

# “European Union and the Council of Europe working together to strengthen the Ombudsperson’s capacity to protect human rights”

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## Legal opinion

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## **Comments on the DRAFT LAW OF UKRAINE On the National Commission for Personal Data Protection and Access to Public Information**

### Table of Contents

<b>1 Introduction.....</b>	<b>2</b>
<b>2 Independence as defined in Convention 108+ and appeal possibilities as defined in Tromsø Convention .....</b>	<b>3</b>
2.1 Explanatory Memorandum of Convention 108+ .....	3
2.2 Explanatory memorandum - Convention on access to public information – Tromsø convention .....	8
<b>3 Comments of the draft law .....</b>	<b>9</b>
3.1 Article 2. Status of the National Commission for Personal Data Protection and Access to Public Information .....	9
3.2 Article 4. Forms of activities, responsibilities, powers, and rights of the National Commission .....	11
3.3 Article 6. Guaranteed Independence of the National Commission.....	12
3.4 Article 8. Requirements for membership of the National Commission.....	14
3.5 Article 9. Competition to appoint members of the National Commission .....	15
3.6 Article 11. The Chair of the National Commission .....	16
3.7 Article 15. The National Commission Inspectorate Service .....	16
3.8 Article 17. Disciplinary Commission of the National Commission .....	17
3.9 Article 19. Remuneration of the Chair of the National Commission, members of the National Commission and staff members (employees) of the National Commission Staff.....	17
3.10 Article 23. Reports to the National Commission.....	18
3.11 Article 29. Participants of the proceedings conducted by the National Commission .....	18

<b>3.12 Article 30. Rights and obligations of the participants and parties to the proceedings of the National Commission .....</b>	<b>19</b>
<b>3.13 Article 36. Handling of cases by the National Commission.....</b>	<b>19</b>
<b>3.14 Article 46. Procedure for conducting inspections .....</b>	<b>21</b>
<b>3.15 Chapter VIII. Final and transitional provisions.....</b>	<b>21</b>
<b>4 CV of the expert.....</b>	<b>22</b>

## 1 Introduction

As a legal expert in data protection and access to public information I was asked to review the Draft of Ukrainian law on “**National Commission for Personal Data Protection and Access to Public Information**”. This Draft law establishes the status, authority, responsibilities, organizational principles, and rules of procedure of the National Commission for Personal Data Protection and Access to Public Information.

In the analysis I focused on compliance with Convention 108 for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108)<sup>1</sup>, Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data regarding supervisory authorities and transborder data flows<sup>2</sup> and Convention 108 +<sup>3</sup>, all covering data protection, and The Council of Europe Convention on Access to Official Documents (CETS No. 205), also known as the *Tromsø Convention*<sup>4</sup>, which entered into force on 1 December 2020, in respect of Bosnia and Herzegovina, Estonia, Finland, Hungary, Lithuania, Montenegro, Norway, the Republic of Moldova, Sweden and Ukraine. Tromsø Convention is the first binding international legal instrument which recognises a general right of access to official documents held by public authorities, the Tromsø Convention hence constitutes a milestone in the promotion of democratic governance, openness, participatory democracy and in the exercise of other human rights and fundamental freedoms.

Where I think the concrete act is not in compliance with Council of Europe convention, my remarks are named »recommendation« and where I found possible other legal shortcomings I marked them as »comment«.

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<sup>1</sup> Available at <https://www.coe.int/en/web/data-protection/convention108-and-protocol>, viewed on January 22, 2022.

<sup>2</sup> Available at <https://rm.coe.int/1680080626>, viewed on January 18, 2022.

<sup>3</sup> The modernised Convention 108 + was not put into force yet.

<sup>4</sup> Available at <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatyenum=205>, viewed on January 22, 2022.

## 2 Independence as defined in Convention 108+ and appeal possibilities as defined in Tromsø Convention

Main focus of my review was on independency of the data protection supervisory body as defined in additional protocol of Convention 108 and in modernised Convention 108 +. It needs to be stressed that Convention 108 + was not put into force yet. It will enter into force on 11 October 2023, provided that at least 38 States Parties have ratified the Protocol by this date.

### 2.1 Explanatory Memorandum of Convention 108+<sup>5</sup>

Modernised Convention 108+ aims at ensuring the effective protection of individuals by requiring the Parties to provide for one or more independent and impartial public supervisory authorities that contribute to the protection of the individuals' rights and freedoms about the processing of their personal data. The explanatory memorandum was followed when evaluating the task entrusted to me.

#### **Chapter IV – Supervisory authorities**

#### **Article 15 – Supervisory authorities**

#### **Paragraph 1**

*Each Party shall provide for one or more authorities to be responsible for ensuring compliance with the provisions of this Convention.*

This article aims at ensuring the effective protection of individuals by requiring the Parties to provide for one or more independent and impartial public supervisory authorities that contribute to the protection of the individuals' rights and freedoms with regard to the processing of their personal data. Such authorities may be a single commissioner or a collegiate body. In order for data protection supervisory authorities to be able to provide for an appropriate remedy, they need to have effective powers and functions and enjoy genuine independence in the fulfilment of their duties. They are an essential component of the data protection supervisory system in a democratic society. In so far as Article 11, paragraph 3, applies, other appropriate mechanisms for independent and effective review and supervision of processing activities for national security and defence purposes may be provided for by the Parties.

