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LEGAL OPINION

ON THE DRAFT LAW OF UKRAINE NO 5019 "ON AMENDING CERTAIN LEGISLATIVE ACTS OF UKRAINE TO IMPROVE THE LEGAL FRAMEWORK OF THE UKRAINIAN PARLIAMANT COMMISSIONER FOR HUMAN RIGHTS

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The views expressed in this opinion are solely those of the author and do not necessarily reflect the official policy of the Council of Europe and the European Union.

List of Abbreviations

CM – Committee of Ministers of the Council of Europe
CoE – Council of Europe
Commissioner – Ukrainian Parliament Commissioner for Human Rights
ECHR – European Convention on Human Rights
ECtHR – European Court of Human Rights
ENNHRI – European Network of National Human Rights Institutions
EU - European Union
GANHRI –Global Alliance of National Human Rights Institutions
NHRI – National Human Rights Institution
ODIHR – Office for Democratic Institutions and Human Rights
OSCE - Organization for Security and Co-operation in Europe
PACE - Parliamentary Assembly of the Council of Europe
UN – United Nations

Introduction

This opinion is designed to assist the Ukrainian Parliament in furtherer improving the legal framework of the Ukrainian Parliament Commissioner for Human Rights (the Commissioner), in line with best applicable international practice.

It was prepared within the framework of the Joint Project "European Union and Council of Europe working together to strengthen the Ombudsperson's capacity to protect human rights" by the Council of Europe (CoE) international consultant Mr Marek Antoni Nowicki – former member of the European Commission of Human Rights and former International Ombudsperson in Kosovo.

The opinion is based on the English translations of the Law of Ukraine “On the Ukrainian Parliament Commissioner for Human Rights” (1997) with the relevant amendments and supplements (as of 13 August 2014), the draft Law of Ukraine No.5019 “On Amending Certain Legislative Acts of Ukraine to Improve the Legal Framework of the Ukrainian Parliament Commissioner for Human Rights” introduced by people’s deputies of Ukraine together with the Explanatory Note and other available documents on the subject matter of the assignment. The opinion includes critical comments on the reviewed draft Law and additional recommendations concerning issues which are not yet covered in this draft Law.

Legal Opinion

According to the explanatory note, the draft Law introduced by the people's deputies of Ukraine aims at the improvement of the legal framework of the Commissioner's activities and the procedure for appointment and dismissal of the Commissioner. The explanatory note indicates that the draft Law aims also *"at setting out specific powers of the Commissioner in times of an ongoing armed conflict and after it will have ended to help to eliminate negative consequences of the conflict for protection of human rights and fundamental freedoms*".

While most of the proposed changes should be considered as a step in the right direction, some of them still merit additional attention and should be subject to further reflection or revision to make the legal framework of the Ukrainian Parliament Commissioner for Human Rights fully compliant with the international standards and best practices in similar institutions in Europe.

When analyzing the presented draft Law, the consultant took into account, in particular, the following international standards and related documents:

- The UN Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights ("Paris Principles)[1].
- Venice Commission Compilation of Opinions Concerning the Ombudsman Institution[2].
- "The Venice Principles" on the Protection and Promotion of the Ombudsman Institution[3].
- Parliamentary Assembly of the Council of Europe (PACE), Resolutions: 1959 (2013) on the Strengthening the Institution of Ombudsman in Europe, 4 October 2013[4]; 2301 (2019) on Ombudsman Institutions in Europe – The need for a set of common standards, 2 October 2019[5].
- Recommendation of the Committee of Ministers to member States on the need to strengthen the protection and promotion of civil society space in Europe[6]
- Recommendation of the Committee of Ministers to member States on the development of the Ombudsman Institution[7].
- Recommendation of the Committee of Ministers to member States on the development and strengthening of effective, pluralist and independent national human rights institutions[8].

[1]Adopted by UN General Assembly Resolution 48/134 of 20 December 1993; https://www.ohchr.org/en/professionalinterest/pages/statusofnationalinstitutions.aspx
[2]Venice Commission, Compilation of Venice Commission Opinions Concerning the Ombudsman Institution, CDL-PI(2016)001, 5 February 2016; https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2016)001-e
[3] Venice Commission, Principles on the Protection and Promotion of the Ombudsman Institution ("The Venice Principles") 3 May 2019, CDL-AD(2019)005; https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)005-e
[4] http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20232&lang=en
[5] http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=28161&lang=en
[6] Adopted on 28 November 2018, CM/Rec(2018)11, https://search.coe.int/cm/pages/result_details.aspx?objectid=09000016808fd8b9
[7]Adopted on 16 October 2019, CM/Rec (2019)6, https://rm.coe.int/090000168098392f
[8]Adopted on 31 March 2021, CM/Rec(2021)1, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680a1f4da

- The UN General Assembly Resolution on "The role of Ombudsman and mediator institutions in the promotion and protection of human rights, good governance and the rule of law", 16 December 2020[9].
- GANHRI General Observations[10].
- Guidelines on ENNHRI Support to NHRIs under Threat[11].

