

ENNHRI Opinion on Transitional Arrangements in the context of the Selection and Appointment of the Head of a National Human Rights Institution (NHRI)

This Opinion sets out relevant international standards that require the independence, pluralism and effectiveness of an NHRI be respected during the selection and appointment of a new Head of NHRIs and during any associated transitional period.

1. Background

On 9 September 2020, the term of the Polish Commissioner for Human Rights ended. According to Article 3.6 of the Law on the Polish Commissioner for Human Rights, the current Commissioner performs his duties until the new Commissioner takes up his position. Pursuant to Article 209.1 of the Polish Constitution, the new Commissioner is appointed by the Sejm with prior approval of the Senate on the application of the Marshal of the Sejm or a group of 35 deputies. Although the appointment procedure has started, a new person has not, at the time of writing, been selected yet for the position.

The Office of the Polish Commissioner for Human Rights, ENNHRI's member NHRI in Poland, has requested ENNHRI to submit an opinion on the international standards and regional practices applicable to the transitional period during the selection and appointment of the Head of a National Human Rights Institution.

2. The UN Paris Principles and NHRIs

The Office of the Polish Commissioner for Human Rights is an A-status National Human Rights Institution, lastly [accredited](#) in November 2017, as in full compliance with the UN Paris Principles.

The [UN Paris Principles](#), adopted by the UN General Assembly Resolution 48/134, set out the international minimum standards that must be met for NHRIs to be recognised as independent and effective. To clarify the meaning and scope of the UN Paris Principles, the Global Alliance of NHRIs ([GANHRI](#)) has adopted [General Observations](#), which reflect GANHRI's Sub-committee on Accreditation's ([SCA](#)) application of the UN Paris Principles in the international accreditation process of NHRIs, as supported by the UN Human Rights Office.

NHRIs in compliance with the UN Paris Principles have been recognised by all UN member states, through the UN General Assembly, as an [indicator](#) of the UN Sustainable Development Goal on “Peace, justice and strong institutions”. Moreover, NHRIs are fundamental actors for the exercise of checks and balances in a country and a core actor in ensuring respect for the rule of law, democracy and fundamental rights, as recognised by the [European Commission](#), [the European Parliament](#), the [EU Council](#) and the [Council of Europe](#).

In the [country chapter](#) for Poland of the European Commission’s report on the rule of law, the European Commission highlights that the “Ombudsman [Polish NHRI] plays an important role in defending the rule of law”. The work of the Polish NHRI in promoting judicial independence standards, the rule of law, and fundamental rights is acknowledged by the European Commission, as well as the increasingly challenging environment in which the NHRI has been functioning.

3. Other international standards requiring Independence of multi-mandated NHRIs

The standards applicable to Ombudsman Institutions also recognise the principle of independence and the need to ensure the continuity of their work in accordance with their firm legal basis, be it in the constitution or legislative texts. This has been reaffirmed by a recent Recommendation of the Committee of Ministers ([CM/Rec\(2019\)6](#)). The Recommendation also states that “arrangements should be in place so that the post of the head of any Ombudsman institution does not stay vacant for any significant period of time”. The [Venice Principles](#) advances that the “Ombudsman shall be elected or appointed according to procedures strengthening to the highest possible extent the authority, impartiality, independence and legitimacy of the Institution”.

The [EU Standards for Equality Bodies](#) also recognises the importance of guaranteeing the independence of persons holding leadership positions.

In one of its expert opinions, the Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Co-operation in Europe (OSCE) advised that members of the decision-making body of an NHRI should remain in office until a successor is appointed, in order to guarantee a proper transfer of duties and ensure the continuity of the institution ([Opinion NHRI-ISL/301/2017](#)). Similarly, the Venice Commission advanced in one of its opinions that the Head of an NHRI should continue in office until the new one starts, in order to avoid lengthy periods without a Head of an NHRI ([Opinion no. 540 / 2009](#)).

4. Application of the UN Paris Principles to an NHRI's Constitutional and Legislative Foundations

The UN Paris Principles' minimum standards of independence, effectiveness and ensuring the continuity of the NHRIs' work apply at all times, including during the selection and appointment of a new Head of NHRI and during the transitional period.

The SCA, when assessing compliance of NHRIs with the UN Paris Principles, considers both the constitutional provisions and other legislation related to the NHRI. In its [General Observation 1.1](#), the SCA sets out that an NHRI's "role, functions, powers, funding and lines of accountability, as well as the appointment mechanism for, and terms of office of, its members" are established in a constitutional or legislative text with sufficient detail, necessary to ensure the NHRIs' clear mandate and independence.

5. Selection and appointment must be transparent, participatory, ensure independence and continuity of work of the NHRI

Relevant authorities must take steps to ensure that the selection and appointment of a new Head follows pre-established procedures which are in line with the requirements under the UN Paris Principles.

The UN Paris Principles and SCA [General Observation 1.8](#) refer to the cornerstone principles of independence and transparency when it comes to the selection and appointment of Head of NHRIs and requires the "formalisation of a clear, transparent and participatory selection and appointment process of the NHRI's decision-making body in relevant legislation, regulations or binding administrative guidelines, as appropriate". It follows that, where such provisions are formalised in national legislation, they must be respected.

