to the institutional relationships vis-à-vis parliament and courts. In particular, Part III also includes analysis of the mandate of the Commissioner in the spheres of antidiscrimination, data protection and access to public information and proposes necessary steps to be taken in order to bring the legal regulation into compliance with EU standards. The analysis then concludes with a list of key recommendations and proposals on how to improve the existing legal regulation.

5. Each proposal presented in this Report relates to the analysis of existing regulatory and legal framework governing the activities of the Commissioner and the information gathered following the fruitful debates with the representatives of the Apparatus as well as other meetings held with the public institutions and civil society organisations. Therefore, in order to have a full understanding of the recommendations prepared, it is suggested to get familiar with the text and conclusions presented in **Report 1.1.** *Analytical Analysis on the Existing Regulatory and Legal Framework governing the Activities of the Ombudsperson* and **Report 1.2.**

Comparative Analysis of National and European Legislation concerning the Activities of the Ombudsperson.

6. This study is also intended to serve as a source of reference and inspiration for carrying out a round table to discuss recommendations regarding particular changes to the legal framework governing the activities of the Commissioner (Activity 1.4.) and drafting amendments to the organisational legal acts regulating activities of the Commissioner (Activity 1.5.). It should, however, not prevent relevant stakeholders from developing and adding new facets to the proposed improvements to the existing legal framework, if there is a good reason to do so. The proposals made in this document are by no means exhaustive. Nor are they intended to determine the only way forward to strengthen the Apparatus of the Commissioner.

1. The Commissioner as a Promoter of Good Administration

7. As provided for under Articles 1 and 3 and a number of other legal provisions set out in the 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.

8. At least currently, there are no legal provisions expressly including the improvement and promotion of the right to good administration.

9. On the level of the Council of Europe, the Recommendation 1615 (2003) advises the Member States to establish a fundamental right to good administration as well as a particular code of good administrative behaviour. The legal embodiment of such standards makes new demands on the control carried out by the ombudspersons. Comparative examples also confirm that in Europe applying and developing the norms of good administration is a part of the ombudspersons' control and educational functions.

   Ombudspersons European-wide have multiple functions, and although one of them is to provide redress for aggrieved citizens, they are now also given the task to provide an independent critical appraisal of the quality of administration and a stimulus towards improvement. This is also true in countries where the ombudspersons, which are traditionally perceived as being of the third generation, i.e. human rights ombudsmen, now are applying the concept of good administration that has an effect beyond the individual complaints.

   Therefore, 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 the principle of good administration. 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.

10. There is no single European standard as to how to incorporate the promotion of the right to good administration in the legislative framework of the Ombudsperson's status and functions, but the idea that the work of the ombudsperson shall cover the promotion of the right to good administration is encouraged at the European level: e.g. in various Venice Commission's recommendations it was emphasized that "The scope of powers of the ombudspersons should not cover only outright violations of rights but also of *the principles of good administration*"[1].

    On the level of the Council of Europe, it is not merely stated that "the work of the ombudsman shall include the promotion of the right to good administration" but the Member States are also advised by the Recommendation 1615 (2003) to establish a fundamental right to good administration as well as a separate code for good administration:

    "In general, the work of the Commissioner is built around the protection of human rights and freedoms. There are strong indications in Europe *that the work of the ombudsman shall include the promotion of the right to good administration*: The

[1] The Venice Commission, *Compilation on the Ombudsman Institution*, 2011, p. 20.

Assembly notes that the European Ombudsman benefits from the inclusion in Article 41 of the Charter of Fundamental Rights of the European Union of a right to good administration. The Assembly believes that *incorporation of such a right into national legislation* could also be of great value, for similar reasons to adoption of a Code of Good Administrative Behavior: indeed the Code would elaborate for practical implementation the detailed standards implicit in the basic right."[2]

11. Hence, the ombudspersons of all generations are moving towards the explicit task to enhance the quality of the administration on the basis of what good administration requires. On the one hand, they need to explain what the citizen can reasonably expect from a good administration, and on the other hand, what the administration should do to act in accordance with good administration and match the citizen's expectations. They can do this in a range of ways such as undertaking major investigations of systemic issues and developing resource materials for use by the public sector, such us, for example, "Guidelines of good administrative behaviour".

12. In a jurisdiction where the government is committed to the idea of good administration and furthers it, the Ombudsperson institution can be a valuable tool for promoting and improving good administration as its key function is to recommend changes in administrative practices and rules following the investigation of maladministration.

13. In addition, today, the ombudspersons need to make clear what principle(s) of good administration requires. The adoption of the codes of good administrative behaviour where there is none could be an important step in the right direction. The European Code of Good Administrative Behaviour of the European Ombudsman[3] could also be a source of inspiration for implementing the principle of good administration in national legal order due to its significant relevance in defining the minimum requirements of good administration.

14. Therefore, based on the findings presented in Report 1.1. *Analytical Analysis on the Existing Regulatory and Legal Framework governing the Activities of the Ombudsperson* and Report 1.2. *Comparative Analysis of National and European Legislation concerning the Activities of the Ombudsperson*, **it is recommended to enhance the awareness of the right to good administration via legislative changes.**

15. Four recommendations could be made in order to include the promotion of the right to good administration into the scope of the powers of the Commissioner:

    First, to amend the Law of the Commissioner including promotion of the right to good administration as one of the functions of the Commissioner next to the promotion and protection of the human rights. This could be done, for example, by amending Article 3 of the Law, which describes the purposes of the parliamentary control exercised by the Commissioner, and including an additional purpose such as *"3. 8) to promote and protect a person's right to good public administration thereby contributing to securing human rights and freedoms and to supervise fulfilment by state authorities of their duty to properly serve the people"*.

    Second, to incorporate the right to good administration into national legislation. This can be done in two ways:

[2] The PACE Recommendation 1615 (2003) The institution of Ombudsman, Report, Doc. 9878, 2003, p. 9.
[3] https://www.ombudsman.europa.eu/en/resources/code.faces#/page/1

a) incorporating this right into the national act regulating administrative procedure if such act would be adopted (currently, in Ukraine, there is no general up-to-date Administrative Procedural Code, regulating administrative procedures in public administration, inter alia, procedural rules for relationships between administrative authorities and individuals. All these procedures are regulated by different separated procedural norms; meanwhile, the Law on the Citizens' Appeals needs a complete redrafting); or

b) incorporating the right to good administration into the Law of the Commissioner, either by including a general chapter with the definitions at the beginning of the Law or by including a new Article on good administration (for example, 3^1), stating at least minimum standard, based on the definition in Article 41 of the Charter of Fundamental Rights of the European Union[4], for example:

"Right to good administration"
"1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of Ukraine.
2. This right includes:
a. the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
b. the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
c. the obligation of the administration to give reasons for its decisions.

Third, to adopt a 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 institutions. It also would serve as a useful guide for civil servants in their relations with the public. By making the principle of good administration more concrete, the Code would help to encourage the highest standards of administration. The Ombudsperson could later on make appropriate references to the Code during the inquiries, as well as in doing the proactive work to promote good administration.

Fourth, regarding the Commissioner's right to initiate an abstract judicial review of regulatory acts when promoting good administration and related recommendation, to establish that the Commissioner shall have a direct right to take action in order to challenge regulatory legal acts before administrative courts, for further details please read below in Part 3.3. *The Mandate of the Commissioner vis-à-vis Judiciary*, 3.3.1. *Normative Control*.

[4] This Code has already provided inspiration for certain similar texts in Member States of the European Union, candidate states and third countries.

2. The Legal Status and Organisational Framework

16. The smooth functioning of the institution requires that the Commissioner is appointed on the grounds of merit and documented administrative and managerial skills, as well as competence and experience relevant to human rights protection, good public administration and that he performs his duties with complete independence and flexibility as to the organisation of the internal functioning of the institution.

17. Generally, the existing legal framework is in compliance with European and international standards. The Law of the Commissioner provides for all major elements of the Commissioner's activities that are aimed at ensuring effectiveness, independence, and impartiality of the Institution. 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. Having said that, the current legal regulation shall be further improved, 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.

2.1. Appointment

18. To the extent that the national legal orders provide for the appointment or election of state officials by political organs, special precautions are needed to guarantee that in such appointment or election procedures the merit of the person is decisive, not political or similar considerations. In assessing the legal framework of Ukraine, it was established that the appointment procedure remains weak on account of the factors such as unfavourable political environment, prolonged appointment procedures and, in particular, insufficient involvement of civil society.

2.1.2. Nomination of Candidates

19. 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). This procedure generally allows for a fair appointment process. In particular, the fact that the legal regulation sets no strict criteria and provides in essence wide access to stand as a candidate is much welcomed. There are nevertheless few aspects that raise concerns and call for the improvement.

20. First, the Law of the Commissioner lacks consistency in terms of what is assumed to be qualities of good repute. As provided for under Article 5(2) of the Law, the candidate shall possess high moral qualities. At the same time, Article 5(5) sets out that a person, who has been given an administrative punishment for corruption during the last year, shall not be appointed as a Commissioner. This would seem to suggest that a person involved in corruption in a sufficiently recent period of time still stands a chance to be considered as a person of good repute. Whereas it is for the Parliament to appoint the Commissioner, choosing a candidate from among persons that offer every requisite of independence, competence and merit of the person shall be a

decisive factor. Therefore, **it is recommended** to amend Article 5 of the Law of the Commissioner and to establish that only persons of good repute and experience and proof of no previous corruption may be nominated as candidates to the post of the Commissioner.

21. Second, as a result of comparative researched, **it is also recommended** to improve the current legal regulation by adhering to the examples of good practice, which are aimed at providing greater transparency in the *nomination* process, including how candidates are selected. As described by the Law of the Commissioner, currently candidates may be nominated by the Chairman of Parliament. The concern has been that, while in the matter of appointment there is no limit as to the number of candidates, it is not quite clear how the Chairman of Parliament reach out for the names of the best candidates. In this regard, more active involvement of the civil society in nominating the candidates could benefit for increasing the transparency and enhancing public confidence in the Institution.

22. It is not proposed here to interfere with the discretion of the Chairman or deputies in making their choice. Having in mind the close constitutional relation of the ombudspersons to the Parliament in so-called traditional models, it is indeed for the Parliament to appoint the Commissioner at the beginning of his mandate and for the duration thereof. Nevertheless, it is strongly believed that in Ukraine the selection procedures could be improved if the civil society gets an opportunity to propose certain candidates.

23. There is a number of ways to enhance the participation of civil society. It is recommended considering the following options:

- The Chairman may publicly call for nominations and set a time-limit for their submission.
- It can be established that the representatives of the civil society should be invited to participate in the selection procedure for the purposes of identifying persons and making recommendations.
- One can discuss a step further such as to establish that at least one or two candidates shall be proposed according to the received applications from the public call.

Regardless which particular form is chosen, the goal here is the same – to enhance the transparency at the selection procedure inasmuch as possible.

2.1.1. Appointment Procedure

24. To begin with, it must be noted that, very recently, on 13 July 2017 the appointment procedure has been changed. Currently, Article 208(7) of the Rules of Procedure of the Verkhovna Rada of Ukraine[5] sets out that the appointment of the Commissioner shall be adopted by the Verkhovna Rada by an open vote by a majority of the votes[6]. Nevertheless, to our knowledge and information available on the official data base of legal acts of Ukraine, the Law of the Commissioner has not been updated and, as

[5] Верховна Рада України; Закон від 13.07.2017 № 2136-VIII.

[6] „**Стаття 208**. Порядок призначення на посаду та звільнення з посади Уповноваженого Верховної Ради України з прав людини

7. Рішення про призначення на посаду та звільнення з посади Уповноваженого Верховної Ради України з прав людини приймається Верховною Радою відкритим голосуванням більшістю голосів народних депутатів від конституційного складу Верховної Ради.“. Online access: <http://zakon2.rada.gov.ua/laws/show/2136-19/page3>.

provided for under Article 5(1) of the Law of the Commissioner, the decision on the appointment of the Commissioner shall be adopted by secret voting[7]. This manifest distortion of the coherence of the legal framework does nothing for legal certainty and brings no closer to the appointment of the new Head of the Institution. Under these circumstances, **it is, first of all, recommended** to amend the legal regulation, in terms of voting procedure, in order to remove confusing, incoherent and inconsistent provisions, which are set out in two legal acts both in force.

25. 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, **it is recommended** revising the legal framework related to the number of votes required in the Parliament for a decision on appointment to be adopted. 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 international standards and the best practices in the field.

26. Last but not least, it is considered that the appointment procedure is not efficient in terms of time. Even though, the existing legal regulation sets out certain time-limits for conducting the appointment it still allows a protracted procedure. Thus, legal notions aimed at terminating the interim situation as soon as possible shall be established. For example, it could be set out that the election procedure for the Commissioner shall start not later than six months prior to the expiration of the term of office of the actual Commissioner or other solutions aimed at preventing the possibility that appointment of new Commissioner will be delayed for tactical reasons should be worked out.

2.1.3. The Length and Number of Terms

27. The Law of the Commissioner states that the term of the Commissioner is five years commencing from the day of taking the oath. The Law does not set out any restrictions regarding the re-election nor provide that the Commissioner is eligible for subsequent term or terms.

28. Under these circumstances, it is suggested considering whether establishing legal regulation providing for a longer term of office (7–8 years) combined with a non-renewable mandate could benefit the Institution. It should be pointed out that this proposal remains optional since international bodies observe distinct trends and do not fix the duration of the term of office of ombudspersons. The discretion in choosing the right model for the national legal order is retained and acknowledged by international bodies. However, it is believed that the exclusion of re-election prevents a risk that the person holding the post is compromised by considerations of future re-election. The principle of a single term provides a safeguard contributing to the ombudsman's independence and precluding such risks.

29. Addressing the same objectives, in case the possibility of renewing the mandate is preferred, for the sake of clarity, it is recommended establishing that the term of the office of the Commissioner can be renewed once.