A. Comments to the draft Law no. 5019

Article 2:

a/ Complaints against public officials

The Commissioner should, in principle, be competent to examine cases against "*bodies of state power and local self-government"* but not "*their officials*" as there is a presumption that these officials act on behalf of these authorities. This is also clear from Principle 13 of the Venice Principles *("The institutional competence of the Ombudsman shall cover public administration at all levels')*[12]. As a result, the current content of the Article, including the proposed amendments, should be modified accordingly.

b/ Exemptions from the Commissioner's jurisdiction

It seems that the exemptions from the Commissioner's jurisdiction and their scope, as provided for in the proposed Article 2, should be reconsidered. The proposed solution is rather unique compared to the competencies of other ombudsmen whose task is to protect human rights and fundamental freedoms. Usually, the matters dealt with by the ombudsman cover public administration at all levels without exceptions – central and local – and their decisions and other acts. According to Principle 13 of the Venice Principles *"the mandate of the Ombudsman shall cover all general interest and public services provided to the public, whether delivered by the State, by the municipalities, by State bodies or by private entities"*[13].

c/ The question of private entities

It should be emphasized that, as follows from the Principle 13, the Commissioner's jurisdiction should also cover private entities to a certain extent. The general scope of the Commissioner's jurisdiction over these entities should be made clear directly by the Law on the Commissioner. Particularly, as the proposed version contradicts Article 2 and Article 17 where the latter explicitly provides for the possibility of lodging a complaint with the Commissioner also in cases involving *'acts or omissions by entities governed by private law in cases provided for by law in force*'.

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[9] A/Res/75/186; https://digitallibrary.un.org/record/3896442
[10] https://www.ohchr.org/EN/Countries/NHRI/Pages/SCA-Rules-of-Procedures.aspx
[11] February 2020;http://ennhri.org/wp-content/uploads/2020/02/Guidelines-on-ENNHRI-support-to-NHRIs-under-threat.pdf;
[12] See: footnote 3.
[13] Ibidem.; see also part II.3 of the CM Recommendation CM/Rec (2021)1 which states that" *Members States shall ensure that the mandate given to the NHRIs (…) allows them inter alia, to fully address all alleged human rights violations by all administrative authorities, other relevant State entities and, when applicable, private entities;"*

d/ The Commissioner and the Judiciary

Special solutions should apply to all courts in connection with cases that they hear. In this domain, the ombudsman's powers are usually confined to ensuring the procedural efficiency and administrative propriety of the judicial system or cases of clear abuse of power.

Article 5:

a/ Candidates' qualifications

Given the importance of this office and the expectations placed on it – both by the general public and by the public authorities – the condition indicated in the proposed amendment of Article 5 that the candidate has at least five years of experience in human rights activity seems insufficient. All the more so as it is also proposed to significantly lower the barrier of the minimum age requirement for candidates from 40 to 35 years. It should be emphasized that Principle 8 of the Venice Principles indicates "*appropriate professional expertise and experience, including in the field of human rights and fundamental freedoms*"[14] as one of the essential criteria for being appointed as Ombudsman.

In general terms, the candidates should be individuals who are recognized in society for their exceptional achievements and activities for the benefit of society, who, through their curriculum vitae and professional activity, can demonstrate that they are independent in their opinions and that they can be expected to resist political pressure if they have to stand up for principles and values they protect. They should be able to be accepted in this role by the broadest spectrum of public opinion.

Therefore, it would be more appropriate to indicate in Article 5, following the example of other similar institutions, that e.g., a candidate should be "*experienced and have distinguished knowledge in the field of human rights*"[15] or have "well-*known activity in the field of defence and promotion of human rights"*[16] or to have "*legal knowledge, professional experience and high authority owing to their moral qualities and social sensitivity*"[17].

b/ Restrictions on candidacy

The solution proposed by the drafters, temporarily excluding certain specified categories of persons from eligibility to stand as a candidate, is uncommon in European practices in the case of candidates for Ombudsman or any other similar office. The author's attempts to find a comparable solution elsewhere were unsuccessful. Even in Greece, where there are several constitutional restrictions on officials standing for parliament[18], there is no such restriction in its legal system in the case of the Ombudsman[19]. In Portugal, on the