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<sup>5</sup> Available at <https://rm.coe.int/convention-108-convention-for-the-protection-of-individuals-with-regar/16808b36f1>, viewed on January 22, 2022.

Paragraph 1 clarifies that more than one authority might be needed to meet the particular circumstances of different legal systems (e.g. federal States). Specific supervisory authorities whose activity is limited to a specific sector (electronic communications sector, health sector, public sector, etc.) may also be put in place. This also applies to the processing of personal data for journalistic purposes if it is necessary to reconcile the right to the protection of personal data with the right to freedom of expression. The supervisory authorities should have the necessary infrastructure and financial, technical and human resources (lawyers, IT specialists) to take prompt and effective action. The adequacy of resources should be kept under review. Article 11, paragraph 3 allows for exceptions to the powers of supervisory authorities with reference to processing activities for national security and defence purposes (where such exceptions apply, other paragraphs of this article may as a consequence not be applicable or relevant). This is however without prejudice to applicable requirements in relation to the independence and effectiveness of review and supervision mechanisms.

## **Paragraph 2**

*To this end, such authorities:*

- a) shall have powers of investigation and intervention;*
- b) shall perform the functions relating to transfers of data provided for under Article 14, notably the approval of standardised safeguards;*
- c) shall have powers to issue decisions with respect to violations of the provisions of this Convention and may, in particular, impose administrative sanctions;*
- d) shall have the power to engage in legal proceedings or to bring to the attention of the competent judicial authorities violations of the provisions of this Convention;*
- e) shall promote:*
  - i. public awareness of their functions and powers as well as their activities;*
  - ii. public awareness of the rights of data subjects and the exercise of such rights;*
  - iii. awareness of controllers and processors of their responsibilities under this Convention;**specific attention shall be given to the data protection rights of children and other vulnerable individuals.*

Parties have a certain amount of discretion as to how to set up the authorities for enabling them to carry out their task. According to paragraph 2, however, they must have, subject to the possibility to provide for exceptions in line with Article 11, paragraph 3, at least the powers of investigation and intervention and the powers to issue decisions with respect to violations of the provisions of the Convention. The latter may involve the imposition of administrative sanctions, including fines. Where the legal system of the Party does not provide for administrative sanctions, paragraph 2 may be applied in such a manner that the sanction is proposed by the competent supervisory authority and imposed by the competent

national courts. In any event, any sanctions imposed need to be effective, proportionate and dissuasive.

The authority shall be endowed with powers of investigation, subject to the possibility to provide for exceptions in line with Article 11, paragraph 3, such as the possibility to ask the controller and processor for information concerning the processing of personal data and to obtain it. By virtue of Article 15, such information should be made available, in particular, when the supervisory authority is approached by a data subject wishing to exercise the rights provided for in Article 9. The latter is subject to exceptions of Article 11, paragraph 1.

The supervisory authority's power of intervention, provided for in paragraph 1, may take various forms in the Parties' law. For example, the authority could be empowered to oblige the controller to rectify, delete or destroy inaccurate or illegally processed data on its own account or if the data subject is not able to exercise these rights personally. The power to take action against controllers who are unwilling to communicate the required information within a reasonable time would also be a particularly effective demonstration of the power of intervention. This power could also include the possibility to issue opinions prior to the implementation of data processing operations (where processing presents particular risks to the rights and fundamental freedoms, the supervisory authority should be consulted by controllers from the earliest stage of design of the processes), or to refer cases, where appropriate, to relevant competent authorities.

Paragraph 2,e. deals with the awareness raising role of the supervisory authorities. In this context, it seems particularly important that the supervisory authority proactively ensures the visibility of its activities, functions and powers. To this end, the supervisory authority must inform the public through periodical reports (see paragraph 131). It may also publish opinions, issue general recommendations concerning the correct implementation of data protection rules or use any other means of communication. Moreover, it must provide information to individuals and to data controllers and processors about their rights and obligations concerning data protection. While raising awareness on data protection issues, the authorities have to be attentive to specifically address children and vulnerable categories of persons through adapted ways and languages.

The Parties should give the supervisory authority the power either to engage in legal proceedings or to bring any violations of data protection rules to the attention of the judicial authorities, subject to the possibility to provide for exceptions in line with Article 11 paragraph 3. This power derives from the power to carry out investigations, which may lead the authority to discover an infringement of an individual's right to protection. The Parties may fulfil the obligation to grant this power to the authority by enabling it to make decisions.

### **Paragraph 3**

*The competent supervisory authorities shall be consulted on proposals for any legislative or administrative measures which provide for the processing of personal data.*

As provided for under paragraph 3, supervisory authorities are, in accordance with the applicable national law, entitled to give opinions on any legislative or administrative measures which provide for the processing of personal data. Only general measures are meant to be covered by this consultative power, not individual measures. In addition to this consultation foreseen under paragraph 3, the authority could also be asked to give its opinion when other measures concerning personal data processing are in preparation, such as for instance codes of conduct or technical norms.