[7] "**Стаття 5.** Вимоги до кандидата на посаду Уповноваженого та призначення на посаду Уповноваженого
Уповноважений призначається на посаду і звільняється з посади Верховною Радою України таємним голосуванням шляхом подання бюлетенів."

2.1.4. Acting Commissioner

30. 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. 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. In order to secure this practice, which is preferred comparing to the solution to confer the activities of the institution on the deputy, it is proposed that the law established directly that, save in the event of the dismissal, the Commissioner shall remain in office until his successor takes up his duties.

2.2. Immunity

31. The functional immunity is a guarantee of independence and shields against false accusations and undue external influence. Certain remedies for the Commissioner against these dangers are set out in Article 20(3) of the Law. However, the existing legal provisions limit the scope of the immunity to the term of the office and do not cover the period after the Commissioner ceases to hold office. In this regard, the Ukrainian legislation falls short of international standards. In order to be in line with applicable standards, **it is recommended** to establish that after the Commissioner has ceased to hold office, he shall continue to enjoy immunity in respect of acts performed by him in his official capacity, including words spoken or written.

32. The fact that the immunities have been provided in the public interest justifies the power given to the parliament to waive the immunity where appropriate. In Ukraine, the wording of Article 20(3) (*The Commissioner shall enjoy the rights to immunity during the entire period of tenure*) establishes rules on inviolability of the Commissioner in a sufficiently large scope. Therefore, in this regard, it is proposed specifying what majority is required in the parliament to lift the immunity and establish a requirement of votes to waive the immunity. Furthermore, the criteria for lifting of such immunity should be specified and the decision should be reasoned. By the same token, in accordance with the fundamental principle of respect for rights of the defence, the person concerned must have an opportunity, before the decision relating to him is adopted, to put forward his point of view on the correctness and relevance of the facts and circumstances on the basis of which the decision is going to be adopted.

33. While the immunities conferred on the Commissioner have a functional character, in that they are intended to avoid any interference with the functioning and independence of the Commissioner's activities, the fact remains that they have not been expressly accorded to the personnel of the Commissioner's Apparatus. The fact that the immunities have been granted to the Commissioner exclusively and not also to its officials shall be remedied accordingly. Therefore, **it is recommended** to establish in the law that the functional immunity is applied not only to the Commissioner but also the staff of the Institution. The personnel of the Apparatus should also enjoy immunity from legal proceedings in respect of words spoken or written and acts performed by them in their official capacity. Similarly, the immunity regarding the personnel should extend not only for acts performed during their time in office but also after the staff ceases their employment. Meanwhile, the power to waive the immunity shall be given to the Commissioner.

34. In order to enhance the independence of the institution, the legal regulation shall be further developed by establishing functional immunity towards both the Commissioner and the personnel. It is believed that addressing the issues of post term functional immunity and special safeguards to the personnel of the Commissioner could strengthen the institution and effectively combat its politicisation.

2.3. Social Guarantees

35. Underlining that the independence of the Commissioner secures taking up strong actions where irregularities are established, it is therefore not a privilege for the Commissioner but a guarantee of respect for human rights and fundamental freedoms, allowing every person to have confidence in the Institution. In other words, social guarantees are a part of assurance that complaints of maladministration made by public authorities will be investigated by an independent and impartial person.

36. Currently, the Law of the Commissioner is silent on the rank of the Commissioner vis-à-vis other state officials. This Law does not link the status of the Commissioner to other high-level officials in terms of remuneration, allowances or pension. In order to foster the consistency of the legal framework on the legal status of the Commissioner, **it is recommended** that the Law of the Commissioner established that in terms of remuneration, allowances and pension the Commissioner has the same rank as a judge at the Constitutional Court or other high rank official of the state.

37. Further to the guarantees of the Commissioner, one should note that the Law of the Commissioner provides the Commissioner with a possibility to return to previous or equivalent job. Even though the guarantees designed to secure the status of the former ombudsperson are not a wide spread practice, it is recommended preserving this legal regulation as an aspect contributing to the independence of the Commissioner.

2.4. Accountability: Presenting Activity Statements

38. Presentation of annual reports to the parliament is one of several fundamental principles for the operation of ombudsperson institution widely acknowledged by international bodies and various countries in Europe. A lot of detailed information on the assessment of the general situation of human rights protection is already made available by the Commissioner and is published on a year-by-year basis. Nevertheless, certain concerns were raised regarding the way of how the annual reports are presented to the parliament and the fact that the annual reports do not disclose sufficient information regarding the functioning of the Institution. In order to address these issues and improve the current reporting it is proposed implementing the following recommendations.

39. **The first recommendation** concerns in particular the Commissioner's right to be heard before the parliament. The current legal regulation should be revised in order to confer on the Commissioner the right to be heard, participate in the debates before the parliament and to present its findings and recommendations. It shall be established 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. Presenting the annual report in person and making it public could also serve as so-called soft sanctions, especially where particular public authorities fail to implement legal requests.

40. Reporting is not an end in itself and the information to be included should be determined by the needs of the society. The information disclosed should be relevant,

concise, understandable, and comprehensive. The annual reports are not only meant to deliver relevant information to the parliament but are also a valuable source of information to the members of the society. As such they should be prepared to the highest standards and presented in a way that is also helpful and informative to the individuals concerned. Therefore, **it is also recommended** to extend the scope of annual reports and include information of a general and operational nature of the Institution itself in order to raise the awareness of the purpose and tasks of the Commissioner, enhance the confidence in their activities and promote protection of human rights and freedoms. Should this prove necessary, a briefer and user-friendly version of report shall be prepared. This, in turn, will ensure that the annual reports are tailored to meet a legitimate and widespread practice in Europe, under which the annual reports not only disclose the information on the general situation of human rights violations but also provide certain data concerning the activities of the ombudsperson's office.

2.5. Cessation of the Duties

41. According to the principle of legal certainty, which is a fundamental part of the European public law, the legislation must be clear and precise and its application foreseeable by individuals. That requirement must be observed all the more strictly in the case of an act liable to have consequences on the legal status of individuals in order that those concerned may know precisely the extent of the obligations which it imposes on them. In this context, legal grounds for termination and dismissal of the Commissioner raise valid points of criticism. Indeed, the existing legal grounds for termination and dismissal of the Commissioner lack precision, simplicity, and legal clarity. In order to address these issues, it is recommended to improve the overall quality of Article 9 of the Law of the Commissioner. Overly long paragraphs and sentences, unnecessarily convoluted wording should be avoided.

    In addition to this, as mentioned above, the most recent practice of legislation in particular, which also concerns the dismissal procedures, deserves strong criticism. According to Article 5(1) of the Law of the Commissioner, the Commissioner shall be dismissed by the Verkhovna Rada of Ukraine by a secret ballot vote. Meanwhile, the amendments of 13 July 2017 to the Rules of Procedure of the Verkhovna Rada of Ukraine[8] set out that the decision on the dismissal of the Commissioner shall be adopted in an open vote by a majority of the votes. Needless to say, this is an atypical situation creating serious legal uncertainty.

42. In amending the existing legal regulation, special attention shall be given to too vague and open grounds for the cessation of the duties of the Commissioner, in particular Article 9(1)(2), which sets out that the authority of the Commissioner ends where verdict of guilty of a court is adopted, and Article 9(2)(1), which establishes that the Commissioner is dismissed if he breaks the oath. These phrases do not exclude minor offences and constitute catch-all clauses, which are not appropriate for the legal relationships in question. It cannot be ruled out that such legal provisions could be used to respond to the activities, which earn a disapproval of the individuals concerned. The slightest risk of such influence is incompatible with the total independence of the Commissioner. Accordingly, **it is recommended** that amendments be drafted to replace the vague term of "violation of the oath" with a

[8] Верховна Рада України; Закон від 13.07.2017 № 2136-VIII.

more qualified wording and to clarify that only serious misconduct provides a legal basis for the cessation of the duties.

Similarly, automatic termination of Commissioner's tenure following "a verdict of guilty", irrespective of its nature and gravity, does not provide for adequate guarantees against politicisation and should be further amended. In this context, it should be noted that crimes may be not only grave bus also minor. They may be committed not only intentionally but also due to negligence, they may be more or less dangerous, they may cause especially severe consequences or the consequences, which are not that severe. The commission of a crime in itself does not mean that a person has alongside violated the Constitution, or breached the oath, or that the person in his activity did not follow the Constitution, the interests of the state.

43. Turning to procedural issues, it is proposed making the dismissal of the Commissioner more difficult by adopting legal rules, which guarantee that the dismissal before the expiry of the term of office does not jeopardise the independence and impartiality of the Institution. First, the current legal regulation should be improved by complying with the relevant international recommendations. In this regard, first, **it is recommended** to establish an increased majority to dismiss the Commissioner. The majority of votes required for termination should be preferably higher than the majority required for election. Second, in order to guarantee transparency in the process of the dismissal of the Commissioner, **it is also recommended** providing for procedure that involves judiciary for giving an opinion on whether the Commissioner no longer fulfils the conditions required for the performance of his duties or is guilty of serious misconduct.

2.6. Administration of the Institution

44. National Human Rights Institutions (NHRIs) are often ineffective because they lack resources[9]. Control over their funding should be independent of the government of the day. Governments and legislature should ensure that NHRIs receive adequate funds to perform all the functions set out in their mandates. That is why the functions of the Commissioner should be clearly set in the legislation, taking in mind that the allotments from the state budget must correspond to the functions delegated from the State to this institution. The legal provisions in the Law of the Commissioner and other legal acts that include the institution's funding as a separate item on the annual budget are recognized as a positive aspect for the Commissioner's independence and effectiveness.

45. Experience all over the world has shown[10] that there is a danger that governments may be tempted to influence the NHRI's strategy and work through the amount of annual funding they provide. Under these circumstances, supplementing the legal provisions of the Law of the Commissioner by establishing a duty to the Government to include the Commissioner's draft proposal into the entire draft budget submitted to the Parliament without any changes shall be discussed. In any way, the Commissioner should be demanding the right to be consulted when the final decision is made on the annual funding by the legislator. The right to be consulted ensures that the objectives of national human rights protection are duly considered when decisions are made

[9] Assessing the Effectiveness of National Human Rights Institutions, Office of the United Nations High Commissioner for Human Rights (OHCHR), International Council on Human Rights Policy, 2005.
[10] The European Commission on democracy through the law (Venice Commission), Compilation of Venice Commission opinions concerning the ombudsman institution, Strasbourg, 2016.

concerning the distribution of financial resources. The Institution's interest would otherwise be placed at a disadvantage with regard to other social interests.[11]

46. It might be appropriate to consider additional safeguards such as the principle ensuring that any necessary budgetary restraints should not be applied to the Ombudsman Institution in a disproportionate manner[12].

47. While discussing other aspects, which could ensure a better financial independence of the Commissioner, it could be noted that the Institution could have appropriate value from the planning process, which requires one to analyse both the internal and external environment of the organization. Close attention should be given to the legal requirements concerning any changes of the Institution's mandate and obligations. The functions of the Commissioner, which are stipulated in the Law of the Commissioner, in particular additional duties in the sphere of data protection and access to public information, do not correspond to the Law of the Commissioner. This leads to the non-conformity in the financing resources of the Institution too and shall be remedied.

48. For these reasons, **it is recommended** to supplement the legal provisions of the Law of the Commissioner and establish that the Government shall include the Commissioner's draft proposal into the draft budget submitted to the Parliament without any changes. The Commissioner should also be demanding the right to be consulted when the final decision is made on the annual funding by the legislator.

    It might also be appropriate to consider additional safeguards such as the principle 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 Parliament, President and Government is reduced.

    The budget of the Institution should include both the State allotments and other funding, which ensure the independence of the Institution and the proper fulfilment of its tasks. All the incomes and expenses should correspond to the tasks and activities of the institution based on the legislation and should be assessed in their strategic and /or annual plans.

49. Turning to the question of organizational independence, it should be noted that the appointment and dismissal of the personnel of the Secretariat, representatives and the advisers of the Commissioner is carried out by the Commissioner and without the interference of any authority, but, as it was mentioned above, the Commissioner is bound by the allocations from the state budget. As it was found from the public information and during the meetings with the staff of the Secretariat, the allocations cover the outlays for the remuneration of the Commissioner, listed staff of the Secretariat including the representatives of the Commissioner, as it is directly regulated by the Law of the Commissioner. Meanwhile, the possibilities to involve the representatives of civil society, as it is set in the Law of the Commissioner, are limited and depends mostly on "ad hoc" contribution of external donors. The lack of such financing could suspend the effectiveness of performing the Commissioner's functions, e.g. the board of advisers, which operates (as set in the Law "can *also* operate") on a voluntary basis, comes to a standstill.

[11] National Human Rights institutions. An Introduction, Valentin Aichele, German institute for Human rights, 2010.

[12] The European Commission on Democracy through the Law (Venice Commission), Compilation of Venice Commission opinions concerning the ombudsman institution, Strasbourg, 2016

50. According to the Law, the Commissioner has the right to appoint representatives. As the provisions of the Law concerning the legal status of the representatives are set separately from the provisions on the Secretariat, the Commissioner, supposedly, has the possibility to separate the budget expenses for them. The representatives act in the scope stipulated by the Commissioner's regulations, which concern specialized spheres of questions. Having the discretion to appoint the representatives, the Commissioner could extend the organization of their activity to the regions where the representatives of the Commissioner could manage the activities of the regional set-up. This practice would also be in line with international recommendations[13].

51. According to the Paris Principles, the NHRI should be accessible for the population especially to people who are exposed to human rights violations or non-fulfilment of their rights (e.g., depending on the national, linguistic, religious or other minorities, indigenous peoples, non-nationals and people with disabilities, as well as the very poor, all NHRIs should ensure they can hear the concerns of such groups). Wide access is especially important when NHRIs handle complaints. On the other hand, they intend to enable quick and non-bureaucratic problem solving on site. In many cases, the national ombudsman holds consultation days at those decentralised offices[14]. Ensuring the accessibility of the Commissioner, the possibility to see the regional set-up under the structure of Secretariat should also be considered[15].