[14] Ibidem.
[15] See: Article 6.1.1.4, Law no. 05 L-019 (2015) on Ombudsperson in Kosovo; https://oik-rks.org/en/2018/08/20/law-no-05-l-019-on-ombudsperson/;
[16] See: Article 6.1.d, Law no. 52 (2014) on the People's Advocate (Ombudsman), Republic of Moldova; https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2017)054-e;
[17] See: Article 2, Act on the Commissioner for Human Rights, Republic of Poland (1987) (with amendments); https://bip.brpo.gov.pl/en/content/act-commissioner-human-rights
[18] See: ECtHR judgment, Gitonas and Others v. Greece, no. 18747/91 and other, 1 July 1997;
[19] Law No. 3094, 22 January 2003 The Ombudsman and other provisions, https://www.synigoros.gr/?i=stp.en.law2477_97;

other hand, candidates for ombudsman must simply meet the same conditions as candidates for members of parliament [20].

The proposal may raise serious doubts as to its compliance with the Constitution (Articles 21, 24, and especially Article 38, which states that "*1. Citizens have the right to (...) be elected to bodies of state power (...). (2) Citizens enjoy the equal right of access to the civil service (...)*[21]*"*

Any restriction of this important civil right guaranteed by the Constitution must be permitted by it and requires a particularly strong and convincing justification demonstrating that the legislator was objectively entitled to introduce it based on the Constitution. Conditions such as age, citizenship or period of residence in the country do not raise such doubts.

Moreover, the explanatory note accompanying the draft amendment to the Act does not contain any justification for this new condition, other than to reiterate the content of the proposed provision.

One may also question why, according to this draft, employees of these specific institutions cannot stand as candidates while other officials can, in a situation where the Ombudsman acts on matters concerning all state bodies. Therefore, there is no consistency here. Similarly, the mere fact of working in these institutions, regardless of one's role there, is disqualifying. This must result in manifest discrimination. This proposed part of Article 5 should therefore be deleted.

Article 6:

a/ Participation of non–governmental organisations in nominating candidates and the procedure leading to the selection of candidates

The proposed participation of non–governmental organisations "*engaged in human rights protection"* in the process of selecting candidates for the Commissioner, consisting of the possibility to propose them, seems to be a step in the right direction and a departure from the current practice of leaving the question of candidates exclusively to political circles. To achieve the stated goal, this participation and influence must be genuine. However, the proposed solutions raise doubts in this respect.

Firstly, considering that the candidates may also be nominated by the Chairman of the Verhovna Rada of Ukraine or people's deputies constituting no less than one-fourth of the constitutional composition of the Verhovna Rada - which allows for the easy nomination of a candidate by the ruling party or coalition - there is a probability that citizens' candidates will be in a losing position from the start, in a situation where it is the Verhovna Rada that qualifies the candidates for the election and ultimately elects the Commissioner.

Secondly, the very short deadlines provided for in the procedure of nominating candidates may pose a significant obstacle for the non-governmental organizations in the ability to nominate a candidate, especially when they have to demonstrate support for him/her collected from at least 25 000 citizens.

[20] Article 5.2, Statute of the Ombudsman Law no. 9/91, of 9 April (as amended by Law no. 30/96, of 14 August, and Law no. 52-A/2005, of 10 October), https://www.legislationline.org/download/id/4115/file/PortugueseOmbudsman_Statute_2007_en.pdf

[21] https://rm.coe.int/constitution-of-ukraine/168071f58b

It follows that the proposed solution may remain merely a gesture towards civil society, which in fact will not change much in the process of selecting candidates.

Moreover, the question remains why only "public associations engaged in human rights protection" are eligible to nominate candidates and not other associations representing civil society or entities representing the legal community in the country, such as the Bar Association, law faculties or other academic institutions, etc. Besides, the very phrase "*public associations engaged in human rights protection"* is vague and raises doubts as to which specific organisation would be entitled to nominate a candidate. There is also the question of who would decide what procedure to follow and what the legal remedies would be if an organisation is deemed not to be entitled to do so?

The optimal solution, also indicated in the Venice Principles (Principle 7 – *"the procedure for selection of candidates shall include a public call and be public, transparent, merit based, objective, and provided for by the law")*[22], is an open procedure based on a public call allowing the application of any interested person who believes that he/she meets the statutory conditions to apply for this office. This solution, which is widely used today, inter *alia* also in the procedure of selecting candidates for the European Court of Human Rights, substantially increases the chances of finding the best and sufficiently independent candidates and limiting the political influence on the entire process from the start. In such a scenario, it is extremely important to guarantee a proper impartial procedure before a special or specially appointed committee in the parliament, which evaluates and qualifies the candidates. This procedure must be as open and transparent as possible, with the active participation and influence of the legal community, non-governmental organisations, etc., with hearings of candidates accessible to the public, at least via the Internet. The candidates should also be widely discussed in the media.