#### **Paragraph 4**

*Each competent supervisory authority shall deal with requests and complaints lodged by data subjects concerning their data protection rights and shall keep data subjects informed of progress.*

Moreover, according to paragraph 4 every data subject should have the possibility to request the supervisory authority to investigate a claim concerning his or her rights and liberties in respect of personal data processing. This helps to guarantee the right to an appropriate remedy, in keeping with Articles 9 and 12. The necessary resources to fulfil this duty should be provided. According to their available resources, the supervisory authorities should be given the possibility to define priorities to deal with the requests and complaints lodged by data subjects.

#### **Paragraph 5**

*The supervisory authorities shall act with complete independence and impartiality in performing their duties and exercising their powers and in doing so shall neither seek nor accept instructions.*

Paragraph 5 clarifies that supervisory authorities cannot effectively safeguard individual rights and freedoms unless they exercise their functions in complete independence. A number of elements contribute to safeguarding the independence of the supervisory authority in the exercise of its functions, including the composition of the authority; the method for appointing its members; the duration of exercise and conditions of cessation of their functions; the possibility for them to participate in relevant meetings without undue restrictions; the option to consult technical or other experts or to hold external consultations; the availability of sufficient resources to the authority; the possibility to hire its own staff; or the adoption of decisions without being subject to external interference, whether direct or indirect.

## **Paragraph 6**

*Each Party shall ensure that the supervisory authorities are provided with the resources necessary for the effective performance of their functions and exercise of their powers.*

The prohibition on seeking or accepting instructions covers the performance of the duties as a supervisory authority. This does not prevent supervisory authorities from seeking specialised advice where it is deemed necessary as long as the supervisory authorities exercise their own independent judgment.

## **Paragraph 7**

*Each supervisory authority shall prepare and publish a periodical report outlining its activities.*

Transparency on the work and activities of the supervisory authorities is required under paragraph 7 through, for instance, the publication of annual activity reports comprising interalia information related to their enforcement actions.

## **Paragraph 8**

*Members and staff of the supervisory authorities shall be bound by obligations of confidentiality with regard to confidential information to which they have access, or have had access to, in the performance of their duties and exercise of their powers.*

## **Paragraph 9**

*Decisions of the supervisory authorities may be subject to appeal through the courts.*

Where an administrative decision produces legal effects, every affected person has the right to have an effective judicial remedy in accordance with the applicable national law. Notwithstanding this independence, it must be possible to appeal against the decisions of the supervisory authorities through the courts in accordance with the principle of the rule of law, as provided for under paragraph 9. Moreover, while supervisory authorities should have the legal capacity to act in court and seek enforcement, the intervention (or lack of ) of a supervisory authority should not prevent an affected individual from seeking a judicial remedy.

## **Paragraph 10**

*The supervisory authorities shall not be competent with respect to processing carried out by bodies when acting in their judicial capacity.*

Paragraph 10 of Article 15 states that supervisory authorities shall not be competent with respect to processing carried out by independent bodies when acting in their judicial capacity. Such exemption from supervisory powers should be strictly limited to genuine judicial activities, in accordance with national law.

## 2.2 Explanatory memorandum - Convention on access to public information – Tromsø convention<sup>6</sup>

### Article 8 – Review Procedure

#### **Paragraph 1**

*An applicant whose request for an official document has been denied, expressly or impliedly, whether in part or in full, shall have access to a review procedure before a court or another independent and impartial body established by law.*

Paragraph 1 states that an applicant whose request has been denied, expressly or impliedly, whether in part or in full, shall have access to a review procedure before a court or another independent and impartial body established by law. This review body must be able, either itself to overturn decisions taken by public authorities which it considers do not comply with the legislation in force, or to request the public authority in question to reconsider its position. At the same time, the possibility of other legal and disciplinary actions against public authorities which have committed a serious breach of their obligations under the present Convention must not be excluded. The term “denied” should be broadly understood and embraces, for instance, the refusal, express or implied, in full or in part of a request for a document on the grounds of an exemption listed in Article 3. When national law establishes time-limits for responding to requests, the applicant should have the right to appeal against administrative silence.

#### **Paragraph 2**

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<sup>6</sup> Available at <https://edoc.coe.int/en/international-law/8488-access-to-official-documents-council-of-europe-convention-on-access-to-official-documents-cets-no-205-tromso-18062009-and-its-explanatory-report.html>, viewed on January 25, 2022.



*An applicant shall always have access to an expeditious and inexpensive review procedure, involving either reconsideration by a public authority or review in accordance with paragraph 1.*

Paragraph 2 states that the applicant shall always have access to an expeditious and inexpensive review procedure. In some national systems, an internal review procedure is a compulsory intermediary step before a court of appeal or other independent complaints procedure. In some Parties to the Convention, it is also possible to complain about refusals or malpractice in this field to an ombudsman or a mediation body. When a public authority refuses access to a document, it should indicate in the decision the possibilities of appealing.