52. In view of the size and population of the country and of the wide spectrum of the obligations of the Commissioner as NHR institution, it clearly would seem desirable to see the person assisting the Commissioner in the daily work (deputy of the Commissioner), at least in order to facilitate the investigative and monitoring functions of the Commissioner as well as performing other planned activities timely and properly.

53. Under these circumstances, **it is recommended** that the amendments to the Law of the Commissioner introduce legal provisions for the activities of the deputy of the Commissioner and the right of the Commissioner to establish the regional units. Moreover, **it is recommended** to amend the wording of the existing legal regulation in a way that empowers the Apparatus to carry out the functions of the Institution effectively and fully. In this regard, the functions of the Secretariat shall be spelled out in a sufficiently precise manner in order to exclude the wrongful interpretation that it is only the Commissioner in his personal capacity, who is entitled to perform the functions of the Institution, and not the personnel. Nevertheless, the right to define the scope and operating principles of the regional set-up should be maintained for the Commissioner[16]. Such legal provisions provide a legal basis for adequate financing of the personnel and the premises in regions as well as give clarity about the expenses

[13] The Venice Commission noted that unless specific conditions in certain regions, it would seem preferable in Kazakhstan to organize regional or local offices manned by representatives of the national Ombudsman, with or without being designated as Deputy ombudspersons. The European Commission on Democracy through the Law (Venice Commission), Compilation of Venice Commission opinions concerning the ombudsman institution, Strasbourg, 2016.

[14] Ombudsman as Promotor of Good Governance, Kucsko-Stadlmayer, 2006.

[15] Assessing the Effectiveness of National Human Rights Institutions, Office of the United Nations High Commissioner for Human Rights (OHCHR), International Council on Human Rights Policy, 2005.

[16] For example, the salary of the Ombudsman and his deputies is regulated by law - the Human rights ombudsman act of the Republic of Slovenia. Ombudsman as Promotor of Good Governance, Kucsko-Stadlmayer, 2006.

for them[17]. **It is also recommended** to separate the expenses for the representatives as well as for the deputy and regional units in the budget plan of the Commissioner, which is produced for the Parliament decision. The expenses for the board of advisers and experts service should be provided from the budget too.

[17] Venice Commission stressed that in view of the particular significance of its financial resources for the independence of the ombudsman Institution, it would be important to redraft the legal provisions in such a way as to avoid any risk of undue cuts to the Ombudsman Institution's budget through an extensive interpretation of the clauses allowing its amendment. The European Commission on Democracy through the Law (Venice commission), Compilation of Venice Commission opinions concerning the ombudsman institution, Strasbourg, 2016.

3. The Mandate of the Commissioner

3.1. Review of Administrative Actions

3.1.1. Administrative Procedure for Handling Individual Complaints

54. The topic of the mandate of the Ombudsperson in the administrative procedure in handling individual complaints is commonly described as falling within the procedural autonomy of national state. However, the exclusive competence of national legislators to create administrative procedural rules has been gradually limited by the growing EU legislation and the jurisprudential development of the EU general principal of good administration by the Court of Justice of the European Union (the CJEU). This general principle of law was developed for the purpose of respecting the procedural margin of discretion of the national states while at the same time ensuring an effective implementation of EU law. The entry into force of the EU Charter of Fundamental Rights has further reshaped the boundaries of national procedural autonomy over a wide range of substantive fields. Article 41 of the EU Charter of Fundamental Rights has introduced additional procedural safeguards, *inter alia*, requiring an effective administrative procedure at each European institution and every national institution implementing EU law, including the Ombudsperson.

1) Diversity of administrative procedural rules on investigation of individual complaints

55. 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. One should also note the peculiarity of the system of the administrative procedures in Ukraine. In Ukraine, 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. Having regard to this, one should not wonder that the Commissioner does not have objective possibilities to use unified (standard) procedure while ruling on the disputes in different situations. The administrative rules on handling individual complaints are distributed in various laws dealing with a particular sector of activities of the Commissioner (the Law on Data Protection, the Law on Equal Opportunities, the Law on Access to Public Information etc.). The administrative procedures and sanctions applied to the public or private institution or civil servants of the public authorities are codified in one legal act – the Code of Administrative Offences. However, the provisions of the Code of Administrative Offences do not provide with sufficiently detailed set of rules on how the procedures should be made. The rules on the administrative procedure set out in the special legal regulation are not uniform. In this respect, it should be noted that mainly every law provides different procedural steps, different deadlines, different extent of the investigation sphere, different procedural rights and duties for parties during the investigation procedure, different legal content of the final decision etc. Thus, the Commissioner should take into account the length of the period of the infringement, individual circumstances of the infringement, whether the alleged infringer contributed to the investigation and disclosed all relevant information. However, it is important to point out that the Law of the Commissioner is completely silent on the matter how the choice among different administrative procedures (investigations) shall be addressed.

56. In order to harmonise different administrative procedures, **it is recommended** to set out respective provisions (possibly a special chapter) in the Law of the Commissioner and establish that the Law of the Commissioner shall be applied to all administrative procedures and remedies concerning the protection of human rights and alleged violations. Meanwhile, the provisions of the special laws concerning the administrative procedures and measures should be applied only as an exception, when the rule of the Law of the Commissioner explicitly directs to the application of this special law. In addition to this, it shall be established that the Commissioner during the investigation of individual complaints should not apply the rules of the Code of the Administrative Offences and the Law on the Citizens' Appeals.

2) Soft law guidelines and content of the principle of good administration in the investigation of individual complaints

57. In most of European countries the national laws make an explicit reference to the principle of good administration or good behaviour. This legal imperative is embodied mostly in the Law on Public Administration (or Administrative Procedural Code) and separately in the laws of the ombudspersons. Mostly the legal provisions make only a general reference to the principle of good administration and the soft law (internal law) provide specific rules how it should be applied or provide with the exact content of this principle.

58. Currently, there are no internal legislation or soft law guidelines defined by the Commissioner concerning the criteria to be followed when handling the complaints based on the principle of good administration. In our view, the Commissioner shall take a more active role and develop soft law guidelines based on the case-law concerning the examination of complaints in accordance with the principle of good administration. Even though these rules must be based on the relevant provisions of the Law of the Commissioner, it can be maintained that the Commissioner is able to indicate specifically in his internal rules (soft law) how those rules should be applied.

59. Even though the status of soft law is identified more as a complementary information source to the binding rule but not as a unique source itself, in most of the cases, the soft law guidelines are followed by implementing institution (executive public authorities, judiciary (courts). Where administrative authorities tackle issues based on soft law, the courts are willing to analyse them as well. This seems to be an accepted practice in a number of European national courts, which develop their case-law based on respective provisions of Article 41 of the EU Charter of Fundamental Rights.

60. One should note that the use of soft law is more frequent among administrative authorities, which are intensively influenced by soft law approaches from international organisations (primarily, the Council of Europe) and the European Union. Therefore, **it is recommended** that different guidelines be adopted concerning the national preventive mechanism or investigation of complaints in the area of data protection or access to public information following similar approaches taken by the Council of Europe or the European Commission. One of the main advantages of the use of soft law by the ombudspersons is more detailed information regarding the subject-matter. For instance, if there are no sources of soft law, administrative authorities exercise their discretion on more abstract legal rules, which lack clarity in many cases and, in turn, may create legal uncertainty.

3) Content and the scope of the provisions on investigation of individual complaints

61. In order to enhance the efficiency of complaint hearing procedure, **it is recommended** extending the provisions set out in Article 17(4) of the Law of the Commissioner concerning the complaints within the jurisdiction of the Commissioner. The activities of the President of the Republic Ukraine, members of the Verkhovna Rada, the Prime Minister, the Government (as a collegial institution), the judges of the Constitutional Court and other courts, municipal councils (as collegial institutions) shall be outside the Commissioner's powers of investigation. The legality and validity of procedural decisions of the prosecutors, pre-trial investigation officials shall remain outside the Commissioner's powers of investigation. However, complaints about the actions of the above-mentioned subjects, which violate the right to good administration, shall fall within the investigative jurisdiction of the Commissioner. The Commissioner shall not investigate complaints arising from the labour legal relations or soundness of court decisions, judgements and rulings.

62. **It is also recommended** to include the provisions concerning the formal steps on submission of complaints and requirements of complaints into Article 16 of the Law of the Commissioner. Non-compliance with the form of the complaint or failure to present the required particulars may not be grounds for refusing to investigate the complaint, except for anonymous complaints and in cases where the investigation may not be opened due to insufficiency of facts on the matter, while the complainant fails to submit the facts on the request or in case the text of the complaint is illegible. Anonymous complaints shall not be investigated unless the Commissioner decides otherwise. It is also suggested that the legal regulation secures the time limit for filing a complaint. The deadline in Article 17(2) for filing complaints is considered to be appropriate (one year; two years). Complaints filed after the deadline shall not be investigated unless the Commissioner decides otherwise. The provisions of Article 16(1)(3) of the Law of the Commissioner on filing complaints, including the Commissioner's right to open the investigation on his own initiative, are sufficient.

63. **It is recommended** to supplement Article 17(3)(3) of the Law of the Commissioner and to set out more grounds for the refusal to investigate a complaint as well as to foresee the deadline for the review of these grounds (during 7–14 working days). The list of the grounds for the refusal to investigate could be extended for the following cases: 1) the Commissioner comes to the conclusion that the complaint has no substance; 2) the complaint is filed after the deadline; 3) the circumstances indicated in the complaint are outside the Commissioner‘s investigative jurisdiction; 4) a complaint relating to the matter has already been resolved or is pending in court; 5) a procedural decision has been taken to open pre-trial investigation in relation to the subject matter of the complaint; 6) the Commissioner comes to the conclusion on the expediency of investigating the complaint in another institution or agency. Where a decision is taken to refuse to investigate a complaint, grounds for refusal must be specified. In the cases where the complaint falls outside the Commissioner's remit, refusal to investigate shall also indicate the institution or agency the complainant may address on the matter. If the circumstances specified in this list are disclosed in the course of complaint investigation the complaint investigation shall be discontinued.

64. **It is recommended** to set out appropriate time-limits (1–3 month) for complaint investigation and for the prolongation of the complaint investigation (in case the complexity of circumstances, abundance of information or continuity of actions require). In general, according to the principle of good administration the complaints shall be investigated within the shortest time possible.

65. **It is recommended** to specify in the Law of the Commissioner the procedural scope of investigation of complaint. The general principle of good administration should oblige the Commissioner to investigate the circumstances specified in a complaint and draw up a statement stating the circumstances disclosed and evidence collected in the course of investigation as well as giving factual and legal evaluation with detailed argumentation of the official's activities. The statement may also be submitted to the head of the institution, where the investigation has been conducted, and the official, whose actions have been subjected to investigation, also, as necessary, to the head of a superior institution or other institutions concerned.

66. It is recommended modifying Article 15(1) of the Law of the Commissioner by clarifying the legal power of the final acts of the Commissioner and setting out explicitly a non-binding (recommending) character of the Commissioner's requests. On the one hand, as provided for under Article 13 of the Law of the Commissioner, the rights of the Commissioner shall provide imperative request to present relevant information, documents and material. On the other hand, the final act after the investigation carried out by the Commissioner, according to the European good practise, has a quality of proposal (recommendation) with a non-legally binding character and any coercive measures could not be applied in this case. However, **it is recommended** to give more power for the proposal (recommendation) of the Commissioner and to set out a special obligation for the institution following the issues of a final proposal by the Commissioner. In every case, the institution and agency or official, to whom this proposal (recommendation) is addressed, must investigate the proposal (recommendation) of the Commissioner and inform the Commissioner about the results of the investigation in appropriate time but not later than 1–2 months after receiving the proposal (recommendation) of the Commissioner.

67. The special situation and the scope of the mandate of the Commissioner concerning the violations of human rights in the area of data protection, access to public information or equal opportunities shall also be taken into consideration. According to the rules of *lex specialis* and having regard to the executive powers given to the Commissioner in special areas of law, **it could be recommended** to foresee in the Law on Data Protection, the Law on Access to Public Information and the Law on Equal Opportunities the second type of final acts of the Commissioner following the investigation of individual complaints – legally binding administrative acts imposing legal sanctions. It is only these special areas where strengthening the power of the request issued by the Commissioner in the indicated manner is appropriate. While bringing to the attention the facts of negligence in office, non-compliance with laws or other legal acts, violations of human rights and recommending to apply measures to eliminate the violations of laws are important, efficient implementation of the legal rules set out in the above-mentioned laws requires the Commissioner to play an active role and, if necessary, to impose sanctions or obligations for the public authority. In such cases, the request of the Commissioner would have a legally binding characteristic of administrative act imposing economic sanctions, which subsequently could be appealed directly to the court.

3.1.2. Expanding Commissioner's Mandate: Mediation

68. Having analysed the Commissioner's activities in the sphere of friendly dispute resolution it was concluded that the informal activities of the Commissioner as a mediator proved to be efficient.

69. Especially valuable this instrument could be where the Ombudsperson is regarded as trustworthy. Due to the increasing European trend to facilitate and encourage mediation in all areas, it could be beneficial to review the existing legal regulation in order to acknowledge expressly that such activities are compatible with the mandate of the Commissioner.

70. Therefore, **it is recommended** to amend the Law of the Commissioner by expressly introducing the right of the Commissioner to act as a mediator. For example, Article 13 of the Law of the Commissioner could be supplemented with a new Subparagraph 15, stating that the Commissioner has the right "to act as a mediator where it is seen possible when trying to improve relations amongst the citizen, the administration and public services and (or) trying to reach a friendly solution. The information gathered through the mediation proceeding cannot be later used in the civil or administrative cases in courts without express permission of the interested parties, except in cases of public interest or where the publicity of the agreement reached through mediation is necessary clause for its validity."

3.2. Relations of the Commissioner with the Parliament

71. Ombudsperson can play an important role in advising the Parliament with respect to bringing national legislation and national practices in line with their human rights obligations.