The provisions of the Law should precisely indicate whether all proposed candidates meeting the necessary criteria will be voted on by the plenary parliament, or whether, in the case of a larger number of suitable candidates (which is at least theoretically possible in the case of nominating civic candidates), there will be a pre-selection procedure in which, for example, 3–4 candidates (short list) will be selected to be voted on by the plenary parliament. Such a pre-selection procedure shall be clearly defined, including precise evaluation and selection criteria, etc.

c/The period during which the election procedure should take place

The Law should provide that, under normal circumstances, the election procedure for the Commissioner should commence early enough, before the end of the term of office of the current Commissioner and not only after the expiry of this term. In some countries, the procedure starts up to six months before this date (e.g., in Slovenia[23], Kosovo[24]). Such a period of several months allows for a proper, diligent and transparent election process. Although Article 6.1 states that after the expiry of his/her term of office the Commissioner remains in office and continues to execute his/her mandate until the day his/her successor takes the oath, such a situation should generally be treated as exceptional. Under normal circumstances, a new Commissioner should be elected and prepared to take office upon the statutory expiry of his/her predecessor's term of office.

[22] See: footnote 3;
[23] Article 13, Human Rights Ombudsman Act of 30 December 1993 (with amendments); https://www.varuh-rs.si/en/about-us/legal-framework/human-rights-ombudsman-act-zvarcp-upb2/;
[24] See: footnote 11, Article 8.1.

Article 6.1:

a/ Duration of the mandate

The proposed provision stating that "*The same person shall not hold the position of the Commissioner for three consecutive terms"* should merit reconsideration. It means that the Commissioner could perform his/her function for one or two mandates. From the point of view of the guarantees of the independence and impartiality of this office and the general public's perception of compliance with these guarantees, it would be more appropriate to limit this period to only one mandate. In such a case, it could be extended beyond the current five-year period e.g., to seven or more years (like in the case of constitutional judges). Principle 10 of the Venice Principles also points to this option: "*The term of office shall preferably be limited to a single term, with no option for re-election (…). The single term shall preferably not be stipulated below seven years"*[25]. In the case of more than one mandate and, as a result, the prospect of the Commissioner seeking re-election, there could always be doubts in the public opinion – legitimate or not - as to whether his/her actions, especially in politically controversial or sensitive matters, would not be influenced by the will to obtain the mandate again rather than by objective reasons existing in cases under consideration.

Article 13:

Third party interventions

Currently, the opportunity to intervene in proceedings at all levels of the domestic and international judiciary systems, as a third party submitting amicus curiae briefs, should be seen as one of the main practical tools available to ombudsman institutions. The proposed amendments to Article 13 provide for such a possibility by stating that the Commissioner has, *inter alia*, the right to "*intervene at any stage of the proceedings initiated on claims (applications) of other persons ...)".* That broad formula provides a legal basis for the Commissioner to independently intervene within the framework of his/her mandate, in every case raising sufficiently serious issues of general interest regarding the protection of rights and freedoms in accordance with international standards to warrant such intervention by the Commissioner.

The role of amicus curiae played generally by the Ombudsman institutions is very important for the judiciary but also for the institution itself, as it demonstrates that it is ready to actively take a position in the public interest cases pending before the courts. In this way, the Ombudsman can strengthen his/her contribution to the effective implementation of good administration and international human rights standards. Therefore, it also helps the institution enormously to strengthen its authority within the society and build much-needed trust in it. Cases in which the Ombudsman intervenes as an amicus curiae should be very carefully selected and should be concerned with problems of special weight from the point of view of the protection of fundamental rights and the requirements of good administration. The public should be able to understand why the Ombudsman decided to act as an amicus curiae in a particular case and not in others. The Ombudsman should not take such actions too often, so as not to inflate it. The fact that the Ombudsman submits an amicus curiae brief must signify to all that the problems under consideration require serious debate and action.

It is worth emphasizing that national institutions for the protection of human rights (NHRI), including the Ombudsman, are increasingly using the option to act as a third party not only

[25] See: footnote 3.

in proceedings pending before the national courts[26], including the constitutional courts, but also before the international human rights bodies. All the more so as networks of the Ombudsman institutions in Europe are establishing ever closer cooperation with the European Court of Human Rights (ECtHR) to strengthen their participation in proceedings in Strasbourg. This opportunity has recently been increasingly used by NHRIs, including Ombudsmen, from different CoE member states[27].

Therefore, explicit provisions in Article 13 should be considered to confirm that the Commissioner can also act as a third party before the ECtHR in cases against Ukraine, as well as against other countries where the issues involved are also of relevance for Ukraine's domestic human rights context.