### 3 Comments of the Draft law

#### 3.1 Article 2. Status of the National Commission for Personal Data Protection and Access to Public Information

##### **Paragraph 1**

*The National Commission for Personal Data Protection and Access to Public Information (hereinafter referred to as the National Commission) is a central special-status executive authority that shapes and implements the public policy of personal data protection and access to public information, as well as is responsible for the government oversight over compliance with the laws on personal data protection and/or access to public information.*

##### **Recommendation:**

In this article it should be stressed that Commission should be totally independent as defined in Article 15, para 5 of Convention 108+. This article defines that supervisory authorities shall act with complete independence and impartiality in performing their duties and exercising their powers and in doing so shall neither seek nor accept instructions.

##### **Paragraph 2**

*The National Commission shall be accountable to the Verkhovna Rada of Ukraine and shall be controlled by, and report to, the Cabinet of Ministers of Ukraine to the extent established by this Law and other regulatory acts.*

##### **Recommendation:**

It is suggested that the Commission is only obliged to report to the parliament (Verkhovna Rada) and should not be controlled by and should not report to the government (the Cabinet of Ministers). This is not in accordance with Article 15, para 5 of Convention 108+. The powers and tools how the government can control the Commission are not defined in this draft, which

made my evaluation harder in this regard. Nevertheless, even if the controlling powers are soft, any government control diminishes the independence of the Commission.

### **Paragraph 3**

*The National Commission shall be established by the Cabinet of Ukraine according to this Law.*

#### **Comment:**

If the government only decides about the establishment of the Commission, it can be argued this is not contrary to Convention 108+, but only if the government does not have any direct impact on the work of the Commission.

### **Paragraph 4**

*The legal framework of the National Commission's activities include the Constitution of Ukraine, international treaties ratified by the Verkhovna Rada of Ukraine, this Law, and other laws of Ukraine, as well as other regulations thereunder.*

*The Law of Ukraine On Central Executive Authorities and other acts regulating the executive authorities, as well as the Law of Ukraine On Civil Service shall apply to the National Commission, employees and staff members of the Staff of the National Commission to the extent consistent with this Law.*

*The Law of Ukraine on Citizen Petitions shall not apply to the procedures followed by the National Commission to consider reports on violations of the laws on personal data protection and/or access to public information.*

#### **Comment:**

If this means that the employment process is done through the government, this is not in accordance with Convention 108+, which demands independence in employees' selection as well (see Article 15, para 5 and adequate explanatory memorandum wording). As far as I could understand the wording of this Draft follows the organization of the National Anti-Corruption Bureau of Ukraine (NABU). In order to achieve the independence of NABU the law was changed in October last year<sup>7</sup>. The parliament explained that the law establishes the peculiarities of the procedure for interaction of the National Bureau with the Cabinet of Ministers of Ukraine, central executive bodies to prevent interference of the Cabinet of Ministers of Ukraine in the activities of the NABU.

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<sup>7</sup> See the news article on <https://www.rada.gov.ua/en/news/News/215049.html>, viewed on January 24, 2022.

The Law also defines the features of the application of the provisions of regulations governing the activities of central executive bodies and the civil service, to ensure the institutional and operational independence of the NABU.

Furthermore, the Law defines the principles of organizing and conducting an external evaluation of the effectiveness of the National Bureau. It is recommended to follow this example.

### 3.2 Article 4. Forms of activities, responsibilities, powers, and rights of the National Commission

#### General recommendation:

The rights, powers, responsibilities and forms of activities are explained in detail in the Explanatory Report of Article 15 of Convention 108+. I do miss for example the power to respond to the complaint of any individual regarding allegations that his/her personal data protection rights are not respected or implemented properly. I also believe that the rights, powers and responsibilities are not transparently arranged, to the detriment of the efficiency of Commission's work.

*1. The National Commission shall implement a policy of personal data protection and access to public information by:*

- 1) regulating personal data protection and access to public information;*
- 2) exercising government oversight according to the Law of Ukraine on Personal Data Protection and the Law of Ukraine on Access to Public Information;*
- 3) taking other measures in pursuance of the Law of Ukraine on Personal Data Protection and the Law of Ukraine on Access to Public Information;*

#### Recommendation:

Among these competencies there should also be a Review procedure as defined in Tromso Convention (see Article 8) which is a binding act for Ukraine. It is suggested to highlight the competence in this or Article 4 of the Draft law.

...

4. The National Commission shall have the following powers:

...

*19) filing claims (petitions) to courts, asking to declare unlawful any regulatory act and/or individual decision issued/made in violation of the Law of Ukraine on Personal Data Protection and/or the Law of Ukraine on Access to Public Information;*

**Comment:**

As I understand it, the allegedly illegal regulatory act and / or individual decision issued / made are in question, which in my opinion exceeds the competence of the Commission, as in the first case it would act as a review organ and in the second case it could intervene to the concrete (authoritative) procedure of another body. The last part regarding the individual decision looks deficient as it is not clear whether it is an authoritative act of a state body within its competence in question, or for example the employer's decision to deliver a copy of the passport or other data controller.