72. The Paris principles[18] stipulate that ombudsperson's institution should have the responsibility to "submit to the government and Parliament on advisory basis through the exercise of its powers to hear a matter concerning the promotion and protection of human rights" and "to promote and ensure the harmonization of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation".

73. Highlighting in annual reports specific cases, which were investigated during the reporting period, the Ombudsperson also informs the legislator of administrative shortcomings and at the same time addresses issues in need of reform. The latter could be partially done by proposing legislative amendments. Such proactive work is best suited to bringing about systemic and lasting changes. Therefore, the vision of the ombudsperson's office should aim to provide effective mechanisms for identifying major systematic issues, in other words, to move to a more proactive focus in relation to systemic changes.

74. Having analysed the European and international framework, the conclusion was made that it is widely acknowledged by international bodies and various countries in Europe that the mandate of the ombudsperson includes the right to timely initiate the adoption or revision of laws, with the purpose of ensuring the human rights and freedoms.

75. One of examples of the interaction between Parliament and the Commissioner is the presentation of annual report of the Ombudsperson to the Parliament. Nevertheless, the existing legal framework in Ukraine does not provide for a sturdier legal ground and methodology as to how the Commissioner participates in the law-making process. Therefore, it is recommended formalizing partially the possibilities of the Commissioner to participate in the process of preparing draft law proposals and to the *ex ante* impact assessments, which could contribute to strengthening the capacity of the Commissioner in the relationship with the legislative bodies.

76. Therefore, the Law of the Commissioner should be improved by establishing the Commissioner's right to timely initiate the adoption or revision of laws, with the purpose of ensuring the human rights and freedoms. Under these circumstances, **it is recommended** that the Law of the Commissioner should be supplemented with legal provisions aimed at establishing the Commissioner's right to the legislative initiative.

77. The current legal regulation should be revised in order to confer on the Commissioner the right to exercise his legislative initiative promptly when it is needed and not to wait for the annual report. This position is also supported by Venice Commission: "It is positive also, in view of the specialized expertise of the Ombudsman, that the Institution may exercise its right to legislative initiative any time "when in the course of the exercise of their jurisdiction *it deems necessary", without being under the obligation to wait for the annual report to make use of this right,* as in previous drafts.

[18] http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx

This will undoubtedly help the Institution to more timely act to respond to new needs in society and, more generally, to more effectively fulfil its mandate."[19]

78. The power to submit suggestions and proposals to the legislator is of great significance for the ombudspersons' effectiveness. It enables the ombudsperson to reveal system errors observed at the level of complaints, which exceed the importance of an individual case to a great extent ("systemic approach").

The Venice Commission has emphasized on more than one occasion that it desirable to have a legal framework, which allows the Ombudsperson to react not only to individual violations but to the general patterns of action by various ways, including right to initiate the adoption or revision of laws, with the purpose of ensuring the human rights and freedoms, any time when it deems necessary[20, 21].

79. Given the fact that the Parliament is the legislator and having regard to the nature of the ombudsperson as a parliamentary institution, recommendations for the amendment of laws should also be directed to the Parliament.

In this regard, **it is recommended** that the Law of the Commissioner should be amended by expressly introducing that, "the Commissioner shall have the right to propose to the Parliament to adopt or revise the legislation with the purpose of ensuring the human rights and freedoms".

80. Europe-wide those ombudspersons who are explicitly appointed to the observation of human rights mostly also fulfil the general task of *advising* the legislator and the government in the field of implementation of human rights (*the Czech Republic, Hungary, Latvia, Lithuania, Poland* etc.). The aim of this is to guarantee the implementation of human rights on the level of legislation and corresponding provisions. In order to fulfil this function the ombudspersons are granted the right to participate in parliamentary sessions and meetings, where matters of human rights are discussed (*Lithuania, Armenia, the Czech Republic, Estonia, Finland, Germany, Hungary* etc.).

The Law of the Commissioner expressly states that the Ukrainian Commissioner also serves this purpose.

Consequentially, **it is recommended** to authorize expressly the Commissioner when performing his duties to attend the meetings of the Parliament, the Government and other state institutions. This right shall be implemented when the issues under consideration are related to the activities of the Commissioner.

81. Both recommendations could be implemented, for example, by introducing a new Article 18^1 "Special powers and duties of the Commissioner" stating a) that the Commissioner shall have the right to propose to the Parliament to adopt or to revise the legislation with the purpose of ensuring the human rights and freedoms and b) that 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.

[19] CDL-AD(2015)034 - Opinion on the Draft Law on Ombudsman for Human Rights of Bosnia and Herzegovina, adopted by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), §33.
[20] CDL-AD(2011)034 – Joint opinion on the protector of human rights and freedoms of Montenegro adopted by the Venice Commission at its 88th Plenary Session (Venice, 14-15 October 2010), §11.
[21] CDL(2001)083 - Consolidated Opinion On the Law on Ombudsman in the Republic of Azerbaijan (Strasbourg, 7 September 2001), §§6, 7, 18 (see CDL(2001)PV 47, §6).

3.3. The Mandate of the Commissioner vis-à-vis Judiciary

3.3.1. Normative Control

82. Section XII of the Constitution ("Constitutional Court") provides for the Commissioner 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 (see Article 150(1)(2) and 150(2) of the Constitution).

    In this regard, the Commissioner holds a very strong position as the right to apply to the Constitutional Court is also granted only to the following state institutions: the President of Ukraine, no less than forty-five people's deputies of Ukraine, the Supreme Court of Ukraine, and the Verkhovna Rada of the Autonomous Republic of Crimea.

83. 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. The absence of limitations related to the competence or activities of the Commissioner may result in constitutional submissions by the Commissioner on the issues that do not fall within its competence.

84. In addition to this, neither the Constitution, nor the Law on the Constitutional Court (including the new privisions, which implemented the recent amendments related to the Constitutional Court[22]) provide 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. This sometimes can impede the effective settlement of problematic human rights issues identified by the Commissioner. The current legal framework also lacks certainty with regard to time limits for consideration of constitutional submissions and, where unconstitutionality is found, revision of the existing legal regulation. The legal uncertainty in this sphere may render the referrals to the Constitutional Court inefficient.

85. Although there is no single European standard as to the status of the ombudspersons, usually in states with constitutional jurisdiction, the ombudsperson is entitled to appeal against laws before the constitutional court. This right of ombudsperson is

[22] Про Конституційний Суд України Верховна Рада України; Закон від 13.07.2017 № 2136-VIII: http://zakon3.rada.gov.ua/laws/show/2136-19/page; Проект Закону про Конституційний Суд України, 6427-д від 07.06.2017, 6 сесія VIII скликання, website of the Verkhovna Rada of Ukraine: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=61971.

encouraged at the European level: in the PACE Resolution 1959 (2013) Strengthening the institution of Ombudsman in Europe member states were once again encouraged to establish a direct access for the ombudsperson to the Constitutional Court in order to challenge the constitutionality of flawed legislation.

86. In this context, in general, the entitlement of the Commissioner to have a direct access to the Constitutional Court is in line with the best European practices. The Commissioner in Ukraine is granted even stronger position as he can apply to the Constitutional Court not only regarding the issues of constitutionality of laws and other legal acts. He is also entitled to request from the Constitutional Court the official interpretation of the relevant provisions of the Constitution; this right is particularly important to promote the progressive human rights standards as the matter *de lege ferenda*, i.e. to set the guidelines for the future legislation and to improve the existing practices by clarifying the constitutional standards.

87. However, there are certain flaws in the existing legal regulation that can be addressed by the legislator or removed in practice, in order to make the use of the Commissioner's power to apply to the Constitutional Court more effective from the standpoint of human rights protection. In this regard, the following **recommendations** for the improvement of the existing legislation can be made.

88. *First*, as mentioned, the absence of limitations on the Commissioner's right to apply to the Constitutional Court may sometimes result in constitutional submissions by the Commissioner on the issues that do not fall within their competence. This limitation that the ombudspersons can apply to the Constitutional Court only on the matters falling within their competence are either explicitly provided or established in practice of majority of the European states. Although this kind of limitation is not explicitly provided in the text of the Constitution of Ukraine, the Constitution can be interpreted in the practice of the Constitutional Court by restricting the power of the Commissioner to apply to the Constitutional Court only to the issues falling within the competence of the Commissioner. It can also be set out in the Law on the Constitutional Court of Ukraine, or in the Law of the Commissioner (the aforementioned Articles 13(3) and 15).

89. *Second*, as mentioned, the existing legal regulation does not provide for any precise time limit for the settlement of the constitutional justice cases by the Constitutional Court. The new Law on the Constitutional Court of Ukraine provides some terms for the decision on opening the proceedings (Article 61(4) – usually one month from the appointment of the judge rapporteur) and the length of proceedings (Article 75(2) – usually 6 months; Article 75(3) – one month for certain most important cases), but no time limit for the announcement of final acts of the Court (judgments and conclusions) is foreseen and that could create preconditions for the Court to continue the practice of unforeseeable announcement of final acts when these acts can be announced even a few years after the closure of the proceedings. Therefore, although the establishment of this time limit is not typical for the majority of European states, in order to establish the practice that the constitutional justice cases are settled without undue delay, it could be proposed to establish a general time limit for the announcement of the final acts of the Constitutional Court of Ukraine in the proceedings.

90. *Third*, no order of priority for hearing the cases is established in the Constitutional Court. That gives for the Court unlimited discretion to set its own order of hearing that can be determined without any objective criteria. This can also result in undue

delays in consideration of cases. Although Article 75(3) of the new Law on the Constitutional Court of Ukraine, which provides one month time limit for proceedings in certain most important cases (conclusions on constitutionality of draft amendments to the Constitution, requests of the President regarding specific acts of the Cabinet of Ministers and the cases referred by the Senate or Grand Chamber of the Court), can be seen as a basis for certain prioritisation of hearings, it does not necessarily include the submissions of the Commissioner or the cases involving systemic problems of human rights protection.

Therefore, it may also be recommended to supplement the new Law on the Constitutional Court (or, as an alternative, the Regulations of the Court) with special provisions regarding the priority of hearings, which can be harmonised with the above-mentioned provisions of Article 75(3).

91. As was confirmed by the previous studies, challenging normative acts proves to be very efficient in the Commissioner's activities. Thus, normative control can be considered as a key task to the Commissioner and a number of positive developments over the past years on this matter is reassuring. It allows stepping back a little from the ongoing individual complaints and thus solving legal issues in a systematic and broader way. Under these circumstances, in setting the future direction, it is proposed that 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.

92. Currently, the Commissioner is entitled to apply to administrative courts in order to challenge normative (regulatory) legal acts if there is an interest of the person concerned in bringing proceedings. According to Article 171(2) of the Code of Administrative Judicial Procedure of Ukraine, the right to take action in order to challenge a normative legal act shall apply to persons who are legitimately affected, i.e. this act is applied to them or they are subject of the legal relationships, in which this act will be applied[23]. This is a model of so-called concrete judicial review of regulatory acts. However, it does not seem to be justified to hold that the current legal regulation allows for an abstract judicial review of regulatory acts and confers a right to initiate this type of review on the Commissioner. Such an interpretation finds no support in the wording of that provision[24]. Nevertheless, there are no compelling reasons, which would support a conclusion that the Commissioner's right to apply to courts shall be made depended on an individual complaint and adversely affected legal interests of particular private parties.

93. Under these circumstances, **it is recommended** establishing that the Commissioner shall have a direct right to take action in order to challenge regulatory legal acts before administrative courts. Article 60(1) of the Code of Administrative Judicial Procedure of Ukraine provides that the Commissioner shall apply to administrative courts in accordance with the procedure established by law. To this end, in achieving the harmonisation, Article 13 of the Law of the Commissioner could be supplemented by a legal norm conferring the right to apply to administrative courts on the Commissioner with regard to the legality of general rules. Similarly to the applications to the Constitutional Court, the request to review the legality of certain

[23] Право оскаржити нормативно-правовий акт мають особи, щодо яких його застосовано, а також особи, які є суб'єктом правовідносин, у яких буде застосовано цей акт.
[24] Even if such interpretation finds its background in the established case law, it still should be brought in line with the wording of the law.

regulatory legal acts raises similar main issue. 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.

94. This proposal is motivated by a set of reasons regarding in particular the systematic approach to the proposed Commissioner's role in promoting good administration and the objectives to be reached in the sphere. First, the Commissioner has already a direct access to the Constitution Court. It would be consistent to apply the same approach in the sphere of legality of other regulatory acts. Second, having regard to the fact that there is a system of state legal aid in place and the Commissioner shall be gradually distancing himself from the role of being a legal representative, it is difficult to see how the right to challenge regulatory legal acts would be efficiently implemented if the legal regulation is not adjusted accordingly. Third, on a positive note, it should be emphasized that under current legal regulation an administrative case concerning the legality of regulatory acts shall be resolved within one month or, in exceptional cases, within two months. Under these conditions, it would be regrettable if a remedy of this kind remains under-utilised despite being very efficient in terms of time and its effects.

3.3.2. Defence of Public Interest

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

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

97. The other possible area of activity regarding the defence of public interest, which could merit further consideration, is initiation of *collective proceedings*. It is also worth noting that if the Commissioner opts to reinforce an active role in judicial matters, the possibility to appear as *amicus curiae* shall be formalized accordingly in the procedural law and the Law of the Commissioner. The expertise knowledge of the Commissioner is in particularly relevant in cases regarding the defence of public interest. Therefore, the right to defend public interest, which is also conferred on the courts, could be implemented more efficiently if the Commissioner is entitled to intervene into the undergoing proceedings regarding the defence of public interest and to provide opinion regarding the matters under consideration.

98. In order to provide an adequate legal framework to implement the aims of the ombudsperson institution, adopting legal provisions regarding the defence of public interest before courts could contribute to enforcing human rights legislation independently of individual complaints filed with the Commissioner. This, in turn, could shift the Commissioner's fragmented efforts in protecting individual interests to cohesive and coordinated approach to implementation of strategic goals regarding human rights protection.