The Law should also confirm that the Commissioner is entitled to submit communications to the Committee of Ministers (CM) of the Council of Europe in the process of the execution of the ECtHR's judgments and to comment on action plans, action reports and other proposals made by the national authorities[28].

The great potential and impact of NHRIs in particular for the effective implementation of the ECHR by taking such actions was underlined by the Committee of Ministers in its recent Recommendation on the development and strengthening of effective, pluralistic and independent national human rights institutions[29].

Equally important in this regard is ensuring that the Commissioner has adequate active cooperation with human rights NGOs and is able to coordinate with them and, if necessary, take joint action as a third party [30].

Article 13.1:

Powers related to internal or international conflict on the territory of Ukraine

In the context of the Commissioner's activities mentioned in this article, it is important to emphasize the crucial role of cooperation with inter-governmental organisations such as the UN, OSCE, CoE, etc. and with international non–governmental organisations. It

[26] See: e.g. Article 12, The Law on the Ombudsman of the Republic of North Macedonia" No. 60/2003, consolidated text published in the "Official Gazette of the Republic of North Macedonia" No. 143/2008: "*To protect the human freedoms and rights in the cases where the party or the Ombudsman requires so, the court may enable the Ombudsman to act as a friend of the court (amicus curiae*)", https://www.refworld.org/pdfid/3fcb36dc4.pdf; Article 4.2. The Law on the Human Rights Ombudsman of Bosnia and Herzegovina, 22 January 2004 "*An Ombudsman […] may initiate court proceedings or intervene in pending proceedings, whenever he or she find that such action is necessary for the performance of his or her duties* (…)";

[27] Mostly by ombudsman institutions from Poland and France but also from Armenia, Georgia, Greece, Czech Republic; examples: from Poland - https://bip.brpo.gov.pl/sites/default/files/Amicus%20curiae%20GC%20Grzeda%20v%20Poland.pdf, from France - https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=24761&opac_view=-1

[28] The mechanism established in 2006 under Rule 9 of the Rules of the CM; used so far inter alia by ombudsman institutions from Poland, France, Armenia; example from France - https://rm.coe.int/native/09000016809f2a58, from Armenia - https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2020)133E%22

[29] See: footnote 8.

[30] See: recent example of the communication submitted to the CM in the process of the execution of the ECtHR's judgment in the case *Poghosyan v. Armenia (Appl. no* 44068/07) jointly by the Human Rights of the Republic of Armenia and the NGO - the Helsinki Committee of Armenia) - concerning rights of persons deprived of liberty.

should cover not only cooperation in order "to e*stablish communication with the parties to the conflict or persons representing them*", which is expressly referred to in Article 13.1.3, but also other activities provided for in this Article, listed in points 2) to 8) and also to some extent in point 9). Such cooperation and assistance are indispensable for better (or any) effectiveness of action in each of these domains.

Article 17:

a/ Accessibility of the institution of the Commissioner

The Commissioner (and the legislator) should ensure that the institution is easily accessible to every person by allowing complaints to be made in writing or verbally and without any unnecessary formal requirements. Therefore, with the advancement of technology, it has become almost common practice for the ombudsman institutions to accept complaints on-line and through social media. However, the requirement to provide an electronic signature significantly hinders the possibility of submitting a complaint by electronic means, and this is a formal condition which the legislator should withdraw. The ombudsman institution should have other means of confirming the identity of the complainant and the authenticity of his/her complaint thus brought.

Moreover, the consent to lodge a complaint in person cannot be an exception, as in many cases, regardless of the possibility of contact by letter, telephone or via other means of communication, such personal contacts are necessary for the interests of the person seeking help. It would therefore be advisable to resign from the proposed clause saying that "*complaints can be verbal when an urgent response is necessary".* It should be left to the person concerned to choose the type of contact with the Commissioner and how to file a complaint, depending on his/her personal circumstances. On the other hand, the institution should be organisationally and logistically prepared to receive complaints in a variety of ways so that it will be, as it has already been mentioned, "easily accessible to every person".

The Law should provide for special solutions in this respect for complainants with disabilities who may have difficulties submitting a complaint and/or participating in further proceedings. Such measures should include, but not be limited to, conducting audiences in accessible locations, providing sign interpretation, making materials available in Braille, and any other necessary and adequate measures that do not imply a disproportionate or unjustified burden for the institution of the Commissioner.
It is also important to ensure that the complainants have the right to make a complaint in their mother tongues, with the state bearing the costs of interpretation.

b/ Access of private legal entities

Access to the institution of the Commissioner should be granted to all natural persons and private legal entities in connection with allegations of violation of human rights and fundamental freedoms[31]. Of course, in the case of private legal entities, due to their specificity, allegations may arise only on a certain range of "human rights" matters.