...

*6. To exercise its powers and perform responsibilities, the National Commission shall have the following rights:*

...

*8) file claims (petitions) to courts, asking to declare unlawful any regulatory act (part thereof) that contradicts the Law of Ukraine on Personal Data Protection and/or the Law of Ukraine on Access to Public Information;*

**Comment:**

I do not see the difference between para 4/19 and para 6/8 of this article.

### 3.3 Article 6. Guaranteed Independence of the National Commission

...

*3. The National Commission may not be used in party, group, or private interests. No political parties may be active in the National Commission.*

**Comment:**

I couldn't quite figure out what the legislature wants to achieve with this paragraph. It would be clearer and more logical if a ban on membership in political party executive bodies (or membership in political parties in general) for commission members is introduced during their term of office or even some time before the employee signs the employment agreement to guarantee the independence of such a person and Commission as a whole (or also the appearance of independence).

*4. Central and local government agencies, authorities of the Autonomous Republic of Crimea, their officials, political parties, CSOs, and other persons may not interfere with activities and responsibilities of the National Commission.*

**Comment:**

Maybe the limitation to interfere with the work of the Commission by the government should be stated here.

*Any written or oral instructions, requests, and other directions that are given to the National Commission or its staff members shall be deemed illegitimate and should not be followed if they relate to responsibilities of the National Commission but **are not provided for by Ukrainian laws**. In case of receiving such an instruction, request, or other direction, a staff member of the National Commission shall immediately notify the Chair of the National Commission in writing.*

**Recommendation:**

This paragraph causes a doubt on the general ban on giving guidelines to the Commission or receiving guidelines and instructions by the Commission. It is suggested to define the permissible instructions which are allowed to be given to the Commission in more details (after all, it is a body with a special position, and it is unlikely that the provisions of previously adopted, and more general laws could easily be applied to it).

*5. Only the Prosecutor General (Acting Prosecutor General) or the Deputy Prosecutor General may serve a notice of suspicion of a criminal offense on the Chair, Vice Chair, or members of the National Commission.*

*The Chair, Vice Chair, and members of the National Commission **may be suspended** from office in connection with criminal prosecution upon a reasoned motion submitted by the Prosecutor General (Acting Prosecutor General) or the Deputy Prosecutor General who is the Head of the Specialized Anti-Corruption Prosecutor's Office. Court shall adopt a decision to suspend the Chair, Vice Chair or a member of the National Commission from office.*

**Comment:**

To suspend the member of the Commission and not offer him/her any assurance to come back to work if allegations were false could represent a danger of possible abuse. There is the safeguard in the process of deciding on the suspension by the court, which means that the procedure will be in progress and the Commission member will have the opportunity to comment. But, not knowing the procedural rules for prosecuting crime (obviously related to corruption), additional safeguards could be to define a certain standard of suspicion that must be met for a court to decide on suspension. Perhaps the safeguard could also be a time limit on the suspension (e.g., to a maximum of 6 months), which would force the state to act quickly and provide additional legal certainty to the suspended Commission member. If the proceedings had not been completed within that time, his/her suspension would be canceled.

*6. The Chair, Vice Chair, members, inspectors of the National Commission, staff members (employees) of the Staff, their family members, and their property shall be protected by the State. Upon receipt of a **relevant request** from the Chair, Vice Chair, or a member of the National Commission, the National Police shall take measures required to ensure the safety*

*and security of the Chair, Vice Chair, member of the National Commission, and their family members and safeguard their property.*

**Comment:**

Maybe it would be wise to add what a relevant request is?

*7. Attacks on life and health of the National Commission's Chair, Vice Chair, a member, an inspector, a staff member (employee) of the Staff of the National Commission, or their family members, destruction or damage of their property, and/or threats of murder or violence shall give rise to liability established by law.*

**Comment:**

It is suggested to add which law regulates this kind of liability - most likely a derogation from general liability is in question, otherwise the provision would not be necessary - but so open does not have actual added value for Commission members and their family members.

### 3.4 Article 8. Requirements for membership of the National Commission

*1. The following candidate shall be eligible for selection as a member of the National Commission: a Ukrainian national not younger than thirty years old who holds a university degree (at least master's degree) in law or public administration, has at least five years of working experience in personal data protection and/or access to public information, has strong commands of the official language and a foreign language, which is one of the official languages in the Council of Europe, and has strong professional and personal merits and **good health** to perform his/her official duties.*

*The Cabinet of Ministers of Ukraine shall approve procedures for testing the foreign language proficiency of candidates for the position of a member of the National Commission.*

**Comment:**

All conditions that are not objectively measurable can negatively affect the transparency and fairness of the candidacy process, which can ultimately lead to de facto (though not formally) reduced independence and autonomy of the commission.

...