3.3.3. Legal Representation of Vulnerable Groups before Courts

99. Currently, the Commissioner invests a lot in helping vulnerable people in order for them to access legal and judicial remedies. Nevertheless, **it is proposed** to revise this role for the following reasons. The Commissioner cannot act in isolation but it should also not replace the prosecutors, legal representatives or providers of state legal aid. Indeed, Ukraine has started to strengthen the legal aid service. Without a doubt, this fact should reflect on the activities of the Commissioner.

100. The institutional framework of Ukrainian legal aid system consists of the Cabinet of Ministers of Ukraine, the Ministry of Justice of Ukraine, the Coordination Centre for Legal Aid Provision, Local Self-Government Authorities and subjects of free secondary legal aid provision.

According to the data of 2016, the legal aid is accessible at:

- 1 Coordination Centre for Legal Aid Provision
- 548 Regional, Municipal or Local Legal Aid Centres
- 1 Legal Aid Call Centre
- 7 444 Movable Advisory Centres
- 1 371 Remote Consulting Points

Capacity of human resources consists of:

- 2 198 Legal aid system employees
- 5 062 Legal aid lawyers in the Registry

According to the Law on Free Legal Aid of the Republic of Ukraine every citizen of Ukraine, a foreigner, a stateless person, including refugees, or other persons seeking additional protection and certain categories of entities (Article 3) has the right to legal aid.

The legal aid consists of primary legal aid and secondary legal aid (Article 2). Free primary legal aid includes informing persons on their rights and freedoms, procedures for their execution, their restoration in case of violation, and procedures for appealing against decisions, actions or lack thereof by the state authorities, local self-government authorities, and public officials. The right to free primary legal aid is granted to all persons under the jurisdiction of Ukraine (Article 8). The providers of free primary legal aid in Ukraine are executive authorities, local self-government authorities, physical and legal entities of private legal practice, specialized institutions. Executive authorities and local self-government authorities are obligated to arrange personal reception of individuals by highly qualified employees providing specific and clear interpretation of legal provisions and giving advice on human and civil rights and freedoms, as well as their duties. Primary legal aid provider is obliged to provide services within 30 calendar days from the day of receiving the application. If the application only contains a query for respective legal information, such legal aid shall be provided within 15 days of the date of receiving the application.

Free secondary legal aid is a type of state guarantee that provides equal access to justice for everyone (Article 13). Free secondary legal aid includes the following types of legal services: 1) defence; 2) representation of the interests of persons in the courts, other state agencies, self-government authorities, and versus other persons; 3) drafting procedural documents. The right to secondary legal aid is conferred on persons whose average monthly average income is lower than the two minimum subsistence levels, disabled persons, orphaned children, internally displaced persons, other vulnerable groups, persons against whom criminal procedure was initiated etc. The providers of secondary legal aid in Ukraine are centres for granting free secondary legal aid and lawyers included in the Registry of Lawyers that provide free secondary legal aid.

For the provision of secondary legal aid, the Ministry of Justice has established regional and local (regional, interregional, municipal, municipal regional, interregional and regional municipal) centres for free secondary legal aid (Article 16). The Centres are regional offices of the Coordination Centre of Free Legal Aid and are established according to the needs of the corresponding administrative-territorial unit and provision of access to the free secondary legal aid. According to Article 19 of the Law on Free Legal Aid the Centre for free secondary legal aid shall take a decision for the provision of legal aid within ten days from the day of receiving the application for free secondary legal aid. The Centre for free secondary legal aid shall appoint the defender immediately if the person concerned is detained.

In this context, it is interesting to point out the data of 2016 concerning legal aid provision to suspected and accused persons in criminal proceedings, to detainees, arrested and imprisoned individuals:

- *15 644 Cases of legal aid provision to detained criminal suspects*
- *11 114 Cases of legal aid provision to persons under administrative detention or arrest*
- *50 475 Cases of defence by appointed legal aid lawyers*
- *3 943 Legal aid provision to imprisoned persons*

Statistics regarding legal aid provision in civil and administrative cases, as well as for certain categories of victims and witnesses in criminal proceedings are as follows:

- *239 164 individuals who have been consulted at regional, municipal or local legal aid Centres*
- *34 126 individuals who received secondary legal aid*
- *30 717 decisions to provide representation in court with appointment of lawyer*
- *3 293 decisions to provide representation in court by jurists of Centres*
- *6 699 persons referred to partner institutions and organizations for assistance*

101. 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. Seeking to reduce the workload of ombudsman institution and enhancing effectiveness of its functioning, **it is recommended** to remove an overlapping between Ukrainian legal aid system and Commissioner's jurisdiction.

It is also recommended that the Commissioner exercised his authority in the sphere of legal aid provision to the extent of abuse of power by and bureaucracy of officials or other violations of human rights and freedoms. To this end, the legal framework regarding the grounds of admissibility of the complaints, review criteria, grounds for adopting particular kind of acts shall be improved.

102. If the Commissioner investigating particular complaint detects malpractice of legal aid organizing and providing institutions in the field of legal aid provision, he may give recommendations how to remedy the situation, escape malpractice and develop good administrative practice at the particular institution and also provide added value to the development of public administration in general. Working in such a manner the Commissioner could focus on the main aim to protect a person's right to good public administration securing human rights and freedoms, to supervise fulfilment by state authorities of their duty to properly serve the people.

Focusing on this issue, the main part of the Commissioner's work should be devoted for the monitoring and supervision of work of legal aid system institutions instead of dealing with complaints or representing interests of applicants before courts. Legal consultation and representation in court should be left to the relevant stakeholders in the Ukraine legal aid system.

Performing his duty in such a way the Commissioner should monitor and make assessment of accessibility to legal aid; should make assessment of actions or inactions of officials of the institutions involved in the system of legal aid; should analyse whether decisions on legal aid provision meet the requirements for administrative acts; should analyse whether institutions taking decisions on legal aid provision do not create unreasonable barriers to get legal aid, whether their request to submit additional information or documents are reasoned, legally grounded and motivated, whether the final decision has been taken after expiration of period for submission of requested information or documents; should make assessment and could control the legal aid quality assessment of actions or inactions of legal aid organizing institutions; should make assessment whether institution makes decisions in the framework of their mandate; should control whether the institutions involved in the system of legal aid provide answers to the applicant in due time; should make assessment whether the personnel of decisions making institution do not work in a bureaucratic manner or do not misuse power or infringe the rights and freedoms of applicant in other manner.

Conversely, when the circumstances indicated in the complaint are outside the Commissioner's investigative jurisdiction or the Commissioner concludes that the investigation of the complaint in another institution or agency would be more suitable or expedient, the complaints should not be investigated. The Commissioner shall focus on the monitoring instead of direct review of the complaints.

3.3.4. Intervention into Judicial Proceedings

103. Strengthening the rule of law, Ukraine undergoes significant judicial reform and this includes improving the functioning of competent bodies, which are entitled to assess the actions of judges or their inaction. Under these circumstances, it is essential that the Commissioner's activities within judicial sphere enter into a transitional mode and take certain measures to strengthen the monitoring and not the supervisory role.

104. It is a well-established international standard and practice in Europe that the ombudspersons are prevented from intervening into judicial proceedings and, above all, questioning the soundness of court decisions. In a majority of cases in Europe, the ombudspersons are not authorized to initiate proceedings regarding the judicial role of courts. Therefore, in most of the cases if judicial proceedings are in progress the ombudspersons declare the complaint inadmissible or terminate its consideration. Similarly, the ombudspersons do not qualify as public authorities for the purposes of

judicial review and their reports are not subject to any annulment procedures before courts.

105. In relation to the legal regulation in Ukraine, it can be maintained that there is considerable room to adapt to the international environment and reflect on the development of equivalent human rights institutions' mandate within the sphere of justice since the existing legal regulation provides for extensive powers to intervene in judicial proceedings. In this respect, reference should in particular be made to Article 13(10)(2) of the Law of the Commissioner, which essentially establishes that the Commissioner is entitled to participate in any proceedings at any stage of the trial irrespective of the fact whether particular proceedings were started upon the Commissioner's initiative. Moreover, as provided for under Article 13(10)(3) of the Law, the Commissioner is authorised to initiate a review of judgments of courts at all times. These procedural rights are not limited to bringing the proceedings but also extends to monitoring of court activities. That is to attend sessions of higher specialized courts of Ukraine (Article 13(2) of the Law) and court sessions of all instances, including court sessions held behind closed doors, if legal person in whose interest the judicial proceedings have been ruled to be held behind closed doors, has given consent (Article 13(9) of the Law). Legal uncertainty how these rights are implemented in practice is created by the legal provisions of the Law establishing that the Commissioner shall not consider complaints on the same issues as already brought before courts (Article 17(4) of the Law). Nevertheless, the current legal framework formally does not limit the Commissioner's mandate to the issues regarding human rights protection.

106. Under these circumstances, the existing legal regulation shall be revised in order to prevent any risks of legal uncertainty and to define the Commissioner's competence on the matter in line with the prevailing international practices in Europe. In general, it would be preferable to give the Commissioner the power to make general recommendations about the functioning of the courts (as regards administration and management of the courts) and exclude or limit the power to interfere into individual proceedings. To this end, **it is recommended** to amend the legal provisions of the Law of the Commissioner, specifically Article 13(10)(2) and (3). In this context, excluding 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 on the basis of the Law № 192-VIII of 12.02.2015[25] was a positive amendment aimed at restoring the balance of powers among state authorities. Regarding the procedural rights conferred on the Commissioner, which permit the Commissioner to intervene into any judicial proceedings, two approaches can be taken to address the issue:

1) Restrictive approach concerning the supervision of judiciary shall mean a withdrawal of legal norms, which establish essentially unlimited possibility to intervene in any judicial proceedings. By ensuring clear boundaries regarding the relationship between the Commissioner and courts, this option would attain better respect for the rule of law, including the balance of institutional powers and a full compliance with international standards and prevailing European practices.

2) A less stringent approach would be to amend the legislation accordingly to enable the Commissioner to act within the sphere of judicial activities only in cases that

[25] У Законі України "Про Вищу раду юстиції". Online Access: http://zakon2.rada.gov.ua/laws/show/192-19/paran470#n470.

raise issues affecting human rights and freedoms from a viewpoint of functioning of the courts or procedural law. In the latter case, it would be appropriate to establish a legal regulation that limits the Commissioner's mandate to the supervision of judicial proceedings of undue delay or evident abuse of authority. This option is suggested bearing in mind the peculiarities of the initial model of the ombudsperson's institution opted as suitable to Ukraine and having regard to the undergoing transitional period leading to completion of judicial reforms.

3.4. Mandate of the Commissioner in Particular Areas of Law

3.4.1. The Mandate of the Ombudspersons in the Sphere of Antidiscrimination

107. The mandate of the Commissioner in the field of gender equality is differently stipulated in two laws, namely the Law on Ensuring Equal Rights and Opportunities of Women and Men of 2005 and the Law on Principles of Prevention and Combating Discrimination of 2013, which is aimed at banning discrimination on numerous grounds (including sex). The latter piece of legislation (the Law on Principles of Prevention and Combating Discrimination) is much more detailed with regard to the powers of the Commissioner in the field of (gender) equality. The inconsistency of both acts intended for combating sex discrimination shall be addressed eventually. **It is recommended** considering two options:

1) to integrate the Law of 2005 on gender equality into the more general antidiscrimination Law of 2013 and to provide a single set of Articles on the mandate of the Commissioner instead of currently existing two articles in two different acts (Article 9 of the Law of 2005 and Article 10 of the Law of 2013)[26]; or

2) to continue with the practice of application of double legislation of Anti-Discrimination Act and a Gender Equality Act[27] with an attempt to reconcile the texts and competence provisions of both laws[28].

108. Having regard to the special character of the covered relationship and political and social-legal importance, **it is recommended** that the provisions of the equality legislation and not the Law of the Commissioner (see above) further contain the provisions with relation to the equality-specific competences of the Commissioner.

109. If the approach to elaborate the Law on Principles of Prevention and Combating Discrimination of 2013 in order to address the enhanced competences of the Commissioner (see above) is taken, the following recommendations shall be discussed:

1) the EU antidiscrimination directives require national equality body to have at least the following competences (Article 20(2) of the Directive 2006/54[29]):
   a. to provide individual assistance to victims of discrimination in pursuing their complaints about discrimination;
   b. to conduct independent surveys concerning discrimination;
   c. to publish independent reports and make recommendations on any issue relating to such discrimination[30].

Even though there could be minor discrepancies as regards the language usage or national practice, it is not certain that all competences are exactly defined by Article

[26] As this is a case for Germany, Austria, Czech Republic, Hungary, Ireland, Poland, Romania, Slovakia, Slovenia, Sweden, and the United Kingdom.

[27] For example, Belgium, Bulgaria, Croatia, Denmark, Finland, Greece, Lithuania, Montenegro, the Netherlands, Romania, and Serbia.

[28] As this was done, for instance, in Lithuania by the legislative amendments of 8 November 2017, which, instead of number of previous articles, introduced a short reference that the compliance of the Law on Equal Opportunities for Men and Women is ensured by the Equal Opportunities Ombudsperson who acts in accordance with the Law on Equal Opportunities.

[29] Identically Article 13 of the Directive 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

[30] The fourth type of competence related to the right of exchange available information with corresponding European bodies such as any future European Institute for Gender Equality is not relevant here.

10 of the Law on Principles of Prevention and Combating Discrimination of 2013 or by Article 9 of the Law on Ensuring Equal Rights and Opportunities of Women and Men of 2005. It is strongly **recommended** to include in the mandate of the Commissioner the duty to "*provide individual assistance to victims of discrimination in pursuing their complaints about discrimination*" as it differs from the existing competences to investigate the complaints or the right to give the opinion to the court. It seems that the existing competence of monitoring and summarizing the results of the application of the principle of equal treatment does not necessarily involve the required competence "*to conduct independent surveys concerning discrimination*", which could be defined more individually or oriented towards specific subject matter compared to the current provisions set out in Article 10(1)(3) and 10(1)(5) of the Law of 2013. For the sake of clarity and full-compliance with EU-law, **it is recommended** to follow the wording of Article 20 of the Directive 2006/54 and to simplify Article 10(1)(3) and 10(1)(5) of the Law of 2013.