[31] See: e.g. Opinion of the Venice Commission no. 808/2015 related to the People's Advocate in the Republic of Moldova, Chapter IV b., § 67; https://rm.coe.int/1680655182; Opinion of the OSCE OIDIHR on the Draft Law Introducing a " People's Advocate for Entrepreneurs' Rights" in Moldova, 19 March 2021, NHRI – MDA/392/2020, §§ 38 – 40,
https://www.osce.org/files/f/documents/5/c/482083.pdf; PACE Resolution 1959 (2013) on Strengthening the Institution of Ombudsman in Europe.

Therefore, there are no grounds to limit access to the institution of the Commissioner of such persons in the manner suggested by the proposed content of Article 17, which stipulates that "*legal entities may submit complaints*" but only *"in cases provided for by law in force".* It should be recalled that any private legal entity can lodge a valid application with the ECtHR and raise ECHR related issues and at the same time, their access to the institution of the Commissioner would be limited in accordance with Article 17.

Article 17.1:

Commissioner's orders

The content of the proposed Article 17.1 indicates that the Commissioner may issue binding and motivated "orders" (in Ukrainian "prypys") addressed to "*a public authority or a local self-government body as well as to an entity governed by private law when established by law"*. It would be difficult to find any example of another human rights Ombudsman institution (thus belonging to the category of NHRIs) with a similar competence in Europe or elsewhere (unlike some Ombudsmen in the private sector). Such a competence seems to be in conflict with the essence of such an institution in a democratic society, which in this way is transformed from a specific body aimed at defending people's rights into another organ of state control and law enforcement.

In this context, it is also important to remember that the essence and raison d'être of the Ombudsman institution includes mediation (and alternative dispute resolution efforts) and the role of intermediary between the authorities and other institutions, on the one hand, and citizens on the other[32]. One should always think about the Ombudsman as having a mandate of influence, not a sanction. As a result, it must therefore be recognized that the legitimacy of maintaining the solution envisaged in the Law, which enables the Commissioner to issue binding "orders" has no basis in the practice generally accepted in Europe to date[33]. In this context, it is also worth recalling, inter alia, the following definition of the Ombudsman institution adopted by the International Bar Association as: "*an office provided for by the constitution or by action of the legislature or parliament and headed by an independent high-level public official (…) who has the power to investigate,*

[32] See: e.g. in Greece: Article 1 of the Law No. 3094, 22 January 2003 on the Ombudsman and other provisions: "The Ombudsman, has as its mission to mediate between citizens and public services, local authorities, private and public organizations (,,.)"; https://www.synigoros.gr/?i=stp.en.law2477_97

[33] See: footnote 3, Principle 17; Compilation of Venice Commission Opinions concerning the Ombudsman Institution, 5 February 2016, *Competences and Powers of the Ombudsman*, pp. 23 – 31, CDL – PI(2016) 001, https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2016)001-e; footnote 8, Appendix to Recommendation CM/Rec (2021)1, part II.3; see also: e.g. 'Strengthening the independence, effectiveness and accountability of ombudsmen and NHRIs', Speech by the European Ombudsman, Professor P. Nikiforos Diamandouros, at the 10th Round Table of European Ombudsmen and the Council of Europe, with special participation of National Human Rights Institutions, Athens, Greece, 12 April 2007, https://www.ombudsman.europa.eu/pl/speech/en/351; Keynote speech by the European Ombudsman, Emily O'Reilly - First conference on alternative dispute resolution in the energy sector, Brussels, 27 January 2015, https://www.ombudsman.europa.eu/sk/speech/en/58851; Creutzfeldt, N., O'Brien, N. and Nowicki, M. 2021. *A Comparative Review on Ombuds: Recommendations of Action for the Turkish Ombudsman and Guidelines for the Ombudsman and Public Authorities*, pp. 53, 78 – 79 (Recommendation 18: "*The Ombud should resist calls for powers to enforce decisions or make legally binding findings"*), will be published shortly on the website of the CoE Office in Turkey;

recommend corrective action, and issue reports"[34].Similarly, the Venice Commission stated that "*the model most widely followed for the institutions of Ombudsman or Human Rights Defender may be briefly described as that of an independent official having the primary role of acting as intermediary between the people and the state and local administration, and being able in that capacity to monitor the activities of the administration through powers of inquiry and access to information and to address the administration by the issue of recommendations (…)*"[35].

B. Comments on some of the issues not covered by the draft Law:

1. The Venice Principles clearly shows that "*the Ombudsman shall be removed from office only according to an exhaustive list of clear and reasonable conditions established by law. These shall relate solely to the essential criteria of "incapacity" or "inability to perform the functions of office", "misbehaviour" or "misconduct", which shall be narrowly interpreted*"[36]. The criterion of 'breach of oath' in Article 9 clearly does not meet this condition and needs to be clarified to avoid any misuse - particularly political - of this ground for possible dismissal of the Commissioner[37].