*3. A member of the National Commission may not be a member of the Verkhovna Rada of Ukraine or have another representation mandate, be a member of election commissions and referendum commissions, engage in entrepreneurship, perform part-time work (except for research, teaching, creative activities, sports coaching, refereeing, and medical practice), be a member of the board or other executive bodies of organizations. A member of the National Commission may not be a member of central and local executive authorities.*

#### Comment:

Maybe this is the more relevant article to define, that members of the Commission are not allowed to be members of executive boards of political parties.

### 3.5 Article 9. Competition to appoint members of the National Commission

*1. Members of the National Commission are appointed **by the Cabinet of Ministers** of Ukraine for five years, following the results of an open competition run by the Selection Panel for the National Commission (hereinafter referred to as the Selection Panel). One and the same person cannot hold this position for two consecutive terms.*

#### Recommendation:

I would like to draw attention to the judgment of the European Court of Justice in Case C 614/10 - Independence of the supervisory authority in the field of data protection (where stricter requirements than for the field of access to public information are required). Even though Directive 46/95/EC was assessed in this case, the requirement for the independence of the supervisory body in this Directive (replaced by GDPR) is not stricter than Convention 108+. Hence, the question is whether the status of the Commission would pass independence test at the Council of Europe level. In the case of Austria, the supervisory body members were appointed by the President - on the proposal of the Government and this process was found out not to be in accordance with the independency requirements. In this Ukrainian case, the members are directly appointment by the government, which, compared to the Austrian case, raises even more doubts about the independence of the Commission.

*2. Candidates for members of the National Commission are elected by the Selection Panel, which is formed according to **the present** Law and approved by the Cabinet of Ministers of Ukraine.*

#### Comment:

It should be written ...to this law? Maybe just lost in translation. See also Article 11.

...

*5) four persons with the experience in personal data protection and access to public information who are to be nominated by the civic associations and selected according to the procedures established by the Competitive Selection Regulations.*

*Members of the Selection Panel shall have at least a master's degree level, impeccable business reputation, high standards of integrity and professionalism, and at least five years of experience in personal data protection and access to public information.*

#### Comment:

Very strict and difficult criterions to be measured objectively which opens a wide margin of discretion.

...

*8) a health certificate issued in the form approved by the central executive authority that shapes and implements the public healthcare policy specifying whether the person is registered with drug rehabilitation or psychiatric institutions.*

*Information from the submitted CVs shall be made public within three business days after the application submission deadline on the official website of the Cabinet of Ministers of Ukraine.*

**Comment:**

I do not see obstacles in the Convention for such a specific requirement, but such a condition most certainly invasively encroaches the privacy of candidates.

### 3.6 Article 11. The Chair of the National Commission

*1. The Chair of the National Commission shall be elected for three years from among its members. One and the same person cannot hold this position for two consecutive terms.*

*2. the Chair of the National Commission:*

*1) organizes the work of the National Commission, convenes and holds its meetings, signs the minutes of meetings and decisions of the National Commission, **ensures the decisions are published on the official website** of the National Commission, organizes the preparation of the draft agenda of the National Commission, and submits it for its consideration;*

**Comment:**

It is unusual that the Commission has an obligation to publish every single decision with no rules how to protect privacy of complainants, freedom of information requestors etc. It needs to be assented that in many cases it is not enough to delete only their personal name, but the Commission will have to focus also on all the wording of the decision to evaluate whether the individual is identifiable. If it is, the content which makes a person identifiable will have to be removed.

### 3.7 Article 15. The National Commission Inspectorate Service

9. Inspectors of the National Commission shall:

- 1) act within the framework and according to the procedures established by the laws regulating inspections and investigations on the reports on violation of laws on personal data protection and access to public information;
- 2) follow commonly agreed ethical practices and standards of behaviour;

**Comment:**

What are commonly agreed ethical practices?



...

*11. Failure to comply with the lawful demands of an inspector gives rise to liability established by law.*

**Comment:**

It is not clear to me whether a civil law liability is in question (compensation for damages) or labour law consequences.

### 3.8 Article 17. Disciplinary Commission of the National Commission

*4. The grounds for taking disciplinary actions against inspectors and staff members (employees) of the National Commission are the following:*

- 1) failure to perform or improper performance of their obligations;*
- 2) illegal disclosure of restricted information which has become known as a result of performing their obligations;*
- 3) abuse of authority provided their actions do not constitute a criminal or administrative offence;*
- 4) **negative results of integrity or life-style checks;***
- 5) violation of professional **ethical standards;***
- 6) use of authority for personal (private) interests or illegitimate interests of other persons.*

**Recommendation:**

When can the Commission start checking the employee? What condition needs to be fulfilled? It is hard to imagine a life-style check and what a negative result of that check would be. I would just like to emphasize that the rules need to be known in advance (when a negative lifestyle check result can occur) to ensure a fair and transparent process, and thus, at least indirectly, the independence and autonomy (appearance) of the Commission.

Do professional ethical standards already exist?