2) The compilation of powers provided by Article 10 of the Law on Principles of Prevention and Combating Discrimination of 2013 is not sufficiently clear as regards the competences in the area of defence of rights. In accordance to those provisions, the Commissioner:
   a. provides findings in discrimination cases at the request of the court ("*надає висновки у справах про дискримінацію за зверненням суду*") (Article 10(1)(7) of the Law of 2013);
   b. presents in person or via representative ("*та особисто або через свого представника*") the case to the court ("*звертається до суду із заявами*") in order to protect the public interest and in person or through a representative involved in the trial in cases and order established by law (Article 10(1)(2) of the Law of 2013);
   c. considers individual or group complaints ("*розглядає звернення*") (Article 10(1)(4) of the Law of 2013).

The draft Law No 3501 of 20 November 2015 focuses on the further extension of the competences of the Commissioner and tries (at least partially) to solve the identified problem. The suggested competences shall include:

- the right of the Commissioner to issue binding requirements ("*видає обов'язкові для виконання вимоги (приписи)*") (instructions) to eliminate violations of equality legislation (Article 10(1)(6) of the draft Law), and
- the right to draw the protocols for the further imposition of administrative sanctions ("*складає протоколи про притягнення до адміністративної відповідальності та направляє їх до суду*") (Article 10(1)(7) of the draft Law).

If adopted, the Commissioner's competence would become multi-layered:

- individual assistance to victims of discrimination in pursuing their complaints about discrimination (required by the Directive – new recommendation);
- the role of *amicus curiae* (current Article 10(1)(7) of the Law of 2013);
- the representation of protected groups (public interests) before courts (current Article 10(1)(2) of the Law of 2013);
- the investigation of individual complaints (current Article 10(1)(4) of the Law of 2013); which is (as proposed by the draft Law No 3501 of 20

November 2015) supported[31] by a new right to issue binding requirements and by the new right to draw administrative protocols.

It is recommended to proceed with the planed legislative changes as they create strong and solid basis for tribunal-type equality body.

3) It is **also recommended** to create a minimal set of requirements for the complaints procedure before the Commissioner. First, in the Law of 2013 the legislator can regulate such issues as formal requirements of the complaint, time limits, length of investigation, types of decisions. The binding requirements to the third parties (novelty of the draft Law No 3501 of 20 November 2015) can be also regulated in a more precise way as, if challenged by the other party, they can end up in the litigation procedure. It is also **recommended** to include into the set of the competences the Commissioner's right to initiate the investigation of alleged discrimination case on its own initiative.

4) The whole set of covered grounds of prohibited discrimination, the variety of covered relationships, the number of inhabitants, the territory of the country and the broad mandate of the Commissioner create doubts whether the broad competences will always be accompanied by adequate human, organisational and financial resources. The mandate of the Commissioner would be compromised in political terms because of weak correlation between ambitious tasks and competences of the Commissioner, on one side, and lack of resources, on the other. The allowed margin of appreciation of the public institution is a matter of legal culture of the given country. Therefore, it is **advisable** that Article 10 of the Law of 2013 includes a general provision on the personal discretion of the Commissioner. For example, the provision that "<…> *the Commissioner shall decide on the involvement of the Commissioner's Office in the matter of* <…> *independently by taking into regard the gravity of the violation, all circumstances of the case, the accessibility of alternative means of defence of rights*" seems to be appropriate in order to eliminate the legal constraints and challenges of those who may wish to challenge administrative decisions of the Commissioner. The judicial control of the Commissioner's decision would be provided by the administrative law provisions.

5) The Law on Principles of Prevention and Combating Discrimination of 2013 does not explicitly address the rules or internal procedures related to the Commissioner's principal competences, such as investigation of complaints, exercise of the individual legal assistance or the role of *amicus curiae*, the presentation in the court of protected groups. The more detailed competence or some procedural particularities probably can be found within the legal framework setting out rules for the exercise of the control over the observance of human and civil rights and freedoms (if there are horizontal provisions within the Law of the Commissioner). However, they could be not sustainable in the longer perspective where the specificity of the matter increases and possible legal challenges of the Commissioner's competences arise. Therefore, **it is recommended** to include in the Law of the Commissioner a provision that the Commissioner approves the

[31] The supportive character would be more visible if the new Paragraphs would be placed as Paragraphs 5 and 6 instead of 6 and 7.

rules on investigation of individual complaints. The territorial, administrative particularities shall be taken into account when drafting those rules.

3.4.2. The Special Mandate of the Commissioner regarding Freedom of Information and the Right to Data Protection

110. The institution of the Ukrainian Parliament Commissioner for Human Rights is established by the Law of Ukraine on the Ukrainian Parliament Commissioner for Human Rights. The task of the Commissioner is defined in Article 1 of this law as the **permanent exercise of parliamentary control** over the observance of constitutional human and citizens' rights and freedoms and the protection of every individual's rights on the territory of Ukraine and within its jurisdiction. This competence is a general one, not limited to control in certain areas of state activities or concerning certain topics; a very relevant limitation is, however, intrinsic in the nature of "parliamentary control", which would have to *concentrate on state functions*.

111. The amount of special tasks vested into the Commissioner, because of his status as an independent authority, has been constantly enlarged by special laws and policies. Control over the observance of legislation on protection of personal data has been explicitly entrusted to the Commissioner by Article 22 of the Law on Personal Data Protection. Parliamentary control[32] over the observance of the right to access to public information was explicitly made a competence of the Commissioner by Article 3 of the Law on Access to Public Information. The following recommendations deal exclusively with the present competences of the Commissioner in the sphere of data protection and access to public information.

A. Recommendations concerning the Institutional Status of the Commissioner

112. The Commissioner is an independent institution established for the purpose of exercising parliamentary control. This task is focused on supervising public institutions with regard to their obeying human rights standards.

The task of a data protection supervisor is not specifically focussed on the proper functioning of public administration (and the judiciary); it is meant to deal with one specific aspect of modern life that is the automated processing of personal data wherever it applies, be it in the public or private sector. The means and procedures for executing the task of data protection supervision will therefore vary considerably from those used to safeguard good governance, particularly also concerning the way how infringements are to be prevented and/or sanctioned.

Hence, in Ukraine the idea has been discussed repeatedly, whether the Commissioner's functions targeted at promoting good administration should not be separated from the function of supervising data processing which has the purpose of safeguarding adherence to the right to data protection in all sectors, regardless of whether processing is taking place in the public or in the private sector.

European examples show that the special tasks of a data protection supervisory authority - sometimes combined with the function of supervising 'access to public information' - are entrusted to special institutions, which are not established in close connection with parliaments but rather as independent administrative bodies. It is true that it took quite a long time to develop a standard for how to organise supervision in

[32] Article 3(5) of the Law discerns between different kinds of control: parliamentary, civil and state control; the Commissioner is in charge of parliamentary control.

the area of data protection.[33] In European Union law, where the existence of such bodies was obligatory since 1995, a precise concept of their tasks and powers and consequently for their organisation has only recently been developed in Chapter VI of the General Data Protection Regulation which will come into force by May 25th 2018. These developments show that the trend goes towards establishing special organizations, evidently because of the growing complexity of the problems involved in the protection of the individual against the dangers of electronic data processing in times of general and complete connectivity and concentration of operational power in the hands of a few private 'giants'.

113. Under these circumstances, **it is recommended** to extract the tasks of a data protection supervisory authority from the present amount of tasks of the Parliamentary Commissioner for Human Rights and **establishing a new independent data protection authority**. As to the necessary tasks and powers the new model contained in Chapter VI of the EU General Data Protection Regulation might be useful as an example which would need, however, adaptation to the Ukrainian situation.

Realization of this recommendation would require the following changes in the legal framework of Ukraine:

- Alteration of Article 22 (1)(1) and Article 23 of the Law on Protection of Personal Data and, consequentially, of all provisions of the Law where the Commissioner is mentioned as competent authority (e.g. Article 2, Article 4(1), last indent, Article 8 (2)(8), Article 9, Article 18(1), Article 20 etc);
- Establishing the data protection supervisory authority as an independent authority within the executive state power under the Ukrainian Constitution.

114. Should the recommendation to establish a new independent data protection authority be taken into serious consideration, it stands to reason that also the competence to supervise access to information should be attributed in a new way. As is shown in the reports 1.1 and 1.2, the task to take care of access to public information is sometimes combined with the function of a data protection supervisory authority. This is evidently a workable solution, taken on by several states in Europe and overseas.

Whether it is advantageous to have a separate institution for access to information or whether it is better to join this task with the tasks of another independent institution, for instance that of a data protection supervisory authority, will mainly depend:

- on the amount of cases, which have to be covered per year;
- on the legal way, in which such cases are to be dealt with according to national law;
- and also on the amount of controversy, which these cases evoke in the society of a country.

Statistics on the workload show that access to information would justify the creation of a separate institution. On the other hand, from the point of view of the citizen, the means for assuring observance of the right to access are fairly similar to those used for enforcing data protection. Thus, it seems advantageous to entrust an institution

[33] Convention 108 does not even mention the special institutions of 'supervisory bodies' – it took until 2001, when the Additional Protocol to Convention 108 was adopted, to have such bodies recognized as essential for providing efficient data protection.

with supervising access, which has great experience in administering these means, as for instance a data protection supervisory authority. As concerns the controversial nature of the topics of access to information on the one hand and data protection on the other hand, it stands to reason that joining the tasks might favour public acceptance of decisions as they will usually be well balanced after having had regard to all foreseeable arguments pro and contra.

115. If a new and specialized independent institution is created for the purpose of acting as data protection supervisory authority, **it is also recommended to entrust it with the task of control[34] over the observance of the right to access to public information**.

Realization of this recommendation would require the following changes in the legal framework of Ukraine, i.e. the Law on Access to Public Information shall be revised in terms of the following legal provisions:

- Article 3 entrusting the Commissioner with the "parliamentary control";
- Article 11 containing a list of the parties involved;
- Article 16 about the exercise of the parliamentary control and Article 17 concerning the procedure;
- Chapter V on the procedures for appealing against information providers' decisions, actions, or lack thereof, but only concerning the denomination of the competent authority deciding about the appeal.

B. Recommendations concerning the Ukrainian Legal Framework for Data Protection

116. The rules of European data protection law are presently spelt out in new forms, although upholding the well-established principles[35]: In the European Union the new General Data Protection Regulation will come into force on May 25th of 2018, in the Council of Europe the Modernisation of Convention 108[36] has been finalised as concerns the text and awaits adoption. One of the goals mentioned in the EU-Ukraine Association Agreement is to bring data protection in the Ukraine to adequacy level when compared to the highest European and international standards.

117. Adaptation to the updated form of European data protection standards will make it necessary to revise the Ukrainian legal framework concerning data protection. Apart from possibly establishing a new data protection authority it will also be necessary to make adjustments in the substance of data protection law. The data protection legal framework in Ukraine consists mainly of the Law of Ukraine on Protection of Personal Data, from 2014, and of several decrees of the Ukrainian Parliament Commissioner for Human Rights, for instance concerning mandatory notification for high risk processing or concerning the exercise of control by the Commissioner over the Observance of legislation on personal data protection.

118. If this legal framework shall be brought in line with the new EU Data Protection Regime a complete overhaul of the existing data protection law seems advisable as it would provide the opportunity to bring the structure and the terminology of the legal provisions closer to the new EU data protection law. (There are concepts in the

[34] This control could then no longer be denominated as "parliamentary" control – it would, perhaps rather be part of what Article 3 of the Law on access to public information calls "state control".
[35] The GDPR does not deny or contradict the rules set up in the Directive 95/46/EC, but develops, enhances and also clarifies the existing rules in the light of technological progress, data digitalisation and globalisation
[36] The text is available in Council of Europe Document T-PD(2012)4Rev3_en. It seems well capable of again bringing in line the standards within Coe-law and EU law

Ukrainian data protection law which are entirely foreign to EU data protection law, such as “classified information” (Article 5 (2)), or “personal data access procedure by third parties” (Article 16)).

119. Therefore, **it is recommended to draft a new Law on the Protection of Personal Data.** This would mean in particular to:

1) revise the *definitions*; e.g. the definition *of “personal data”* is – at least in the translation – Inadequate;

2) join the provisions on the “subjects of relations connected to personal data” (Articles 2 and 4) with the definitions in Article 2:

   - Article 10 (1) should also be added to the definitions;
   - The same applies to Articles 12–15: the rules for collection, accumulation, dissemination, disclosure etc. are the same as for “processing” as such;
   - Rules on deletion (destruction, Article 15) of data are usually provided as a special principle of data protection (which should altogether be contained in Article 6) and also in provisions concerning the right of the data subjects to have data deleted (that would be in Article 8).

3) abolish the *concept of* “*classified information*” (Article 5): under European data protection standards all personal data are protected; they may be used only if, in a concrete case, an overriding legal interest in their use can be proved; what is an overriding legal interest for using data is finally regulated in Article 7 of Directive 95/46, respectively in Article 6 GDPR, should be finally regulated in Article 11 of the Ukrainian Law on the Protection of Personal Data;

4) abolish rules on a special *access procedure for third parties* (Article 16); Article 19(2) sounds as if it was thinkable that data are sold to third parties? That would be blatantly illegal according to European data protection standards. An unimpeded and free access to personal data for authorities within their mandate (Article 19(4)) does also not comply with European data protection standards;

5) find a better structure for presenting the *preconditions for processing in compliance with the law*:

   - the principles (limit the present Article 6 to true principles and make it a new Article 5 after abolishing “classified information”);
   - then name the general legal bases of processing (Article 11 should be changed to a new Article 6); include “disclosure” (Article 10(2) last sentence), as this is only a special form of processing;
   - then name the special legal bases for sensitive data in Article 7.