In addition, the guarantees in this area also require consideration to be given to tightening the majority in parliament required to dismiss the Commissioner, for example to 3/5 or 2/3. Such a solution would be an appropriate application of Principle 11 of the Venice Principles, which states that "*The parliamentary majority required for removal - by Parliament itself or by a court on request of Parliament - shall be equal to, and preferably higher than, the one required for election"[38].*

2. It would be worth considering introducing into the Law an explicit possibility for the Commissioner to make recommendations to suspend the execution of the administrative or disciplinary decision in exceptional cases and for a specified period or until the completion of his/her investigations, where its execution may result in irreparable prejudice for the rights of the complainant. In every such a case, the Commissioner would be obliged to specify recommended measures and carefully justify why he/she decided to take such a step. The authority concerned could refuse to comply with the recommendation, explaining, without undue delay, the reasons thereof, and in any case, before executing the challenged measure. However, there would have to be very cogent reasons for refusing to agree with the recommendation. Such cases should be treated

[34] Ombudsman Committee, International Bar Association Resolution (Vancouver: International Bar Association, 1974), quote from: Dean M. Gottehrer, Fundamental Elements of An Effective Ombudsman Institution, The 9th International Ombudsman Institute World Conference, Stockholm, June 2009, https://www.theioi.org/publications/stockholm-2009-conference-papers.
[35] Opinion on the possible reform of the Ombudsman Institution in Kazakhstan, 1-2 June 2007, §§12,14,20, CDL-AD (2007)020;
[36] See: footnote 3, Principle 11.
[37] See: e.g. in Spain: "flagrant negligence in fulfilling the obligations and duties of his office" (Article 5.1.d of the Organic Act regarding the Ombudsman, 6 April 1981 (with amendments), https://www.defensordelpueblo.es/en/wp-content/uploads/sites/2/2015/06/LOIngles.pdf; see also: part II.5 of the CM Recommendation CM/Rec (2021)1 which states that "*The dismissal process should be (…) confined to only those actions which impact adversely on the capacity of the leaders of NHRIs to fulfil their mandate*";
[38] See also: e.g., in Slovenia: Article 21, Human Rights Ombudsman Act; in Spain: Article 5.2 of the Organic Act regarding the Ombudsman.

with absolute priority in the Commissioner's office and completed at the earliest possible date[39].

3. The Law does not contain sufficient guarantees of the Commissioner's immunity. Its Article 20 simply states that "*the Commissioner should enjoy the rights to immunity for the duration of his/her tenure*". An important guarantee associated with the Commissioner's immunity is the obligation to define in detail in this Law the procedure for Parliament's consent to his or her prosecution and to specify in detail the conditions under which his or her arrest or detention on remand may take place in this context[40].

4. Another issue of particular importance is his/her functional immunity. Not only the Commissioner and his or her Deputies but also his or her decision-making staff should have immunity from legal process in respect of words spoken or written and acts carried out in their official capacity. Such immunity shall continue to be accorded even after the Commissioner's mandate expires or after the members of staff cease their employment with the Commissioner's office. This immunity should also extend to the Commissioner's baggage, correspondence and means of communication [41].

5. The Law should be amended by adding a paragraph stating that the premises of the office of the Commissioner shall be inviolable. Its archives, files, documents, communications, property, funds and assets, wherever located and by whomsoever held, shall be inviolable and immune from search, seizure, requisition, confiscation, expropriation or any other form of interference, whether by executive, administrative, judicial or legislative action[42].

6. The Law should include a special provision requiring open, transparent and meaningful consultation concerning any amendments to this Law including with the Commissioner, at all stages of the law-making process[43].

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[39] See: e.g. in Kosovo: footnote 15, Article 18.5; in Bosnia and Herzegovina: Article 24, Law on the Human Rights Ombudsman of Bosnia and Herzegovina, 22 January 2004, https://www.legislationline.org/download/id/3360/file/Bosnia_and_Herzegovina_Lawonombudsman_2004_en.pdf

[40] See: e.g. Article 7, Act on the Commissioner for Human Rights, Republic of Poland (1987), (with amendments);

[41] See: e.g. Opinion No. 540/2009 on Draft Amendments to the Law on the Protector of Human Rights and Freedoms of Montenegro, adopted by the Venice Commission, 9 – 10 October 2009, CDL-AD(2009) 043, § 28 – 29, https://www.venice.coe.int/webforms/documents/?pdf=CDL(2009)109-e;