### 3.9 Article 19. Remuneration of the Chair of the National Commission, members of the National Commission and staff members (employees) of the National Commission Staff

*1. The salary of the Chairman, members of the National Commission and staff members (employees) of the National Commission Staff must provide sufficient material conditions for the proper performance of their duties, subject to the nature and intensity of work, ensure recruitment and retention of qualified staff, encourage strong performance at work, as well as compensate the cost of intellectual work of employees.*

2. *The salary of staff members of the National Commission Staff who are civil servants consists of a fixed salary, a long-service increment, an increment for the civil service rank, bonuses and other increments established by the law on civil service. The conditions as well as the amount of remuneration and financial support of the staff members of the National Commission shall be determined by the **Cabinet of Ministers of Ukraine**, subject to the requirements of this Law.*

**Comment:**

Does this mean that the government is deciding about the salaries of employees of the Commission? If this is the case for all public servants in Ukraine, if this is a general public sector salary system, I do not see the problem regarding the independence of the Commission. If this is not the case, then the independency might be questionable.

### 3.10 Article 23. Reports to the National Commission

1. *For the purposes of this Law, a complaint is a report submitted to the National Commission by a person specified by Article 22 of this Law regarding the protection of his/her rights established by the legislation on personal data protection and/or **access to public information**.*

2. *Complaints shall be submitted to the National Commission **in writing within six months from the moment the applicant becomes aware of the violation**. However, in exceptional circumstances, this period may be extended by the National Commission, but never for more than one year.*

**Comment:**

In the Ukrainian Law on Access to public information (see Article 24) an appeal is identified as a remedy. It is not very transparent throughout the whole draft why special competencies in the field of access to public information are given to the Commission (i.e., Commission being not only the appeal body, but is given wider supervisory powers).

Furthermore, I have not found a deadline for filing an appeal in the Access to public information Act. A six-month subjective deadline can lead to conflicts and reduce legal certainty on both sides.

### 3.11 Article 29. Participants of the proceedings conducted by the National Commission

1. *The parties to the proceedings of the National Commission include the applicant and the controlling entity.*

2. *The participants of the proceedings of the National Commission include an inspector (Head of the Inspectorate Service), who has conducted the investigation, an expert, a specialist, a translator/interpreter, **a representative of the governmental authorities that provide state regulation in the area of operation of the controlling entity.***

3. *The applicant may participate in the proceedings either directly or through a representative.*

**Comment:**

It needs to be stressed that the mere presence, without a representative having a role in the proceedings in terms of protecting certain legal interests, or exercising jurisdiction, may give the impression of influencing Commission's decision-making process. As a result, at least the appearance of the Commission impartiality could be in question and its independence could be reduced.

### 3.12 Article 30. Rights and obligations of the participants and parties to the proceedings of the National Commission

...

3. *The parties to the proceedings are entitled to:*

...

5. *Actions designed to mislead the National Commission give rise to the liability established by law.*

**Comment:**

It might be just a translation problem, but from the wording it is not clear what kind of a liability is in question. I presume not liability for damages but most probably a liability for false reporting or false testimony. In any case, it is suggested to supplement the provision with a reference to a specific law governing such a liability.

### 3.13 Article 36. Handling of cases by the National Commission

...

6. *An applicant who has submitted an application to the National Commission may be invited to participate in a meeting of the National Commission if his presence is required for the purposes of case handling.*

**Comment:**

It seems that article 36/6 and article 30/3/2 are in contradiction (... *The parties to the proceedings are entitled to: submit evidence, participate in the meetings of the National Commission, participate in the examination of evidence, **ask questions to other participants of the case, as well as witnesses, experts, and specialists;*** ...). I read the right from the article

30/3/2 as an unconditional one, on the other hand, article 36/6 is conditioned by its “necessity”.

*10. The **judge** who presides at the meeting shall explain to the witnesses and experts their rights and obligations set out by this law.*

**Comment:**

This is the only article where the word “judge” in the context of the Commission’s internal proceedings is mentioned. Maybe the president of the Commission is that person and not a judge?

...

*13. If the National Commission finds signs of violation of the law on personal data protection and/or access to public information in the actions of other persons during case handling, the National Commission may decide to institute proceedings **on its own initiative**.*

**Comment:**

It is not common in the freedom of information laws that I am aware of that the authority is beside being the appeal body also a supervisory body which can start proceedings *ex offio* (on its own initiative). Inspection rights for data protection and access to public information are also defined in article 45/2. I am aware of the article 17 of Ukrainian law on access to public information which defines that the Commissioner shall ... 7) *inspect information providers in the process of addressing information requests and disclosure of information, either following complaints or on his/her own initiative;*<sup>8</sup> but it needs to be emphasised that normally supervision powers and appeal competence could not co-exist. The appeal body is only reacting upon the concrete appeal of the requester and should in that context decide whose arguments are stronger in order to make the information available to the public or not – the requestor’s or public sector body’s, holder of the requested information. On the other hand, inspection process always starts from the pillar of a public interest, no matter what parties involved say or do.