6) Bring the “*rights of the data subjects*” (Article 8) up to the latest standard, concerning terminology and content (e.g. concerning the “right to information” or the “right to object” and “the right to have data deleted”):

   - introduce the new “right to data portability” into the Ukrainian legal framework;
   - Article 20 (rectification) should be fused with Article 8;

- Article 21 should be fused with the right to information in Article 8; the notification obligations under Article 22 (3) seem unjustifiably broad – it would at least need adding "unless he has this information already";
- Concise and comprehensive rules are needed for the procedure of exercising a data subject's right vis à vis a controller especially also in the private sector! (e.g. what is meant to be "postponement"? There should be an explicit time limit for answering to a request; or: what is the necessary content of an answer to a request for access by the data subject?)

7) List the special *obligations of controllers*[37]:

At present:

- Article 9 (notification of processing to the DP authority): time may not be ripe yet in Ukraine for exchanging this system in favour of "impact (self-) assessment" by controllers; the notification system also takes risk into consideration;
- Article 24 contains elements of the controller's obligation to provide data security[38] but also elements which relate to the existence of a data protection officer. Both topics could be regulated in more detail and clarity.

In future:

- A clear and comprehensive statement about the accountability of the controller is needed including responsibility for data security;
- the obligation to notify data breaches (Art. 43 and 44 GDPR) should be added;
- an obligation to have regard to data protection by design and by default (Article 25 GDPR) should be added;
- an explicit obligation for controllers and processors to cooperate with the data protection authority might be useful (comparable to Article 31 GDPR).

8) the topic of *certification* (Article 42 and 43 GDPR) is not yet dealt with in the Ukrainian Law;

9) the *relationship between controller and processor* should be regulated more extensively – at present there is only Article 4 (4) and (5);

10) *transborder data flow*: provisions are missing on how a controller of personal data can provide "relevant guarantees of non-interference in private and family life of the personal data subject" in case of transborder data flow – contractual clauses and binding corporate rules should be mentioned and defined;

11) The *Law* on Protection of Data does not contain any provisions on what is an *infringement* which triggers fines. Having some provision in the Law on Citizens' Appeals is not enough, as data protection infringements can be found by the authority also outside a complaint and should then be nevertheless eligible for fines.

[37] The translation available in the Internet contains in Article 24 several references to the "possessors of data" - is this just an error and is it meant to be "processor"?
[38] Mentioning third parties in this context is unusual.

C. Recommendations concerning the Ukrainian Legal framework for Right of Access to Information

120. The right of access to information and/or official documents held by public authorities all over Europe is recognised as a self-standing right aimed at reinforcing transparency in the conduct of public affairs. States recognize that genuine advocacy of improved public administration and fight against corruption must entail transparency in the work of public authorities. The right to seek and receive information is also seen as an essential element of the right to freedom of expression, which encompasses the general right of the public to have access to information of public interest, the right of individuals to seek information concerning themselves that may affect their individual rights and the right of the media to access information[39].

121. The right to seek information is expressly guaranteed by Article 10 of the ECHR, Article 11 of the EU Charter of Fundamental Rights, Article 19 of the 1966 International Covenant on Civil and Political Rights, as well as Article 19 of the UN Universal Declaration. The adoption in 2009 of the Council of Europe Convention on Access to Official Documents[40] (still ratified just by few states) confirms a continuous evolution towards the recognition of the State's obligation to provide access to public information. Furthermore, in the EU context, Article 42 of the European Union's Charter of Fundamental Rights as well as Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents guarantee to citizens a right of access to documents held by the EU institutions.

122. In Ukraine, the right of access to information is regulated by the Law on Access to Public Information. Welcoming the existence of a separate and detailed law, the expert team, however, considers that the Law should be updated bringing it closer to the standards of international instruments mentioned above as well as other standards common to European states. Below, certain areas within the ambit of the Law are discussed in more detail offering recommendations as to possible improvement.

1) Commissioner's tasks in relation to supervision of the right to access public documents

123. Under Article 17(1) of the Law on Access to Public Information (*Control over the access to public information*) parliamentary control over the observance of human rights to access to information is carried out by the Ukrainian Parliament Commissioner for Human Rights, temporary investigating commissions of the Verkhovna Rada of Ukraine, people's deputies of Ukraine. Under Article 17(3) state control over the provision of access to information by information processors is carried out in accordance with the law.

124. As it was noted in the Report prepared under Activity 1.1 (Section III.4.2. The Right to Access Public Information), 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, moreover, it was suggested removing certain powers, which are now assigned to the Commissioner.

[39] See, Report of the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression to the General Assembly on the right to access information, published on 4 September 2013 (A/68/362)
[40] https://rm.coe.int/1680084826

This in particular relates to the Commissioner's right to draw up a protocol in cases of breach of the right to access to public information. Later, this protocol might result in administrative sanctions (Article 188-40 of the Code of Administrative Offenses of Ukraine, establishing that failure to comply with legal requirements of the Ukrainian Parliament Commissioner for Human Rights entails a penalty for officials and entrepreneurs in the amount from 100 to 200 untaxed minimum incomes of citizens; and Article 212-3 of the Code, which specifies fines for the violation of the right to information). The question which was raised by the experts is why this right is delegated to body exercising parliamentary control over the observance of the right to access to public information. It was considered that it should better be removed from the mandate of the Commissioner.

125. The experts **suggest** that a following approach should be taken. Firstly, according to the model suggested by the experts (see Section 3.1. Review of Administrative Actions of this Report), the Commissioner would firstly have a power to issue recommendation on improvement of situation (пададня) in the area of access to public information and, secondly, in case the recommendations are not fulfilled, the Commissioner should have a power to issue administrative act with administrative sanctions in it. Accordingly, it is suggested that the right of the Commissioner to issue administrative protocol (Протокол об административном правонарушении) is removed and the rules on liability are established in the Law on Access to Public Information.

2) Regarding structure of the Ukrainian Law on Access to Public Information

126. The structure of the Ukrainian Law on Access to Public Information could be improved. The law starts with general provisions (Section I), then regulates procedure of access to public information (Section II), while many definitions, beneficiaries and the scope of the law are contained only in Section III. This makes it hard to use and understand the law.

127. The Ukrainian Law on Access to Public Information should be re-structured. **It is recommended** that the law started by defining its purpose, principles, defining beneficiaries and scope of its application (listing institutions/bodies, to whom this law applies). Then the definitions should be presented (document, applicant, publication of document, etc.). A special section could also be dedicated to the exceptions (when institutions may refuse access to a document – information with restricted access, confidential, secret information, etc.) and treatment of sensitive documents. Later on, the law should continue with rules on submitting and processing applications to access to public documents and appeal procedure.

3) The reuse of public information

128. The Ukrainian Law on Access to Public Information is very brief about the reuse of public information. However, during the meetings the representatives of the Commissioner have identified, that it is common that information received is used for other purposes from those to which the information was initially meant, causing questions as to the legality of the reuse as well as issues on personal data protection. It should be noted that guidelines for such amendment of the law could be found in European Directive on Reuse of Public Sector Information (2013/37/EU)[41].

[41] See also 2014/C 240/01 "Guidelines on recommended standard licences, datasets and charging for the re-use of documents". It should be noted that the Directive focuses on the economic aspects of re-use of information

129. Thus, **it is recommended** establishing a legislative framework for open data and reuse of public sector information (mirroring the provisions of the European Directive on Reuse of Public Sector Information). It could be incorporated as a separate section in the Ukrainian Law on Access to Public Information.

4) Means of providing access to information

130. Article 5 of the Ukrainian Law on Access to Public Information ("Providing access to information") establishes that access to information is ensured by: (i) systematic and prompt publication of information and (ii) provision of information on the requests for information. As to proactive publication of information, the law states that this might be done in official publications; on official web-sites in the internet; on the unified state web-portal of open data; at the information stands; in any other way. During the meetings, the representatives of the Commissioner have identified that not all state institutions and bodies, especially in regions have their webpages.

This is not in line with general European trend, where having a webpage is often seen as a duty of state institutions or bodies (for example, in Lithuania there is a special law establishing such duty and listing requirements for such webpages[42]). Having constantly updated webpages enable citizens to exercise their right to access to public information more properly and efficiently.

131. Under these circumstances, **it is recommended** to supplement Article 5 of the Ukrainian Law on Access to Public Information by establishing a duty of state and municipal institutions and other bodies to have and regularly update their webpage (duty of active publishing of public information by the institutions). In addition, a separate legal act could be drafted by the government setting the requirements for such webpages (or amending the existing Article 15 of the Law).

132. In order to reduce the number of access to information requests for information that is already available on the websites of public institutions, the Ukrainian Law on Access to Public Information **should be supplemented** with the provision stating, that in case the requested information is published online, only reference to it should be provided by the requested institution.

5) Time limit for consideration of requests for information

133. In accordance with Article 20 of the Ukrainian Law on Access to Public Information, the information processor shall give a response to the request for information no later than in five working days from the date of the receipt of the request. This is a very short time and it might be very problematic for institutions/bodies to respond so promptly. In Lithuania, for example, the law allows 20 working days for an institution to handle the request, while the EU regulation in this area[43] allows 15 working days for this purpose. In exceptional cases (in the event of an application relating to a very long document or to a very large number of documents) the time limit may be extended (plus 20 days in Lithuania, plus 15 days for EU institutions).

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rather than on the access of citizens to information. It encourages to make as much information available for re-use as possible.

[42] (in Lithuanian) Dėl Bendrųjų reikalavimų valstybės ir savivaldybių institucijų ir įstaigų interneto svetainėms aprašo patvirtinimo. Valstybės žinios, 2003-04-24, Nr. 38-1739

[43] Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, Article 7.

134. Thus, the Ukrainian Law on Access to Public Information should be amended to establish more reasonable time limits to handle requests for information.

6) Costs of the provision of information

135. The Article 21 of the Ukrainian Law on Access to Public Information states that information upon request is provided free of charge. However, if the reply to the request for information involves making copies of documents in volume more than 10 pages, requester shall reimburse the actual costs of copying and printing. It should be noted that such provision does not provide any possibility to refuse the repeated requests from the same subject and allows to receive much more pages by submitting separate requests.

136. One should consider amending the Ukrainian Law on Access to Public Information to limit the abuse of right by submitting repeated requests and thus avoiding payment for printing/copying. In addition, it is suggested including in the law a provision stating that as much as possible priority should be given to provision of information using internet and electronic resources.

7) Limitations to access to information

137. The Ukrainian law does not provide the sufficient mechanisms to deal with frivolous or vexatious requests, this also applies to the Commissioner's Office. The comparative analysis on dealing with this question in other states was performed in the Report prepared under the Activity 2.1.3.

138. Article 22 of the Ukrainian Law on Access to Public Information should be supplemented to allow authority to decline to process requests that are frivolous or vexatious or when it is impossible to clearly identify the person submitting request.

Key Recommendations and Proposals

As stated above, this report essentially reflects general legal concerns and recommends establishing or further strengthening, as the case may be, a coherent and comprehensive framework for the legal regulation of the Commissioner's activities. The following recommendations and proposals seek to address the legal issues encountered by the Commissioner's institution and provide advice and guidance in the form of particular suggestions on how to amend the existing legal regulation to bring it more closely in line with European standards. The proposals made in this document are by no means exhaustive. Nor are they intended to determine the only way forward to strengthen the Apparatus of the Commissioner. Therefore, the following recommendations and proposals are subject to further revision if this proves necessary following the upcoming stakeholder consultations and discussions.

PROPOSAL NUMBER 1 – Promotion of the Right to Good Administration

1. It is recommended to establish in the Law of the Commissioner that the promotion of the right to good administration is one of the fundamental functions of the Commissioner. In doing so, it is proposed to:

   1.1. supplement the legal provisions of the Law of the Commissioner, which describe the purposes of the parliamentary control exercised by the Commissioner, and to include the additional purpose in Article 3: *"8) to promote and protect a person's right to good public administration thereby contributing to securing human rights and freedoms and to supervise fulfilment by state authorities of their duty to properly serve the people"*;

   1.2. incorporate the right to good administration into national legislation, stating at least a minimum standard, based on definition in Article 41 of the Charter of Fundamental Rights of the European Union;

   1.3. adopt a Code of Good Administrative Behaviour, which provides guidance on practical steps towards greater effectiveness, transparency and accountability of the state authorities.

PROPOSAL NUMBER 2 – Strengthening the Independence

2. Whereas the Commissioner must perform his duties with complete independence and in order to dismiss any reasonable doubt as to the neutrality and the imperviousness of the Institution to external factors, it is recommended to establish few measures, which could prevent interference in the activities of the Commissioner and strengthen the legal status of the Institution. Those guarantees of independence and impartiality require amending certain rules, particularly as regards the appointment procedure, immunity, social guarantees, accountability, and the grounds for dismissal, namely it is recommended to:

A. As regards appointment procedure:

   2.1. establish that only persons of good repute and experience and proof of no previous corruption may be nominated as candidates to the post of the Commissioner;

   2.2. improve the current legal regulation by providing greater transparency in the nomination process and enhancing the participation of civil society;

2.3. amend the legal regulation, in terms of voting procedure, in order to remove confusing and inconsistent provisions, which are set out in the Law of the Commissioner and the Rules of Procedure of Verkhovna Rada;

2.4. revise the legal framework related to the number of votes required in the Parliament for a decision on appointment to be adopted;

2.5. secure the practice that, save in the event of the dismissal, the Commissioner shall remain in office until his successor takes up his duties by establishing it directly in the law.

B. As regards immunity and social guarantees:

2.6. establish that after the Commissioner has ceased to hold office, he shall continue to enjoy immunity in respect of acts performed by him in his official capacity, including words spoken or written. It is also recommended to establish in the law that the functional immunity is applied not only to the Commissioner but also to the personnel of the Institution;

2.7. establish in the Law of the Commissioner that in terms of remuneration, allowances and pension, the Commissioner has the same rank as a judge at the Constitutional Court or other high rank official of the state.