[42] See: e.g. Joint Opinion of the Venice Commission No. 724/2013 and the ODIHR No. NHRI – TUN/233/2013 "On the Law (…) Relating to the Higher Committee for Human Rights and Fundamental Freedoms of the Republic of Tunisia by the Venice Commission and the OSCE/ODIHR, adopted by the Venice Commission, 14 – 15 June 2013, CDL-AD(2013) 019, § 52, https://www.legislationline.org/download/id/4461/file/233_NHRI_TUN_17%20June%202013_en.pdf ; Opinion on Amendments to the Law on the Human Rights Defender of Armenia", No. 397/2006, adopted by the Venice Commission, 15 – 16 December 2006, CDL – AD (2006)038, § 76, https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2006)038-e;

[43] See: Belgrade Principles of the Relationship between National Human Rights Institutions and Parliaments, 22 – 23 February 2012, § 4, §§ 27 - 28, https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-9_en.pdf; OSCE ODIHR, Opinion on the Draft Law Introducing a "People's Advocate for Entrepreneurs' Rights, 19 March 2021, NHRI – MDA/392/2020, §§ 19 – 25. https://www.osce.org/files/f/documents/5/c/482083.pdf

C. Recommendations

1. Concerning the proposed amendments

The comments and suggestions made above show that, while the draft Law as it has been presented for review contains many amendments adjusting the current legal framework to European standards and practice, it also requires more in-depth work and reflection in order to fully implement the stated objectives.

More specifically, the authors of the draft Law should:

1) redraft the proposed Article 2 so that the Commissioner would be competent in matters concerning "*bodies of state power and local self-government*" but not "*their officials*";

2) reconsider the proposed scope of exemptions from the jurisdiction of the Commissioner according to the Venice Principles;

3) increase the eligibility requirements for candidates for the office of the Commissioner, particular with regards to their experience related to human rights;

4) withdraw from the proposed exclusion of certain specified categories of persons from eligibility to stand as a candidate for the office of the Commissioner;

5) consider an open, transparent selection procedure based on a public call or to make the participation of the civil society sector in the candidates' selection process more realistic and broaden the list of civil society organisations or entities authorized to propose candidates to include other entities, not only those operating in the field of human rights protection;

6) define in detail the procedure for pre-selecting candidates;

7) ensure that the process of electing a new Commissioner takes place before the current Commissioner's term of office expires;

8) consider the option of the Commissioner serving a single term of office, but one that is much longer than the current one;

9) consider making explicit in the Law the Commissioner's authority to act as amicus curiae not only before domestic courts but also the ECtHR and the CM of the CoE;

10) establish appropriate legal conditions for much wider cooperation with inter-governmental organisations and international non-governmental organisations in the context of the Commissioner's activities related to international or internal armed conflicts in the territory of Ukraine than the one proposed in the draft Law;

11) ensure the widest possible access to the Commissioner without any unnecessary formalities, so that the institution is genuinely "easily accessible to everyone";

12) make clear in the draft Law appropriate special arrangements concerning access to the Commissioner of complainants with disabilities;

13) ensure that the complainants have the right to make a complaint in their mother tongues, with the state bearing the costs of interpretation;

14) abandon the restriction on access to the institution of the Commissioner of private legal entities under the proposed Article 17 of the draft Law;

15) to resign from maintaining the Commissioner's power to issue binding "orders".

2. Other recommendations

The authors of the draft Law should also:

15) clarify the criterion of 'breach of oath' in Article 9 to avoid any misuse- particularly political - of this ground for possible dismissal of the Commissioner;

16) consider tightening the majority in parliament required to dismiss the Commissioner, for example to 3/5 or 2/3.

17) define in detail the procedure for Parliament's consent to the Commissioner's prosecution and specify in detail the conditions under which his/her arrest or detention on remand may take place in this context;

18) consider introducing into the Law an explicit possibility for the Commissioner to make recommendations to suspend the execution of the administrative or disciplinary decision in exceptional cases and for a specified period or until the completion of his/her investigations, where its execution may result in irreparable prejudice for the rights of the complainant.

19) guarantee to the Commissioner and his or her Deputies but also his or her decision – making staff immunity from legal process in respect of words spoken or written and acts carried out in their official capacity. Such immunity shall continue to be accorded even after the Commissioner's mandate expires or after the members of staff cease their employment with the Commissioner's office. This immunity should also extend to the Commissioner's baggage, correspondence and means of communication;

20) guarantee the inviolability of the premises of the office of the Commissioner, its archives, files, documents, communications, property, funds and assets, wherever located and by whomsoever held, shall be inviolable and immune from search, seizure, requisition, confiscation, expropriation or any other form of interference, whether by executive, administrative, judicial or legislative action.

21) include a special provision requiring open, transparent and meaningful consultation concerning any amendments to this Law, including with the Commissioner, at all stages of the law-making process.