Another problem could occur that in the field of data protection authorities should have a strong preventive role and can also offer advice to data controllers. In the field of access to public information advisory role of an appeal body is minimised, since advice cannot be given in a case which is already in the process or might reach the appeal body in the future. Giving the advice prior the end of an appeal proceeding could damage the impartiality of the Commission and prejudices the decision of the authority in advance.

Additional comment - articles 36 and 37 are identical.

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<sup>8</sup> Available at <https://www.article19.org/data/files/pdfs/laws/ukraine-the-law-on-access-to-public-information.pdf>, viewed on January 25, 2022.

### 3.14 Article 46. Procedure for conducting inspections

9. Refusal of public authorities, local self-government authorities, associations of citizens, enterprises, institutions, organizations, regardless of the form of ownership, their officials and cooperating officials, as well as deliberate concealment or provision of false data, any illegal interference with the activities of the National Commission for the purpose of countering entail liability set out by law.

#### Comment:

As already mentioned above in comments of article 30, it is not clear what kind of liability is in question and which law defines it.

### 3.15 Chapter VIII. Final and transitional provisions

*2. A decision of the National Commission for Personal Data Protection and Access to Public Information is appealed to the Administrative Court of Appeal in the appellate district, which includes Kyiv city, within thirty days from the date of its publication on the website of the National Commission.*

*To challenge the decisions of the National Commission for Personal Data Protection and Access to Public Information an appeal shall be made to the Supreme Court, which is the court of appeal in this case.*

#### Comment:

These two paragraphs are not clear. They both define the appeal possibility after the Commission reaches the decision. Did the legislator mean that the appeal could be made to the Supreme court after the judgement of the Administrative Court of Appeal is reached? Meaning the Supreme Court is the second level appellate body?

*3. An appeal against the decision of the National Commission for Personal Data Protection and Access to Public Information has a suspensive effect on the decision in the part relating to collection of the fine that has been imposed.*

#### Comment:

*Ex lege* suspensive effect only in the part relating to collection of fines does not meet the fundamental requirements of the data protection and access to public information paradigm. The suspensive effect of the decision should be also defined when deciding on access to public information as well and when data controller denies access to person's own personal data and the Commission overrules such a decision. As an alternative, it may be possible to request an interim injunction, but it is certainly clearer, if the suspension is already defined by law. If there is no suspensive effect, the legal remedy becomes meaningless, as it is no longer

possible to achieve non-disclosure of the required public information or certain personal data for which the court can decide not to reveal it.

#### 4 CV of the expert

Nataša Pirc Musar was born in 1968 in Ljubljana. After graduating from the Faculty of Law of the University of Ljubljana in 1992, she passed the national bar examination in 1997. After completing her studies, she was employed for six years at the Slovenian national television station as a journalist and news presenter for the main news programme TV Dnevnik. Subsequently, she worked for five years as a news presenter on “24 ur”, the primary information programme of the largest commercial television broadcaster in Slovenia, POP TV. She gained additional experience in journalism at CNN and studied at the Media Department of Salford University in Manchester in the UK for two semesters. During her studies she did professional internships at BBC, Granada TV, Sky News, Reuters TV, and Border TV. She has also written newspaper articles and worked on radio.

Striving for new knowledge, in 2001 she moved to the financial sector, where she joined the largest Slovenian private financial corporation, Aktiva Group, as Head of Corporate Communications. In April 2003 she became the Director of the Training and Communications Centre of the Supreme Court of the Republic of Slovenia. On July 15 2004, the National Assembly elected her the second Slovenian Commissioner for Access to Public Information. She was nominated for this position by the President of the Republic of Slovenia. Since 31 December 2005, when the Office of the Commissioner for Access to Public Information merged with the Inspectorate for Personal Data Protection, Nataša Pirc Musar has held the office of Information Commissioner.

Upon the proposal of the President of the Republic Dr. Danilo Türk, on May 21 2009 the National Assembly elected Mrs. Pirc Musar to an additional five-year term as Information Commissioner. She began her new term of office on July 16 2009 and finished it on July 2014. In October 2009, Nataša Pirc Musar was elected Vice President of the Europol Joint Supervisory Body, and in March 2013 President of the JSB Europol. Members of this supervisory authority are representatives of national supervisory authorities for the protection of personal data from all Europol member states; i.e. the EU Member States. In accordance with the Europol Convention, the mission of the joint supervisory authority is to conduct independent reviews of the activities of Europol in order to ensure that individual rights are not violated by the storage, processing, and use of data held by Europol. The joint supervisory authority monitors the permissibility of the further transfer of data originating from Europol.

On 9 December 2014 she took an oath as attorney at law at the Slovenian Bar Association. From the 1 January 2015 Nataša Pirc Musar is the director and owner of the Law Firm Pirc Musar.

In November 2015 she successfully defended her Ph.D. thesis at Law Faculty in Vienna, Austria titled How to strike the right balance between access to public information and personal data protection – using a public interest test.

From 2015 until 2019 she was a member of a jury at [Journalism Fund](#) in Brussels evaluating grant proposals for journalistic investigative stories.

From 2021 she is the member of the Executive Board of Slovenian Bar Association.