C. As regards accountability of the Institution:

2.8. revise the current legal regulation in order to confer on the Commissioner the right to be heard, participate in the debates before the parliament and to present its findings and recommendations. It shall be established 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;

2.9. extend the scope of annual reports and include information of a general and operational nature of the Institution itself in order to raise the awareness of the purpose and tasks of the Commissioner, enhance the confidence in their activities and promote protection of human rights and freedoms. Should this prove necessary, a briefer and user-friendly version of report shall be prepared.

D. As regards the dismissal procedure:

2.10. improve the overall quality of Article 9 of the Law of the Commissioner concerning the grounds for dismissal. Overly long paragraphs should be avoided, in particular legal uncertainty surrounding voting on dismissal procedures shall be removed;

2.11. draft amendments to replace the vague term of “violation of the oath” with a more qualified wording and to clarify that only serious misconduct provides a legal basis for the cessation of the duties;

2.12. draft amendments to replace automatic termination of Commissioner’s tenure following “a verdict of guilty”, irrespective of its nature and gravity, with a more qualified wording;

2.13. establish an increased majority to dismiss the Commissioner. The majority of votes required for termination should be preferably higher than the majority required for appointment. In order to guarantee transparency in the process of the dismissal of the Commissioner, a procedure for dismissal should also involve judiciary for giving an

opinion on whether the Commissioner no longer fulfils the conditions required for the performance of his duties or is guilty of serious misconduct.

E. As regards organisational framework:

2.14. the law should explicitly stipulate, as a general principle, that the budgetary allocation should be adequate to the need to ensure full, independent and effective discharge of the tasks of the Institution. For these reasons, it is recommended that the legal provisions of the Law of the Commissioner establish that the Government shall include the Commissioner's draft proposal into the draft budget submitted to the Parliament without any changes. The Commissioner should also be demanding the right to be consulted when the final decision is made on the annual funding by the legislator;

2.15. it might also be appropriate to consider additional safeguards such as the principle 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 Parliament, President and Government is reduced;

2.16. the budget of the Institution should include both the State allotments and other funding that ensure the independence of the Institution and the proper fulfilment of its tasks. All the incomes and expenses should correspond to the tasks and activities of the institution based on the legislation and should be assessed in their strategic and /or annual plans;

2.17. it is recommended that the amendments to the Law of the Commissioner introduce legal provisions for the activities of the deputy of the Commissioner and the right of the Commissioner to establish the regional units. It is also recommended to amend the wording of the existing legal regulation and to spell out the functions of the Secretariat in a sufficiently precise manner as to fully empower it. Nevertheless, the right to define the scope and operating principles of the regional set-up should be maintained for the Commissioner. Such legal provisions provide a legal basis for adequate financing of the personnel and the premises in regions as well as give clarity about the expenses for them. It is also expedient to separate the expenses for the representatives as well as for the deputy and regional units in the budget plan of the Commissioner, which is produced for the Parliament decision. The expenses for the board of advisers and experts service should be provided from the budget too.

PROPOSAL NUMBER 3 – Enhancing Efficiency of Complaint Handling Procedure

3. In order to simplify and harmonise legal rules for investigation of individual complaints, it is necessary to revise the Law of the Commissioner and to clarify its relationship with other laws. Principal legal rules of administrative procedure shall be established in the Law of the Commissioner. Meanwhile, the rules of procedure set out in other laws shall be considered as special legislation (*lex specialis*) vis-à-vis the Law of the Commissioner only where particular reference is made in this Law. It is also recommended to exclude the Commissioner's activities from the scope of the Code of Administrative Offences and the Law on the Citizens' Appeals. Such clarification in the law would provide legal certainty on the applications dealt by the Commissioner and would thereby improve the compatibility of diverse procedural rules, which are currently scattered over several laws.

4. Greater harmonisation could be also achieved by developing procedural rules via soft law. A soft law (internal law) that provides specific rules how this principle should be applied should be adopted. Adopting soft law measures with regard to the principle of good administration only will facilitate application of the procedural safeguards in any administrative procedure and decrease the likelihood of divergent approaches in different laws, giving rise to regulatory uncertainty and inefficiency of handling individual complaints.

5. For reasons of efficiency, it is also recommended to clarify the content and the scope of the provisions on investigation of individual complaints. Supplementing the legal regulation with the legal provisions concerning the formal steps of submission of complaint and their requirements, extending the grounds for refusal to investigate particular complaints, setting out appropriate time limits to investigate complaints, developing good practice on the duty to state reasons are few measures, which could enhance the overall effectiveness of complaint handling.

   In addition to this, types of acts adopted by the Commissioner shall be revised. Under a general rule, the Commissioner shall adopt a final act of investigation with a non-legally binding character. For the sake of clarity, this characteristic (nature of recommendation) shall be established explicitly in the law. Nevertheless, it is suggested that the power of the Commissioner to issue acts on established violations of human rights was more efficient if it was accompanied by a special duty conferred on the public authority to inform the Commissioner about the measures taken to remedy the situation in due time.

   Having regard to the executive powers given to the Commissioner in special areas of law, it is recommended to foresee in the Law on Data Protection, the Law on Access to Public Information and the Law on Equal Opportunities the second type of final acts of the Commissioner following the investigation of individual complaints, i.e. legally binding administrative acts imposing legal sanctions.

PROPOSAL NUMBER 4 – Promoting Sound Public Administration via Mediation

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

PROPOSAL NUMBER 5 – Strengthening the Relationship with the Legislator

7. In order to confer on the Commissioner the right to legislative initiative at any time when in the course of the exercise of their jurisdiction this proves to be necessary rather than waiting for the annual report to make use of this right, 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.

8. It is also recommended to amend the Law of the Commissioner by expressly introducing the right of the Commissioner to participate in parliamentary sessions and meetings, the meetings at the Government and other state institutions where matters of human rights are discussed.

PROPOSAL NUMBER 6 – Access to Justice

A. Normative Control before the Constitutional Court

9. The absence of limitations on the Commissioner's right to apply to the Constitutional Court may sometimes result in constitutional submissions by the Commissioner on the issues that do not fall within their competence. This limitation shall be either explicitly provided or established in practice. Therefore, the Constitution can be interpreted in the practice of the Constitutional Court by restricting the power of the Commissioner to apply to the Constitutional Court only to the issues falling within the competence of the Commissioner. It can also be set out in the Law on the Constitutional Court of Ukraine (Article 52) or in the Law of the Commissioner (Articles 13(3) and 15).

10. The current legal framework lacks certainty with regard to time limits for consideration of constitutional submissions. Under these circumstances, it is proposed to establish a general time limit for the announcement of the final acts of the Constitutional Court of Ukraine in the proceedings.

11. No order of priority for hearing the cases is established in the Constitutional Court. That gives for the Court unlimited discretion to set its own order of hearing that can be determined without any objective criteria. Therefore, it is also recommended to supplement the Law on the Constitutional Court (or, as an alternative, the Regulations of the Court) with special provisions regarding the priority of hearings.

B. Normative Control before Administrative Courts

12. Current legal framework relates the Commissioner's right to apply to administrative courts in order to challenge normative (regulatory) legal acts to the fact that application is made by the subject of the legal relationships, in which this act will be applied. Nevertheless, there are no compelling reasons, which would support a conclusion that the Commissioner's right to apply to administrative courts in order to challenge regulatory acts shall be made depended on an individual complaint and adversely affected legal interests of particular private parties. Therefore, it is recommended that the Commissioner should have a direct right to take action in order to challenge regulatory legal acts before administrative courts. Similarly to the applications to the Constitutional Court, the request to review the legality of certain regulatory legal acts shall be limited to the issues falling directly into the competence of the Commissioner.

C. Defence of Public Interest

13. It is proposed to consider establishing a legal regulation that would entrust the Commissioner to apply to courts specifically in cases regarding the defence of public interest (*popularis actio*). The objective of this proposal is to establish a legal framework, which entitles the Commissioner to act independently. This would be particularly relevant where revealed irregularities are considered to be of a systemic character. In order to provide an adequate legal framework to implement the aims of the ombudsperson institution, adopting legal provisions regarding the defence of public interest before courts indeed could contribute to enforcing human rights legislation independently of individual complaints filed with the Commissioner. This, in turn, could shift the Commissioner's fragmented efforts in protecting individual interests to cohesive and coordinated approach towards strategic goals on human rights protection.

PROPOSAL NUMBER 7 – Limitations to the Commissioner's Role in Legal Representation

14. 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, it is recommended to remove the overlapping between Ukrainian legal aid system and Commissioner's jurisdiction. Instead of dealing with complaints or representing interests of applicants before courts, the main part of Commissioner's work should be devoted to the monitoring and supervision of work of legal aid system institutions to the extent of their compliance with the right to good administration and prevention of abuse of powers or bureaucracy.

PROPOSAL NUMBER 8 – Limited Intervention into Judicial Proceedings

15. The existing legal regulation shall be revised in order to prevent the Commissioner from intervening into judicial proceedings and, above all, questioning the soundness of court decisions. It is a well-established international standard and practice in Europe to limit the ombudspersons activities in the sphere of judicial activities. In such cases, the correction of possible errors is entrusted to the judicial system consisting of courts of lower, higher and final instances. In addition to this, the functioning of judiciary, including disciplinary proceedings, is supervised by autonomous institutions such as the Judicial Council or similar, which are entitled to assess the actions of judges or their inaction.

    Thus, in general terms, it would be preferable for the Commissioner to retain the power to make general recommendations about the functioning of the courts (as regards administration and management of the courts) and exclude or limit the power to interfere into individual proceedings. To this end, it is recommended to amend the legal provisions of the Law of the Commissioner, specifically Article 13(10)(2) and (3). In this respect, two approaches and accordingly two options may be considered:

    A. Restrictive approach concerning the supervision of judiciary shall mean a withdrawal of legal norms, which establish essentially unlimited possibility to intervene in any judicial proceedings. By ensuring clear boundaries regarding the relationship between the Commissioner and courts, this option would attain better respect for the rule of law, including the balance of institutional powers and a full compliance with international standards and prevailing European practices.

    B. A less stringent approach would be to amend the legislation accordingly to enable the Commissioner to act within the sphere of judicial activities only in cases that raise issues affecting human rights and freedoms from a viewpoint of functioning of the courts or procedural law. In the latter case, it would be appropriate to establish a legal regulation that limits the Commissioner's mandate to the supervision of judicial proceedings of undue delay or evident abuse of authority. This option is suggested bearing in mind the peculiarities of the initial model of the ombudsperson's institution opted as suitable to Ukraine and undergoing transitional period leading to completion of judicial reforms.

PROPOSAL NUMBER 9 – Harmonisation of Equality Laws

16. The mandate of the Commissioner in the field of gender equality is differently stipulated in two laws, namely the Law on Ensuring Equal Rights and Opportunities of Women and

Men of 2005 and the Law on Principles of Prevention and Combating Discrimination of 2013, which is aimed at banning discrimination on numerous grounds (including sex). It is therefore recommended to consider two options:

A. To integrate the Law of 2005 on gender equality into the more general antidiscrimination Law of 2013 and to provide a single set of Articles on the mandate of the Commissioner instead of currently existing two articles in two different acts (Article 9 of the Law of 2005 and Article 10 of the Law of 2013); or

B. To continue with the practice of application of double legislation of Anti-Discrimination Act and a Gender Equality Act with an attempt to reconcile the texts and competence provisions of both laws.

17. Having regard to the special character of the covered relationship and political and social-legal importance, it is recommended that the general mandate of the Ombudsperson in the equality area to be stipulated in the Law of the Commissioner and the equality-specific competences of the Commissioner should be regulated in the Law on Ensuring Equal Rights and Opportunities of Women and Men of 2005 and the Law on Principles of Prevention and Combating Discrimination of 2013.

18. It is recommended proceeding with the planed legislative changes (the draft Law No 3501 of 20 November 2015) as they create strong and solid basis for tribunal-type equality body. It is strongly recommended that the mandate of the Commissioner included the duty to "*provide individual assistance to victims of discrimination in pursuing their complaints about discrimination*" and competence "*to conduct independent surveys concerning discrimination*", as it is foreseen in the Directive 2006/54.

PROPOSAL NUMBER 10 – Data Protection and Access to Public Information

19. The means and procedures for executing the task of data protection supervision may vary considerably from those used to safeguard good governance, particularly also concerning the way how infringements are to be prevented and/or sanctioned. Therefore, it is recommended to extract the tasks of a data protection supervisory authority from the present amount of tasks of the Commissioner and establish a new independent data protection authority. This body should also be entrusted with the task of control over the observance of the right to access to public information. Joining the tasks might favour public acceptance of decisions as they will usually be well balanced after having had regard to all foreseeable arguments pro and contra.

20. Having regard to the updated form of European data protection standards, it is necessary to revise the Ukrainian legal framework concerning data protection. It is recommended to draft a new Law on the Protection of Personal Data, revising certain definitions and paying attention in particular to the preconditions for processing in compliance with the law, the rights of the data subjects and special obligations of controllers, the topic of certification, the relationship between controller and processor, the transborder data flow, the content of data protection infringements and other relevant legal aspects.

21. In the sphere of access to information, it is recommended that the Law on Access to Public Information should be updated bringing it closer to the standards of international instruments as well as other standards common to European states. First of all, overall structure of the Ukrainian Law on Access to Public Information could be improved. The legal rules concerning the reuse of public information, means of providing access to

information, time limit for consideration of requests for information, costs of the provision of information, and limitations to access to information shall be also revised.

Particular attention shall be paid to the Commissioner's tasks in relation to the supervision of the right to access public documents. It is recommended that the Commissioner would firstly have a power to issue recommendation on improvement of situation in the area of access to public information and, secondly, in case the recommendations are not fulfilled, the Commissioner should have a power to issue administrative act with administrative sanctions in it. Accordingly, it is suggested to remove the right of the Commissioner to issue administrative protocol and to establish the rules on liability in the Law on Access to Public Information.