The SCA also [notes](#) that the assessment of applicants must be on the basis of pre-determined, objective and publicly available criteria, which promotes the merit-based appointment of candidates, limits the capacity for undue interference in the selection process, and serves to ensure the appropriate management and effectiveness of the NHRI.

Moreover, the SCA specifies in its [General Observation 2.2](#) that "the terms and conditions of a member's service cannot be modified to their detriment during their period of appointment". Additionally, it states that "such terms and conditions should be equivalent to those with similar responsibilities in other independent State agencies".

In its recently released [report](#) on NHRIs, the EU's Agency for Fundamental Rights has emphasised the importance selection and appointment processes that ensure greater transparency and that are open to the widest possible range of applicants.

6. International standards and European arrangements applicable in case of a transitional period

In case relevant national authorities do not achieve timely selection and appointment in line with their national constitution or law, international standards continue to apply to ensure the continued independent and effective functioning of the NHRI ([General Observations 1.8, 2.1 and 2.2](#)).

This understanding has been [applied](#) by the SCA during the accreditation of NHRIs. For example, in a case concerning a long transition period between the end of term and appointment of a new Head of NHRI, the SCA [referred](#) to the need to “maintain the permanency and institutional independence” of the NHRI, and affirmed that the institution “must seek to operate in compliance with the legal provisions through which it was created”.

In most European countries, the constitutional provisions in relation to an NHRI are concise and are complemented by national legislation. It is also common practice that provisions clarifying arrangements for the transitional period after the end of office of a Head of an NHRI can be found in legislative provisions, rather than in the Constitution.

The most common transitional arrangement in European countries for internationally-accredited NHRIs of the Ombudsman-type is that the Head of the NHRI continues in office until a new individual has been selected, appointed, and/or taken oath, as specified in the legislative foundation of the NHRI. This is the case, for instance, for the Ombudsman Institutions in Portugal and Bulgaria, among many others.¹ In other countries, this is also the practice based on the principle of continuity of public services.

Many of the NHRIs in countries with such legislative arrangements had their establishing provisions and practices carefully examined by the SCA and were found to be in full-compliance with the UN Paris Principles (A-status NHRIs). This is also the case of the Office of the Polish

¹ This is the case for NHRIs accredited with A-status in: Albania, Armenia, Bosnia and Herzegovina, Bulgaria, Georgia, Lithuania, Moldova, Poland, Portugal, Russia, Ukraine. It is also the case in Azerbaijan (B-status NHRI) and in Czechia, Denmark (Ombudsman), Kosovo* and Romania (Ombudsman), which have non-accredited institutions.

* This designation is without prejudice to positions on status, and is in line with UNSC 1244 and the ICJ Opinion on the Kosovo Declaration of Independence

Commissioner for Human Rights, which was granted A-status after the SCA review that included the assessment of all relevant Constitutional provisions and Law on the Polish Commissioner for Human Rights.

7. International standards applicable in case of changes of NHRI regulation during appointment, selection, or transition

Changes to the legislative provisions affecting the functioning and independence of the NHRI during the selection and appointment process - including in relation to the selection, appointment, and mandate of Head of NHRIs – require a careful consideration of its compliance with the UN Paris Principles and prior effective consultation with all relevant concerns, including a strong role for the NHRI itself. This is necessary to ensure that the independence and effectiveness of an NHRI is not negatively affected, in line with the UN Paris Principles, the SCA General Observations, the [Venice Principles](#), and the [opinion](#) of the EU's Agency for Fundamental Rights.

The Sub-Committee on Accreditation (SCA) may initiate a Special Review where it appears that the circumstances of an NHRI may have changed in a way that affects compliance with the UN Paris Principles, such as when the enabling law of the NHRI has been amended significantly.

The direct appointment of the Head of the NHRI, without a clear, transparent, merit-based and participatory selection and appointment process, would severely impact on the independence, effectiveness, and public confidence in the NHRI.

8. Conclusion

International standards require that the independence, pluralism and effectiveness of an NHRI is respected at all times, including during the selection and appointment of a new Head of NHRI and during any associated transitional period. ENNHRI is available for any further clarification on the applicable international standards.

15 October 2020

About ENNHRI

ENNHRI, the European Network of National Human Rights Institutions, brings together 45 members across Europe to enhance the promotion and protection of human rights in the region. The Office of the Polish Commissioner for Human Rights is a member of ENNHRI.

ENNHRI works alongside partners to support European NHRIs in their work to promote and protect human rights in the region, including the Office of the UN High Commissioner for Human Rights (OHCHR), the OSCE Office for Democratic Institutions and Human Rights (ODIHR), the Council of Europe (CoE), including the CoE Commissioner for Human Rights and Venice Commission, the European Union, including its Agency for Fundamental Rights (FRA), the Global Alliance of NHRIs (GANHRI), the International Ombudsman Institute (IOI), and the European Network of Equality Bodies (Equinet).